

Discriminatory Prohibition of the Right of Transit Passage of a Commercial Ship

The Arrest of Stena Impero by Iran

8.1 Geographical and Geopolitical Characteristics of the Strait of Hormuz

The Strait of Hormuz is the gateway between, on the one hand, the Persian Gulf and, on the other hand, the Gulf of Oman, the Arabian Sea, and the Indian Ocean (see Map 7). It is a relatively large strait as its narrowest point is approximately 27 NM wide both at its western and eastern entrance. The territorial seas of the coastal States of the Strait of Hormuz overlap only at the centre of the strait, located north of the Omani Musandam Peninsula and between the Omani island of Great Quoin and Iran's island of Larak, where the strait is approximately 21 NM wide.¹ Thus, by comparison, the Strait of Hormuz is wider than the Strait of Bab el-Mandeb (about 4 NM and 9.5 NM at two of its narrowest points) and the Strait of Dover (approx. 18 NM).

The coastal States of the Strait of Hormuz are Iran (north) and Oman (south). At the approaches to the Strait of Hormuz, both in the Persian Gulf and the Arabian Sea, are also located the maritime zones of the United Arab Emirates. The United Arab Emirates has the second-longest coastline in the Persian Gulf, behind only Iran that controls the whole eastern coast of the Persian Gulf and the Gulf of Oman. In addition, the Strait of Hormuz leads to the maritime areas of Bahrain, Iraq, Kuwait, Saudi Arabia, and Qatar.

The depth of the Strait of Hormuz is largely more than 100 metres in the areas that are crossed by the main shipping lanes. In its eastern and centre areas, the strait is deeper on the side of the Arabian Peninsula where it is navigable by even the world's largest crude oil tankers.² By contrast, in the Persian Gulf, the Strait of Hormuz is deeper on the Iranian side. A few islands are present in the area used for international shipping in the central and western parts

1 For a description of the geographical limits of the Strait of Hormuz, see RK Ramazani, *The Persian Gulf and the Strait of Hormuz* (Sijthoff & Noordhoff, Alphen aan den Rijn 1979) 1; see also map in *ibid.*, 3.

2 Anonymous, 'Hormuz and Malacca Remain Top Oil Chokepoints', *Maritime Executive* (8 April 2017).



MAP 7 The Strait of Hormuz

SOURCE: A FRAGMENT OF THE MAP 'THE STRAIT OF HORMUZ' (THE UNITED STATES CENTRAL INTELLIGENCE AGENCY, WASHINGTON DC, 2004), AVAILABLE [HTTPS://LEGACY.LIB.UTEXAS.EDU/MAPS/MIDDLE_EAST_AND_A SIA/IRAN_STRAIT_OF_HORMUZ_2004.JPG](https://legacy.lib.utexas.edu/maps/middle_east_and_asia/iran_strait_of_hormuz_2004.jpg); ACCESSED 5 APRIL 2021. THE MAP IS TURNED INTO BLACK AND WHITE COLOUR BY THE AUTHOR.

of the Strait of Hormuz. These islands include Great Quoin and Little Quoin, Abu Musa, Bani Forur, Sirri, Greater and Lesser Tunb.

The Strait of Hormuz has great significance for the world economy as an important chokepoint for the export of oil and liquefied natural gas (hereafter LNG), accounting for more than one-quarter of global LNG trade.³ Oil shipments through the Strait of Hormuz amounted to nearly 18.5 million barrels a day in 1973.⁴ In 2014, that amount had slightly decreased (to 17.2 million) but reached 20.7 million barrels a day in 2018.⁵ Thus, the rate of oil shipments through the strait has remained relatively stable throughout the past half a century.

The flow of oil through the Strait of Hormuz accounted for 21% of the consumption of global petroleum liquids in 2018.⁶ Over three quarters of that oil

3 J Barden, 'The Strait of Hormuz is the world's most important oil transit chokepoint', *US Energy Information Administration* (20 June 2019).

