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# The Legal Regime of the Strait of Hormuz and Attacks Against Oil Tankers: Law of the Sea and Law on the Use of Force Perspectives

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## ABSTRACT

The Strait of Hormuz has great significance for the world economy as an oil chokepoint. Yet in recent years, international navigation through the Strait of Hormuz has been repeatedly hampered and subject to discriminatory navigational restrictions and attacks. Such measures have been mostly aimed at oil tankers. This article examines the maritime incidents that occurred in the Strait of Hormuz in 2019: mine attacks against oil tankers and the arrest of an oil tanker by the Iranian armed forces. This study approaches these incidents from the perspectives of the law of the sea and from *jus ad bellum*.

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armed attack; innocent passage; legal regime of straits; self-defense; Strait of Hormuz; traffic separation scheme; transit passage; use of force

## Introduction

The Strait of Hormuz has great significance for the world economy as an oil chokepoint. Yet in the past decades, international navigation through the Strait of Hormuz has been repeatedly hampered and subject to attacks that have been primarily aimed at oil tankers. In June 2019, two oil tankers struck mines at the approach to the Strait of Hormuz.<sup>1</sup> The United States claimed that the attacks against the oil tankers were carried out by the armed forces of Iran.<sup>2</sup> A few days later, Iran shot down a U.S. drone over the Strait of Hormuz.<sup>3</sup> Iran has confirmed the downing of the drone, but denied any involvement in the attacks against the oil tankers.<sup>4</sup>

In July 2019, Iranian armed forces arrested the *Stena Impero*, a United Kingdom-flagged oil tanker, in the Strait of Hormuz for an alleged violation of, inter alia, the traffic separation scheme (TSS) operating in the strait. The arrest of the tanker was considered a hostile act by the United Kingdom's government, as well as an infringement of

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<sup>1</sup> Edmund Blair, "Latest on tanker attacks south of the Strait of Hormuz" 14 June 2019, *Reuters* at: <https://www.reuters.com/article/us-mideast-attacks-latest-idUSKCN1TF1FN> (accessed 17 February 2022).

<sup>2</sup> "Strait of Hormuz: US confirms drone shot down by Iran" 20 June 2019, *BBC News* at: <https://www.bbc.com/news/world-middle-east-48700965> (accessed 17 February 2022).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

the applicable passage regime.<sup>5</sup> A similar attempt had been made by the Iranian armed forces a few days earlier, but was abandoned as a consequence of intervention by a Royal Navy frigate.<sup>6</sup> In January 2021, a South Korea-flagged tanker was arrested by Iran, in response to which South Korea deployed a destroyer close to the Strait of Hormuz.<sup>7</sup>

These incidents all occurred in or over the Strait of Hormuz and they provide the context for the present study. Maritime incidents in or near the Strait of Hormuz are often rooted in disagreements between Iran and other states over the international legal framework applicable to the Strait of Hormuz. Surprisingly, there is relatively scarce literature on the legal regime of the Strait of Hormuz. For example, James 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 regime in the Strait of Hormuz.”<sup>8</sup> In light of this, this study examines the legal regime of the Strait of Hormuz and adopts both a law of the sea and a security law perspective in order to examine recent maritime incidents in the Strait of Hormuz.

The purpose of this study is to identify the legal implications of recent navigational restrictions against oil tankers in the Strait of Hormuz that have involved the arrest of ships and use of force against oil tankers. This article examines incidents that occurred in the summer of 2019 in the Strait of Hormuz and explores whether they amount to discriminatory navigational restrictions, illegal use of force, or an armed attack against the relevant flag states. The arrest of ships and mine attacks in the Strait of Hormuz in 2019 are selected as the basis of this study principally because these incidents occurred both temporally and spatially relatively close to one another and thus appear *prima facie* as a form of orchestrated campaign, designed to impede the passage of neutral commercial ships sailing through the Strait of Hormuz.

This article first briefly describes the geographic and economic characteristics of the Strait of Hormuz. It then sets its focus on the 2019 *Stena Impero* incident. Next, it examines the passage regimes in the territorial sea and internal waters of the Strait of Hormuz for determining the rights and duties of both coastal and user states in relation to the passage of ships through the Strait of Hormuz. In the second part of the article, the recent mine attacks against oil tankers at the entrance to the Strait of Hormuz in the summer of 2019 are analyzed from the perspective of *jus ad bellum*.

## Characteristics of the Strait of Hormuz

### Geographic Aspects

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. It is a

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<sup>5</sup> Emma Graham-Harrison, “Iran’s top diplomat in UK summoned over seizure of *Stena Impero* tanker” 20 July 2019, *The Guardian* at: <https://www.theguardian.com/world/2019/jul/20/iran-on-dangerous-path-with-seizure-of-stena-impero-says-uk> (accessed 17 February 2022).

<sup>6</sup> *Ibid.*

<sup>7</sup> “South Korea to send delegation after Iran seizes tanker” 5 January 2021, *BBC News* at: <https://www.bbc.com/news/world-asia-55540507> (accessed 17 February 2022).

<sup>8</sup> James Kraska, “Legal Vortex in the Strait of Hormuz” (2013) 54 *Virginia Journal of International Law* 324, 326.

relatively large strait as its narrowest point is approximately 27 nautical miles (NM) wide at both its western and its eastern entrance. The territorial seas of the coastal states of the Strait of Hormuz overlap only at the center 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.<sup>9</sup> Thus, by comparison, the Strait of Hormuz is slightly wider than the Strait of Bab el-Mandeb (approximately 19.5 NM) and the Strait of Dover (approximately 18 NM).

