



Assessing the 'Law of the Sea'

A Case for the US'
Right of Passage in the
Strait of Hormuz

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Introduction

The Strait of Hormuz is a narrow body of water between the states of Iran and Oman. Besides serving as the only traversable entrance to the Persian Gulf, the Strait is also the world's most important trade chokepoint. One fifth of the world's oil passes through the Strait¹, which means that states are keen on preserving stability in the region, ensuring that their trade is protected and oil prices around the world are stable. The United States (US) has bases in multiple states bordering the Persian Gulf, which makes the Strait of Hormuz a vital passage for the US Navy.

One of the first missions of the US Navy following independence was to protect US commercial vessels in the Atlantic and the Mediterranean from maritime threats. In 1812, a major reason for the US going to war was to ensure the freedom of the rights of trade and commerce across seas and oceans. In 1918, this principle was also staunchly advocated for by US President Woodrow Wilson in his famous 'Fourteen Points' speech. These key moments in US history along with the fact that since 1979, the 'Freedom of Navigations Program' (FONOPS) has been formally active², highlights that the US has a significant interest in acting to protect the freedom of navigation. China, against whom a majority of US FONOPs have been more recently directed, has asserted repeatedly that such actions by the US violate Chinese sovereignty.³

This leads to the broader question of how such operations should be viewed under international law. A context where this question is particularly salient is the Strait of Hormuz, which is a potential site for US FONOPs due to the recent escalation of tensions between the US and Iran. This report analyses the rights of transit and innocent passage of US Navy ships and argues that such passage is permissible under international law despite Iranian requests for prior authorisation or notification. To that end, this report lays out the relevant provisions of international law that are applicable in this context and draws mainly from the judgement of the International Court of Justice (ICJ) in the Corfu Channel case of 1949.

¹ Strait of Hormuz: the worlds most important oil artery. (2019, July 22). Retrieved from <https://www.reuters.com/article/us-mideast-iran-tanker-factbox/strait-of-hormuz-the-worlds-most-important-oil-artery-idUSKCN1UG0FI>

² United States Department of State Report. Retrieved from <https://2009-2017.state.gov/e/oes/ocns/opa/maritimesecurity//index.htm>

³ China says U.S. warship violated its South China Sea sovereignty. (2018, January 21). Retrieved from <https://www.reuters.com/article/us-china-us-sovereignty/china-says-u-s-warship-violated-its-south-china-sea-sovereignty-idUSKBN1F9088>.

Warships in the Strait

Prior to delving into the relevant provisions of international law governing maritime passage, the reasons for the presence of warships in the Strait of Hormuz must be considered. Far from being a space characterised by peace and stability, the Strait of Hormuz has historically been both a chokepoint and a flashpoint. From the Tanker War of the 1980s to Iran's Vice President Mohammad Reza Rahimi threatening to close the passageway, the Strait has been a platform for states to assert their dominance in the region. In the latter instance, Iran executed 'Velayat-90', a 10-day military exercise in international waters near the Strait in response to economic sanctions imposed by the US. To counter this, the US deployed the aircraft carrier John C. Stennis, which heightened tensions. As a result of the spillover of the current and ongoing dispute between the US and Iran after the US's unilateral withdrawal from the Joint Comprehensive Plan of Action (JCPOA), the US and several regional actors such as Saudi Arabia have accused Iran of adopting a tactic of attempting to disrupt maritime trade in the Gulf.⁴ This affects shipping to and from Saudi Arabia, the United Arab Emirates, Kuwait, Bahrain, and Qatar.

Unsurprisingly, this has led foreign warships, particularly those of the US, to engage in a show of force in the region. With the threat to oil tankers—and maritime trade in general—growing in the region, states such as US and the UK have proposed, and even begun, sending warships as escorts to tankers—a show of strength to protect their perceived regional interests. This is evidenced by the constant presence of the US Navy's Fifth Fleet in the Persian Gulf, which solidifies the strategic impact of the multiple bases the US has in the region. Following the damage caused to multiple tankers due to mine strikes and the shooting down of a US drone by Iran in June 2019, the likelihood of more warships passing through the region has increased.

