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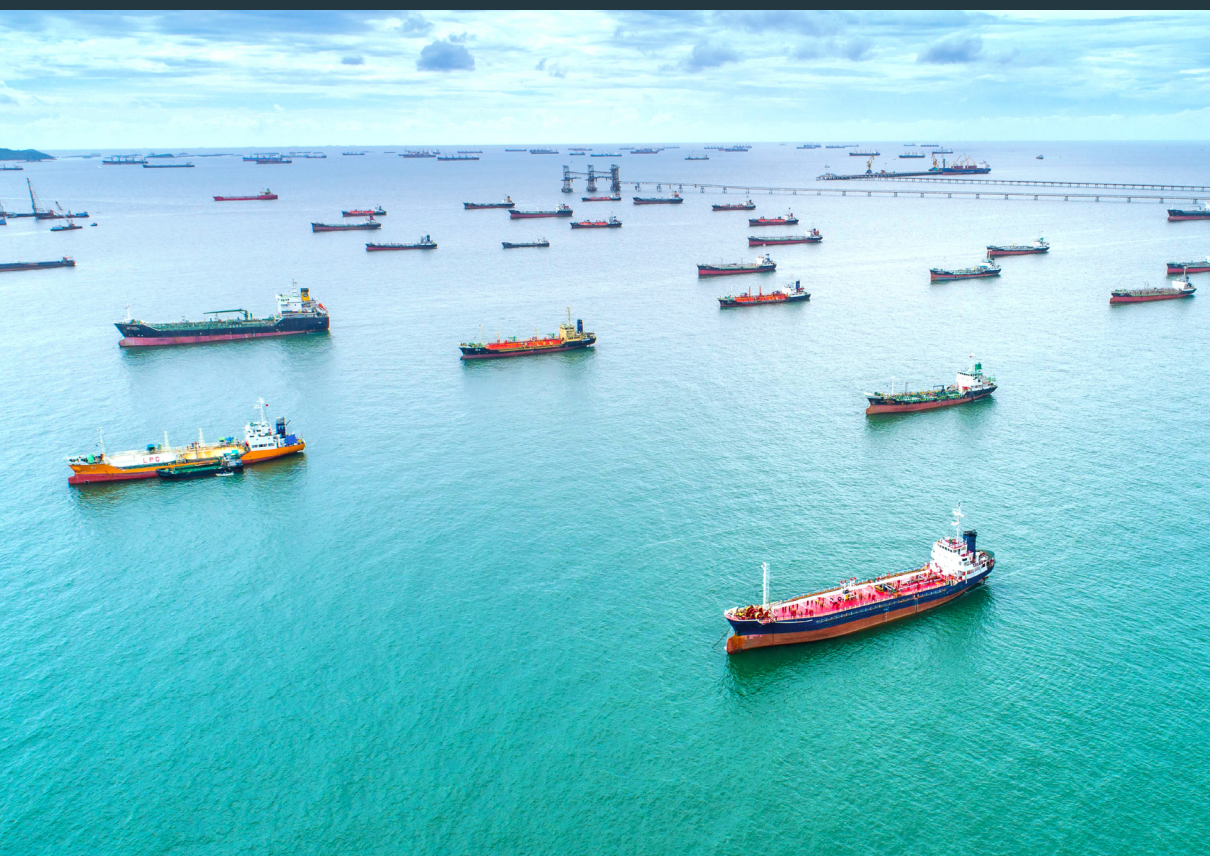
# UNCLOS and the Protection of Innocent and Transit Passage in Maritime Chokepoints

Edited by: Benny Spanier, Orin Shefler, Elai Rettig



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The center was established in response to the of rising significance of the maritime domain both globally and in our region: the emerging strategic maritime competition between the United State and China, the expansion of exclusive economic zones (EEZ) and the crucial role of the seas in the international economic system both as a source of economic activity as well as serving as the world's main trade route. Our immediate environment saw a similar rise in the significance of the seas including the oil discoveries in the eastern Mediterranean, the evolution of the Israeli navy into a national strategic arm, Israel's total dependence on sea trade, and the growing realization that future development of national infrastructure may have to be done in the sea as land is becoming scarce.

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The Konrad-Adenauer-Stiftung (KAS) is a political foundation of Germany, with the vision to promote international dialogue, sustainable development, good governance, capacity building, regional integration and enhance understanding of the key drivers of global developments. It is named after the first Chancellor of the Federal Republic of Germany, Konrad Adenauer who embodied Christian-social, conservative and liberal traditions. His name represents the democratic rebuilding of Germany, reconciliation with France, the anchoring of German foreign policy in a trans-Atlantic community of values, the establishment of the unique relationship between Israel and Germany as well as a vision of European unity and Germany’s orientation towards a social market economy.

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# INTRODUCTION

**Shaul Chorev, Elai Rettig, Orin Shefler, Benny Spanier**

## The Importance of Safe Maritime Transit in the 21st Century

The world's oceans account for nearly 90% of all international commerce. Maritime straits are narrow waterways that connect two seas or other large bodies of water, and often help reduce the time of shipping by a significant amount. Some straits that are particularly sensitive and present unique challenges are referred to as "chokepoints"; these become a focal point for geographic, commercial, and political interests. There are approximately 200 straits or canals around the world but only eight are referred to as "primary maritime chokepoints".[1] These chokepoints control some of the most important navigation routes in the world and many of them are also located near theaters of interstate conflict, maritime terrorism, piracy, and smuggling. Despite these factors, avoiding these chokepoints would cause significant delays in maritime shipping which would result in substantial losses to the global economy.

The geostrategic importance of chokepoints has grown with the rise in the volume of global maritime trade, whose annual volume in 2019 was slightly over 11 billion tons – more than 4 times the volume of trade in 1970. The direction of maritime trade has also changed throughout the decades, with commodities flowing to and from East Asia increasing substantially in the past two decades. This is particularly evident in the trade of energy resources. In 2019, around 19 million oil barrels passed daily through the Straits of Hormuz, and 17 million through the Straits of Malacca, marking an increase of around 50% in volume compared to two decades before.

In the early days of global shipping, control of maritime chokepoints and other straits was mostly in the hands of great powers. The United Kingdom, as the dominant maritime power of the late 18th and the 19th century, controlled most

1 Primary maritime chokepoints include the Straits of Gibraltar, which connect the Mediterranean and the Atlantic Ocean; the Bosporus Straits, connecting the Black Sea with the Mediterranean; the Suez Canal, which connects the Red Sea and the Mediterranean; the Straits of Bab el-Mandeb, which connect the Indian Ocean and the Red Sea and serve as the gateway to the Suez Canal; the Straits of Hormuz, which connect the Indian Ocean and the Arabian Sea; the Cape of Good Hope, which connects the Indian and the Atlantic Oceans; the Straits of Malacca in the Indian Ocean; the Panama Canal, which connects that Atlantic and Pacific Oceans; and the Danish Straits which connect the Baltic Sea with the North Sea.

of the global chokepoints: Gibraltar, Malta, the Suez Canal, the Gulf of Aden (Bab el-Mandeb), Malacca and the Strait of Magellan in Chile. Gradually, with the process of decolonization, most of the world's chokepoints came to be controlled – or contested – by local states. In some cases, such as the Suez Canal, chokepoints and the trade that passes through them serve as an important source of national revenue. Nevertheless, at many points in time great powers have sought to impose partial or full blockades of various maritime straits as a means of leveraging rivals. At present, the option of a US blockade at the Straits of Malacca has been proposed in US policy circles as a means of pressuring China economically while avoiding the risk of a nuclear escalation, to win a limited conflict in East Asia. The logic behind such a blockade would be to punish China and deny its access to key resources, rather than defeat its military forces, while positioning the blockade itself beyond the reach of China's anti-access / area denial capabilities.[2]

In 1982, the United Nation's Convention on the Law of the Sea (UNCLOS) sought to protect the international access for nations to sail through straits or canals and ensured these passageways are available as routes for all nations, regardless of size and power. This was meant to assure political and economic relief for nations whose main energy flow or lifeline exclusively depends on safe passage through geographical chokepoints.[3] UNCLOS recognizes two different categories of right of passage applicable in the Middle East/Mediterranean area: innocent passage and transit passage, and while both categories apply during peacetime and in war, fewer restrictions may be imposed on transit passage compare with innocent passage (As will be detailed in the following chapter by Donald R. Rothwell).[4] These different provisions demonstrate the importance attached by the international community to the freedom of navigation through international straits.

## Confronting the Growing Challenges to UNCLOS

Despite the guidelines set by UNCLOS, States can and still weaponize maritime chokepoints to advance their political and strategic goals, as is particularly evident in the past decade among the various set of straits that connect the Arab Gulf

2 Piona S. Cunningham, "The Maritime Rung on the Escalation Ladder, Naval Blockades in a US-China Conflict," Security Studies, 29(4), (2020). pp. 730–768. https://doi.org/10.1080/09636412.2020.1811462 [accessed 15 December 2020].

3 Law of the Sea Convention (LOSC), Articles 17–18

4 In UNCLOS there is also the archipelagic sea passage which is not directly related to our case and is a major issue in Southeast Asia.

with the East Mediterranean. Threats by Iran to block the Straits of Hormuz have become a recurring theme, and the risk of active sabotage to tankers passing in the Arab Gulf and the Bab-el-Mandeb have risen substantially. The recent Ever Given incident in March 2021 – the blockage of the Suez Canal by a single large container vessel for almost a week in March 2021 – demonstrates the vulnerability of international chokepoints and the ease with which a belligerent actor could disrupt, or threaten to disrupt, global trade. In the specific instance, the Ever Given was seized by canal authorities until a financial settlement has been reached which covered the salvage operation, costs of stalled canal traffic, and lost transit fees for the week-long blockage.

From a military standpoint, there are various methods that states can employ to deny control over chokepoints from adversaries that are within the bounds of UNCLOS provisions. Such methods include preventing navigation by naval forces; preventing commercial navigation and the transfer of naval forces through choke points; providing assistance to land forces in defending choke points; ensuring the transfer of friendly forces; and preventing the transfer of hostile forces. However, disruption of trade that is not limited to direct adversaries is also a very powerful way of exercising pressure by harming the global economy as a whole; even a threat of disruption is often enough, as it significantly raises insurance prices and makes navigation – and therefore all transported commodities – more expensive. To achieve these goals, navies may engage in Anti-Access / Area Denial tactics, which are designed to prevent an adversary from entering certain contested zones. Such tactics include both battles of decision and avoiding such battles; lengthy attrition; surprise attacks on enemy shores or maritime infrastructure; and the defense or capture of major choke points.

However, in today's world there are other methods that states may employ to weaponize chokepoints, short of direct military action, and these offer new challenges and complications to UNCLOS. Cyberattacks and electronic jamming can often cause similar levels of disruption but are significantly harder to attribute. So is the use of non-state actors, such as terrorist organizations or even acts of piracy. Since such methods are harder to attribute, they are also more difficult to deter. One example of such a scenario could be Iran working through Houthi rebels in Yemen to disrupt trade through Bab el-Mandeb.

Independent attacks by non-state actors are a factor that needs to be considered on its own. Beginning in the 1980s, terrorist organizations have increasingly targeted international maritime activities, including hijacking of a passenger vessels for bargaining purposes (the PLO hijacking of the *Achille Lauro* in 1985)

and an attack on a private Israeli yacht in a marina in Larnaca, Cyprus (the Paltsur family, 1985). Patterns of maritime terrorism from 2010–2018 point to a tendency to focus on maritime chokepoints in Southeast Asia, the Indian Ocean, the Arabian Sea and West Africa. This is a serious global threat and also a threat for Israel and other Mediterranean countries, whose trade with East Asia has increased significantly in recent years and which is therefore more reliant than ever on trade through the Indian Ocean and the Suez Canal.

Instances of piracy around maritime choke points is also a growing concern. Piracy off the coast of Somalia was a major challenge in the early 2000s. A combination of weak governance, internal conflict, dire economic scarcity and the depletion of local fisheries have led Somali fishing communities to form armed groups that gradually took up piracy as a more lucrative trade. Somali pirates have attacked hundreds of vessels in the Arabian Sea and the Indian Ocean, though most attacks did not result in a successful hijacking. In 2008 there were 111 attacks, 42 of them successful, and the rate of attacks in January-March 2009 was more than 10 times higher than in the same period in the previous year, with attacks centering mostly around the Gulf of Aden. This led to the formation of Task Force 150 – an anti-piracy coalition composed of 33 nations, which established a maritime security patrol in the Gulf of Aden. By November 2017, no major vessels remained in pirate captivity. From 358 instances of piracy around Somalia from 2010-2014, the numbers have dropped to only 8 from 2015-2020. This demonstrates both the need and the effectiveness of international cooperation to combat threats to maritime choke points.

## The Purpose of this Report

To overcome the challenges to UNCLOS and its ability to govern global maritime transit in the 21st century, we must first understand the extent of these challenges and the existing tools that UNCLOS has to address them. Through this analysis we can offer recommendations not just to overcome new threats to maritime transit, but turn them into an opportunity to strengthen UNCLOS and perhaps even attract more countries in the region to work within its framework.

To accomplish these goals, we have collected contributions from leading academic and legal scholars from around the world that offer us new insights into the challenges facing UNCLOS when considering innocent and transit passage through the various chokepoints connecting the Arab Gulf with the Mediterranean Sea. The first three chapters of the report will provide us with a broad overview of the legal challenges facing UNCLOS from both military and civilian sources. **Donald R.**

**Rothwell** will elaborate on the increased legal difficulty to distinguish between "innocent passage" and "transit passage" and the political tensions this creates. **Aris Marghelis** will then focus on the particular issue of warships' navigation rights in foreign territorial waters and jurisdiction zones, and how its manifestation is indicative of a larger global shift in the balance of power. Lastly, **Natalie Klein** will identify the different lawful responses that UNCLOS provides littoral states as they engage in a dispute over maritime transit between them, up to and including the legal use of force.

Following this overview, the next four chapters focus on specific case studies, spanning from the Dardanelles to the Straits of Hormoz, that demonstrate the current challenges facing UNCLOS and what remedies, if at all, does it offer. **Ida Caracciolo** will argue that the legal status of waterways in the Eastern Mediterranean are extremely varied and complex because the regulation established by UNCLOS either do not apply or do not fully meet the perceived safety and environmental protection needs of coastal States in the area. Next, **Stephen Blackwell** will argue that there is evident ambiguity over the rights of ships passing through the Straits of Hormuz, and so long as territorial disputes and security fears continue, they are likely to deter states in the region from joining UNCLOS. Furthermore, **Orin Shefler** will examine the strategic implications of the "Abraham Accords" signed by Israel and the UAE, and the resulting increase in transit of energy goods between the two countries, which may provide good reason for Israel to reassess its policies on UNCLOS by ratifying the convention or otherwise by applying recognized legal tools available therein which could ensure safe transit. Finally, **Benny Spanier** will discuss the intriguing case of the Straits of Tiran, where the governing laws were shaped over the years as a direct result of the political relations between the littoral countries, specifically Israel and Egypt. He argues that policymakers in the region need to be familiar with the laws that govern the straits in the region and know its histories, so they can better resolve the lack of clarity peacefully and prevent misunderstandings from deteriorating into violence. Following these seven chapters, we will offer some conclusions for the way forward, both for the countries of the region and for UNCLOS, at the end of the report.