The coastal states of the Strait of Hormuz are Iran (north) and Oman (south). At the approaches to the Strait of Hormuz, in both 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, which controls the whole eastern coast of the Persian Gulf and the Gulf of Oman. The Strait of Hormuz leads also to the maritime areas of Iraq, Kuwait, Saudi Arabia, Bahrain and Qatar (Map 1).

The depth of the Strait of Hormuz is largely more than 100 m in areas that are crossed by the main shipping lanes.<sup>10</sup> In its eastern and central 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.<sup>11</sup> 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 of the Strait of Hormuz. These islands include Great Quoin and Little Quoin, Abu Musa, Bani Forur, Sirri, and Greater and Lesser Tunb.<sup>12</sup>

### **Density of Ship Traffic and the Strait's Significance for the Global Economy**

The Strait of Hormuz is an important chokepoint for the export of oil and liquefied natural gas (LNG), accounting for more than one-quarter of global LNG trade.<sup>13</sup> Oil shipments through the Strait of Hormuz amounted to nearly 18.5 million barrels a day (b/d) in 1973.<sup>14</sup> In 2014, that amount had slightly decreased, to 17.2 million b/d, but reached 20.7 million b/d in 2018.<sup>15</sup> 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 percent of the consumption of global petroleum liquids in 2018.<sup>16</sup> More than three-fourths of that oil is shipped to Asian countries, mostly to China, India, Japan, and South Korea.<sup>17</sup> 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

<sup>9</sup> For a description of the geographical limits of the Strait of Hormuz, see Rouhollah K. Ramazani, *The Persian Gulf and the Strait of Hormuz* (Sijthoff & Noordhoff, 1979), 1; see also map in *ibid.*, 3.

<sup>10</sup> See Map 1.

<sup>11</sup> "Hormuz and Malacca Remain Top Oil Chokepoints" 8 April 2017, *Maritime Executive* at: <https://maritime-executive.com/article/hormuz-and-malacca-remain-top-oil-chokepoints> (accessed 17 February 2022).

<sup>12</sup> See Map 1.

<sup>13</sup> Justine Barden, "The Strait of Hormuz is the world's most important oil transit chokepoint" 20 June 2019, *US Energy Information Administration* at: <https://www.eia.gov/todayinenergy/detail.php?id=39932&lang=en> (accessed 17 February 2022).

<sup>14</sup> Ramazani, note 9, 12.

<sup>15</sup> Barden, note 13.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*



**Map 1.** A fragment of the map of the Strait of Hormuz, produced by the U.S. Central Intelligence Agency, 2004, at: [https://legacy.lib.utexas.edu/maps/middle\\_east\\_and\\_asia/iran\\_strait\\_of\\_hormuz\\_2004.jpg](https://legacy.lib.utexas.edu/maps/middle_east_and_asia/iran_strait_of_hormuz_2004.jpg) (accessed 17 February 2022).

Ocean. Unlike the Strait of Hormuz, there are numerous alternative routes with respect to ship traffic through the straits of Malacca and Singapore, for example, via the straits of Lombok and Makassar. The absence of such alternative routes further underlines the strategic significance of the Strait of Hormuz as one of the most important geographic chokepoints for the contemporary oil-based world economy.

### ***TSS in the Strait of Hormuz and the 2019 Stena Impero Incident***

The TSS in the Strait of Hormuz was adopted in 1973 by a resolution of the Inter-Governmental Maritime Consultative Organization (IMCO, now IMO) and consisted of two lanes and a one-mile-wide separation zone.<sup>18</sup> It is one of the oldest TSS globally as the 1973 resolution was adopted only a year after the adoption of the International Regulations for Preventing Collisions at Sea (COLREG),<sup>19</sup> including Rule 10 on TSS. The TSS in the Strait of Hormuz was modified in 1979.<sup>20</sup> It currently consists of a separation zone and two traffic lanes for, respectively, eastbound and westbound traffic, in addition to an inshore traffic zone that

<sup>18</sup> Inter-Governmental Maritime Consultative Organization, Resolution A.284(VIII), "Routing Systems," adopted on 20 November 1973, 'In the Strait of Hormuz', 41 at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.284\(8\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.284(8).pdf) (accessed 17 February 2022).

<sup>19</sup> Convention on the International Regulations for Preventing Collisions at Sea, adopted 20 October 1972, entered into force 15 July 1977, 1050 UNTS 16.

<sup>20</sup> Inter-Governmental Maritime Consultative Organization, COLREG.2/Circ.11, Amended Traffic Separation Scheme in the Strait of Hormuz, 7 June 1979 at: [https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik\\_dok/imo\\_colreg\\_2\\_cirkular.pdf](https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik_dok/imo_colreg_2_cirkular.pdf) (accessed 17 June 2022).

lies in the area between the Musandam Peninsula's coast and the landward boundary of the TSS.<sup>21</sup>

Iran has adopted controversial measures in responding to alleged breaches of the TSS in the Strait of Hormuz. For example, 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.<sup>22</sup> The ship was arrested and taken to the Iranian Bandar Abbas port.<sup>23</sup> Iran claimed that the *Stena Impero* collided with an Iranian fishing vessel:

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.<sup>24</sup>

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.”<sup>25</sup> The United Kingdom further maintained that there is no evidence of an alleged collision with an Iranian fishing boat and that “even 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*.”<sup>26</sup>

Iran deemed the arrest of the *Stena Impero* necessary for the investigation of alleged damage to Iranian nationals and the fishing vessel, as well as pollution of and damage to the marine environment, in addition to alleged dangerous navigation by the tanker.<sup>27</sup> Iran also carried out a review of the specialized navigation maps.<sup>28</sup> The *Stena Impero* and its crew were released by Iranian authorities two months after the arrest, at the end of September 2019.<sup>29</sup> This incident raises questions about the limits of the rights of a coastal state to hamper international navigation through straits for alleged violations of TSS safety rules.