The question of the passage of warships through a state's territorial waters is one pertaining to the 'law of the sea', a body of customs, treaties, and international agreements governing the rights and duties of states in maritime environments. In relation to this question, there exists a subtle yet legally significant difference between the laws that apply to warships and commercial ships. It has been established as a part of customary international law that a warship is a direct arm of the sovereign of the flag state. Such a ship, operated for non-commercial purposes, is immune from the jurisdiction of the coastal state, albeit it has been conceded that the latter has the right to ask the warship to leave its

⁴ Gulf of Oman: Saudi Arabia blames tanker attacks on rival Iran. (2019, June 16). Retrieved from <https://www.bbc.com/news/world-middle-east-48648788>

waters if the ship breaches the rules governing passage, as was established in the *Ara Libertad* (Argentina vs Ghana) case in the International Tribunal for the Law of the Sea.⁵

The Applicability of International Law of the Sea in the Strait of Hormuz

At this point, the body of law (*corpus juris*) that is applicable to the Strait must be described in more detail. The regime of international law governing the world's waters is primarily defined by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This convention, which has been ratified by 168 states, formally entered into force in 1994 following years of deliberation. Despite the US's immense contribution to the development of the law of the sea historically, it has not signed or ratified the UNCLOS, whereas Iran has signed but not ratified it.

While the Convention itself has come to embody certain key principles of international law as practiced by states, there are several principles which are directly derived from customary international law. Moreover, there are certain principles which exist as customary law and as evidence of state practice independently of the 1982 Convention. Prior to 1982, the principal body of law that applied to maritime environments were the Geneva Conventions, particularly the 1958 Convention on the Territorial Sea. This implies that regardless of the question of ratification of the UNCLOS, states today are still expected to adhere to the key provisions of the law of the sea, such as the right of innocent passage or the right of transit passage—either due to the 1958 Convention on the Territorial Sea or as a part of customary international law.

Both Iran and the US adhere to the 12 nautical mile limit set under international law for the extension of a state's territorial waters beyond the baseline. Oman, the other state whose territorial waters constitute the Strait of Hormuz, is a party to the UNCLOS, and therefore, there exists no debate regarding the applicability of the provisions of the Convention in Omani territorial waters. Iran extended its territorial waters to 12 nautical miles by decree in 1990. Due to non-ratification of the 1982 Convention, the principles of international law applying in Iranian territorial waters are derived from customary international law and the 1958 Convention, but due to its signatory status, Iran is generally expected to follow the UNCLOS in principle. The US, on the other hand, while being a non-signatory to the

⁵ Shaw, M. (2017). *International Law*. Cambridge: Cambridge University Press. See 'The Law of the Sea'.

UNCLOS, has made several declarations accepting principles enunciated by it. The most prominent example of this was the 1989 USA-USSR 'Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage', recognising the 'right of innocent passage' and the applicability of the UNCLOS.

The Principle of the Right of Innocent Passage

Central to understanding the permissibility under international law of US Navy ships passing through the Strait of Hormuz is the principle of the 'right of innocent passage'. This pertains to the right of the ships of all states to pass through the territorial waters of another state, the sovereignty of the coastal state over its territorial waters notwithstanding. This is a longstanding principle of customary international law and has been defined by Article 17 of the 1982 UNCLOS. The concept of innocent passage is applicable only to the territorial waters of states and not on the high seas. Thus, both the coastal state and the state whose flag the passing ship flies are subject to a certain set of duties under international law.

This principle, which was earlier established under Article 14 of the 1958 Convention on the Territorial Sea, stipulated that the coastal state must not hamper innocent passage and must publicise any dangers to navigation in the territorial sea for the purpose of crossing that sea. The definition of 'innocent' is such that it must not be prejudicial to the 'peace, good order or security of the coastal state'. The 1982 Convention has furthered this understanding with examples of actions that can be termed as prejudicial such as the threat or use of force, weapons practice, spying, propaganda, breach of customs, etc. If passage is indeed 'innocent', then by virtue of Article 24 of the UNCLOS, coastal states must not hamper passage by imposing any requirements which would have the effect of denying or impairing the right of passage.