4 Ramazani, *op. cit.*, 12.

5 Barden, *op. cit.*

6 *Ibid.*

is shipped to Asian countries, mostly to China, India, Japan, and South Korea.⁷ Hence, most of the oil that is shipped through the Strait of Hormuz also passes through the Straits of Malacca and Singapore located between the Indian Ocean and the Pacific Ocean. Unlike the Strait of Hormuz, there are numerous round-about routes in respect of ship traffic through the straits of Malacca and Singapore, e.g., via the straits of Lombok and Makassar. The absence of round-about routes in respect of the Strait of Hormuz further underlines its strategic significance as a chokepoint for the current oil-based world economy.

In the past decades, international navigation through the Strait of Hormuz has been repeatedly hampered and subject to attacks that have been mostly aimed at oil tankers. In June 2019, two oil tankers struck mines at the approaches to the Strait of Hormuz.⁸ The United States claimed that the attacks against the oil tankers were carried out by the armed forces of Iran.⁹ A few days later, Iran shot down a United States' drone over the Strait of Hormuz.¹⁰ Iran has confirmed the downing of the drone, but denied any involvement in the attacks against the oil tankers.¹¹ In July 2019, the Iranian armed forces arrested *Stena Impero*, a United Kingdom-flagged oil tanker, in the Strait of Hormuz for an alleged violation of, *inter alia*, the rts. The arrest of the tanker was considered as a hostile step by the United Kingdom's government and an infringement of the applicable passage regime.¹² A similar attempt had been made by the Iranian armed forces a few days earlier, but it was abandoned as the Royal Navy's frigate intervened.¹³ In January 2021, a South Korean-flagged tanker was arrested by Iran, in response to which, South Korea deployed a destroyer close to the Strait of Hormuz.¹⁴

These incidents all occurred in or over the Strait of Hormuz. Surprisingly, there is relatively scarce literature on the legal regime of the Strait of Hormuz. For example, Kraska has observed that "there is virtually no contemporary analysis of the far-reaching disagreement between Iran and the United States on the international law of the sea, and in particular, the appropriate legal

7 Ibid.

8 E Blair, 'Latest on tanker attacks south of the Strait of Hormuz', *Reuters* (14 June 2019).

9 Anonymous, 'Strait of Hormuz: US confirms drone shot down by Iran', *BBC News* (20 June 2019).

10 Ibid.

11 Ibid.

12 E Graham-Harrison, 'Iran's top diplomat in UK summoned over seizure of Stena Impero tanker', *The Guardian* (20 July 2019).

13 Ibid.

14 Anonymous, 'South Korea to send delegation after Iran seizes tanker', *BBC News* (5 January 2021).

regime in the Strait of Hormuz.¹⁵ In the light of this, this study debates the legal regime of the Strait of Hormuz and adopts a law of the sea and security law perspective for examining recent maritime incidents in the Strait of Hormuz. Maritime incidents in or near the Strait of Hormuz are often rooted in disagreements between Iran and other States over the applicable passage regime, as examined next.

8.2 Legal Regime of the Strait of Hormuz

The Strait of Hormuz connects the EEZs of Iran, Iraq, Kuwait, Saudi Arabia, Bahrain, Qatar, and United Arab Emirates in the Persian Gulf with the EEZs of Iran, Oman and the United Arab Emirates in the Gulf of Oman. Thus, the Strait of Hormuz meets the criteria of Article 37 of LOSC for the regime of transit passage. Thus, for example the Royal Navy ships routinely use the right of transit passage for sailing through the strait.¹⁶

The right of transit passage was an innovative legal concept that was introduced in the drafting of LOSC for balancing the extension of the maximum width of the territorial sea under Article 3 of the Convention to 12 NM with rights of navigation. It provides a similar passage regime to the freedom of navigation and overflight, subject to some restrictions as stipulated in Articles 39–42 of LOSC, solely for the purpose of continuous and expeditious transit of ships and aircraft through the strait (Art 38(2) of LOSC). The right of transit passage applies in the areas of the Strait of Hormuz where the territorial sea of the strait States overlaps, i.e. where the width of the strait is 24 NM or less as measured from the baselines.