Under Articles 39(3) and 41 of the United Nations Convention on the Law of the Sea<sup>30</sup> (UNCLOS or Convention), the TSS does not apply to aircraft that exercise the right of transit passage. Neither are sovereign immune vessels under the regime of

<sup>21</sup> See Map 1. For a description of the coordinates of the TSS in the Strait of Hormuz, see Annex to “Traffic Separation Scheme “In the Strait of Hormuz” Change of Reference Chart and Chart Datum,” COLREG.2/Circ. 33, 25 February 1994 at: [https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik\\_dok/imo\\_colreg.2\\_cirkular.pdf](https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik_dok/imo_colreg.2_cirkular.pdf) (accessed 17 February 2022).

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> *Ibid.*

<sup>25</sup> UN Security Council Doc. S/2019/589, note 22, 1.

<sup>26</sup> *Ibid.*

<sup>27</sup> UN Security Council Doc. S/2019/593, note 23, 1.

<sup>28</sup> *Ibid.*

<sup>29</sup> Jonathan Marcus, “*Stena Impero*: Seized British tanker leaves Iran’s waters” 27 September 2019, *BBC News* at: <https://www.bbc.com/news/world-middle-east-49849718> (accessed 17 February 2022).

<sup>30</sup> United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

transit passage strictly obliged to follow a TSS, although it is generally recommended to do so.<sup>31</sup> 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 UNCLOS).

Yet it is not entirely clear whether and to what extent a coastal state is entitled to take measures against commercial ship sailing through a strait under the right of transit passage in response to violations of the TSS. Article 233 of UNCLOS 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 UNCLOS, 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 UNCLOS.<sup>32</sup> 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 UNCLOS, Nandan and Anderson argue that “to 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).”<sup>33</sup> A breach of the TSS and the relevant compulsory routing measures does not entitle the coastal state of a strait to arrest that ship, as this would result in hampering and suspending the right of transit passage against the terms of Article 44 of UNCLOS.<sup>34</sup> 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, the relatively liberal transit regime does not apply in a strait if the strait is instead governed by the regime of innocent passage. According to Iran’s position, the legal regime of innocent passage applies in the Strait of Hormuz.<sup>35</sup> The question of which regime applies and the implications of this to navigation in the Strait of Hormuz are examined in the following.

## Legal Regime of the Strait of Hormuz Under the Law of the Sea

### *Passage Regime(s) in the Territorial Sea of the Strait of Hormuz*

The Strait of Hormuz connects the exclusive economic zones (EEZs) of Iran, Iraq, Kuwait, Saudi Arabia, Bahrain, Qatar, and the 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 UNCLOS for the regime of transit passage.

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<sup>31</sup> See Section 8.2 of the IMO Resolution A.572(14), as amended. General Provisions on Ships’ Routeing, adopted 20 November 1985, entered into force (as amended) 1 January 1997. See also *The Commander’s Handbook on the Law of Naval Operations* (United States Department of the Navy 2017), 2–8.

<sup>32</sup> Article 41 of UNCLOS permits the designation of sealanes and the prescription of TSS in straits where this is necessary to promote the safe passage of ships.

<sup>33</sup> Satya N. Nandan and David H. Anderson, “Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982” (1989) 60 *The British Yearbook of International Law* 159, 192.

<sup>34</sup> See, e.g. Steven B. Kempton, “Ship Routing Measures in International Straits” (2000) 14 *Ocean Yearbook* 232, 241 (with further references to state practice and opinions expressed in the relevant legal literature).

<sup>35</sup> UN Doc. S/2019/593, note 23, 2.

The right of transit passage was an innovative legal concept that was introduced in the drafting of UNCLOS in order to balance 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, however, to restrictions as stipulated in Articles 39–42 of UNCLOS and solely for the purpose of continuous and expeditious transit of ships and aircraft through the strait (Article 38(2) of UNCLOS). The right of transit passage applies in the Strait of Hormuz where the territorial sea of the strait states overlaps (where the width of the strait is less than 24 NM).

In addition, ships and aircraft are entitled to the right of transit passage in the approaches to the Strait of Hormuz in the Persian Gulf where that maritime area is almost completely subject to the sovereignty of strait states. Even though there exists an EEZ corridor 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, and Greater and Lesser Tunb (all under Iran's control) and, on the other hand, the United Arab Emirates' coast on the Arabian Peninsula, the straits regime nevertheless still applies in the maritime area between the Iranian and the United Arab Emirates' mainland coast where the mentioned islands are located.<sup>36</sup> The TSS in the Strait of Hormuz also applies in the waters located between the already-mentioned Iranian-controlled islands.

The eastern end of the Persian Gulf is wholly subject to the transit passage regime owing 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 UNCLOS. Very Large Crude Carriers and Ultra Large Crude Carriers cannot safely cross the EEZ corridor, as it is located closer to the United Arab Emirates' coastline where the waters are relatively shallow. For smaller ships heading into or out of the central or western part of the Persian Gulf, the roundabout 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, and Greater and Lesser Tunb. In addition, the narrowness of the EEZ corridor means that if international vessel and air traffic is directed to the confines of this narrow maritime area, ships and aircraft transiting this area may be at increased risk of collision.