If the passage is not innocent, coastal states have the power to suspend innocent passage, especially if it is in the coastal state's interest of security. Even though neither the 1958 nor the 1982 Convention addressed the issue of whether or not the right extended to warships, states such as the US assumed that it did. This is evidenced in the 1989 agreement with the then USSR, which stated that a warship enjoyed the right of innocent passage as long as it did not engage in any of the acts laid out in Article 19(2) of the UNCLOS. Therefore, even though the principle of innocent passage allows ships of foreign states to pass

through the territorial waters of another state, the latter reserves the right to suspend this passage if it is deemed to be 'not innocent'. This is applicable to any part of the world's water bodies which are a part of the territorial waters of a given state.

The Right of Passage through an International Strait

The principle of the right of innocent passage in the Strait of Hormuz finds itself at the confluence of two streams of international law: one that focuses on the rights of the coastal state, by virtue of the fact that its territorial waters are a part of the Strait, and the second, on the right of passage through international straits regardless of which state's waters the given strait is part of. The former may be regarded as an extension of the philosophy enshrined in *Mare Clausum* written by John Selden and the latter in *Mare Liberum*, theorised by Hugo Grotius, often referred to as the father of international law. How, then, does this principle operate in the case of an international strait?

An international strait is a relatively narrow body of water that connects two parts of the high seas. Yet if the territorial waters of certain states overlap an international strait, to what degree can the coastal state exercise restrictions upon the passage of ships through it? Even a cursory glance at Article 16(4) of the 1958 Convention shows that innocent passage of foreign ships cannot be suspended through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial waters of a foreign state. The extension of such an interpretation of the right of transit passage to warships was established in one of the earliest and most fundamental cases of the International Court Justice, the Corfu Channel case, between UK and Albania. In the Merits judgement of the case, the ICJ noted that "states in times of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal state, *provided that the passage is innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace"(emphasis added).⁶

Therefore, provided that the passage is "innocent," a coastal state cannot prohibit transit passage through an international strait by warships of a foreign state. Malcolm Shaw notes

⁶ Latest developments: Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania): International Court of Justice. (n.d.). Retrieved from <https://www.icj-cij.org/en/case/1>

that although there is no formal requirement for 'innocent' transit passage, the effect of Articles 38 and 39 appear to render transit passage subject to the same constraints. Article 44 of the UNCLOS conclusively establishes that there shall be no suspension of transit passage, and thus Shaw further notes that this passage cannot be suspended for security or any other reasons.⁷ However, the status of the right of transit passage as being embedded in customary law is still debatable. This is significant because if 'transit passage' as a right is conclusively established as a principle of customary international law, then states are bound by it regardless of ratification or non-ratification of any treaty providing for it. A detailed comparison of the illustrative dispute in the Corfu Channel case and the situation in the Strait of Hormuz is undertaken further ahead in this report.

The Geography of the Strait of Hormuz and its Implications

The Strait of Hormuz connects the Gulf of Oman and the Arabian Sea with the Persian/Arab Gulf and is bordered by two states. On the northern side, the Strait is bordered continuously by Iran and Iranian islands, particularly the Qeshm Island. On the southern side it would be bordered by the United Arab Emirates, if not for the fact that the horn of land jutting into the Strait is a part of Oman (the Governorate of Musandam), making Oman the southern coastal state whose territorial waters extend into the Strait. While the Strait is 52 nautical miles at its widest point, at its narrowest point the width is 21 nautical miles, thus effectively 'enclosing' the Strait in territorial waters. Oman has signed and ratified the UNCLOS whereas Iran has only signed it. The US has accepted that certain provisions of the UNCLOS constitute customary international law, especially the principles of passage. Since passage through these waters would mean passage through the territorial waters of a state, the principle of innocent passage would be applicable with the coastal state reserving the right to suspend 'non-innocent' passage.

However, since these waters also form an international strait—and one that serves as the only sea-based entrance to the Gulf—the principle of the right of transit passage would apply, and not just innocent passage. While Oman, having ratified the UNCLOS, recognises this right, Iran submitted a declaration while signing the 1982 Convention that it would only recognise the right of transit passage of ships of states which had ratified the UNCLOS. Since the US is not a state party to the UNCLOS, it is the 1958 Convention that would still

⁷ Shaw, M. (2017). *International law*. Cambridge: Cambridge University Press. See 'The law of the sea'.

apply to it. The US considers the right of transit passage to be granted by customary international law. However, as explained above, there is still no consensus on whether or not this right is part of customary law.