Foreign ships and aircraft are entitled to the right of transit passage also in the approaches to the Strait of Hormuz in the Persian Gulf to the extent that the relevant maritime area is subject to the sovereignty of strait States. Even though there exists an EEZ corridor of a couple of nautical miles wide in the eastern end of the Persian Gulf between, on the one hand, the islands of Abu Musa, Bani Forur, Sirri, Greater and Lesser Tunb (all under Iran's control) and, on the other hand, the United Arab Emirates' coast on the Arabian Peninsula. However,

15 J Kraska, 'Legal Vortex in the Strait of Hormuz' (2013) 54(2) *Virginia Journal of International Law*, 326.

16 United Kingdom Foreign, Commonwealth and Development Office, 'Written evidence (UNCO028). UNCLOS: fit for purpose in the 21st century?', UK Parliament, 26 November 2021, 26, available <https://committees.parliament.uk/work/1557/unclos-fit-for-purpose-in-the-21st-century/publications/written-evidence/?page=2>; accessed 1 December 2021.

that narrow EEZ corridor in the eastern part of the Persian Gulf does not render the straits regime inapplicable in the maritime area between the Iranian and the United Arab Emirates' mainland coast where the above-mentioned islands are located at.¹⁷ The eastern end of the Persian Gulf is wholly subject to the transit passage regime due to the reason that the narrow EEZ corridor south of the Iranian-controlled islands is not "of similar convenience with respect to navigational and hydrographical characteristics" as the rest of the strait in terms of Article 36 of LOSC. Very Large and Ultra Large Crude Carriers cannot safely cross the EEZ corridor as it is located closer to the United Arab Emirates' coastline where the sea is relatively shallow. For smaller ships heading in or out of the central or western part of the Persian Gulf, the round-about route via the EEZ corridor would significantly increase the length and cost of the voyage in comparison with the main route that crosses the territorial sea between the Iranian-controlled islands of Abu Musa, Bani Forur, Sirri, Greater and Lesser Tunb. The TSS in the Strait of Hormuz also crosses the waters located between the above-mentioned Iranian-controlled islands.¹⁸ In addition, the narrowness of the EEZ corridor means that if international vessel and air traffic is directed to the confines of this only a couple of NM-wide maritime area, ships and aircraft transiting this area would bear a much greater risk of collisions.

The determination of the legal regime applicable to the Strait of Hormuz is complicated by the fact that Iran has not ratified LOSC. Iran considers that parts of LOSC "are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character".¹⁹ According to the Iranian position, the regime of transit passage, an innovative concept first introduced in LOSC to balance the extension of the territorial sea to 12 NM with the rights of navigation, is not part of customary international law and only States party to LOSC are entitled to benefit from the right of transit passage.²⁰ This claim and the passage regime applicable to the Strait of Hormuz is discussed below (see *infra* Chapter 8.4).

17 See 'Iran', MarineRegions.org, available <https://www.marineregions.org/eezdetails.php?mrgid=8469&zone=eez>; accessed 10 February 2021.

18 See Map 7.

19 Division for Ocean Affairs and the Law of the Sea, 'United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter', Iran's declaration upon signing LOSC on 10 December 1982. Oman's declarations made upon ratification of LOSC on 17 August 1989, available https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec; accessed 26 March 2021.

20 Ibid.

8.3 The 2019 *Stena Impero* Incident and the Traffic Separation Scheme in the Strait of Hormuz

Maritime security in the waters around the Arabian Peninsula is instable not only due to numerous conflicting parties' use of arms, explosives, and mines in their attacks against ships transiting the long waterway that stretches from the Persian Gulf to the Mediterranean via the Red Sea. Ships navigating in that area have recently also been subject to various discriminatory navigational restrictions, as discussed next based on a case study of the arrest of a foreign tanker by Iran in the Strait of Hormuz in 2019.