Iran has not ratified UNCLOS and considers that parts of it “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.”<sup>37</sup> Iran considers that the regime of transit passage, an innovative concept first introduced in UNCLOS 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 parties to UNCLOS are entitled to benefit from the right of transit passage.<sup>38</sup>

It has been argued that since Iran 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

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<sup>36</sup> See “Iran,” MarineRegions.org at: <https://www.marinerregions.org/eezdetails.php?mrgid=8469&zone=eez> (accessed 17 February 2022).

<sup>37</sup> Iran's declaration upon signing UNCLOS on 10 December 1982 at: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg\\_no=XXI-6&chapter=21&Temp=mtmsg3&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&clang=_en#EndDec) (accessed 17 February 2022).

<sup>38</sup> *Ibid.*



commonly adopted by coastal states for measuring the breadth of their territorial sea prior to the agreement on the 12-NM limit under UNCLOS.<sup>39</sup> However, the 12-NM maximum breadth of a territorial is supported by consistent state practice and has been deemed, *inter alia*, by the International Court of Justice (ICJ) as forming a rule of customary international law.<sup>40</sup> Moreover, the 12-NM limit of the territorial sea was widely considered a customary rule before the entry into force of UNCLOS.<sup>41</sup> The same cannot necessarily be said about the classification of the right of transit passage as part of customary international law.<sup>42</sup> James Kraska summarizes Iran's approach, which is critical of the existence of a customary right of transit passage, and has found that "the regime of transit passage is reserved only for parties to UNCLOS."<sup>43</sup> Notably, Iran or, for example, the United States as one of the main user states of the Strait of Hormuz is not a state party to UNCLOS. 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, the United States has made it clear that "the 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."<sup>44</sup>

Distinct from the right of transit passage, the regime of innocent passage *expressis verbis* enables the coastal state to take action in its territorial sea to prevent passage that is not innocent (Article 25(1) of UNCLOS). 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 (Articles 21(1) and 22(1) of UNCLOS). 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. In contrast to other parts of territorial sea, the right of innocent passage through international straits cannot be suspended under customary international law. This was first recognized by the ICJ in its judgment in the *Corfu Channel case*, according to which the right of nonsuspendable innocent passage applies in straits that connect two parts of the high seas.<sup>45</sup> The ICJ found that this rule is part 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.<sup>46</sup>

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<sup>39</sup> Kraska, note 8, 326, 328–329, 365.

<sup>40</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624 [177]. John E. Noyes, "The Territorial Sea and Contiguous Zone" in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), 91, 94–95.

<sup>41</sup> Said Mahmoudi, "Passage of warships through the Strait of Hormuz" (1991) *Marine Policy* 338, 339.

<sup>42</sup> *Ibid.*, 339, 347.

<sup>43</sup> Kraska, note 8, 360.

<sup>44</sup> J. Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (Martinus Nijhoff 2012, 3rd Edition), 294–295.

<sup>45</sup> *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, 28.

<sup>46</sup> *Ibid.*

The regime of nonsuspendable innocent passage is also recognized in the 1958 Convention on the Territorial Sea and the Contiguous Zone (1958 TS Convention).<sup>47</sup> Iran signed the 1958 Convention but has not ratified it (as is the case for UNCLOS).<sup>48</sup> By contrast, Oman has not signed the 1958 Convention, but it ratified UNCLOS in 1989.<sup>49</sup>

Under Article 16(4) of the 1958 TS Convention, it is stipulated that there shall be no suspension of the innocent passage of foreign ships through straits that 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. Nonsuspendable innocent passage is also safeguarded under Article 45 of UNCLOS. The legal regime of nonsuspendable innocent passage prevents the suspension of passage owing to any reason, including coastal state military exercises in a strait.

Both Iran and Oman may require foreign warships to apply for a permit if those warships intend to exercise their right of innocent passage through Iran's or Oman's territorial sea.<sup>50</sup> This requirement is based on Iran's and Oman's interpretation of Articles 19, 21, and 25 of UNCLOS. Under Article 9 of the Act on the Marine Areas of Iran in the Persian Gulf and the Oman Sea, passage through the territorial sea is subject to the prior authorization of Iran's relevant authorities with respect to 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.<sup>51</sup> However, under customary international law, as stated in the ICJ's judgment in the *Corfu Channel case*, the permit-based passage regime cannot be applicable with respect to warships that cross the Iranian territorial sea in the Strait of Hormuz solely for transiting the strait.<sup>52</sup>

Based on the earlier discussion, the passage regimes of the Strait of Hormuz depend on the flag state's status as either a party or a nonparty to UNCLOS. In this context, Said Mahmoudi has concluded:

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.<sup>53</sup>

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<sup>47</sup> Convention on the Territorial Sea and the Contiguous Zone, adopted 29 April 1958, entered into force 10 September 1964, 516 UNTS 205.

<sup>48</sup> United Nations Treaty Collection, Convention on the Territorial Sea and the Contiguous Zone, status at 17 February 2022 at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-1&chapter=21&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21&clang=_en) (17 February 2022).

<sup>49</sup> United Nations Treaty Collection, United Nations Convention on the Law of the Sea, status at 17 February 2022 at: [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (17 February 2022).

<sup>50</sup> Iran's declaration upon signing UNCLOS on 10 December 1982, note 37. Oman's declarations made upon ratification of UNCLOS on 17 August 1989 at: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec) (accessed 17 February 2022).