# CHALLENGES TO THE DISTINCTION BETWEEN INNOCENT PASSAGE AND TRANSIT PASSAGE ACCORDING TO UNCLOS

**Donald R. Rothwell**

## Introduction

The history of the law of the sea has been a tension between the freedoms of navigation and the growing recognition of the rights and entitlements of coastal States to control an ever expanding area of seas adjacent to their coasts. Those tensions have been accommodated both in the customary international law of the sea, and in the multilateral treaties that have been adopted during the United Nations (UN) era. The most significant of these developments occurred with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force in 1994 and has a total of 168 state parties. UNCLOS is widely considered to be the 'Constitution of the Oceans'. As coastal State entitlements in adjacent maritime zones have increased from initially a very narrow territorial sea of only three nautical miles (nm) to a 12nm territorial sea, and 200nm exclusive economic zone (EEZ) balancing those rights with the freedom of navigation became essential. Here there is a long body of state practice that initially recognised the right of all ships to enjoy innocent passage within the territorial sea, which was codified in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and subsequently in UNCLOS. Importantly, this right of innocent passage was also recognised by the International Court of Justice (ICJ) in the 1949 *Corfu Channel* case (United Kingdom v Albania). In that decision innocent passage of warships during peacetime though the Corfu Channel was upheld. The ICJ in this case also acknowledged the importance of international straits for the freedom of navigation. That decision was responsible for further developments in the law of the sea that are reflected in UNCLOS.

## Innocent Passage

Innocent passage is the most high profile of all the UNCLOS navigational regimes because it recognises the freedom of navigation for the ships of all States within the territorial sea (Article 17). Given the narrow breadth of the territorial sea at only 12nm (Article 3) there is considerable sensitivity for some States in allowing such a broad navigational right so close to their coast. Importantly, the right is reciprocal: when one State recognises the entitlement within its territorial sea

then its own flagged vessels can enjoy the right elsewhere. Innocent passage is also critical for international seaborne trade which all States rely upon.

The right of innocent passage comprises two dimensions. The first is the right of movement which is the physical passage of a ship. The passage can comprise two forms: the movement of a ship through the territorial sea without entering the internal waters of the coastal State, or the movement of a ship from the territorial sea to and from internal waters so as to facilitate a port visit (Article 18). The stopping and anchoring of a ship is only permissible as part of that process if it is incidental to ordinary navigation; such as would occur if a ship was required to anchor offshore awaiting a berth at a port. This passage dimension therefore envisages a ship constantly engaged in some form of navigation as it moves through the territorial sea. A foreign flagged pleasure cruiser or yacht that moves between the coast and offshore islands that stops and anchors as it pleases is not therefore engaged in a legitimate act of passage.

The second dimension is the mode of conduct and this is the most critical. UNCLOS effectively has a default that a ship will be engaged in innocent passage, providing that passage is not "prejudicial to the peace, good order or security of the coastal State" (Article 19). There is considerable scope for how those words can be interpreted by the coastal State. Too liberal an interpretation could result in very significant limitations on innocent passage and the freedom of navigation, while too narrow an interpretation could result in security threats being posed to the coastal State. A significant advance in UNCLOS is how Article 19 (2) provides a list of 12 activities that are considered to be prejudicial to the interests of the coastal State if a ships engages in any of those activities. This extends to the threat or use of force, any exercise or practice of weapons, acts of propaganda, acts of wilful and serious pollution, and fishing activities. This list has proven to be very helpful in bringing clarity to the innocent passage regime and provides certainty for both coastal States – who will be legitimately concerned about their security and other interests as a result of the presence of foreign ships in their territorial sea – and flag States who will be concerned that their ships are able to safely and securely navigate through a variety of waters providing they comply with UNCLOS.

The UNCLOS right of innocent passage is a finely tuned balance between the rights and interests of coastal and flag States. The coastal State can enact certain laws and regulations that will apply to innocent passage, such as the safety of navigation, which foreign ships are to comply with (Article 21). Sea lanes and traffic separation schemes can also be put into place to ensure the safety of

navigation (Article 22). The coastal State also has important rights to protect its interests. Temporary closures of the territorial sea are permitted for the purposes of weapons exercises or other essential security measures (Article 25(3)). Most importantly, the coastal State can take the "necessary steps" within its territorial sea to prevent passage that is not innocent. What precise measures can be taken is unclear from UNCLOS. State practice in this area suggests it can extend from a request that a foreign vessel leave the territorial sea, closure of the territorial sea to delinquent vessels, and even forcing a foreign vessel to leave the territorial sea through physical interdiction. Foreign vessels that violate the laws and regulations of the coastal State may also be subject to arrest. Against these measures the coastal State importantly must not 'hamper' the innocent passage of foreign ships; this includes the taking of measures that have the practical effect of denying or hampering the right of innocent passage (Article 24). Finally, while UNCLOS is silent on whether warships enjoy a right of innocent passage there are two provisions which make clear they do. First, innocent passage applies to the ships of all States (Article 17) with no distinction between certain types of ships. Second, submarines are required to navigate on the surface within the territorial sea (Article 20).

## Transit Passage

Whereas innocent passage through the territorial sea provides a series of significant constraints on how foreign ships are to navigate, the right of transit passage through the territorial sea of an international strait is more liberal in scope and provides ever greater recognition of the freedom of navigation. The effect of a 12nm territorial sea was that many more bodies of water became subject to the overlapping territorial sea entitlement of coastal States. All straits less than 24nm in width would have become subject to an innocent passage regime with implications for the freedom of navigation, including the potential closure of straits passage in some instances. The UNCLOS response was the adoption of a distinctive regime of transit passage which applies to both ships and aircraft. First, the regime extends to straits that are used for international navigation (Article 37) which is a reference to both the geographic and functional criteria the ICJ discussed in the *Corfu Channel* case. A strait can be formed between two islands (Singapore Strait), between an island and a continent (Bass Strait), or between two continental mainlands (Bab el-Mandeb). But the strait must be one that is used for international navigation and this suggests the actual usage as opposed to the potential usage of the strait. The result is that as traffic flows vary through a strait its characterisation may change over time (Bering

Strait). Nevertheless, there remain some disputes as to whether certain bodies of water are international straits (Northwest Passage) and as UNCLOS does not include a list of such straits this is an area of contention in state practice.

Within an international strait foreign flagged vessels enjoy a right of continuous and expeditious passage through the territorial sea from one area of EEZ or high seas to another area of EEZ or high seas (Article 37). In undertaking transit passage a ship is to proceed without delay, refrain from any act that constitutes a threat of or use of force against the coastal State, refrain from any activities other than those that are incidental to the normal modes of navigation, and comply with generally accepted international laws and regulations with respect to the safety of navigation and marine pollution controls (Article 39). A critical aspect of the transit passage regime is that the coastal State is not to hamper transit passage and also cannot suspend transit passage (Article 44). By these provisions UNCLOS makes clear that it favours the freedom of navigation for foreign ships through an international strait. The littoral State does have a capacity to enact laws and regulations with respect to transit passage such as pollution prevention (Article 42), but as has been demonstrated when Australia and Papua New Guinea sought to put into place compulsory pilotage provisions in Torres Strait, some flag States such as Singapore and the US were very resistant to any such changes on the grounds that transit passage was being hampered.

## Concluding Remarks

One of the challenges associated with both the innocent passage and transit passage regime is the increasing securitisation of the territorial sea that arises from coastal States adopting an expanding arrange of measures to ensure security of that zone. This is partly reflected in how some coastal States have sought to adopt measures requiring prior authorisation of foreign warships within their territorial sea (China), and the Torres Strait compulsory pilotage regime. This trend will no doubt continue and tensions will inevitably continue to arise over contested interpretations of UNCLOS that place constraints on the freedom of navigation. Relatedly, the efforts of some coastal States to seek to extend navigational controls over the EEZ will also be strongly contested. The EEZ as the area beyond the 12nm territorial sea is an area of the ocean where the historical freedoms of navigation prevail subject to very limited controls such as piracy. Foreign military operations within the EEZ will remain contentious, however major military powers such as China and the US recognise that within certain parameters such activity is permissible and consistent with UNCLOS. The continuing emergence of

non-state actors will remain a challenge for the law of the sea, as for a number of areas of international law. However to date there have been a range of legal responses addressing terrorist attacks at sea, to protest activity. UNCLOS and the United Nations Charter have proven robust enough to deal with these challenges. A remaining issue is the universal nature of UNCLOS. As with any treaty there will be different views as to how it is to be interpreted. This is not exceptional. The US, however, has remained outside of the UNCLOS framework since 1982 and never signed the convention. Rather, the US position is that UNCLOS is mostly reflective of customary international law. Whether a convention of 320 articles meets the high threshold for recognition as customary international law is debateable. The ICJ, for example, has only had occasion to consider a small number of UNCLOS provisions from that perspective. Importantly, the UNCLOS innocent passage and transit passage provisions are broadly considered to reflect contemporary customary international law. The US actively asserts this view as reflected in US Freedom of Navigation operations. The UNCLOS freedom of navigation through the territorial sea and within international straits is therefore well established in both international law and state practice and is a cornerstone for international maritime trade and commerce.

# UNCLOS AS A REGULATORY TOOL OF INTERNATIONAL RELATIONS: THE CASE WITH THE WARSHIPS' RIGHTS OF PASSAGE AND MILITARY ACTIVITIES

**Aris Marghelis**

## Introductory remarks

From many aspects, the oceans are central to international life; yet, what confers them a strategic dimension are the flows and the resources. The ability to define and enforce the rules applicable at sea is, thus, vested with a strategic significance. Concurrently, the world ocean is the most conducive natural space to global power projection which, in turn, offers those actors capable of such a projection the ability to preserve a certain global order favourable to their interests. For this reason, (a) the balance of power at sea is, historically, a *reliable* indicator of the global balance of power and (b) the particular issue of warships' navigation rights in foreign territorial waters is an *excellent* indicator of the balance of power at sea and the challenges it faces. Accordingly, any attempt to upset a well-established balance of power, regional or global, finds at sea a fertile ground for an early manifestation. Clearly, this is the current trend in the Indo-Pacific and the Eastern Mediterranean, where the rules concerning the flows and resources - that is navigation rights and maritime delimitations - are being contested by State actors that do challenge a certain regional and global order.

## UNCLOS and interstate relations at sea

As a consequence of the abovementioned elements, any attempt to create a holistic legal regime for the area covering 70% of the Earth's surface, could not but be conceived as a regulatory tool of International Relations and be vested with a high strategic importance. Since the United Nations Convention on the Law of the Sea (UNCLOS) governs an area that is crucial to international life, it is itself key to the international order. For this reason - and because, as a legal text, it remains static while international realities to which it applies are dynamic and change over time - UNCLOS' main challenge is to stay relevant and safeguard its role as an International Relations regulation tool. To overcome this basic dichotomy, UNCLOS is subject to a dual approach on issues that are of particular importance for interstate relations, such as the navigation issues - and particularly those related to the operation of foreign warships - and the delimitation issues.

On the one hand, it contains what could be called "hard provisions", that set up strong principles, establish a common language for all States, while they clearly distinguish what is acceptable and legitimate from what is unacceptable and illegitimate as a claim (*i.e.* the global legal framework). Those provisions constitute the strong pillars necessary for a convention of such a scope to be well-grounded. On the other hand, it contains what could be called "soft provisions", that are deliberately structured in a way that leaves room for legitimate competing interpretations. These soft provisions provide UNCLOS with the necessary degree of adaptability to the diversity and complexity of the world to which it applies and makes possible the "absorption" of the natural impact of the competition between States. In other words, it provides the necessary space for the inescapable interstate rivalry to take place in the less chaotic possible way, provided that this happens within the framework established by the hard provisions.

In that sense, both types of provisions do not compete but are complementary in defining UNCLOS' approach of interstate relations. Given its global scope and regulatory role, the presence of only hard provisions would have been detrimental to its efficiency and to the massive adherence of States, without which it wouldn't make sense: a credible and efficient legal regime for the oceans can only have global characteristics. On the other side, only soft provisions would have rendered UNCLOS a loosely respected text and it would not fulfil its role as a Constitution for the oceans. The final result is a cleverly structured and well-balanced single text. This dual approach has, until now, participated to ensure UNCLOS' longevity and relevance, in parallel with the development of customary law, which plays a similar role.

## The case with delimitation issues

In the field of the maritime delimitation, UNCLOS does not provide a clearly defined method of delimitation, regardless the fact that practice and jurisprudence have clearly favoured the three-stage method (equidistance line, relevant circumstances, proportionality test).[1] However, the very limits within which the delimitation has to be negotiated and achieved are set up by elementary hard provisions, unless the concerned States decide otherwise.

1 This method has been "consecrated" by the International Court of Justice in the 2009 Black Sea delimitation case. See: Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61. Available on: https://www.icj-cij.org/public/files/case-related/132/132-20090203-JUD-01-00-EN.pdf (28 October 2021).

Those are, for instance:

- The unequivocal, non-negotiable unilateral right of a coastal State to extend its territorial waters up to 12 nm (art. 3);
- The fact that an EEZ cannot exceed 200 nm (art. 57);
- The principle according to which land dominates the sea and the subsequent provision according to which islands have unequivocally the same rights as other territories to generate all maritime zones (art. 121.2).

These provisions and principles establish the framework within which soft provisions will fulfil their role of adaptation of a strongly principled legal regime to the particularities of each case and to the variety of the regional dynamics that make our world. The notion of "equitable solution" (art. 74 and 83 for the EEZ and the continental shelf respectively), as well as art. 121.3 on the inability of "rocks" to generate any zone beyond territorial waters - which was deliberately drafted in a way allowing each State to have its own interpretation in order to circumvent the deadlock in the negotiations - satisfy precisely this necessity.

## The case with the warships' rights of passage and the military activities

In the field of the warships' rights of passage, there are two basic principles setting the framework. On the one hand, there is the freedom of navigation, legally expressed - in what concerns the areas under the coastal State's sovereignty - by the various rights of passage codified or instituted by UNCLOS (innocent, transit and archipelagic passages). On the other hand, there is the coastal State's security. In between, there are a series of provisions that provide the States - maritime or coastal - with an important degree of freedom of interpretation and action, as the outcome of the application of these provisions is not necessarily well predictable and may vary on particular circumstances. Such provisions are, for instance:

- Art. 298.1(b) that allows the States to exclude military issues from international adjudication;
- Art. 19.2(l) that gives to the coastal State the "last word" as to what can allow to qualify a passage as non-innocent, since it provides that non-innocent is "*any other activity not having a direct bearing on passage*";
- Art. 32 and 95 on the sovereign immunity of warships in the territorial waters and in the high seas respectively;

- Art. 30 according to which the coastal State *may* require the warship to leave immediately its territorial waters.

Each of these provisions leave an important room for manoeuvre to the coastal and maritime States, as far as the freedom of navigation on the one hand, and the coastal State's security on the other, are not critically at stake.