Similar to the Bab el-Mandeb, the TSS in the Strait of Hormuz was adopted under the 1973 Resolution.²¹ The TSS in the Strait of Hormuz was modified in 1979.²² It consists of a separation zone and two traffic lanes for, respectively, eastbound and westbound traffic in addition to an inshore traffic zone that lies in the area between the Musandam Peninsula's coast and the landward boundary of the TSS.²³

Iran has adopted controversial measures in reacting to alleged breaches of the TSS in the Strait of Hormuz. In July 2019, the United Kingdom-flagged and Swedish-owned tanker *Stena Impero* was approached by four Iranian vessels and a helicopter and boarded by Iranian maritime forces.²⁴ The ship was arrested and taken to the Iranian Bandar Abbas port.²⁵ Iran claimed that the *Stena Impero* collided with an Iranian fishing vessel:

21 Inter-Governmental Maritime Consultative Organization, Resolution 'Routeing Systems', *op. cit.*, 'In the Strait of Hormuz', 41.

22 Inter-Governmental Maritime Consultative Organization, COLREG.2/CIRC.11, 'Amended Traffic Separation Scheme in the Strait of Hormuz', adopted on 7 June 1979, available https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik_dok/imo_colreg.2_cirkular.pdf; accessed 5 April 2021.

23 See Map 7. For a description of the coordinates of the TSS in the Strait of Hormuz, see IMO, COLREG.2/Circ. 33, Annex to the 'Traffic Separation Scheme "In the Strait of Hormuz" Change of Reference Chart and Chart Datum', adopted on 25 February 1994, available https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik_dok/imo_colreg.2_cirkular.pdf; accessed 5 April 2021.

24 Letter dated 20 July 2019 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2019/589, 22 July 2019, 1.

25 Letter dated 23 July 2019 from the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2019/593, 23 July 2019, 1.

As a result of that collision, the Iranian vessel suffered serious physical damage and some of the injured crew and fishermen are still in critical condition. Subsequently, the tanker disregarded the warnings by the Iranian coastal authorities, switched off its Automatic Identification System at 2059 local time and, in a dangerous operation, entered the Strait of Hormuz from the exit lane.²⁶

This narrative contradicts the position of the United Kingdom, according to which the tanker was “in full compliance with all navigation and international regulations, with her Automatic Identification System (AIS) switched on and publicly available and verifiable.”²⁷ The United Kingdom further maintained that there is no evidence of an alleged collision with an Iranian fishing boat and that “[e]ven if it had occurred, the ship’s location within Omani territorial waters means that Iran would not have been permitted to intercept the *Stena Impero*.”²⁸

Iran deemed the arrest of the *Stena Impero* necessary for the investigation of alleged damages to the Iranian individuals and the fishing vessel as well as pollution of and damage to the marine environment, in addition to alleged dangerous navigation by the tanker.²⁹ In this context, environmental law may fall the subject of securitization, particularly where the main stakeholders engage in so-called lawfare.³⁰ Arguments from the field of environmental law can be used, *inter alia*, as a tool that serve broader security and related geopolitical aims for prohibiting or advocating against activities that are perceived as having a detrimental effect on the security of the coastal States.

The *Stena Impero* and its crew were released by the Iranian authorities two months later, at the end of September 2019.³¹ The incident raises questions about the limits of a coastal State’s right to hamper international navigation through straits for alleged violations of TSS safety rules.