<sup>51</sup> Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, adopted 20 April 1993, entered into force 2 May 1993 at:

[https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN\\_1993\\_Act.pdf](https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf) (accessed 17 February 2022).

<sup>52</sup> *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, 28.

<sup>53</sup> Mahmoudi, note 41, 348.

It is not clear if the right of transit passage forms part of customary international law. If it does not, then nonparties to UNCLOS can at least invoke the customary right of nonsuspendable 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 European Union (EU) member states, the United Kingdom, Norway, and other states parties to UNCLOS can invoke the applicability of the right of transit passage in the Strait of Hormuz. Both Iran (as a signatory state to UNCLOS) and Oman (as a state party to UNCLOS) need to respect the right of transit passage of states parties to UNCLOS in the Strait of Hormuz.

### ***Passage Regime in the Internal Waters of the Strait of Hormuz***

Iran's current system of straight baselines that connect islands in the Persian Gulf does not have great significance for the passage regime in the Strait of Hormuz. When selecting base points for its system of straight baselines, Iran appears to have 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 UNCLOS. The title over the islands of Greater and Lesser Tunbs and Abu Musa, located in the eastern end of the Persian Gulf, has been contested between Iran and the United Arab Emirates since 1971, when Iran occupied the islands.<sup>54</sup>

Iran has not connected Greater and Lesser Tunbs and Abu Musa by a straight baseline with its mainland coast and neighbouring islands.<sup>55</sup> The islands of Forur, Bani Forur, and Sirri are also not part of Iran's system of straight baselines, notwithstanding that Iran's title over these islands is not disputed.<sup>56</sup> It is doubtful that these islands can be considered as a fringe of islands along the coast in the immediate vicinity of Iran's coast (pursuant to Article 7(1) of UNCLOS). They are distant from the mainland coast, as they are located in the center of the eastern part of the Persian Gulf and west of Tunbs and Abu Musa islands.<sup>57</sup>

However, Section 3(2) of the Iranian Marine Areas Act stipulates that the 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 of Iran. The islands of Tunbs, Abu Musa, Forur, Bani Forur, and Sirri are all located within a 24-NM limit as measured from each other.<sup>58</sup> Thus, they generate a continuous stretch of territorial sea that extends from the Iranian mainland coast deep into the Persian Gulf. Iran's territorial sea also extends relatively close to the coast of the United Arab Emirates on the southern coast of the Strait of Hormuz on the Musandam Peninsula.

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<sup>54</sup> UN Doc. S/10409, (3 December 1971), 1 at: <https://undocs.org/S/10409> (accessed 17 February 2022). UN Doc. S/2017/17, (6 January 2017), 1 at: <https://undocs.org/S/2017/17> (accessed 17 February 2022).

<sup>55</sup> J. Ashley Roach, John T. Oliver, and Robert W. Smith, *Limits in the Seas, No. 114: Iran's Maritime Claims* (United States Department of State 1994), 9. [Marinerregions.org](http://www.marinerregions.org), "Iran · MRGID 8469," Flanders Marine Institute (VLIZ) 2021 at: <https://www.marinerregions.org/eezdetails.php?mrgid=8469> (accessed 17 February 2022).

<sup>56</sup> *Ibid.*

<sup>57</sup> See Map 1.

<sup>58</sup> Abu Musa, the most distant island as measured from the Iranian coast, is located some 24 NM away from its closest neighboring island of Sirri.

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 the event that Iran chooses to connect the aforementioned islands by straight baseline segments with its mainland coast, this would result in the designation of internal waters that span a large maritime area in the center of the eastern end of the Persian Gulf. The outer limit of Iranian internal waters in this case would be located at approximately 40 NM as measured 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.<sup>59</sup>

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

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.<sup>60</sup>

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 center 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 UNCLOS, 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 UNCLOS has the effect of enclosing as internal waters areas that had not previously been considered as such. Thus, 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.

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<sup>59</sup> See Map 1.

<sup>60</sup> Hugh F. Lynch, "Freedom of Navigation in the Persian Gulf and Strait of Hormuz" in Myron H. Nordquist and John Norton Moore (eds), *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation* (Martinus Nijhoff, 1998), 315, 327–328.

However, hypothetical new straight baseline segments cannot in any case be drawn in accordance with Article 7 of UNCLOS because 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 could, hypothetically, claim that these waters had been historically considered by Iran as internal waters, this claim would, in all likelihood, not be recognized by most states. In conclusion, Iran's hypothetical establishment of new straight baseline segments around the aforementioned islands would not meet the criteria of Articles 7, 8(2), and 35(a) of UNCLOS, as a result of which, such a unilateral measure by Iran would not, from a legal perspective, have an impact on international shipping in the Strait of Hormuz.

## **The Use of Force in Self-Defense in Response to an Attack Against an Oil Tanker**

### ***Two Main Issues***

As examined in the preceding, from the perspective of the law of the sea, passage through the Strait of Hormuz must remain free for international navigation and the strait states must refrain from discriminatory navigational restrictions against foreign vessels. In addition, the recent maritime incidents in and over the Strait of Hormuz also bring into question the legality of the use of force against foreign ships. As explained in the introduction, several maritime incidents occurred from 2019 to 2021 in or over the Strait of Hormuz. The 2019 mine attacks against a Panama-flagged oil tanker (owned by a Japanese firm) and a Marshall Islands-flagged oil tanker (owned by a Norwegian company) led to international tensions between Iran and other states, especially the United States.<sup>61</sup> The United States claimed that the Iranian armed forces perpetrated the attacks against the oil tankers. However, Iran rejected this allegation. In the face of this disagreement, the United States issued "U.S. Central Command Statement on Operation Sentinel," which aims to "promote maritime stability, ensure safe passage, and de-escalate tensions in international waters throughout the Arabian Gulf, Strait of Hormuz, the Bab el-Mandeb Strait (BAM) and the Gulf of Oman."<sup>62</sup> The scope of this operation was somewhat ambiguous and it appears that the option of the use of force by the United States against Iran was not excluded.<sup>63</sup> To reinforce this operation, the United States invited Germany, France, United Kingdom, Australia, Japan, Norway, Belgium, South Korea, and other countries to participate in its coalition.<sup>64</sup>