Image courtesy: British Broadcasting Corporation⁸

At this point, a common question is whether Iran can legally close the Strait of Hormuz in its entirety if Iran believes its national security is threatened. This threat was relatively high in 2011⁹, which prompted several academic reports that easily concluded the illegality of such an act. Yet it would be futile to engage in a discussion of whether or not Iran closing the Strait of Hormuz to international shipping would violate international law, as most of the shipping lanes lie in Omani territorial waters, as per the records of the International

⁸ Iran tanker seizure: What is the Strait of Hormuz? (2019, July 29). Retrieved from <https://www.bbc.com/news/world-middle-east-49070882>

⁹ Iran threatens to block Strait of Hormuz oil route. (2011, December 28). Retrieved from <https://www.bbc.com/news/world-middle-east-16344102>

Maritime Organisation.¹⁰ Hence, any threat or use of force by Iran to block the Strait entirely, using its Islamic Republic of Iran Army (Artesh) or the Iranian Revolutionary Guard Corps Navy (IRGC Navy), would indubitably be illegal under international law.

US-Iran Naval Clashes during the Iran-Iraq War

Prior to analysing the current dynamics of US-Iran naval relations, a brief recollection of past military engagements is necessary, particularly those relating to the Iran-Iraq War. The US Navy's Fifth Fleet is headquartered in Bahrain, making transit through the Strait of Hormuz inevitable. Details of the composition of the Fifth Fleet are less important than the overall presence of an entire fleet in the Gulf. Under the UNCLOS, innocent passage of naval vessels cannot be suspended even during armed conflict¹¹, unless innocence itself is under question.

Several reports compare the present-day situation in the Persian/Arab Gulf and the Strait of Hormuz with the situation in the 1980s during the 'Tanker War' fought as a part of the larger war between Iraq and Iran. While this conflict was ongoing, the threat to international shipping through the strait increased considerably, thus pushing the US to execute Operation Earnest Will, under which US warships escorted reflagged Kuwaiti tankers through the Strait of Hormuz, protecting them from both Iranian and Iraqi attacks. At that point, there existed an active state of armed conflict or declared war under the Hague Conventions of 1907. It is a standing principle in international relations that most treaty relations do not continue during armed conflict barring those which reflect peremptory norms of international law (*Jus Cogens*).

With such a predicament prevailing, the determination of innocent passage is a moot point, as was the case when, beyond passage, ships of the US Navy also engaged actively with Iranian fast attack craft. This was evident in the multiple encounters between the IRGC Navy and US ships protecting the Mobile Sea Base *Hercules*. Following the Iranian Silkworm missile attack in October 1987 on the reflagged Kuwaiti tanker *Sea Isle City*, US's

¹⁰ International Maritime Organisation – New and Amended Traffic Separation Schemes, 2004. Retrieved from http://www.forsvaret.dk/vtsstb/documents/vtsstb/lokale%20resurser/regler/hastighedsbegr%C3%A6nsning%20i%20%C3%B8sterrenden/default/54_eed6aca9-b750-43f2-a0c6-6801fe712e4f.pdf

¹¹ Official Text of the United Nations Convention on the Law of the Sea. Retrieved from https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

then President, Ronald Reagan, ordered a limited retaliation by attacking and destroying the *Rostam* oil platform that had been vital for IRGC operations. The subsequent mining campaign launched by the IRGC also caused immense damage to the USS *Samuel B. Roberts*, following which President Reagan again ordered a military response (Operation Praying Mantis) under which US forces destroyed two Iranian oil platforms, *Sassan* and *Sirri*. Due to the ongoing military conflict in which Iran considered the US to be siding with Iraq, the other belligerent in the conflict, passage of US ships through the Strait of Hormuz was not deemed innocent by Iran. This was further influenced by the direct confrontation between the naval forces of both the US and Iran. However, in the current situation, there is no active inter-state military conflict in the Strait and there has been no declaration of war. Hence, despite intermittent skirmishes, through a legal lens the current situation would still be viewed as 'peacetime'.