Under Articles 39(3) and 41 of LOSC, the TSS does not apply to aircraft that exercise the right of transit passage. Neither are sovereign immune vessels under the regime of transit passage strictly obliged to follow a TSS, although

26 Ibid.

27 UN Security Council Doc. S/2019/589, *op. cit.*, 1.

28 Ibid.

29 UN Security Council Doc. S/2019/593, *op. cit.*, 1.

30 *Lawfare* is a term coined by Charles J. Dunlap, Jr. in 2001 for characterising “the use of law as a weapon of war”. CJ Dunlap, Jr, *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* (Harvard University, Washington DC, 2001), 2.

31 J Marcus, ‘Stena Impero: Seized British tanker leaves Iran’s waters’, *BBC News* (27 September 2019).

it is generally recommended to do so.³² By contrast, non-State-owned foreign ships, such as *Stena Impero*, are obliged to follow the TSS during transit passage (Articles 39(2)(a) and 41(7) of LOSC).

Yet it is not entirely clear whether and to what extent a coastal State is entitled to take measures against a commercial ship sailing through a strait under the right of transit passage in response to violations of the TSS. Article 233 of LOSC stipulates that if a non-State-owned foreign ship has committed a violation of the laws and regulations referred to in Article 42(1)(a)-(b) of LOSC, causing or threatening major damage to the marine environment of a strait, the States bordering the relevant strait may take appropriate enforcement measures. The scope of Article 42 covers, *inter alia*, violations of the safety of navigation and the regulation of maritime traffic, including TSS, through its reference to Article 41 of LOSC. It is widely understood that these rights fall short of arresting the ship that has breached the relevant TSS. With a reference to the drafting history of Article 42(2) of LOSC, Nandan and Anderson argue that “[t]o give a right of arrest in a strait would undermine the right of transit passage (arrest in port, in an appropriate case, in respect of something done in a strait, was a different matter).³³ Arresting a ship for a breach of the TSS and the relevant compulsory routing measures in a strait would result in hampering and suspending the right of transit passage against the terms of Article 44 of LOSC.³⁴ Although a ship that has breached the relevant TSS would have the right to continue its transit passage, the State bordering the strait can issue a warning to the ship and may take other relevant steps, such as seeking a compensation for any damage inflicted or issuing a fine.

However, such a liberal transit regime does not apply in a strait if it is, instead, governed by the regime of innocent passage. Notably, according to Iran’s position, the legal regime of innocent passage applies in the Strait of Hormuz.³⁵ The question of which regime applies and the implications of this to navigation in the Strait of Hormuz is examined below.

32 See Section 8.2 of the IMO Resolution A.572(14), as amended, ‘General Provisions on Ships’ Routing’, adopted on 20 November 1985, entered into force (as amended) 1 January 1997. See also *The Commander’s Handbook on the Law of Naval Operations*, *op. cit.*, 2–8.

33 Nandan, Anderson, *op. cit.*, 192.

34 See, e.g., SB Kempton, ‘Ship Routing Measures in International Straits’ (2000) 14 *Ocean Yearbook*, 241 (with further references to State practice and opinions expressed in the relevant legal literature).

35 UN Security Council Doc. S/2019/593, *op. cit.*, 2.

8.4 Parallel Passage Regimes in the Strait of Hormuz?

It has been argued that since Iran has not ratified the LOSC and rejects the right of transit passage as part of customary international law, it is entitled only to a 3-NM-wide territorial sea which was commonly adopted by coastal States for measuring the breadth of their territorial sea prior to the agreement on the 12-NM-limit under LOSC.³⁶ However, the 12 NM maximum breadth of a territorial sea is supported by consistent State practice and has been deemed, *inter alia*, by the ICJ as forming a rule of customary international law.³⁷ The 12-NM-limit of a territorial sea was widely considered a customary rule before the entry into force of LOSC.³⁸ The same cannot necessarily be said about the classification of the right of transit passage as part of customary international law.³⁹