If a user state of a strait seeks to resort to the use of force against a strait state in response to attacks against commercial ships, how can this be justified under the law on the use of force? The aim of this section is to answer this question by means of using

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<sup>61</sup> Eliza Mackintosh, Helen Regan, and Vasco Cotovio, "Gulf of Oman tankers attacked: What flags were these ships flying under?" 13 June 2019, *CNN* at: [https://edition.cnn.com/middleeast/live-news/gulf-of-oman-incident-latest-intl/h\\_079a90757bf7fbc0b383d10f4e275007](https://edition.cnn.com/middleeast/live-news/gulf-of-oman-incident-latest-intl/h_079a90757bf7fbc0b383d10f4e275007) (accessed 19 February 2022).

<sup>62</sup> U.S. Central Command, *U.S. Central Command Statement on Operation Sentinel* (2019), available at: <https://www.centcom.mil/MEDIA/STATEMENTS/Statements-View/Article/1911282/us-central-command-statement-on-operation-sentinel> (accessed 19 February 2022).

<sup>63</sup> "Operational Sentinel International Maritime Security Construct (IMSC)" 24 February 2020, *Global Security* at: <https://www.globalsecurity.org/military/ops/sentinel.htm> (accessed 19 February 2022).

<sup>64</sup> *Ibid.*

the 2019 mine attacks in the Strait of Hormuz as a case study. As is well known, there are disagreements among scholars on the legal basis of the use of force. Nevertheless, the following two legal bases of the use of force are unanimously agreed: self-defense, and authorization by the UN Security Council.<sup>65</sup> Given that there is no authorization by the UN Security Council in the context of the Strait of Hormuz, the only possible legal basis for the use of force by the United States against Iran is self-defense. While the United States has not actually used force against Iran in response to the 2019 mine attacks, the question is whether the United States would be entitled to use force against Iran by exercising collective self-defense in order to protect the flag states whose oil tankers have been attacked, for example, Panama and the Marshall Islands.

However, this argument raises two main issues related to the concept of an “armed attack,” which triggers the right of self-defense.<sup>66</sup> First, the 2019 mine attacks were directed against oil tankers, which are merchant vessels. Can an attack against a single merchant vessel reach the threshold of an “armed attack” under Article 51 of the UN Charter? Thus, the material scope of an “armed attack” (the “armed attack” requirement *ratione materiae*) is analyzed next. Second, it is not clear who perpetrated the attack in question. It has been suggested that the Iranian armed forces were behind the attack, but it is also possible that the perpetrator was a nonstate actor. In this context, the personal scope of an “armed attack” (the “armed attack” requirement *ratione personae*) is also examined.

### **The “Armed Attack” Requirement *Ratione Materiae***

On the issue of whether an attack against a single merchant vessel can reach the threshold of an “armed attack” under Article 51 of the UN Charter, we can identify two approaches among scholars. The first school of thought insists that an attack against a single merchant vessel can be regarded as an “armed attack.”<sup>67</sup> For example, Christopher Greenwood adopted this position by commenting that “international law does treat an unlawful attack upon a merchant ship as an act to which the flag state may respond by force.”<sup>68</sup> By contrast, the second school of thought advocates that an attack against a single merchant vessel cannot be considered an “armed attack.”<sup>69</sup> For instance, Michael Bothe has endorsed this position by suggesting that “the individual

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<sup>65</sup> The legal bases of the use of force other than self-defense and authorization by the UN Security Council, for example countermeasures, have been advocated by some scholars. However, their legality has not been shared by all scholars. Considering this situation, we will refer to self-defense and authorization by the UN Security Council as the firmly established legal bases of the use of force. On the (in-)admissibility of countermeasures as a legal base for the use of force, see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2021), 204–246.

<sup>66</sup> Needless to say, there are additional requirements for collective self-defense against an “armed attack”: the duty to report to the UN Security Council; the temporary limit of the UN Security Council having taken measures necessary to maintain international peace and security; the declaration by the victim state that it suffered an “armed attack”; the request by the victim state for assistance from the third state; necessity; proportionality. Of course, the argument in the text could also raise some issues on these requirements. However, for the sake of simplicity, this section concentrates on the criterion of an “armed attack.”

<sup>67</sup> See, for example, Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff, 1985), 148; Christopher Greenwood, “Comments” in Ige F. Dekker and Harry H. G. Post (eds), *The Gulf War of 1980–1988: The Iran–Iraq War in International Legal Perspective* (Martinus Nijhoff, 1992), 214.

<sup>68</sup> Greenwood, note 67, 214.