Same goes with the military activities. The freedom of navigation of military vessels in the high seas, as well as the coastal State's security and the peaceful use of oceans set the limits between what is acceptable and unacceptable. However, deliberately ambiguous or poorly detailed provisions leave room for competing interpretations on highly sensitive issues, and this is particularly the case between China and the United States (US)[2]. For instance:

- UNCLOS does not explicitly state if the freedom of navigation includes military activities. This allows many developing States and China to argue that it does not; conversely, Western countries - and particularly the US - consider this right as being unequivocally part of the "freedom of navigation";
- Military activities are not defined in UNCLOS;
- Despite devoting a whole part (XIII) to the marine scientific research, UNCLOS does not provide a clear definition of what this research includes or not, particularly with regard to the research of military interest in the EEZ. The US considers that research on economic and military purposes fall under separate regimes: the research on military purposes is not subject to the coastal State's jurisdiction, contrarily to the research on economic purposes (category-based approach)[3]. To the opposite, many developing States and China consider that all types of research fall within the coastal State's jurisdiction in its EEZ (zonal approach)[4].

2 See, for instance: Erik Franckx, "American and Chinese Views on Navigational Rights of Warships", *Chinese Journal of International Law*, Vol. 1, No 10, 2011, pp. 187-206.

3 See, for instance: Raul (Pete) Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone", *Chinese Journal of International Law*, Vol. 1, No 9, 2010.

4 See, for instance: Haiwen Zhang, "Is It Safeguarding Freedom of Navigation or Maritime Hegemony of the United States? Comment on Raul (Pete) Pedrozo's on Military Activities in the EEZ", *Chinese Journal of International Law*, Vol. 1, No 9, 2010, pp. 31-47; Yu Zhirong, "Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries", in Peter Dutton (Ed.), *Military Activities in the EEZ. A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, Naval War College, China Maritime Studies Institute, No 7, 2010.

- Lastly, there are no provisions *explicitly* prohibiting or authorizing military intelligence gathering in the EEZ.

The objective of this ambiguity is two-folded. Firstly, the States, and particularly the military powers, are generally reluctant to negotiate such rights in the framework of legally binding international texts, as those rights are a direct emanation of sovereignty and such a development would restrict their ability to operate and conduct their policies regionally and globally. Secondly, it is a way to bring the balance of power into the legal equation and to influence the outcome of a particular situation that may arise. It is not a coincidence that this ambiguity creates problems when two world-class military powers such as the US and China share different views, as each of these States has the practical means to defend its views. To the contrary, it is expected that when weaker States are involved in a disagreement with stronger powers, their room of manoeuvre or of legal recourse is limited and they may only express this disagreement verbally or try to act through the diplomatic channel.

As these ambiguities may create security problems, the question arises on if a further clarification/development of ambiguous provisions is (a) possible and (b) opportune.

## Is a clarification/development of ambiguous provisions possible?

In practice, it is of course possible to further clarify/develop those provisions in order to decrease the uncertainty they may generate in particular circumstances.

A first way could theoretically be a revision of UNCLOS, which is "technically" possible pursuant to art. 312 and 313, but practically unrealistic in the current state of international affairs, given the degree of consensus that is necessary for such a procedure to succeed.

A second way is, of course, the development of jurisprudence and State practice, that may lead, under certain conditions, to the development of customary law, that becomes binding. In the field of jurisprudence, for instance, the 2019 ITLOS case concerning the detention of three Ukrainian military vessels[5] is quite interesting. The Court decided not to qualify the capture by Russia of Ukrainian military ships and their crew as a *military activity* - on which both Ukraine and Russia reject compulsory jurisdiction pursuant to art. 298.1(b) -, despite the

5 ITLOS, 25 May 2019, *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Provisional Measures, Case No 26. Available on: https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf (20 September 2021).

fact that military force was used against foreign warships, that is to say against another State's sovereignty. Instead, the Court decided to qualify the incident as use of force in the context "*law enforcement activity*", which Russia - but not Ukraine - has also excluded from compulsory jurisdiction. In any case, the fact that, despite the use of force between military vessels of two States, this incident was not qualified as a military activity, gave birth to a precedent that may well provide the ground to restrain at a considerable level the scope of the "military activities" notion, given, moreover, that ITLOS operated on a "virgin ground", as there was no previous jurisprudence on that issue. A similar case in which International Justice operated on a "virgin ground" is the Permanent Court of Arbitration's 2016 award on the South China Sea[6], as it was the first court to provide an assumed and extended interpretation of art. 121§3, which, according to the views expressed in this paper, may well contradict the basic role of this very provision, since its vagueness is not the result of a deficiency, but it is deliberate and part of a wider balance.

A third way can be State practice. Bilateral or regional agreements on a common understanding of ambiguous provisions may provide a basis for legal development or clarification. This was the case, for instance, between the US and the Soviet Union in 1989, following two incidents involving American warships operating a passage in the Soviet territorial waters in Crimea in 1986 and in 1988[7]. The vessels' passages were claimed as non-innocent by the USSR, leading to verbal and military escalation between the two superpowers which, finally, issued a joint declaration on the common understanding of the right of innocent passage for warships. Nonetheless, this example also corroborates the fact that this kind of arrangements are more likely to take place among those States whose power allows them to defend their views on the field and, thus, to lead to a potentially dangerous military escalation. This is less likely to happen between a powerful and a weak State, since such a configuration does not favour a balanced arrangement; the powerful State will be more inclined to maintain ambiguities if it cannot formally associate the weaker State to its views.

However, more than the practical ability to further clarify/develop some provisions, whose ambiguity is part of UNCLOS' subtle balances on highly sensitive issues, the most important question is if such an evolution is actually *opportune*.

6 PCA, Arbitration 12 July 2016, South China Sea (Philippines v. China), Case No 2013-19. Available on: https://pcacases.com/web/sendAttach/2086 (21 September 2021).

7 See, for instance: Erick Franckx, "Innocent passage of warships. Recent development in US-Soviet relations", *Marine Policy*, November 1990, pp. 484-490.

## Is a clarification/development of ambiguous provisions opportune?

The clarification/development of ambiguous or poorly detailed legal provisions is basically a positive and beneficial process. It brings further predictability which, in International Relations, is synonym of further security. However, in the very case of UNCLOS, the imprecision of those provisions related to the military activities and the warships' rights of passage are part of UNCLOS' global compromise. This imprecision is definitely a virtuous element, as far as it is used wisely, in a balanced manner, and, of course, within the "box" set by the hard provisions. However, it may become a tricky element precisely if the framework set by the hard provisions is not respected (or considered as not respected). The US-China dispute regarding the military activities in the EEZ of third States is typical of this situation. Each State believes, for its own reasons, that the other is a threat to its security and, thus, that it is acting outside UNCLOS' "box"; in that case, these imprecisions act as a destabilizing factor.

Nevertheless, precisely because it proceeds from a disagreement of political and strategic nature, it should not be taken for granted that an answer of legal nature through the gradual decrease of these ambiguities would necessarily be an efficient solution. Indeed, as these legal "grey zones" offer to the States a precious and safe space for the *secure* expression of their legitimate interests and ensure a wide and lasting adherence to the rule of law at sea, shrinking them gradually may well erode this adherence and, in the end, undermine UNCLOS' role as a regulation tool of International Relations.

The various stakeholders involved directly or indirectly in the development of this field of the Law of the Sea should take these particularities into consideration.

# LAWFUL RESPONSES TO PASSAGE VIOLATIONS, RULES OF ESCORT, AND THE USE OF FORCE UNDER UNCLOS

**Natalie Klein**

## Introduction*

Violations of the rights of passage through important navigational routes may provoke a variety of responses from the relevant littoral State. The first case before the International Court of Justice (ICJ), *Corfu Channel*, highlighted the competing interests and actions of the States concerned.[1] In that case, the Court examined the legality of a British mission through the Corfu Channel after Albania sought to deny the passage of British warships. The British warships struck mines while passing through the Corfu Channel and the United Kingdom subsequently sent in its minesweepers. The Court confirmed that warships may exercise the right of innocent passage through international straits in times of peace, but the minesweeping operation was unlawful self-help and a violation of Albanian sovereignty. Various aspects of this case remain pertinent today in assessing what lawful responses may be taken when rights of passage are violated in different contexts.

This paper seeks to identify the different lawful responses that may be applicable during contestations relating to the exercise of navigational rights through the territorial sea and during transit passage in international straits. It is not an in-depth examination but seeks to highlight a variety of legal considerations that may be at play during passage disputes. Ultimately, how international law applies in each of these settings will be highly fact specific, but it is important to underline that there are always legal rules setting out rights and duties that should frame decisions on responses to passage violations.

## Responses under UNCLOS: Innocent Passage

If a foreign-flagged vessel violates the right of innocent passage in the territorial sea, the *UN Convention on the Law of the Sea* (UNCLOS) sets out the expected

* Parts of this paper are drawn from Natalie Klein, 'Responding to Law of the Sea Violations' (2021) 27 *Australian International Law Journal* (forthcoming). The author gratefully acknowledges the research and editorial assistance of Jack McNally.

1 *Corfu Channel (United Kingdom v Albania) (Merits Judgment)* [1949] ICJ Rep 4 ('*Corfu Channel*').

lawful response that is open to the coastal State under Article 25(1).[2] The coastal State is authorised to 'take the necessary steps… to prevent passage which is not innocent'.[3] Those necessary steps are not articulated but Barnes has observed they most likely involve the following:

> A logical first step is for the State to verify the exact nature or character of the passage so that it is fully appraised of the situation. It can then decide what further necessary measures are appropriate. This may include requesting information from the ship about, inter alia, its flag status, route, and purposes … Subsequent measures may include warning communications, warning shots, interdiction, boarding and inspection. Vessels may then be denied passage, diverted, expelled from the territorial sea or ordered into port.[4]

Commentators have further suggested there is a right for coastal States to employ necessary and proportionate force.[5] Generally, coastal States enjoy wide discretion in responding to non-innocent passage.

It may further be noted that coastal States are allowed to suspend innocent passage in the territorial sea, provided the suspension does not discriminate in fact or in form.[6] The closure of ports to foreign vessels provides a further means for coastal States to control shipping, although such port measures do not implicate the right of passage without entry into port.

It must be noted that there are more limitations in responding to violations of the right of innocent passage if the foreign-flagged vessel in question is a warship. Warships enjoy sovereign immunity and consequently the only option for a coastal State is to ask a warship to leave its territorial sea immediately if the coastal State determines the warship has violated the right of innocent passage.[7]

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2 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('*UNCLOS*').

3 Ibid art 25(1).

4 Richard Barnes, 'Article 2' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 27, [6], referring to Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (Kluwer, 1998) 268 ff.

5 John Astley III and Michael N Schmitt, 'The Law of the Sea and Naval Operations' (1997) 42 *Air Force Law Review* 119, 131; Dale G Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1999) 29(2) *California Western International Law Journal* 283, 309.

6 *UNCLOS* (n 2) art 25(3).

7 *UNCLOS* (n 2) art 30.

## Responses under UNCLOS: Transit Passage

UNCLOS does not deal as explicitly with the lawful response of a coastal State if there is a violation of the right of transit passage through an international strait. In this situation, mostly general rules of international law, which are addressed in the following Sections, will be applicable. Nonetheless, it is worth underlining that the creation of the regime of transit passage was intended to protect navigational rights and so there are limitations on the laws and regulations that littoral States may impose (in that there are no plenary powers granted to the coastal State but rather explicit heads of power under which laws and regulations are to fall).[8] Furthermore, there are duties imposed on the coastal State not to hamper or suspend transit passage and to give notice of dangers to navigation within the strait.[9] Any response will need to account for these restrictions under UNCLOS.

## Retorsion and Countermeasures

Where a coastal State objects to another State's conduct during passage and considers that conduct in violation of international law, the first diplomatic response is often a formal protest. Protests may be issued through various diplomatic channels and may be sufficient in many contexts to note a State's disagreement to the claimed rights of another State. Protests are important for demonstrating a lack of acquiescence.[10]

If the coastal State's warships or other State-operated vessels are on-scene at the time a passage violation is perceived to have occurred and seek to respond, there may be an act of retorsion. Measures of retorsion may constitute unfriendly acts but not amount to unlawful conduct under international law. If the response is to anchor in such a way to block passage or to interfere in the exercise of another State's rights without violating international law then that could be a lawful act of retorsion.[11]

8 *UNCLOS* (n 2) art 42.

9 *UNCLOS* (n 2) art 44 (the latter duty reflecting the view of the ICJ from the *Corfu Channel* (n 1) case).

10 Christophe Eick, 'Protest' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [13].

11 Thomas Giegerich, 'Retorsion' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [1].

If the response involves dangerous manoeuvring and potentially violates international law,[12] then it may still count as a lawful countermeasure. When a coastal State believes that its rights have been infringed, this violation of international law may entitle the injured State to engage in countermeasures to induce compliance by the State that has acted unlawfully. The response of the injured State to the unlawful act falls within the domain of State responsibility.

For a State to engage lawfully in countermeasures, the requirements to be followed are drawn from the International Law Commission's (ILC) work on State responsibility. The ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts usefully summarises the limitations on countermeasures as follows:

> First, … [they] concern[] *only non-forcible countermeasures* (art 50, para 1(a)).
>
> Secondly, countermeasures are limited by the requirement that they be *directed at the responsible State and not at third parties* (art 49, paras 1 and 2).
>
> Thirdly, since countermeasures are intended as instrumental – in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment – they are *temporary in character and must be as far as possible reversible* in their effects in terms of future legal relations between the two States (arts 49, paras 2 and 3, and 53).
>
> Fourthly, countermeasures *must be proportionate* (art 51).
>
> Fifthly, they *must not involve any departure from certain basic obligations* (art 50, para 1), in particular those under peremptory norms of general international law.[13]

There are also procedural requirements that must be met. These duties include that: countermeasures be preceded by '*a demand by the injured State that the responsible State comply* with its obligations'; that the demand '*must be accompanied by an offer to negotiate*'; and that countermeasures must be '*suspended if the internationally wrongful act has ceased*' and the dispute is submitted to 'a court or

12 As was at issue in the *South China Sea* arbitration. *South China Sea Arbitration (Philippines v China) (Award)* (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016) [1092].

13 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) 2 *Yearbook of the International Law Commission* 31, 75 ('*ILC Draft Articles on State Responsibility*') 129 [6] (emphasis added).

tribunal with the authority to make decisions binding on the parties'.[14] Although the requirements are thus strict, the implication is that the resort to an unlawful act must be deliberate and fully justified on the part of the injured State in this scenario. Further, a key motivation of the countermeasure must be inducing compliance with existing international law.[15]

## Use of Military Escort of Civilian Vessels

The possible use of escort should be considered against this general legal framework that is in place to regulate responses to violations of the right of innocent or transit passage. Arguably, the mere fact of escort is not unlawful. The ICJ faced the escort missions occurring in the Gulf in the context of the *Oil Platforms* case.[16] It did not address these missions and so one might conclude that there was no strong objection to the practice. Similarly, in the *South China Sea* arbitration, the Philippines challenged China's fishing activities in an area that the Philippines claimed as its own EEZ. The Tribunal did not question specifically the fact that Chinese State vessels were escorting fishing vessels. Rather, it was the failure of the Chinese State vessels to prevent its nationals from fishing that led to a finding of UNCLOS violation.[17] At most, we can say there is implicit acceptance.