James Kraska summarizes Iran's approach, which is critical of the existence of a customary right of transit passage and has found that "[t]he regime of transit passage is reserved only for parties to [LOSC]."⁴⁰ Notably, Iran or, for example, the United States as one of the main user States of the Strait of Hormuz are not States party to LOSC. On the other hand, the position of the United States is that the right of transit passage is part of customary international law and in a diplomatic note to Iran has made it clear that "[t]he regimes of ... transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflect the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention".⁴¹

Distinct from the right of transit passage, the regime of innocent passage clearly enables the coastal State to take action in its territorial sea to prevent passage which is not innocent (Art 25(1) of LOSC). A ship that does not comply with rules adopted for the safety of navigation and the regulation of maritime traffic, including relevant rules relating to sea lanes and TSS, would be in a non-innocent passage (Arts 21(1) and 22(1) of LOSC).

36 Kraska 2013, *op. cit.*, 326, 328–329, 365.

37 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, 624, para 177. JE Noyes, 'The Territorial Sea and Contiguous Zone', in DR Rothwell, AG Oude Elferink, KN Scott, T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015), 94–95.

38 S Mahmoudi, 'Passage of warships through the Strait of Hormuz' (1991) *Marine Policy*, 339.

39 *Ibid.*, 339, 347.

40 Kraska 2013, *op. cit.*, 360.

41 J Ashley Roach, RW Smith, *Excessive Maritime Claims* (Martinus Nijhoff, Leiden/Boston 2012, 3rd Edition), 294–295.

Nonetheless, even if ships sail through the Strait of Hormuz under the right of innocent passage, they are granted under the law of the sea additional safeguards that are aimed at protecting the stability of navigation in international straits. The ICJ has found that the right of non-suspendable innocent passage through straits forms a rule of customary international law:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁴²

The regime of non-suspendable innocent passage is also recognised in the 1958 Convention on the Territorial Sea and the Contiguous Zone.⁴³ Iran signed the 1958 Convention but has not ratified it (as is the case for UNCLOS).⁴⁴ By contrast, Oman has not signed the 1958 Convention, but it ratified LOSC in 1989.⁴⁵

Under Article 16(4) of the 1958 Convention, it is stipulated that there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State. Non-suspendable innocent passage is also safeguarded under Article 45 of LOSC. The legal regime of non-suspendable innocent passage prevents the suspension of passage due to, *inter alia*, the coastal State's military exercises in a strait.

Both Iran and Oman might require foreign warships to apply for a permit if warships intend to exercise the right of innocent passage through Iran's or Oman's territorial sea.⁴⁶ This requirement is based on Iran's and Oman's interpretation of Articles 19, 21 and 25 of LOSC. Under Article 9 of the Act on the Marine Areas of Iran in the Persian Gulf and the Oman Sea, passage through

42 Ibid.

43 Convention on the Territorial Sea and the Contiguous Zone, adopted 29 April 1958, entered into force 10 September 1964, 516 UNTS 205.

44 UN Treaty Collection, Convention on the Territorial Sea and the Contiguous Zone, status at 10 February 2021.

45 UN Treaty Collection, United Nations Convention on the Law of the Sea, status at 10 December 2021.

46 Iran's declaration upon signing LOSC on 10 December 1982, *op. cit.*

the territorial sea is subject to the prior authorisation of Iran's relevant authorities in respect of the following types of ships: warships and submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances harmful to the environment.⁴⁷ However, under customary international law, as stated in the ICJ's judgment in the *Corfu Channel Case* (cited above), the permit-based passage regime cannot be applicable in respect of ships that cross the Iranian territorial sea in the Strait of Hormuz solely for transiting the strait.