Rising tensions have complicated this situation since the May 2018 withdrawal from the JCPOA by the US, which announced three days later that it was deploying a carrier strike group and bombers to the Middle East due to "threats from Iran."¹² During May and June, six tankers were attacked in the Hormuz and Gulf region, with the latter two ships, *Front Altair* and *Kokuka Courageous*, being struck close to Iranian territorial waters just outside the Strait, in the Gulf of Oman.¹³ It seems obvious that these skirmishes in the Gulf, regardless of the Iranian role in them, escalated after the US withdrawal from the JCPOA. Both Iran and the US have released multiple statements iterating their willingness to defend their rights. Thus, while on one hand it appears Iran would view even the most basic transgression of the law of the sea seriously and as an opportunity to assert itself, on the other hand, the US is seemingly determined to ensure the freedom of navigation in general and to deter Iranian assertion of dominance in particular.

¹² Borger, J. (2019, May 6). US deploys aircraft carrier and bombers after 'credible threat' from Iran. Retrieved from <https://www.theguardian.com/world/2019/may/06/us-deploys-aircraft-carrier-and-bombers-after-troubling-indications-from-iran>

¹³ These were merchant ships flagged in Norway, Saudi Arabia, United Arab Emirates and Japan, which suffered damage from limpet mines in the Gulf of Oman, at the mouth of the Strait of Hormuz, across May and June of 2019. States such as Israel, USA, Saudi Arabia and UK have attributed these attacks to the Iranian Revolutionary Guards. Iran has denied these charges. Responsibility for these attacks is yet to be conclusively determined.

US Freedom of Navigation Operations and the Iranian View of Passage

For years, the US has promulgated the theory of freedom of navigation through the world's seas; it believes this principle is embedded in customary international law and is one of the few states willing to enforce this through the use of force. US Secretary of State Mike Pompeo has stated that the US is bound to guarantee freedom of navigation through the Strait of Hormuz.¹⁴ In the past, the US Navy has conducted multiple Freedom of Navigation Operations (FONOPs) in multiple parts of the world but particularly so in the South China Sea. Formally active since 1979, the US's FONOPS has had a two-pronged complementary strategy: to support global mobility of US forces, and the unimpeded traffic of lawful commerce. According to a 2018 US Department of Defense (DoD) report, "The Department of State leads the first prong by diplomatically protesting excessive maritime claims. The Department of Defense complements those efforts by conducting operational challenges against excessive maritime claims."¹⁵ The same report includes a list of states and specific regions that the DoD deems legitimate for the execution of FONOPs or the assertion of freedom of navigation. An important aspect of the report is the description of the maritime claim next to the entry of 'Strait of Hormuz', which reads as follows: "Restrictions on the right of transit passage through the Strait of Hormuz to Parties of the United Nations Convention on the Law of the Sea. [Declaration upon Signature of the 1982 Law of the Sea Convention, Dec. 10, 1982.]"¹⁶

At the time of signing the UNCLOS, Iran submitted a declaration to the UN in accordance with Article 310 of the 1982 Convention that gives states the liberty to submit a declaration. According to its interpretation and application of Article 34 of the 1969 Vienna Convention on the Law of Treaties, Iran considers that only states that are party to the UNCLOS shall benefit from the contractual rights in the treaty. In the declaration, Iran also stated that "Notwithstanding the intended character of the Convention being one of general application and of law-making nature, certain of its provisions are merely product of quid pro quo which do not necessarily purport to codify the existing customs or established

¹⁴ Mike Pompeo vows U.S. will guarantee passage through Strait of Hormuz. Retrieved from <https://www.japantimes.co.jp/news/2019/06/17/world/mike-pompeo-vows-u-s-will-guarantee-passage-strait-hormuz/#.XY1GikYzY2x>

¹⁵ Department of Defense Report to Congress: Annual Freedom of Navigation Report – Fiscal Year 2018. Retrieved from [https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20\(final\).pdf?ver=2019-03-19-103517-010](https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20(final).pdf?ver=2019-03-19-103517-010)