In relation to the question of whether escort is permissible in the territorial sea, Moore has argued that the presence of warships escorting civilian merchant vessels in the territorial sea is not consistent with the right of innocent passage.[18] Rather, he suggests that it implies the use of force to protect the other vessels under escort and so is a possible threat of force. Escort could further be considered as an 'activity not having a direct bearing on passage',[19] in which case it would be a violation of the right of innocent passage.[20]

Competing with that view would be an analysis drawing on the ICJ's decision in *Corfu Channel*. There, the Court did not have regard to the surrounding political

14 The court or tribunal must be one with the authority to make decisions binding on the parties. Ibid 129, [7] (emphasis added).

15 Ibid 130 [1].

16 *Oil Platforms (Iran v United States) (Merits)* [2003] ICJ Rep 161.

17 *South China Sea Arbitration* (n 12) [756].

18 Cameron Moore, *Freedom of Navigation and the Law of the Sea* (Routledge, 2021) 68.

19 Contrary to *UNCLOS* (n 2) art 19(2)(l).

20 Moore (n 18) 68.

tensions or Britain's stated intention that it wanted to 'test the resolve' of Albania. Instead, what mattered the most was what the warships actually did while traversing the Corfu Channel. On this basis, it could be strongly argued that if warships sail through the territorial sea continuously and expeditiously at the same time as civilian merchant vessels then this passage should be viewed as innocent. Nonetheless, it falls to the coastal State to decide on the character of passage and the presence of warships accompanying civilian merchant vessels may well be perceived as a threat of the use of force.

Turning to the question of escort in straits subject to the regime of transit passage, the question is whether such escort is the 'normal mode' for the warships concerned. Moore in this instance argues that the mode in which the ship navigates outside an international strait is the mode in which it may navigate in an international strait, subject to specific rules and navigational constraints that may apply in the strait. As such, if warships may escort merchant vessels on the high seas, doing so in an international strait is seemingly 'normal mode' provided it is continuous and expeditious and does not threaten the peace, good order and security of the bordering States.[21] This approach aligns with a policy of keeping international straits open to traffic, in line with the prohibition on suspending transit passage.[22] Of course, the outstanding question is whether the presence of warships ready to use force does actually threaten the peace, good order and security of the littoral States.

## Law Enforcement and Use of Force

Beyond possible threats of use of force, there are specific instances where States may lawfully use force within the territorial sea or in an international strait subject to transit passage. Within the territorial sea, UNCLOS does anticipate that the coastal State will exercise law enforcement powers and sets out the bases for prescriptive jurisdiction and enforcement jurisdiction.[23]

UNCLOS does not provide as explicitly for the exercise of criminal jurisdiction or enforcement jurisdiction in international straits. However, according to the *Arctic Sunrise* tribunal, enforcement jurisdiction existed in relation to continental shelf rights, even though it was not specifically included in UNCLOS.[24] Perhaps a similar

21 Ibid 87–88.

22 *UNCLOS* (n 2) art 44.

23 See ibid arts 27, 28.

24 *Arctic Sunrise Arbitration (Netherlands v Russia) (Award on the Merits)* (2015) 32 RIAA 183, 285 [283].

analogy could be drawn in relation to transit passage, especially when taking into account the language in Article 42(4) of UNCLOS.[25] Any law enforcement actions would be constrained by requirements relating to non-discrimination as well as not hampering passage.

Law enforcement, notably an at sea interdiction rather than in port, may involve the use of force. The International Tribunal for the Law of the Sea (ITLOS) has observed 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.'[26] Efforts must first be made to hail the vessel or to fire across its bow before resorting to direct force against the vessel. Methods other than gun fire are to be used wherever possible when a vessel refuses to stop, such as out-manoeuvring tactics, high pressure water hoses, and fouling propellers.[27] There are boundaries to the level of aggression that may be deployed, and guidance should also be found from the *International Convention for the Safety of Life at Sea*[28] and the *Convention on the International Regulations for Preventing Collisions at Sea* (COLREGs).[29]

## Self-defence

What are the instances beyond law enforcement that warships or other government vessels may resort to the use of force? In this scenario, Moore has highlighted unit self-defence, distinguishing it from national self-defence. Unit self-defence involves the 'immediate defence of the warship, task group or vessels which they are escorting, and may occur only against targets which pose an immediate threat'.[30] Necessity and proportionality remain as key criteria.

Otherwise, we are potentially dealing with a situation where the use of force is so grave that it amounts to an armed attack, perhaps precipitating a national

25 'Foreign ships exercising the right of transit passage shall comply with such laws and regulations': *UNCLOS* (n 2) art 42(4).

26 *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* [1999] ITLOS Rep 10, 61 [155]–[156] (*M/V 'Saiga' (No 2)*).

27 Ivan A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35(2) *International and Comparative Law Quarterly* 320, 342.

28 *International Convention for the Safety of Life at Sea* (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278.

29 *Convention on the International Regulations for Preventing Collisions at Sea*, opened for signature 20 October 1972, 1050 UNTS 16 (entered into force 15 July 1977).

30 Moore (n 18) 46.

decision to engage in self-defence or decisions to engage in collective self-defence.[31] At that point, we may arrive at a situation of armed conflict and the law of naval warfare applies. Another helpful insight from Moore's work is that the threshold to reach an armed conflict at sea is high. It is a decision to be reached by a government and not a commander on the scene who must deal more immediately with the safety of her or his own vessel and those on board.[32]

## Conclusion

So much will depend on the specific facts, the location of the vessels, and the types of vessels engaged. However, there are legal rules to which we can turn and it is clear that necessity and proportionality remain critical criteria. Foremost we should remember that considerations of humanity apply at sea and those considerations should also inform State decision-making.[33]

31 Consistent with article 51 of the *Charter of the United Nations.*

32 See Moore (n 18) 63.

33 *M/V Saiga (No 2)* (n 26) 61 [155]-[156].

# THE ROLE OF UNCLOS IN THE PROTECTION OF MARITIME TRANSIT: THE CASES OF THE EAST MEDITERRANEAN AND GULF REGION

**Ida Caracciolo**

The Mediterranean Sea is typically an enclosed or semi-enclosed sea according to the definition given by UNCLOS. This basin is surrounded by twenty-one coastal States and it is connected to other seas and oceans through three openings that are from east to west: the straits of the Bosporus and the Dardanelles, joining the Mediterranean Sea to the Black Sea, which is in turn another closed or semi-closed sea; the Suez Canal, an artificial opening controlled by the Egyptian State, which leads into the Red Sea and then into the Indian Ocean; and finally, the Strait of Gibraltar which links the Mediterranean Sea directly to the Atlantic Ocean.

The Mediterranean Sea is usually divided in two basins: the Western and the Eastern Mediterranean which respectively include a series of secondary seas whose geographical features are characterized, *inter alia*, by the presence of major and minor peninsulas, a few big islands and numerous small islands. In particular, the eastern basin is surrounded by the Italian, the Balkan and the Anatolian peninsula, and its waters are disseminated of islands: Sicily, Cyprus and Crete as well as a very large number of small islands mostly in the Adriatic, the Ionian and the Aegean Sea. Because of the complex geographical situation with many islands and an irregular coastal line, many competing States' claims jeopardise the status of the Eastern Mediterranean waters; political tensions and different economic interests of coastal States relating to gas and oil reserves and underwater pipelines further exacerbate the interstate relations in the area.

Waterways - natural straits and artificial canals - are another distinctive element of the Eastern Mediterranean. Some of these waterways fall entirely within the internal waters and/or the territorial sea of coastal States such as the Bosporus and the Dardanelles, the Strait of Messina, and the Strait of Corfu, while others, such as the Otranto Channel and the Kythera Strait, are larger and include a strip of high seas, or rather of exclusive economic zone. Canals, as the Suez and the Corinth canal, are fully parts of the respective States' territories.

Some of these waterways constitute strategic choke points which are of critical economic and military importance. The Turkish Straits are surely major choke points but they seem to have mainly regional significance particularly to the

countries bordering the Black Sea. On the contrary, the Suez Canal is certainly a "global" choke point. The presence of many islands in the Aegean Sea also implies numerous straits, between Greek mainland coasts and Greek islands or between Greek islands, often relevant only to inland navigation.

The mentioned straits and canals do not exhaust the range of sensitive choke points in the Eastern Mediterranean basin. Actually a study prepared in 2010 by the European Commission on jurisdiction waters in the Mediterranean Sea and the Black Sea considers points of natural congestion the two wide sea lanes between the northern coast of Cyprus and the southern coasts of the Anatolian peninsula, the narrow waterways between the Dodecanese islands and the Anatolian peninsula, and the sea waters off the southern coasts of Israel and those of Gaza.

This complex geographical situation is backed up by an equally complex legal situation concerning the regime of navigation in the Eastern Mediterranean waterways. It is worth underlying that the most important Eastern Mediterranean waterways, namely those providing access not only to this part of the Mediterranean but to the entire basin, are completely exempt from the application of the regimes on transit passage and innocent passage in international straits contained in UNCLOS. This is the case for different reasons of the Bosporus and the Dardanelles and of the Suez Canal where the navigation is disciplined by specific international treaties. On the other hand, the relevant UNCLOS rules, when applicable to straits in the region, have been partially challenged by some coastal States aiming at somehow controlling maritime navigation through the straits especially for reasons of environmental protection. Not to mention that during the III UN Conference on the law of the sea several States in the region have been very active in protecting the sovereignty of the straits' coastal States to the detriment of the full application of the freedom of navigation therethrough.

Thus different regimes apply to maritime navigation through waterways in the Eastern Mediterranean – from the principle of transit passage to specific conventional regimes – and consequently different degrees of freedom of navigation coexist. In particular, the principle of ensuring in all circumstances the passage of merchant ships and warship through straits between two parts of the high sea and forming ordinary routes of international navigation, laid down by the International Court of Justice in the *Corfu channel* case, is submitted to some conditions established by treaties or *de facto* imposed by the practice of certain States.

In general, the regime of transit passage should be applied by coastal States parties to the UNCLOS, while the regime of innocent passage, due to its customary nature, by all the States in the region.

The regime of transit passage both for warships and merchant ships is applicable to straits used for international navigation and connecting two parts of the high seas or exclusive economic zones. The right of transit cannot be suspended or impeded and it is excluded from all appreciation and coercion by the bordering State. All ships and aircraft, without discrimination based on type, function, nationality, cargo or destination enjoy the right of transit passage. The passage must be rapid and continuous and the ship must refrain from any activity unrelated to the passage itself. The restrictions imposed on ships in transit are very few and the prerogatives of the coastal State are extremely reduced. In short, navigation through these straits is guaranteed by a regime very close to the freedom of navigation on the high seas.

The regime of transit passage is substituted by the regime of innocent passage in the straits existing between a continental State and an island belonging to it, if there is an alternative route of comparable convenience, such as the Strait of Messina, and in those connecting the territorial sea of a State to the high seas, the so-called dead-end straits. Passage implies navigation in the strait for the purpose of passing through, entering, or leaving it; it shall be continuous and expeditious, but may include stopping and anchoring, if connected with navigation or necessitated by force majeure or distress. Passage is innocent if it does not threaten the peace, good order or security of the coastal State. The coastal State may enact laws and regulations, applicable to innocent passage, concerning a very broad category of matters, in particular, safety of navigation, traffic routes and traffic separation schemes, but also any other matter falling within its sovereign functions. The coastal State may not, in any case, impede the innocent passage of foreign ships, just as it may not hinder their passage in transit. However, in the case of innocent passage the coastal State has the possibility of adopting the necessary measures to prevent non-innocent passage.

However, the application of the regimes of transit or innocent passage under UNCLOS seems to be contested for the so called “internal” straits in the Aegean Sea. Insofar as they are used for international navigation, the Aegean straits should all be subject either to the regime of transit passage and overflight when they link two parts of the high seas, or to the regime of innocent passage, either when they divide the Greek mainland coast from a Greek island, as is the case

with Laurium and the island of Kèa, or when they link the Greek territorial sea to the high seas.

Indeed, at the time of signing the UNCLOS, Greece deposited an interpretative declaration (then confirmed at the time of ratification) on the subject of straits according to which in areas where there are numerous spread out islands that form a great number of alternative straits which serve in fact one and the same route of international navigation, the coastal State concerned has the responsibility to designate the routes, in the said alternative straits, through which ships and aircrafts of third countries could pass under transit passage regime, in such a way as on the one hand the requirements of international navigation and overflight are satisfied, and on the other hand the minimum security requirements of both the ships and aircrafts in transit as well as those of the coastal state are fulfilled. The Greek declaration was contested by Turkey, which argued that Greece had thereby created a new category of straits ignored by UNCLOS. The legal status of these straits must therefore be assessed in the light of the dispute between Greece and Turkey in the Aegean Sea, in which, since Turkey has not ratified UNCLOS, the question whether the transit passage regime has acquired customary nature is clearly relevant.

The Bosporus and the Dardanelles are subject to an *ad hoc* conventional regime, contained in the Montreux Convention of 1936. This special regime tries to balance the Turkish interest to exercise sovereign powers over the straits and the interests of other States, mainly the Black Sea coastal States, to enjoy a fully freedom of navigation. The result is a rather curtailed freedom of navigation regime.

Under the Montreux Convention the freedom of passage and navigation of merchant vessels of all nations is guaranteed without a time limit, but it is also regulated by some restrictions under the control of Turkish authorities. In other words, as a principle, freedom of passage for merchant vessels is guaranteed in the Turkish Straits but Turkey's security interests are as well taken into consideration, since the Convention gives to the Turkish authorities necessary control powers on the passage. These same provisions apply in time of war when Turkey is not a belligerent. When Turkey is a belligerent, merchant vessels not belonging to a State at war with Turkey enjoy freedom of passage and navigation through the Straits on condition that they do not in any way assist the enemy. However, such vessels should enter the Straits during daytime and must follow the route indicated by Turkish authorities. When Turkey is threatened with

imminent danger of war, it may require merchant vessels to enter the Straits only by day and they must follow the route indicated by Turkish authorities.

Since the entering into force of the Montreux Convention, the technology, types, and sizes of ships have developed, and concerns about the protection of maritime environment have progressively increased. Therefore, Turkey has considered the Montreux Convention not fully responding to these new exigencies. Following some fatal accidents in the Straits and in order to carry out safe passage through them, Turkey adopted unilaterally a set of rules called "Maritime Traffic Regulations for the Turkish Straits and the Marmara Region" in 1994, then renewed in 1998. These regulations caused some complaints as to whether they were compatible with the Montreux Convention. Some argue that the right of freedom of innocent passage which is guaranteed by the Montreux Convention is violated.

On the contrary, the Suez Canal, being an artificial waterway, is not subject to the regimes laid down by UNCLOS for international straits. Generally, although artificial canals are navigable routes of communication between two parts of high seas, the status of their waters do not change. They remain internal waters and do not become territorial waters because of their navigability. The regime of artificial canals is exclusively established by domestic law unless because of the canal's importance for international navigation the regime is fixed by an international treaty stipulated at the time of its opening or subsequently because of other events concerning the canal. In the case of the Suez Canal this regime is contained in the Constantinople Convention of 1888. The Suez Canal is not subject to a particular regime of internationalisation: it is permanently part of the Egyptian territory; however freedom of navigation, both in peace and in war time, is recognised and the total blockage of the Canal is prohibited so that it may be regarded as neutralised.