Based on the previous discussion, the passage regimes of the Strait of Hormuz depend on the flag State's status as either a party or a non-party to LOSC. In this context, Said Mahmoudi has concluded that:

In a hypothetical situation where Iran and a third State – both non-parties to the LOS Convention – have a dispute concerning the passage of a certain warship through the Strait of Hormuz, the legal implication of Iran's declaration seems to be that the status of transit passage as customary law has to be decided *proprio motu* by the court, or at any rate the onus of proof as to the existence of such status is placed on the party which invokes it. In both cases, the present position of Iran seems to be in order.⁴⁸

It is not clear if the right of transit passage forms part of customary international law. If it does not, then non-parties to LOSC can at least invoke the customary right of non-suspendable innocent passage for transiting the Strait of Hormuz. By contrast, such prominent user States of the Strait of Hormuz as China, Japan, South Korea, the EU Member States, the United Kingdom, Norway, and other States party to LOSC can invoke the applicability of the right of transit passage in the Strait of Hormuz. Both Iran (as a signatory State to LOSC) and Oman (as a State Party to LOSC) need to respect the right of transit passage of States party to LOSC in the Strait of Hormuz.

As discussed previously in the example of the Kerch Strait,⁴⁹ the strait State's system of straight baselines might have a significant impact on the passage regime of a strait. Hence, it is examined next whether the legal regime of

47 Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, adopted on 20 April 1993, entered into force 2 May 1993, available https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf; accessed 5 April 2021.

48 Mahmoudi 1991, *op. cit.*, 348.

49 See *supra* Chapters 4.6–4.7 of Part 2.

internal waters can potentially adversely affect international navigation in the Strait of Hormuz and in its approaches.

8.5 Significance of Iranian Internal Waters for the Passage Regime in the Strait of Hormuz

Iran's current system of straight baselines that connects islands in the Persian Gulf appears not have great significance for the passage regime in the Strait of Hormuz. When selecting base points for its system of straight baselines, Iran respected the rule that a base point that is located on land over which there are contested sovereignty claims cannot constitute an "appropriate point" in terms of Article 7(1) of LOSC. The title over the islands of Greater and Lesser Tunbs and Abu Musa, located in the eastern end of the Persian Gulf, is contested between Iran and the United Arab Emirates since 1971 when Iran occupied the islands.⁵⁰

Iran has not connected Greater and Lesser Tunbs and Abu Musa by a straight baseline with its mainland coast and neighbouring islands.⁵¹ The islands of Forur, Bani Forur and Sirri are also not part of Iran's system of straight baselines, albeit Iran's title over these islands is not disputed.⁵² It is doubtful if these islands can be considered as a fringe of islands along the coast in the immediate vicinity of Iran's mainland (see Art 7(1) of LOSC). These islands are distant from the mainland coast as they are located in the centre of the eastern part of the Persian Gulf and west of Tunbs and Abu Musa islands.⁵³

However, Section 3(2) of the Iranian Marine Areas Act stipulates that waters on the landward side of the baseline of the territorial sea, and waters between islands belonging to Iran, where the distance of such islands does not exceed 24 NM, form part of the internal waters and are under Iran's sovereignty. The islands of Tunbs, Abu Musa, Forur, Bani Forur and Sirri are all located within

50 Letter dated 3 December 1971 from the Permanent Representatives of Algeria, Iraq, Libyan Arab Republic and People's Democratic Republic of Yemen to the United Nations Addressed to the President of the Security Council, UN Doc. S/10409, 3 December 1971, 1.

51 Letter dated 5 January 2017 from the Chargé d'affaires a.i. of the Permanent Mission of the United Arab Emirates to the United Nations addressed to the President of the Security Council, UN Doc. S/2017/17, 6 January 2017, 1.

52 J Ashley Roach, JT Oliver, RW Smith, *Limits in the Seas, No. 14: Iran's Maritime Claims* (United States Department of State, Washington DC, 1994), 9. Marineregions.org, 'Iran', *op. cit.*

53 Ibid.

54 See Map 7.

24-NM-limit as measured from each other.⁵⁴ Thus, they generate a continuous stretch of territorial sea that extends from the Iranian mainland coast deep into the Persian Gulf. It also extends relatively close to the coast of the United Arab Emirates on the southern coast of the Strait of Hormuz (Musandam Peninsula).