¹⁶ *ibid*

usage (practice) regarded as having an obligatory character.” Furthermore, Iran applied this specifically to “the right of transit passage through straits used for international navigation (Part III Section 2 Article 38).”¹⁷

Therefore, there is a dispute between two different interpretations of the right of transit passage by the US and Iran. The former considers it to be a part of customary international law while the latter does not. Moreover, the US views the Iranian interpretation and declaration as a cause to exhibit a show of strength by means of a FONOP. Without prejudice toward either of these interpretations it must be kept in mind that historically, states have usually sought to uphold the right of passage—as is also reflected in Article 43 of the Charter of the United Nations. However, the rights of a coastal state are explicitly enshrined in the 1982 Convention, and in no international convention is the national security of a state subject to compromise in light of treaty obligations. This view seems to be consistent in the practice of states, even if inconsistency exists with regard to the interpretation of the right of transit passage as a principle of customary international law.

In the Strait of Hormuz, there have been multiple skirmishes between the US Navy and the IRGC Navy. However, for the arguments presented in this report, only those incidents which occurred after the US's withdrawal from the JCPOA shall be considered. The downing of the US drone by Iran is not central to the argument of this report because not only does a dispute exist regarding the location of the drone's downing, but also because the drone was a reconnaissance aircraft (RQ 4A Global Hawk),¹⁸ which leads any argumentation into the realm of espionage and international law, beyond the purview of this report. However, the drone incident does hint at the national security concerns that Iran so frequently raises. Additionally, the January 2019 assassination of the IRGC's General Qassem Soleimani in a US strike in Iraq did bring in its wake heightened concerns in the region with regard to the safety of trade passing through the Strait. Any analysis of these series of events is inextricably linked to the doctrine of state responsibility under international law, and though only tangentially connected to the topic of this report, it is not one which affects the argument presented herein.

¹⁷ UN, United Nations, UN Treaties, Treaties. Retrieved from https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec

¹⁸ Strait of Hormuz: US confirms drone shot down by Iran. (2019, June 20). Retrieved from <https://www.bbc.com/news/world-middle-east-48700965>

FONOPs and Inferences from the Corfu Channel Case

A productive analytical comparison can be made with the 1949 Corfu Channel case to better understand the legal issues surrounding present day freedom of navigation operations. First, however, it should be noted that a freedom of navigation operation is significantly different from an escort mission. A FONOPs mission is a deliberate show of force to challenge what is termed by the US as an “excessive maritime claim” by another state, which must be challenged to ensure freedom of navigation. In the South China Sea, the US has conducted multiple FONOPs missions to express its resistance to Chinese claims of sovereignty over the Spratly and Paracel group of islands as well as other islets in the region.¹⁹ According to a report published by the Harvard Kennedy School’s Belfer Center, a Freedom of Navigation Operation would involve “deliberately transiting in a manner inconsistent with innocent passage.”²⁰ This aids an understanding of the reason stated in the US DoD report for a potential FONOP: an excessive maritime claim. It appears the US is willing to contravene a fundamental provision of the UNCLOS to preserve another provision. The former is the definition of innocence and the latter is the right of transit passage—the interpretation of which Iran has legally submitted to the UN in the form of a declaration in accordance with the right granted to do so by the UNCLOS itself.

Here the Corfu Channel case is worth examining in more detail. In October 1946, two destroyers of the UK’s Royal Navy, the *Saumarez* and *Volga*, struck mines while passing through the channel, leading to considerable damage to these ships and loss of life. Following this, in November 1946, the UK undertook a minesweeping operation in Albanian territorial waters and cut several German GY mines. In the case before the ICJ, the reason Albania considered the November 1946 action to be a breach of international law was that it was a clear violation of Albanian sovereignty. However, also meriting attention is Albania’s reason for also calling the October 1946 passage of British warships through its waters a violation of international law: Albania did not recognise the right of passage of merchant vessels and warships through its territorial waters without prior authorisation.