In conclusion, the legal status of waterways in the Eastern Mediterranean is extremely varied and complex because of the different types of waterways and because the regulation established by UNCLOS either do not apply or do not fully meet the perceived safety and environmental protection needs of coastal States. The strategic problems in the same area do not let the settlement of the different interests easy and often lead to different interpretations of the freedom of navigation. Paradigmatic is for example the evaluation of the lawfulness of escort which even if it is generally lawful and often necessary to protect some political or economic interests of flag States can nonetheless be perceived by coastal States as a threat to their security.

# UNCLOS AND THE STRAITS OF HORMUZ

**Stephen Blackwell**

A recent series of alleged attacks by drones and missiles on oil tankers and other shipping in waters adjacent to the Arabian Peninsula has refocused international attention on the security of strategically vital waterways in this region. The recent uptick in these incidents has been attributed to an ongoing 'shadow war' between Israel and Iran.[1] Such attacks raise significant questions over the rights of shipping to pass freely through the critical global 'chokepoint' of the Straits of Hormuz, and the nature of the international legal regime that applies to these activities.

While the Strait of Hormuz is recognized as an international strait, sovereignty over its territorial waters is divided between the Islamic Republic of Iran and the Sultanate of Oman. Constituting a 90 nautical miles-long sea passage, the Strait is only 21 nautical miles wide at its narrowest point. Commercial shipping using the Strait carries up to one third of global output of liquefied natural gas and one quarter of global oil respectively. In practice, ships transiting the Straits mainly travel through Oman's territorial waters as these provide the easiest navigable routes.

However, the concern that Iran might be prepared to entirely close the Straits of Hormuz in certain circumstances reinforces the vulnerability of the area as a strategic 'chokepoint'. Ongoing tension between the United States and its allies on the one hand and Iran on the other increase the risk of armed conflict breaking out in the Straits and the adjacent seas. This article examines the international legal regimes relating to the passage of shipping, interference with shipping, and the use of force in this region.

## Transit Passage and Innocent Passage

In accordance with the 1982 UN Convention on the Law of the Sea (UNCLOS), third country shipping has extensive rights to transit the Straits of Hormuz and other narrow waterways between coastal states. In addition to provisions of 'innocent passage' set out in the 1958 Convention on the Territorial Sea and

1 'Iran denies role in tanker attack, says seeks Gulf security', *Reuters*, 7 August 2021 (https://www.reuters.com/world/middle-east/iran-denies-role-tanker-attack-says-seeks-gulf-security-2021-08-07/) [accessed 4 September 2021].

Contiguous Zone,[2] UNCLOS, which subsumed the four treaties that constituted the 1958 Convention on the High Seas, also established the principle of 'transit passage' between one part of the high seas or exclusive economic zone and another.

'Transit passage' rights as set out Article 38 of UNCLOS relate to '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'.[3] While littoral states have the right to regulate transit passage in respect to navigational safety, shipping traffic, pollution, fishing, and border and customs management[4], UNCLOS is explicit that for vessels observing their legitimate rights, 'bordering straits shall not hamper transit passage'.[5]

In terms of 'innocent passage', Article 17 of UNCLOS subsumed the provisions of the 1958 Geneva Convention by stipulating that 'ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'.[6] However, 'innocent passage' assumes that the passage is 'not prejudicial to the peace, good order or security of the coastal State'; to this end, ships must desist from the threat or use of force or any of a range of activities that might threaten the security of a littoral state.[7] Similarly, the innocent passage of warships through the territorial sea of a littoral state is subject to the 'laws and regulations' of that state and must abide by the same provisions regarding the threat or use of force.[8]

The existing regime therefore consolidates rights of passage through narrow straits. However, in relation to the nature of passage rights for shipping through

2 United Nations, Convention on the Territorial Sea and the Contiguous Zone, Section III, Articles 14-23, Geneva, April 1958 (https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf) [accessed 24 August 2021].

3 United Nations Convention on the Law of the Sea (henceforth UNCLOS), Part III, Article 38, 10 December 1982 (https://www.un.org/Depts/los/convention_agreements/texts/unclos/part3.htm) [accessed 20 August 2021].

4 UNCLOS, Part III, Article 42(1) [accessed 20 August 2021].

5 UNCLOS, Part III, Article 44 [accessed 20 August 2021].

6 UNCLOS, Part II, Article 17, (https://www.un.org/Depts/los/convention_agreements/texts/unclos/part2.htm) [accessed 20 August 2021].

7 UNCLOS, Part II, Article 19, [accessed 20 August 2021].

8 UNCLOS, Part II, Article 30, [accessed 20 August 2021].

the Straits of Hormuz, it is worth also taking into account the International Court of Justice (ICJ) opinion in 1969 in the *North Sea Continental Shelf Cases* concerning the delimitation of the continental shelf of the North Sea between Denmark, the Netherlands and the Federal Republic of Germany. Based on applicable international law, the Court held that the boundary lines in question should be resolved according to equitable principles based on natural prolongation of each country's land territory under the sea, rather than in accordance with the principle of equidistance as outlined in the 1958 Geneva Convention on the Continental Shelf. The judgment accepted that as the Federal Republic of Germany had not ratified the 1958 Convention, the equidistance principle was therefore not a rule of customary international law.[9]

The implication of the ICJ's *North Sea Continental Shelf* judgment is that the existing conventions on the international law of the sea do not supersede a state's territorial rights in its claimed maritime zones. The retained sovereign rights of littoral states mean that while Iran and Oman should permit civil and military shipping to pass through the Straits of Hormuz in accordance with UNCLOS, they are also permitted to enforce their laws and regulations in their territorial waters under their control. Transiting ships are thus obliged to observe their duties in accordance with their obligations as set out in UNCLOS. In the case of both UNCLOS and the earlier 1958 Convention, Iran signed but did not ratify the agreements. In signing UNCLOS, Iran indicated that it would only apply the new 'transit passage' regime to those states that ratified the Convention; in other cases, the 1958 Convention would apply.

Iran has also reserved its position on the right of 'innocent passage' through the Straits; the implication of this is that 'innocent passage' rights could be regarded as weaker than 'transit rights', given that a state can deny passage if it is deemed not to be innocent.[10] Nevertheless both UNCLOS and the 1958 Convention prohibit the unjustified prevention of 'innocent passage', and no notification or authorization needs to be secured by any transiting vessel regardless of their activity.

9 International Court of Justice, 'North Sea Continental Shelf Cases', Judgment of 20 February 1969, ICJ Reports 1969 (https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf).

10 Matthias Hartwig, 'Tanker Games – The Law Behind the Action', *EJIL: Talk! Blog of the European Journal of International Law*, 20 August 2019 (https://www.ejiltalk.org/tanker-games-the-law-behind-the-action/) [accessed 22 August 2021].

In the view of many nations, including the United States, customary law as codified in UNCLOS and the 1958 Convention confirms the right of passage in the case of Straits of Hormuz. In practice, while Iran has periodically threatened to close the straits in response to international pressure, it has never actually followed through on such threats. Both during the Iran-Iraq war and the 1990 Gulf War, US warships were able to pass through the straits without interference from the Iranian authorities. Established opinion also questions the legal status of a potential retaliatory move by Tehran to close the Straits of Hormuz in the event of conflict. In general, previous legal cases suggest that the enforcement of UN sanctions against Iran, or even a military strike without UN Security Council backing to degrade or destroy the Iranian nuclear program, would not justify countermeasures such as impeding commercial shipping or warships or closing the Strait entirely.[11]

Nevertheless, it is remains problematic to claim that the rights of 'innocent passage' and 'transit passage' constitute customary international law. In addition to Iran and Oman, other states, including non-parties to UNCLOS such as Turkey and Venezuela and full parties such as Russia and Spain, have reserved their positions on passage rights through straits that they claim to exercise full or partial territorial control over. The *North Sea Continental Shelf* ruling appears to reinforce the position that what might be regarded as a customary rule does not override preexisting territorial rights and associated laws and the right to deny passage regardless of the 'transit passage' provision in UNCLOS.[12] These reservations might be particularly pertinent to those states that have not ratified the Convention. This, arguably, would apply to the United States, which has availed itself of the right for its civil and military shipping to transit the Straits of Hormuz even though it has not signed or ratified UNCLOS.

## Interference with shipping: The Stena Impero incident, 2019

The international legal regime is less ambiguous in the case of shipping impeded or detained in the Straits of Hormuz and adjacent seas. On 19 July 2019, Iranian forces stopped and impounded the *Stena Impero*, a British-flagged vessel owned by a Swedish shipping company. It was alleged that the ship was actually detained in Oman's territorial waters. The Iranian justification was that the *Stena Impero*

11 Giuseppe Cataldi, 'The Strait of Hormuz', *Questions of International Law*, Vol. 76 (2020), pp. 5-19 (http://www.qil-qdi.org/wp-content/uploads/2020/12/02_Asian-Straits_CATALDI_FIN.pdf).

12 Cataldi, 'The Strait of Hormuz', pp. 18-9.

had disregarded local navigational rules and had collided with an Iranian fishing boat. Nevertheless, other countries suspected that the incident was a retaliatory measure against the detention, two weeks earlier, by the British navy of the previously Panamanian-flagged tanker *Grace 1* near Gibraltar due to suspicions that the vessel was carrying Iranian oil to Syria in violation of international sanctions.[13]

Whether or not the detention took place in Omani waters, the Iranian justification for the detention of *Stena Impero* was highly dubious. The action undoubtedly entailed multiple violations of UNCLOS. Article 39 of the Convention obliges ships exercising the right of transit to proceed without delay through the strait without any threat or use of force against states bordering the strait;[14] *Stena Impero* was clearly not contravening this provision. There is no conclusive proof that *Stena Impero* was taking a route in violation of recognized sea lanes and maritime traffic rules, as required by Article 41.[15] The International Maritime Organization and other international accords including the 1972 International Regulations for Preventing Collisions at Sea regulate traffic through the Straits. In addition, states bordering straits may not hamper or suspend passage through straits, according to Article 44.[16]

As was noted previously, Iran has never ratified the 1958 Convention on the High Seas or UNCLOS, but has in practice generally not interfered with the passage of shipping through the Straits of Hormuz. If the case of the *Stena Impero* had been brought before an international court of tribunal, the UK may have been able to argue that UNCLOS now represents customary international law.[17] As was discussed earlier, this claim remains open to dispute. The Iranian government could have countered with arguments based on the *North Sea Continental Shelf* ruling that local laws and regulations in its territorial seas superseded the Convention.

13 BBC News, 'Stena Impero: Seized British tanker leaves Iran's waters', 27 September 2019 (https://www.bbc.com/news/world-middle-east-49849718) [accessed 5 September 2021].

14 UNCLOS, Part III, Article 39.

15 UNCLOS, Article 41, Part III.

16 UNCLOS, Part III, Article 44.

17 Andrew Serdy, 'Iran: what the law of the sea says about detaining foreign ships in transit', *The Conversation*, 23 July 2019 (https://theconversation.com/iran-what-the-law-of-the-sea-says-about-detaining-foreign-ships-in-transit-120816) [accessed 22 August 2021].

At the same time, a claim that the stopping of the *Stena Impero* was a legally justified countermeasure against the detention of *Grace 1* would be unlikely to be accepted. Article 49 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* states that countermeasures may only be taken against illegal acts and that any violation must directly affect the state that claims the right to take such measures. As the *Grace 1* was previously registered in Panama and did not carry an Iranian flag, Iran's rights in this case were therefore question able.[18]

## The use of force

In relation to passage rights of shipping through the Straits of Hormuz, the final issue to be discussed here is how might international law apply in the event of a conflict that led to attacks on shipping or a closure of the Straits. Regarding self-defense in the event of attacks on commercial vessels in the Gulf, the main legal precedent is the International Court of Justice's (ICJ) verdict on the *Oil Platforms* case involving Iran and the US in 2003.[19] In its judgment, the Court's rejection of both parties' claim that the other party had breached their 1955 bilateral treaty due to their conflict in 1987-8 generated legal uncertainty over whether attacks on commercial shipping could be considered as 'armed attacks' on the state under which they were flagged.

Specifically, the Court questioned whether missile and mine attacks alleged to have been the responsibility of Iran could justify the US invoking the principle of self-defense. While some commentary that the ICJ did not rule that these incidents amounted to an 'armed attack',[20] others suggest that the Court was ambiguous on the question of whether attacks on commercial shipping constituted attacks on a state.[21] Perhaps the most convincing interpretation

18 Hartwig, 'Tanker Games – The Law Behind the Action'.

19 International Court of Justice, 'Case Concerning Oil Platforms (Islamic Republic of Iran v. United States', Judgment of 6 November 2003 (https://www.icj-cij.org/public/files/case-related/90/090-20031106-JUD-01-00-EN.pdf) [date accessed 25 May 2021].

20 Djamchid Momtaz, 'Did the Court Miss an Opportunity To Denounce the Erosion of the Principle Prohibiting the Use of Force?', *Yale Journal of International Law*, Vol. 29, Issue 2 (2004), pp. 307-13.

21 Clause Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"', from Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford & New York: Oxford University Press, 2015), pp. 561-604; Geir Ulfstein, 'How International Law Restricts the Use of Military Force in Hormuz', *EJIL: Talk! Blog of the European Journal of International Law*, 27 August2019 (https://www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz/) [accessed 14 May 2021].

is that by focusing so closely on the contradictory evidence surrounding the circumstances of the attacks, the ICJ declined to give a definitive opinion on the question of armed attacks in these cases.

Regarding the relationship between UNCLOS and possible military action in the Straits of Hormuz, there is some uncertainty over whether the Convention permits military vessels to launch and recover aircraft during a transit passage of a strait. The main 'transit passage' provisions would suggest that military aircraft may overfly and military vessels may transit a straight while maintaining defensive readiness and observing navigational requirements. In practice, the US navy does not give prior notice of the passage of its vessels through straits in accordance with UNCLOS.

At the same time, Iran's Islamic Revolutionary Guard Corps (IRGC) navy operates small boats and drones in the Strait of Hormuz and reserves the right to investigate all vessels entering the Gulf. Whether the IRGC has a international legal basis for such activities now that it is designated by the US as a 'terrorist entity' is a question that remains unresolved. UNCLOS Article 39 also provides that vessels exercising their right of passage in the Strait would be able to deviate from their normal mode of activity if they were threatened by armed drones or boats, implying that vessels would be permitted to take defensive action in such circumstances.[22] At the same time, action aimed at impeding and detaining ships cannot be regarded as an 'armed attack', even if such action violates established international norms.[23]

## Conclusion

In terms of existing international legal conventions, there is evident ambiguity over the rights of ships passing through the Straits of Hormuz. While the right of 'innocent passage' could arguably be viewed as customary law, the position is less clear in relation to 'transit passage'. While littoral states such as Iran are not permitted to impede shipping according to international norms, these states still exercise territorial rights in their sea areas that are supported by some international legal precedents. Most importantly, justifying the use of military

22 Farzin Nadimi, 'Clarifying Freedom of Navigation in the Gulf', PolicyWatch 3154, *The Washington Institute for Near East Policy*, 24 July 2019 (https://www.washingtoninstitute.org/policy-analysis/clarifying-freedom-navigation-gulf) [accessed 15 August 2021].