The TSS in the Strait of Hormuz crosses this maritime area. Westbound traffic is directed to waters between, on the one hand, the Iranian mainland coast and, on the other hand, the islands of Greater and Lesser Tunbs and Forur. These three islands separate eastbound traffic from westbound traffic, while Bani Forur, Sirri and Abu Musa islands are further away and bolster Iran's influence and potential control over international traffic in the Strait of Hormuz.

In case Iran would connect the afore-mentioned islands by straight baseline segments with its mainland coast, then this would result in the designation of internal waters that span a large maritime area in the centre of the eastern end of the Persian Gulf. The outer limit of Iranian internal waters would be located approximately 40 NM away from the closest point on its mainland coast. Notably, this scenario is not dependent on whether Iran extends a hypothetical straight baseline system to the contested Tunbs and Abu Musa islands. Iran's title over Sirri Island is not contested. The distance from Sirri Island to the mainland coast of Iran is comparable to that of the furthest lying Abu Musa Island.⁵⁵

The potential for the extension of the Iranian system of straight baselines in the Persian Gulf has led Hugh Lynch to conclude that:

The practical significance of such an Iranian "internal sea" is that Iran might attempt to divert non-Iranian shipping, especially tankers, to southern Gulf waters which would be impassable for some Very Large Crude Carriers (VLCCs) and most, if not all Ultra Large Crude Carriers (ULCCs)... If Iran held tenaciously to the concept of such *internal* waters, it might also claim that merchant ships, including tankers, might not proceed under the provisions of *innocent* passage; and warships might be challenged while exercising the right of *transit* passage.⁵⁶

54 Abu Musa, the most distant island as measured from the Iranian coast, is located some 24 NM away from its closest neighbouring island of Sirri.

55 See Map 7.

56 HF Lynch, 'Freedom of Navigation in the Persian Gulf and Strait of Hormuz', in MH Nordquist, JN Moore (eds), *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation* (Martinus Nijhoff, The Hague/Boston/London, 1998), 327–328.

It might be tempting for Iran to unilaterally encircle, under Section 3(2) of its Marine Areas Act, the western part of the TSS in the Strait of Hormuz with its straight baseline segments. However, under the law of the sea, the establishment of such internal waters in the centre of the eastern end of the Persian Gulf would not have a significant adverse impact on international shipping. As stipulated in Articles 8(2) and 35(a) of LOSC, the rights of innocent passage and transit passage still apply in internal waters if the establishment of a straight baseline in accordance with the method set forth in Article 7 of LOSC has the effect of enclosing as internal waters areas that had not previously been considered as such.

On the basis of this legal analysis the rights of innocent and transit passage could still be used by ships transiting the western part of the TSS in the Strait of Hormuz even if Iran declares this maritime area as its internal waters. Since the maritime area between the Iranian islands of Tunbs, Abu Musa, Forur, Bani Forur and Sirri has not been previously classified as internal waters, the creation of internal waters (mis)using the method stipulated in Article 7 of UNCLOS for the drawing of straight baselines would not preclude the continued enjoyment of the rights of innocent and transit passage by foreign vessels.

However, hypothetical new straight baseline segments cannot in any case be drawn in accordance with Article 7 of LOSC as the Iranian islands of Tunbs, Abu Musa, Forur, Bani Forur and Sirri are not situated along the Iranian mainland coast in its immediate vicinity. Furthermore, even if Iran would, hypothetically, claim that these waters had been historically considered by Iran as internal waters, then this claim would, in all likelihood, not be recognised by most States. In conclusion, Iran's hypothetical establishment of new straight baseline segments around the afore-mentioned islands would not meet the criteria of Articles 7, 8(2) and 35(a) of LOSC, as a result of which such a unilateral measure by Iran would not have, from a legal perspective, an impact on international shipping in the Strait of Hormuz.