¹⁹ Panda, A. (2019, May 21). South China Sea: US Destroyer Conducts Freedom of Navigation Operation Near Scarborough Shoal. Retrieved from <https://thediplomat.com/2019/05/south-china-sea-us-destroyer-conducts-freedom-of-navigation-operation-near-scarborough-shoal/>

²⁰ Freund, E. (n.d.). Freedom of Navigation in the South China Sea: A Practical Guide. Retrieved from <https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>

The ICJ did not recognise the requirement of prior authorisation by Albania for passage through its territorial waters as valid in international law, as it impeded the “generally admitted principle that states, in time of peace, have a right to send their warships through straits used for international navigation between two parts of the high seas, provided that the passage is innocent.”²¹ The ICJ recognised this principle regardless of both the volume of maritime traffic passing through the strait as well as the particular parts of the high seas it connected. Thus, the passage of British warships through Albanian waters in October 1946 was legal and in conformity with innocent passage. However, despite British destroyers suffering considerable damage from mine strikes as well as loss of life, the Court ruled that the subsequent minesweeping operation by the UK in Albanian waters could not be justified as innocent passage. It further rejected the British proposition that this was an act of self-defence that needed to be executed before the mines could be carried away by the perpetrators. The ICJ ruled that “this was presented either as a new and special application of the theory of intervention, by means of which the intervening State was acting to facilitate the task of the international tribunal, or as a method of self-protection or self-help. The Court cannot accept these lines of defence.”²²

It essentially ruled that such a form of intervention had no justification in international law and that respect for territorial sovereignty was an essential foundation of international relations. The decision of the Corfu Channel case reflected a principle of international law, which, through state practice as well as multiple reiterations in further Court judgments, has come to be established as a principle of customary international law.

²¹ Summaries: Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania): International Court of Justice. (n.d.). Retrieved from <https://www.icj-cij.org/en/case/1/summaries> See Judgement of April 9, 1949

²² *ibid*

Implications for Assessing the Situation in the Strait of Hormuz

In the context of a historical perspective, it appears that US warships have a legal right to transit and pass through Iranian territorial waters in the Strait of Hormuz, disregarding the Iranian requirement for prior authorisation or notification. This assumes that the warships will transit without violating the principle of innocence. However, if the US Navy conducts a FONOP that includes acts not having a direct bearing on passage in the Strait, such an operation would not be legitimate under international law. Furthermore, if US warships escort a vessel or tanker that is in violation of Iranian regulations for passage through the strait and/or further impede Iranian efforts to take necessary action against the vessel in question, such an act would also be in conflict with international law.

Iran, by virtue of Articles 30 and 31 of UNCLOS, would have the right to ask the warship to leave its waters. Yet the US has long expressed concerns of global freedom of navigation being hindered by other states and has continuously sought to justify upholding this freedom through US foreign policy and the actions of its navy. Notable, though, is that the ICJ essentially pre-empted the use of this argument for carrying out any operations in the Strait of Hormuz beyond the act of passage, effectively having declared it to be invalid under international law in 1949 in the Corfu Channel case. The ICJ interpreted the UK's actions as aiming to facilitate the task of an international tribunal, declaring these actions to be illegal.

Conclusion

Conceding the point so often promulgated by US state representatives that the safety of trade passing through the Strait of Hormuz is paramount, it is imperative that an international coalition be set up with the cooperation of Iran to ensure this safety. In a September 2019 address to the UN General Assembly, Iran's President, Hassan Rouhani, proposed a 'Coalition of Hope' with the participation of other regional actors to ensure, *inter alia*, freedom of navigation in the Strait of Hormuz. This development adds to the argument against increased US naval presence in the Strait.

Notwithstanding the legal analysis in this report, it must be acknowledged that the US Navy will not exit the region any time soon. Neither will the US navy end its calls for protecting freedom of navigation, as several states bordering the Gulf host US bases and are wary of perceived threats posed by regional state and non-state actors. Moreover, taking into account the instability currently miring the wider region, it is highly unlikely that the trust required by regional actors to enter into a coalition with Iran to ensure freedom of navigation will soon be gained. While there has not been an international investigation of attacks on Saudi oil fields and other tankers in the Gulf in the September-October 2019 period and responsibility cannot be conclusively determined, contestation around such an initiative could heighten regional tensions. Ultimately, with or without restoration of the JCPOA, a marked improvement of US-Iran relations would certainly aid in the unhindered enjoyment of the right to passage by ships transiting the Strait of Hormuz.



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