23 Douglas Guilfoyle, 'Iran and the Strait of Hormuz: some initial thoughts', *EJIL: Talk! Blog of the European Journal of International Law*, 2 February 2012 (https://www.ejiltalk.org/iran-and-the-strait-of-hormuz-some-initial-thoughts/) [accessed 1 September 2021].

force to protect shipping in the Straits would be difficult without a clear UN Security Council mandate

The applicability of UNCLOS to the Straits of Hormuz is intricately related to a range of political questions, territorial disputes and security fears. While such disputes are ongoing, they are likely to deter states from joining UNCLOS. The unwillingness of some local states, including Iran and Oman, to ratify the Convention further undermines its force. At the same time, the fact that the US is not an UNCLOS signatory influences the position of many other states. It is incumbent on great powers to ensure the Convention operates more effectively, perhaps through a regional accord that clarifies the legal regime in the Straits.

# A STRATEGIC PERSPECTIVE FOR ISRAEL ON CONTENDING WITH INNOCENT AND TRANSIT PASSAGE THROUGH MARITIME CHOKEPOINTS IN WAKE OF HEIGHTENED ENERGY COLLABORATION IN THE MIDDLE EAST

**Orin Shefler**

## Introduction

This chapter will introduce a new premise for the State of Israel ("Israel") that shall support the formulation of a multi-lateral regional maritime framework. This framework is meant to ensure the protection of innocent and transit passage ("Rights of Passage") for vessels travelling through navigational straits, waterways and/or territorial waters in the Middle East ("Maritime Chokepoints"). The purpose of this chapter is to flag important strategic issues to be considered with respect to the transit of goods through Maritime Chokepoints, with special emphasis on energy products (such as fuels) which are of vital interest for safe transit in the region.

The chapter argues that the transit of energy goods will play a significant role in maintaining the energy security of Israel, the UAE and other nations in the future, and ensuring safe transit is a vital regional interest. In 2019 alone, the UAE exported from the Persian Gulf approximately ~2,414.2 thousand barrels of oil per day, ~881.8 thousand barrels per day of other petroleum products and ~9374.2 (million cu. m.) of natural gas.[1] The safe transit of such products will, and must, play a major factor in regional policy making, especially during the transition period to “blue” and “circular” economies. Additionally, it is expected that the maritime industry will transcend to use of LNG or similar as a preferred fuel in the foreseeable future therefore any multi-lateral regional maritime framework must also ensure that LNG bunkering, loading and/or refueling depots that are established in the Middle East are safe, accessible, abundant and open to maritime traffic. This is an essential interest in order for the maritime industry to effectively adopt LNG as its preferred maritime fuel. Furthermore, any such regional framework must also include measures to ensure that the

1 UAE facts and figures. *Organization of the Petroleum Exporting Countries.* (Last visited October 2021).

Rights of Passage through Maritime Chokepoints do not become tools to force and/or regulate behavior via access and control of such Maritime Chokepoints in a process called "weaponization of chokepoints" as further explained below.

This chapter will also establish that in the specific context of the Middle East, analysts must also consider the historical and cultural context of engaging in dispute resolution and reconciliation activities through securing economic interests – all of which play a significant role in regional policy. This element will be addressed in the second half of the chapter through a review of the impact of the 2020 normalization agreement between Israel, the UAE and Bahrain ("Abraham Accords"). This analysis will focus specifically on (1) the Israel-UAE agreement to transit oil through the Europe Asia Pipeline Company ("EAPC") and (2) how climate change and the transition to "blue economies" (also referred to as "Ocean Economies") and cleaner maritime fuels will affect regional dynamics.

## The United Nations Convention on the Law of the Sea

As mentioned in previous chapters, Israel has not yet signed or ratified the United Nations Convention on the Law of the Sea ("UNCLOS"); however, traditionally with respect to matters covered by UNCLOS, Israel has chosen to align itself to the principles of UNCLOS as a matter of customary law. Historically, Israel has chosen not to join UNCLOS for several strategic reasons. Amongst others, one of Israel's prime concerns has been the perception that an internal bias exists against Israel by the United Nations ("UN") and by some of the UN chartered institutions. Over the years, this bias perception has often been exploited by Arab countries to single out Israel as an aggressor that refuses to cooperate with international law, and has also been exploited to apply pressure upon Israel to make excessive concessions under a false premise that international law "mandates" them and as a means to avoid direct negotiations.

It has traditionally been Israel's policy to resolve conflicts by direct negotiations and agreements with its opponents. The basic premise is to reach a bargain or balance of interest where each party gives and gains during a fair negotiation that leads to cessation of all conflicts. However, the fact that UNCLOS introduces mandatory dispute resolution procedures that apply to signatories where no settlement can be reached on "*disputes concerning the interpretation or application of the convention*",[2] it follows that if Israel became a signatory such disputes could potentially be referred unilaterally for conciliation in a variety of methods

2 See UNCLOS, PART XV, Section 281.

which, *amongst other options*, could also be heard by the International Court of Justice ("ICJ").[3] The ICJ's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. If such a dispute was eventually submitted for mandatory review at the inter-state level, the common perception would be that the bias perception could lead to a decision that could be detrimental to the interests of the State of Israel and unfair. Such a legal proceeding would contradict Israel's inherit right to negotiate a fair deal directly with its neighbors on matters relating to maritime borders, natural resources and/or other existential maritime affairs.

The contextual tailwind for Israel's policy on UNCLOS is of course a similar policy extended by the United States which also chose not to join UNCLOS (for different reasons). At this point in time, the political balance between the senate and the congress are still divided, therefore it is unlikely that the US will make radical changes on its position on UNCLOS in the foreseeable future. Having said that, there may be those who believe that UNCLOS jurisprudence has gradually developed over time sufficiently and would support a future reassessment of the Israeli policy to join UNCLOS. There may be some good reasoning for Israel to reassess its historical position on UNCLOS and perhaps change its policy sometime in the future – but the general consensus at this point is that such time has not yet come.

Factors in favor of developing a new regional maritime framework for Israel are attributed to several strategic interests which are ever-changing, and yet must all be aligned for Israel to move forward in such regard. Such interests include (i) a more positive perception and international reception of UNCLOS over time; (ii) proven stability and agility of the Camp David Peace Accords between Israel and Egypt, and the Peace Agreement between Israel and the Hashemite Kingdom of Jordan - specifically with respect to the rights of passage through the Straights of Tiran and the Suez Canal; (iii) a shift in Israel's understanding of the importance of participating in international fora; (iv) the signing of the Abraham Accords ; (v) a dire need to protect the passage of goods in the Middle East, and (vi) possible future changes (however unlikely) with respect to the policies on UNCLOS of the United States;

3 See UNCLOS, Part XV, Section 287.

## The Right of Passage Through Maritime Chokepoints

To set the stage, this chapter will focus on several key provisions of UNCLOS with respect to establishing Rights of Passage in the Middle East. The area in question includes seven critical waterways which are (1) the Red Sea, (2) the Straights of Tiran, (3) Bab-El-Mandeb, (4) the Gulf of Aden, (5) the Gulf of Oman, (6) the Straits of Hormuz and (7) the Persian Gulf. These locations are all historical maritime chokepoints through which third -country shipping must be granted extensive Rights of Passage by littoral states.


Picture 1: Maritime Chokepoints

As a general rule, according to UNCLOS a Coastal State can establish and enforce laws for their territorial waters and straights under their control although they cannot prevent passage through such Maritime Chokepoints.[4] Rights of Transit and/or Innocent Passage should be observed by transiting ships when passing

4 See UNCLOS Part II, Article 18 & 19 ("Right of innocent passage" & "Meaning of innocent passage") & UNCLOS Part III, Article 38 ("Rights of Transit Passage").

through navigational waters. Transit Passage means 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...".[5] Innocent Passage includes the right to "(a) traverse a territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) [to proceed] to or from internal waters or a call at such roadstead or port facility".[6] Passage would be regarded as innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State". Passage would be considered prejudicial to the peace, good order or security of the Coastal State if in the territorial sea it engages in, *amongst other things*, "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State ... any exercise or practice with weapons of any kind ... the launching, landing or taking on board of any military device".[7] "Passage must be continuous and expeditious...".[8]

In simple terms, amongst other things, vessels are expected to act in good faith towards a littoral state during transit passage; Under UNCLOS, military vessels also enjoy Rights of Passage but they cannot use force while passing through such waters (subject to exceptions established by other instances of international law). As further discussed in other chapters, if a vessel violates international law during transit, there are several internationally acceptable alternates to the use of force that a coastal state may invoke within their territorial sea that can be further explored with respect to a new regional maritime framework. Such alternatives could include protest, escort and acts of self-defense. All which can be applied to the Maritime Chokepoints in the Middle East.[9]

History has shown that when Rights of Passage through Maritime Chokepoints have been impeded, more often than not, hostilities have erupted immediately. For example, the Sinai Campaign (Operation Kadesh) (1956) and the Six Day War

5 See UNCLOS, Part III Article 38(2).

6 See UNCLOS, Part II, Article 18.

7 See UNCLOS Part II, Article 19 ("Meaning of innocent passage").

8 See UNCLOS, Part II, Article 18 (2).

9 Natalie Klein, "Lawful Responses to Passage Violations, Rules of Escort and the Use of Force under UNCLOS", 2021 (UNSW Sydney, Faculty of Law and Justice. Parts of this paper are drawn from Natalie Klein, 'Responding to Law of the Sea Violations' (2021) 27 Australian International Law Journal (forthcoming). The author gratefully acknowledges the research and editorial assistance of Jack McNally).

(1967) erupted following the closure of the Straights of Tiran and the Suez Canal by Egypt for passage of Israel bound vessels to the ports of Haifa, Ashdod & Eilat which was considered a "Casus belli".[10]

## The Abraham Accords Peace Agreement: Treaty of Peace, Diplomatic Relations and Full Normalization between the United Arab Emirates and The State of Israel (September 2020)

The Abraham Accords were signed on September 15, 2020 by and between the UAE and Israel under the brokerage of the United States of America, and will have an important effect on maritime transit in the Middle East. The Abraham Accords were negotiated by national intelligence agencies during the Trump and Netanyahu administrations and have been hailed by many as a triumph of foreign diplomacy; As part of the Abraham Accords, amongst other things, Israel and the UAE have made the following declarations which impact the maritime state of affairs between them:

> "The Parties shall be guided in their relations by the provisions of the charter of the United Nations and the principles of international law governing relations among states…".[11]

> " …. The Parties shall work to advance the cause of peace, stability and prosperity throughout the middle east, and to unlock the great potential of their countries and of the region …. in …. spheres … of mutual interests as may be agreed ".[12]

Such *spheres of mutual interests* are explained in the Annex to the Abraham Accords which, *amongst other things*, includes the following mutual declaration:

> "Each Party shall recognize the right of vessels of the other Party to innocent passage through its territorial waters in accordance with international law. Each Party will grant normal access to its ports for vessels and cargoes of the other party, as well as vessel s and cargoes destined for or coming from the other Party. Such access shall be granted on the same terms and conditions as generally applicable to vessels and cargoes of other nations. The Parties shall conclude agreements and arrangement in maritime affairs, as may be required"[13].

10 Benny Spanier, "The Straits of Tiran (The Red Sea): From the Peace Agreement Between Israel & Egypt to UNCLOS – the Challenges" (2021).

11 Section 2 of the Abraham Accords Peace Agreement.

12 Section 5 of the Abraham Accords Peace Agreement.

13 Annex of the Abraham Accords Peace Agreement.

From inception, Israel has relied primarily on access to the sea following conflicted relations with all its land-neighbors (i.e., Lebanon, Syria, Jordan, Egypt and the PA). Such conflicted relations have historically led to blockage *de facto* of land-based import options and as such, Israel has traditionally acted as an "Island" with regards to use of its ports for the import of goods and products. Unfortunately, not much has changed over the past seventy-four years from independence, and Israel's reliance on access to the sea is expected to increase over the years to come, especially following the signing of the Abraham Accords.

Following the Abraham Accords, Israel can expect to expand its import and export capabilities to and from the Arab world and to attract major Arab investments in its economy and infrastructure (in areas such as finance, investments, healthcare, science technology, outer space, energy, environment, maritime, water and more). Such Arab investments will amount to tens of billions of US dollars in the near future for Israel. To facilitate this forecast, Israel has invested significantly in doubling its port infrastructure in order to allow upgraded docking and freight processing for more vessels, including the new class super type vessels. The Abraham Accords will undoubtably have significant impact on the Middle East and will bring with them a multitude of far-reaching economic interests. These financial and strategic interests are the foundation of the Abraham Accords and without them, the Abraham Accords would probably never have been signed. These economic interests have also taken a historical and reconciliatory role, and have boosted the mutual interests of the parties to engage each other. The result will no doubt be a significant increase of maritime shipping in the region.

It should also be noted that the 2021 change of the US & Israeli leaderships might have a mild chilling effect on some of the long-term goals attributed to the Abraham Accords. The new leaderships are now prioritizing climate change and transition to cleaner energy sources, which marginalizes the traditional fossil fuel economy. Some experts foresee that the opportunities introduced by the Abraham Accords may have been slightly impeded.

Notwithstanding, it is still projected that the UAE will be able to establish new export routes for petroleum products to Europe via the Red Sea. The UAE will now gain stronger influence in the region and participate in future Israeli energy projects. Also, the UAE will now be able to invest vast wealth in Israel's booming technology sector bringing prosperity and new opportunity to the region. Of course, the fact that the UAE is now doing business directly with what it considers to be the closest ally of the United States in the region brings with it additional strategic benefits and positions the UAE with a better seat at the

table with respect to US-Israel regional interests; perhaps even with the intent of restraining Iranian influence and advances in the region. For the UAE the timing of the Abraham Accords is especially right due to the current divestment from a traditional hydrocarbon economy and its future legacy. We can also assume, with fair level of certainty, that all of the sides will enjoy "a wink and nudge, and a pat on the back" with respect to major arms deals planned to be carried out in the years to come.

All of the above and more are the key to understanding the historical and reconciliatory significance of the Abraham Accords and can also shed light on why other nations would view the Abraham Accords as a threat to their own interests; once we better understand the magnitude of the potential new economic ties between Israel and the UAE, it will become clearer why other countries would go out of their way to impede them. The weak link in the equation, which could be easily exploited by opponents, is the need to facilitate safe and reliable shipping in the middle east. As such, the success of the Abraham Accords is highly dependent on the ability to carry out safe, reliable and uninterrupted maritime trade between the nations over the seas. Even today, at any given moment, there are multiple vessels owned or leased by Israeli or UAE businesses or that otherwise serve such interests, enroute between the UAE and Israel. These vessels would be very vulnerable if they were targeted by countries and/or organizations who have counter interests to those described hereto.