<sup>69</sup> See, for example, Michael Bothe, “Neutrality at Sea” in Dekker and Post, note 67, 209; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2005), 200.

merchant ship (like nationals abroad) cannot be equated with the state itself and ... the attack against it must not be seen as an armed attack against the flag state.”<sup>70</sup> In the face of this conflict of opinions, which of the two approaches should we take? Unfortunately, there is considerable uncertainty in state practice on the matter, with Vaughan Lowe asserting that “State Practice is in a state of considerable confusion.”<sup>71</sup> Hence, it is difficult to deduce an answer from an examination of state practice. However, we can acquire some guidance from the judgment of the ICJ in the *Oil Platforms case*.

In the *Oil Platforms case*,<sup>72</sup> the legality of the use of force in self-defense by the United States against Iran in response to an attack against a merchant vessel was disputed. On the one hand, the United States argued that an attack against a single merchant vessel was sufficient to qualify it as an “armed attack.”<sup>73</sup> Indeed, before the Court, the United States stated that “each of the two specific attacks that preceded United States defensive measures—the missile attack on *Sea Isle City*, and the mining of the *USS Samuel B. Roberts*—was an armed attack giving rise to the right of self-defence.”<sup>74</sup> This position could be regarded as being in line with the argument made by Christopher Greenwood. On the other hand, while Iran was initially silent on its own position,<sup>75</sup> it ultimately argued that an attack against a single merchant vessel was not enough to qualify as an “armed attack.”<sup>76</sup> Before the Court, Iran stated that “military action against an individual merchant ship may be an infringement of the rights of the flag State, but it does not constitute an armed attack against that State triggering that State’s right of self-defence.”<sup>77</sup> This position is consistent with the argument of Michael Bothe. According to Iran, “only massive acts of violence against merchant shipping of a State, attacking whole fleets, would amount to an act of aggression.”<sup>78</sup> Faced with these opposing views between the two parties, what decision did the ICJ reach in the *Oil Platforms case*?

For the purposes of the judgment, the ICJ focused on whether Iran’s actions could qualify as an “armed attack.” The Court concluded that on the matters complained of by the United States, Iran had not launched an “armed attack.” Importantly, in coming to this conclusion, the ICJ considered whether Iran had, as a matter of fact, committed the missile attack against the *Sea Isle City*,<sup>79</sup> and answered this question in the negative

<sup>70</sup> Bothe, *ibid.*, 209.

<sup>71</sup> Vaughan Lowe, “Self-Defence at Sea” in William E. Butler (ed), *The Non-Use of Force in International Law* (Martinus Nijhoff, 1989), 200.

<sup>72</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 191.

<sup>73</sup> ICJ, *Oil Platforms: Counter-Memorial and Counter-Claim Submitted by the United States of America*, 23 June 1997, 130 [4.10]; ICJ, *Oil Platforms: Rejoinder Submitted by the United States of America*, 23 March 2001, 155 [5.22].

<sup>74</sup> ICJ, *Oil Platforms: Counter-Memorial and Counter-Claim Submitted by the United States of America*, note 73, 130 [4.10].

<sup>75</sup> ICJ, *Oil Platforms: Memorial Submitted by the Islamic Republic of Iran*, 8 June 1993, Vol. I, 93–106 [4.01–4.42].

<sup>76</sup> ICJ, *Oil Platforms: Reply and Defence to Counter-Claim Submitted by the Islamic Republic of Iran*, 10 March 1999, Vol. I, 146 [7.37].

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, 146 [7.38]. In this context, Iran relied on Article 3(d) of the UN General Assembly Resolution on the Definition of Aggression. *Ibid.* Article 3(d) of the UN General Assembly Resolution on the Definition of Aggression refers to “an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State” as one of acts of aggression. UNGA Resolution A/RES/3314 *Definition of Aggression* (14 December 1974). The reference to “marine ... fleets” has been generally understood as indicating that it applies to cases in which attack is directed to several merchant vessels, not a single one. See, for example, Bengt Broms, “The Definition of Aggression” (1977) 154 *Collected Courses of the Hague Academy of International Law* 1, 351.

<sup>79</sup> *Case Concerning Oil Platforms*, note 72, 189–190 [57–60].

by concluding that the United States was not able to demonstrate that the attack was attributable to Iran.<sup>80</sup> To put it differently, the ICJ made little examination of whether an attack of this nature could in principle reach the threshold of an “armed attack” within the meaning of Article 51 of the UN Charter. Nevertheless, we can infer certain implications of the “armed attack” requirement *ratione materiae* from the judgment of the ICJ.

The assumption of the ICJ was that an “armed attack” must be characterized as the most grave form of the use of force. This means that an “armed attack” needs to be regarded as having a stringent threshold. The ICJ opined as follows:

As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”<sup>81</sup>

However, in connection with the mining of the *USS Samuel B. Roberts* the ICJ accepted the possibility that the mining of even a single military vessel could be categorized as an “armed attack.” Indeed, the ICJ asserted that “the Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence.’”<sup>82</sup> Accordingly, taking into consideration this line of reasoning, it is reasonable to conclude that although the ICJ characterized an “armed attack” as the most grave form of the use of force, it applied the *de minimis* threshold of an “armed attack” in a flexible manner.<sup>83</sup> Importantly, as noted by Olivier Corten, “by not excluding the possibility that the mining of a single military vessel could be sufficient to trigger the right of self-defence, the Court made a very important statement confirming the great flexibility of the ‘gravity criteria.’”<sup>84</sup>

Nevertheless, we must examine whether the same reasoning can be applied to an attack against a single merchant vessel. Unfortunately, the ICJ did not expressly address this question.<sup>85</sup> However, scholars have advocated two ways of interpreting the judgment of the ICJ with respect to this question. The first interpretation is that the ICJ accepted the possibility that an attack against a single merchant vessel could amount to an “armed attack.”<sup>86</sup> For example, Natalino Ronzitti has asserted that “it can be inferred from the judgment that an attack against a private ship may qualify as an armed attack under article 51[of the UN Charter].”<sup>87</sup> By contrast, the second interpretation is that

<sup>80</sup> *Ibid.*, 190 [61].