## The EAPC – UAE Agreement (2020)

The first and immediate outcome of the Abraham Accords has been the agreement signed by and between the Europe Asia Pipeline Company Ltd. ("EAPC") and a UAE controlled company in October 2020 ("EAPC-UAE Agreement"). The EAPC-UAE Agreement will allow the transport of petroleum and/or other energy related products from the Gulf region via the Red Sea, the offloading of said petroleum products at the EAPC onshore terminal near the Port of Eilat and the further transmission of petroleum products through the onshore EAPC pipeline from Eilat to Ashdod where, *in turn*, petroleum products will be delivered to clients in Europe. Clearly, a key performance indicator of the Abraham Accords will be the success of the EAPC-UAE Agreement.

Historically, EAPC was a joint venture established in the 1970's between Israel and Iran for the transport of petroleum products to Israel and has been the subject of continuous dispute and international arbitration proceedings with respect to its assets and legacy following the Iranian revolution in 1979. It is for this reason

that EAPC enjoys a complete "military style" confidentiality blanket on all its operations and therefore the exact details of the EAPC-UAE Agreement have not been made publicly available. It is highly likely that the EAPC-UAE Agreement also contains future looking provisions with respect to new infrastructure upgrades, blue economy aspects and possible transitions to handling other products such as natural gas, LNG and/or other forms of fuel (such as hydrogen).

Critics of the EAPC-UAE Agreement argue that it was signed in haste without taking into account major security concerns in total disregard of the environment. Maritime security experts claim that if oil tankers enroute to Eilat are attacked or require security and/or escort intervention, the Israeli navy would be limited in its ability to provide protection at Maritime Chokepoints. Also, environmental experts condone the haste in which the EAPC-UAE Agreement was formulated including the blanket confidentiality and its apparent disregard of environmental, emergency response and/or municipal implications with respect to the city of Eilat and surrounding area.

The City of Eilat is the tourist capital of Israel and is also a world class nature reserve. The premise that Eilat will become host to convoys of oil tankers importing petroleum products bound for Europe is, to opponents of the EAPC-UAE Agreement, incomprehensible. Also, critics have pointed out that the existing EAPC infrastructure along the pipeline route is over forty years old and requires major refurbishment and upgrades. The notion that these risks have been blindly assumed by Israel during a transition period from conventional uses of petroleum products to alternative energy resources around the world - in total disregard to the environment - has caused civil unrest and will probably be challenged.

## Establishing and Securing Maritime Trade Routes as A Means of Developing a Blue Economy, Lowering Carbon Footprint and Increasing Global Trade

To further understand the timing of the Abraham Accords and in particular its significance with respect to regional maritime arrangements, we will also take a look at the worldwide policies, trends and context with respect to climate change, transition to blue economies (also referred to as "Ocean Economies") and cleaner maritime fuels. For its part, Israel has set quantifiable goals with respect to reducing carbon emissions and prioritizing its gradual transition to the use of renewable energy, and this can be relevant to regional trade dynamics. These goals were first introduced by the Israeli ministry of energy following the

adoption of the Paris Agreement[14] and include, *amongst other things*, increasing energy efficiency in electricity consumption, reduction (or even elimination) of the use of coal, increasing the use of renewable energy sources for electricity production, and efficiency of fuels used for transport.[15]

The OECD has envisaged decarbonizing of maritime fuels by transitioning to use alternative, cleaner fuel sources - such as Liquefied Natural Gas (LNG).[16] The OECD predicts that the transition to LNG as a maritime fuel will lead to the reduction of maritime pollution and an increase in maritime safety.[17] Such transition will lower the carbon footprint of ships entering ports in heavily populated cities. LNG is largely considered a superior marine fuel with the best option for improving air quality. It is also easily scalable and has been named as the leading choice that could assist in meeting decarbonization goals.

Therefore, it is imperative to make LNG bunkering, loading and/or refueling depots safe, abundant and available throughout Maritime Chokepoints – this is a global interest which requires a multi-lateral maritime arrangement. LNG and/or hydrogen bunkering and/or refueling facilities may be established along the coasts of littoral states throughout the Maritime Chokepoints. Such facilities will offer safe and easy access for maritime vessels to cheaper and cleaner fuel alternatives. A smooth transition to the use of cleaner maritime fuels is a global interest and not just a regional interest. The key to achieving this goal will be to make LNG accessible and uninterrupted which will in turn lead to further cooperation, exploration, production, supply, trade and construction of new LNG infrastructure. With the signing of the Abraham Accords, the parties are well positioned to lead the aforementioned transition and can work together to regulate of such practices through a multi-lateral regional maritime arrangement.

## Protecting Maritime Chokepoints in the Context of Geopolitics & Global Affairs

It follows that the security of maritime transit through Maritime Chokepoints remains a dire concern in the region. The security and military aspects with respect to passage have increased dramatically over the past years and have always been a major concern to Israel. Based on media reports, the years 2020

14 The Paris Agreement, 2015.

15 The National Plan for the implementation of the Paris Agreement, September 2016

16 OECD. The Ocean Economy in 2030.

17 ibid.

and 2021 have shown a significant rise in the number of coordinated attacks on Israeli-UAE tied vessels in transit through Maritime Chokepoints. The frequency of such attacks and the severity of them has raised security and military concerns with respect what tools are available to protect such vital interests[18].

The traditional militaristic view to responding to attacks on the seas is to *stand firm* in self-defense against state-sponsored provocations and/or acts of piracy as part of what the media has dubbed a "Secret War" between Israel, Iran and the Gulf states. However, given the current tensions between the US, Israel, the Gulf States and Iran at this time, and in the context of a potential nuclear deal being brokered in the background – a purely militaristic approach entails great risks which may not the best option for Israel to pursue at this time. Moreover, an effective strategic response which involves escort, warships and/or use of alternative methods depends on the specific circumstances and must also take into account that the commencement of such activities and/or the mere presence of warships in the region can create "threat perception", impose significant cost and create even more complex legal issues in the aftermath. Foreign media reports attributing attacks by Israel and/or others on Iranian maritime interests throughout Maritime Chokepoints as part of an enforcement strategy of international sanctions, and vis-a-verse, do not necessarily serve the best strategic interests of the parties since they can potentially open up a new front.

Looking ahead, the European Council on Foreign Affairs has recently classified a new phenomenon dubbed as the "weaponization of choke-points". This broad term is used to describe how influencers can control and regulate behavior via access and control critical global infrastructure networks such as world financial systems, internet, 5G cellular networks, trade routes and/or waterways (like the Suez Canal). The right of access to such networks can be used as a weapon to "*force changes in behavior from others in exchange for the use of a platform or supply chain*"[19].As China and other regional powers gain traction on developing their own chokepoints, there is also risk that the "weaponization of chokepoints" will increase as a tool of rivalry between super powers. Such weaponization will reflect on the control and regulation of Maritime Chokepoints as well which can potentially disrupt global trade significantly.

18 *Sky News*. Limpet mines and drone attacks: Tracking Israels maritime war with Iran.

19 Filip Medunic. A glimpse of the future: The Ever Given and the weaponisation of choke-points. *European Council on Foreign Relations,* 23 April 2021.

## Summary

This chapter has identified some of the new strategic interests that have emerged, and has introduced a need to establish a new multi-lateral regional maritime framework for the Middle East. The primary goal for a new framework must be to ensure the free, uninterrupted and safe transit of vessels throughout Maritime Chokepoints. The driving force for such framework must be mutual interests such as securing international trade, energy security, investments, healthcare, science technology and environment, all in accordance with the long-term goals of the Abraham Accords. Such framework should also be the basis for applying international law and principals of UNCLOS (as a matter of customary law) to Maritime Chokepoints, and should also include a tool box for adequate responses to violations and/or threats on passage through waterways and Maritime Chokepoints.

# THE STRAITS OF TIRAN (THE RED SEA): FROM THE PEACE AGREEMENT BETWEEN ISRAEL & EGYPT TO UNCLOS – THE CHALLENGES

**Benny Spanier**

## Introduction

Maritime straits are naturally formed, navigable waterways that connect between two bodies of water. They are sensitive locations where geography, commerce and politics meet hence they are also referred to as maritime choke points. As the importance of international maritime trade routes steadily increases, the geo-strategic importance of maritime choke points grows accordingly. Some maritime choke points have been identified as a possible cause for international conflicts. In this article we would like to examine the development of the regime of passage through the Straits of Tiran ("Straits") under the principles of the law of the sea.

The story of the Straits, which are located between the Sinai and Arabian peninsulas which separate the Gulf of Aqaba from the Red Sea, combines political changes in the region and at the same time the continuous development of the law of the sea.

Our analysis shall be in chronological order. We will argue that the United Nation Convention on the Law of the Sea ("UNCLOS") and the continuous development of the principles of the law of the sea, which have been modified over the years, challenges the regime of passage in the Straits and its surrounding region.

This is especially true as of the 1979 peace agreement between Israel and Egypt and the recent transfer of control of the islands of "Tiran" and "Sanafir" from Egypt to Saudi Arabia. Instead of bringing peace and certainty to a volatile region, UNCLOS is now becoming a source of tension which should be flagged to policy makers.

## The Arena

The Straits are located between the Red Sea and the Gulf of Eilat (or the Gulf of Aqaba) (each the "Gulf").

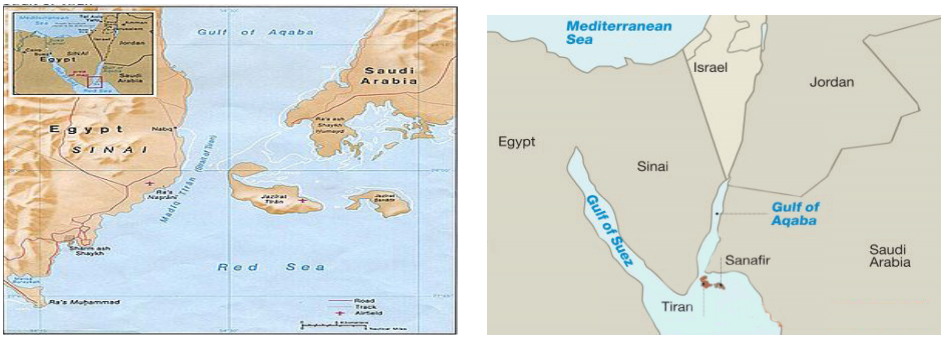


Fig. 1. The arena

The Straits are located at the southern end of the Gulf within a range of about 100 nautical miles from the cities of Eilat and Aqaba. Along the coast, which is between 7 to 14 nautical miles wide there are four sovereign countries: Israel, Egypt, Jordan, and Saudi Arabia.

Each of these countries use the Straits frequently and depend on the regime of passage through them. The width of the Straits at their narrowest point is about 2.1 Nautical Miles and there are two passages through them: On the west side (line to the south) is the "Grafton" passage which is 1300 yards wide; and on the east side (line to the north) the "Enterprise" passage which is 950 yards wide.

Today the Straits are governed by two states – Egypt and Saudi Arabia – and each state controls one side of the water way (Egypt controls the "Grafton" passage, and Saudi Arabia controls the "Enterprise" passage).

## 1948–1967 – The "Innocent Passage" regime

On November 29th, 1947, the United Nations General Assembly adopted a resolution concluding the British Mandate in Palestine and established two new states, a Jewish state, and an Arab state. Consequentially, a war broke out and at its conclusion, the Armistice Agreements were signed between the Arab countries and the State of Israel (which declared its independent in 1948). The city of Eilat became the southern border of Israel. At that time, the Straits were ruled by Saudi Arabia on the east side and by Egypt on the west side.

At the end of 1949, and after the entry into force of a ceasefire between Israel and Egypt, Egypt began to understand the importance of the Straits and their surrounding islands. During that time, an agreement was signed between Egypt and Saudi Arabia. Under this agreement, the states agreed that Egypt would be

allowed to bring military equipment to the islands of Tiran and Sanafir to protect them from occupation by Israel. The terms of the agreement between Egypt and Saudi Arabia have never been fully disclosed.

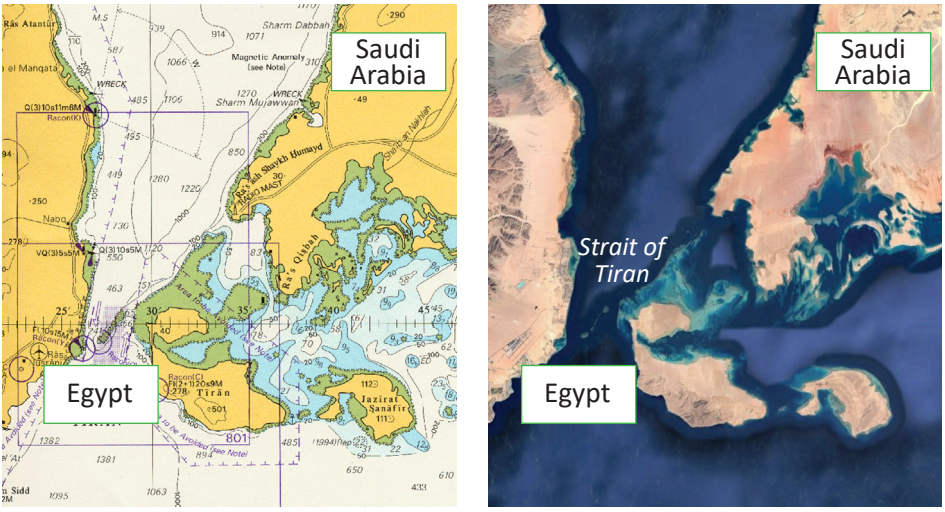


Fig. 2. Straits of Tiran from 1948–1967

On July 23, 1952, the officers' revolution took place in Egypt and as a result, Gamel Abdul-Nasser seized power. From that time onwards and until 1955 Egypt asserted control of the Straits in tangible form. It issued notices to mariners according to which all ships seeking to pass through the Straits were required to give 72 hours' notice and to provide additional details such as the name of the ship, type of cargo, nationality, transit time and more. In addition, Egypt actively exercised its control over the Straits. Thus, for example in several documented incidents shots were fired at ships who passed through the Straits. In other documented cases, ships were detained and/or delayed for several hours and even days. The United Nations Security Council discussed repeated complaints on these matters, and even made several decisions on the matter, however, Egypt ignored them.

In 1955, Egypt began blocking passing ships from sailing to or from Israel. These actions by the Egyptians led to the complete paralysis of the port of Eilat. On July 26th, 1956 Egypt declared the nationalization of the Suez Canal Company that was controlled by Britain and France who were unwilling to give up an asset of such great economic significance. In October 1956, in a joint operation with Britain and France, Israel occupied the Sinai Peninsula as well as the Straits. It

was only after international pressure was placed on Israel that she agreed to withdraw its military forces from the area and the Straits were eventually returned to Egyptian control.

In 1958 the United Nations established the Geneva Convention on the Territorial Sea and Contiguous Zone which codified the Regime of Innocent Passage in crossing Straits (Article 16(4)). While Israel signed and ratified this convention, Egypt and Saudi Arabia did not sign. The reasoning for their decision was to avoid any legal basis to be forced to allow passage through the Straits for Israel.

None the less, in accordance with the principles of international law in force at that time, the Regime of Innocent Passage was the applicable regime for passage through the Straits from that time on.

## 1967–1979 – Innocent Passage Regime

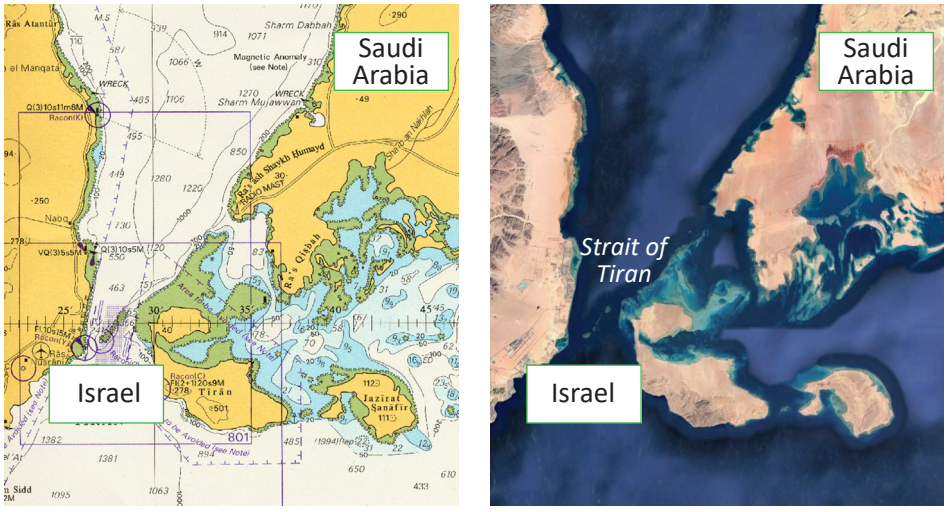


Fig. 3. The Straits of Tiran from 1967–1979

In May 1967 Egypt, once again, blocked passage through the Straits for ships sailing to or from Israel. A war immediately broke out, and in June 1967 Israel occupied the entire Sinai Peninsula including the Straits and controlled both sides of the Straits. At that time the passage regime was "Innocent Passage" in accordance with the principles of international law, and Israel was committed to it.

In 1979, Israel and Egypt signed a peace agreement ("Peace Agreement") which ended the state of war between the two countries and ultimately led to mutual

recognition between them. In the Peace Agreement, Israel and Egypt dedicated a section to the Straits as set forth in Article V (2) as follows:

> The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba.

In the Peace Agreement, Israel and Egypt agreed to extend the existing rights beyond the applicable law of the sea as it existed at that time so that it also included the right of "freedom of navigation" which is the broadest possible passage regime to which states can aspire. The first sentence set forth above clarifies in the broadest terms that from then on there was no more dispute between Israel and Egypt with respect to the Straits which were clearly defined as "International Waterways".

As part of the Peace Agreement, Israel agreed, once again, to withdraw its forces from the Sinai Peninsula and from the Straits. Egypt returned to its original status and controlled the entire region under the terms of the Peace Agreement and the new maritime passage regime.

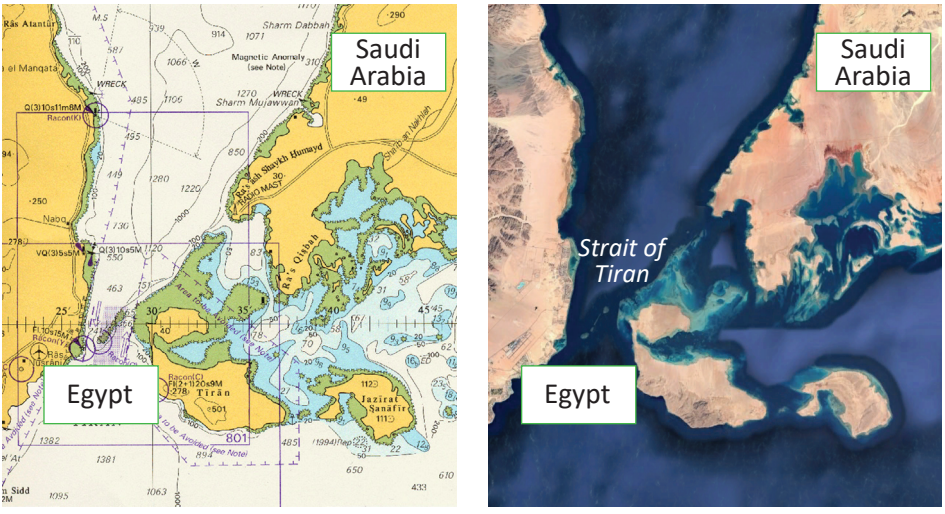


Fig. 4. The Straits of Tiran from 1979 after the peace agreement

## 1979–2016 – Freedom of Navigation Against Innocent Passage

In 1982, only three years after the signing of the Peace Agreement with its implications for the Straits, UNCLOS was established and became the norm with respect to the law of the sea.

UNCLOS is regarded to be a normative convention which establishes general norms that set standards for reference to the states with respect to the maritime domain and natural resources.

Article 37 of UNCLOS also created new regime of passage which had not previously been defined known as the regime of "Transit Passage". This regime applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Transit Passage incorporates the principle of freedom of navigation and as such under this regime any passage of ships and/or aircraft, passing through a strait solely for the purpose of continuous and expeditious transit, cannot be impeded.

With respect to the geographical status of the Straits, we can conclude that they do not meet the requirements set forth in UNCLOS to qualify for rights of Transit Passage. First, the Straits connect between the high sea (the Red Sea) and a semi-enclosed sea (Aqaba Bay). Secondly, the Straits connect between the high sea and the territorial water of the Coastal States and not an exclusive economic zone (in this case Saudi Arabia and Egypt) (Article 45).

As such, according to the standards set forth in UNCLOS, the regime of passage through the Straits could only establish the right of Innocent Passage but not of Transit Passage with respect to the rights and duties of any Coastal State that controls them (Article 21). In short, according to the black letter law set forth under UNCLOS, once again the possibility of hampering the passage through the Straits may still exist.

In retrospect this was one of the reasons why Israel decided not to sign UNCLOS and become a part of the convention unlike Egypt and Saudi Arabia who immediately agreed to sign and ratify it.

The legal question which remains with respect to the Straits is what regime of passage prevails – is it the Peace Agreement between Israel and Egypt that includes the principle of freedom of navigation, or is it UNCLOS in accordance with the Innocent Passage regime?

In 1982, the United States, being a party to the Peace Agreement, issued a statement stating that there is no conflict between the provisions of the Peace Agreement and UNCLOS. In 1983 when Egypt ratified UNCLOS it attached a declaration stating that the provisions in the matter of transition of the Straits and the Gulf of Aqaba included in the Peace Agreement is consistent with the framework of the norm established in UNCLOS concerning Egypt. Israel, which is not a signatory to UNCLOS, responded to this announcement in a statement to the UN Secretary-General and announced that the Peace Agreement and the Egyptian declaration are consistent with UNCLOS.

In general, in light of the current status and declarations with respect to international law, it seems reasonable to assume that between the existing law (*Lex Latat*) and the Peace Agreement, the Peace Agreement will prevail being a specific norm that confers the right of freedom of navigation without the possibility of discrimination.

Even more so, UNCLOS provides interpretive tools to answer this question. Article 35(c) of UNCLOS provides that the regime of passage on Straits under the auspices of an agreement that has been in force for a long time will prevail over UNCLOS. Article 311 of UNCLOS gives priority to existing agreements under the condition that it shall not prevent other states from exercising their rights as set forth under UNCLOS.

Thus, we can derive that despite the inconsistencies and challenges posed by UNCLOS in relation to the Peace Agreement, from the point of view of Egypt and Israel, the entering effect of UNCLOS did not harm to the regime of passage in the Straits.

## 2016–Current – Hybrid Regime

As early as 1982, during Israel's withdrawal from the Sinai Peninsula, Saudi Arabia turned to Egypt and claimed ownership on the islands of Tiran and Sanafir.

On April 8th, 2016, during the visit of the King of Saudi Arabia to Egypt, the two countries signed an agreement regulating the maritime borders between them. Their maritime delimitation agreement stipulates that the islands of Tiran and Sanafir will be transferred to Saudi Arabia in return for significant economic aid, estimated at $22 billion, which will be given by Saudi Arabia to Egypt.

On December 29th, 2016, the Egyptian Cabinet (Council of Ministers) approved the maritime delimitation agreement between the two countries. Israel's defense

minister acknowledged that Israel had approved the agreement between the Egypt and Saudi Arabia.

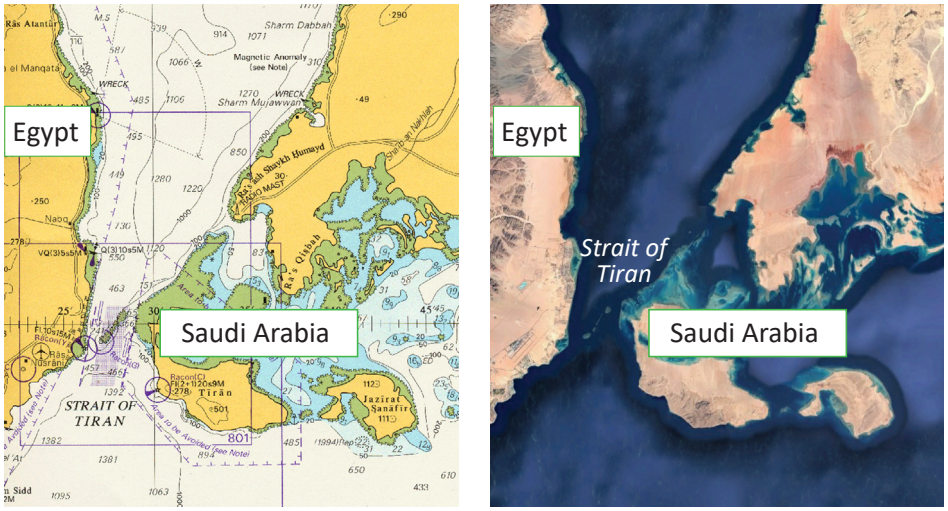


Fig. 5. 2016–Current

On April 24th, 1996, Saudi Arabia ratified UNCLOS. At that time, it also submitted a detailed statement which in fact included declarations upon ratification no. 2 as follows:

> The Government of the Kingdom of Saudi Arabia is not bound by any international treaty or agreement which contains provisions that are inconsistent with the Convention on the Law of the Sea and prejudicial to the sovereign rights and jurisdiction of the Kingdom in its maritime areas.

As such, Saudi Arabia stated in its declaration that it was not bound by any agreement that impedes UNCLOS with respect to its sovereignty. This declaration is clearly referring, *amongst others*, to the Peace Agreement. It seems that from the Saudi perspective, the Peace Agreement does not comply with UNCLOS because it expands and potentially harms, in Saudi Arabia's opinion, its right to control the islands of Tiran and Sanafir which are located in the Straits, and which are under their control and in its sovereign waters.

It seems that upon its ratification of UNCLOS, Saudi Arabia made these declarations in order to retain its claim that under Article 311 of UNCLOS it is not bound by the Peace Agreement because the Peace Agreement infringes upon its rights (i.e., infringes in the rights of a third state).

If this is in fact the case, from an Israeli perspective the regime of passage with respect to at least half of the Straits have been rescinded and are now back to the starting point which was defined as Innocent Passage (1956, 1967).

As explained, under some scenarios, the regime of Innocent Passage can potentially hamper the rights of passage through the Straits to and from Israel. As history has already shown, the state of Israel will not be able to tolerate this.

## Conclusion

Over the past seventy years, the rules of passage through the area known as the Straits of Tiran are constantly changing on two dimensions, the political (geo-strategic) dimension and the governing law of the sea. The two dimensions have crossed over each other several times.

The two key points that can be concluded from this article are as follows:

One, the regime of Innocent Passage, in which countries have the option to suspend the transition through the Straits, can create a risk of war, especially with respect to the Straits.

The second, if adjoining coastal states do not interpret the law under the same normative basis (for example, not being signatories in the same treaties) they are therefore not committed to work together under the same legal framework nor by using the same legislative tools and this can lead to tensions.

Policy makers in the region need to know the history as we have described it hereto and understand that they must resolve the lack of clarity that we are facing today peacefully, so it will prevent occurrences we have witnessed in the past such as the risk of war.

# CONCLUSIONS

**Shaul Chorev, Elai Rettig, Orin Shefler, Benny Spanier**

The concepts introduced by the United Nations Convention on the Law of the Sea regarding innocent and transit passage through territorial seas and international straits are recognized in practice through international law and regional state practice and are the cornerstone for international maritime trade and commerce.

This report was intended to provide an international stage for practitioners to examine the scope of UNCLOS and its applicability to the unique challenges in the Middle East. As demonstrated in this report, recent developments have substantially increased the strategic importance of the waterways throughout the Eastern Mediterranean, the Red Sea, and the Arab Gulf for all stakeholders in the Middle East, making the adherence to a common set of rules, as set forth in UNCLOS and/or international law, more vital than ever.

The common interests of Middle Eastern littoral states are (1) identifying and addressing vital marine transportation concerns in emergency situations; (2) maintaining lines of communication in the Red Sea and the Gulf of Aden to prevent mistakes and misunderstandings that may deteriorate into hostile actions; (3) developing environmental policies to protect and preserve the ecological system of the region; and (4) formulating a coherent legal framework to address disputes and emerging common challenges such as piracy, autonomous vessels, and cyber threats.

By addressing these interests, which are critical to each of UNCLOS-signatory countries and non-UNCLOS-signatory countries alike, common ground can be found.

The emerging maritime conflicts in the Middle East are indeed complex, and mistrust runs deep among regional actors. A permanent solution is unlikely to be found for the foreseeable future therefore confidence-building measures and de-escalation actions are imperative.

Any small and seemingly insignificant naval incident has the potential to trigger a series of escalating events, and this requires attention. While lengthy international legal proceedings may not suffice for a region that is on such a short fuse, a common framework setting forth the general “rules of the game” can help reduce the chances for unintended consequences that would not benefit any of the actors involved.

Despite the many challenges, and along with the risks, there are also many opportunities of which Middle Eastern countries should take advantage to improve their maritime security. Some of the challenges can be addressed by national action, as described in this report, but many other strategies will require regional and/or international collaboration between like-minded nations in the Middle East, as well as the world.

We would expect all countries that have so far been reluctant to ratify UNCLOS and those who already have, during this time of uncertainty and change, to follow a commonly agreed-upon set of rules and guidelines, and to craft a process through which maritime disputes can be managed, even if not officially and/or publicly declaring their adherence to them.

Legal practitioners and academic scholars must continue to examine the implications and inform policymakers on how to seize opportunities and minimize the risk. Relying on UNCLOS and/or the principles of international law can ultimately assist in such policy making and promote and maintain UNCLOS's influential role in the region. This report is one step forward in achieving this goal by raising awareness to the benefits that UNCLOS has to offer.

# ABOUT THE AUTHORS

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This joint publication by the Maritime Policy & Strategy Research Center (HMS) and the Konrad Adenauer Foundation (KAS) examines the emerging challenges and threats to maritime "chokepoints" that connect the Arab Gulf with the Mediterranean Sea. As issues such as piracy, autonomous vessels, and deliberate sabotage come to the forefront, this edited volume offers us new insight into how The United Nations Convention on the Law of the Sea (UNCLOS) can help ensure the protection of innocent and transit passage in the volatile waters of the Middle East.

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