<sup>81</sup> *Ibid.*, 187 [51].

<sup>82</sup> *Ibid.*, 195 [72].

<sup>83</sup> See, for example, Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press, 2010), 143; Olivier Corten, “Judge Simma’s Separate Opinion in the *Oil Platforms* Case: To What Extent Are Armed ‘Proportionate Defensive Measures’ Admissible in Contemporary International Law?” in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 852; Claus Kreß, “The International Court of Justice and the ‘Principle of Non-Use of Force’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 582.

<sup>84</sup> Corten, note 83, 852.

<sup>85</sup> See, for example, Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2013), 119.

<sup>86</sup> See, for example, James A. Green, “The *Oil Platforms* Case: An Error in Judgment?” (2004) 9 *Journal of Conflict and Security Law* 357, 382–383; Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, “Exploring the Limits of International Law Relating to the Use of Force in Self-Defence” (2005) 16 *European Journal of International Law* 499, 513; Natalino Ronzitti, “The Expanding Law of Self-Defence” (2006) 11 *Journal of Conflict and Security Law* 343, 350.

<sup>87</sup> Ronzitti, note 86, 350.



the ICJ acknowledged that an attack against a single merchant vessel could not constitute an “armed attack.”<sup>88</sup> For instance, Geir Ulfstein has suggested that “the best reasons militate against seeing an attack against a single ship as an armed attack,” adding that “the ICJ’s decision in the *Oil Platforms* case suggests that attacks on commercial vessels only qualify as armed attack if they are of such gravity that they threaten the state’s security interests.”<sup>89</sup> In the face of these alternative interpretations of the judgment of the ICJ, we argue that, in principle, either interpretation is plausible.

In this context, it is noteworthy to point out that the ICJ examined whether the attacks under consideration could qualify as an “armed attack” against the United States on the hypothesis that they were attributable to Iran. The ICJ opined as follows:

On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the *Sea Isle City*, the question is whether that attack, either in itself or in combination with the rest of the “series of ... attacks” cited by the United States can be categorized as an “armed attack” on the United State justifying self-defence.<sup>90</sup>

The ICJ’s final ruling was that the attacks under consideration could not be considered as an “armed attack” against the United States. Indeed, the ICJ held that “even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a ‘most grave’ form of the use of force.”<sup>91</sup> However, it is necessary to clarify the line of reasoning by which the ICJ finally ruled that the attacks under consideration could not be regarded as an “armed attack” against the United States. Importantly, in coming to this final ruling, the ICJ implicitly left open the possibility that the attacks under consideration could in theory reach the threshold of an “armed attack.”

In this context, two parts of the ICJ judgment have great significance. First, as regards the attack against the *Sea Isle City*, the ICJ emphasized that it could not have been specifically aimed at this merchant vessel. The ICJ opined as follows:

The Court notes first that the *Sea Isle City* was in Kuwaiti waters at the time of the attack on it, and that a *Silkworm* missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters.<sup>92</sup>

Hence, the ICJ took the position that a specific intention to attack a particular target was required for triggering an “armed attack.” This position has been criticized by some scholars.<sup>93</sup> Logically, according to this position, a victim state subject to an indiscrimin-

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<sup>88</sup> See, for example, William H. Taft, “Self-Defense and the Oil Platforms Decision” (2004) 29 *Yale Journal of International Law* 295, 299; Djamchid Momtaz, “Did the Court Miss an Opportunity to Denounce the Erosion of the Principle Prohibiting the Use of Force” (2004) 29 *Yale Journal of International Law* 307, 309–310; Geir Ulfstein, “How International Law Restricts the Use of Military Force in Hormuz” 27 August 2019, *EJIL: Talk!* at: <https://www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz> (accessed 19 February 2022).

<sup>89</sup> Ulfstein, note 88.

<sup>90</sup> *Case Concerning Oil Platforms*, note 72, 191–192 [64] (emphasis added).

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* (emphasis added).

<sup>93</sup> See, for example, Taft, note 88, 302–303.

ate attack could not respond in self-defense.<sup>94</sup> This result appears irrational. However, what is important for our discussion is that the ICJ did not regard the attack against the *Sea Isle City* as an “armed attack” because it was not specifically aimed at this merchant vessel. Therefore, the ICJ left room for the possibility that a deliberate attack against the *Sea Isle City* could reach the threshold of an “armed attack.”<sup>95</sup> In other words, the implication of this part of the judgment is that an attack against a single merchant vessel might in other circumstances potentially reach the threshold of an “armed attack.”<sup>96</sup>

Second, as regards the attack against the other merchant vessel, that is, *Texaco Caribbean*, the ICJ put an emphasis on the fact that this merchant vessel did not fly a United States flag. The ICJ opined as follows:

Secondly, the *Texaco Caribbean*, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State.<sup>97</sup>

The ICJ examined, in this part of the judgment, whether the attack against the *Texaco Caribbean* could be considered as an “armed attack” against the United States. The reason why the ICJ did not regard the attack against the *Texaco Caribbean* as an “armed attack” against the United States was that this merchant vessel did not fly a United States flag. Given this line of reasoning, as in the case of the attack against the *Sea Isle City*, the ICJ also left room for the possibility that the attack against the *Texaco Caribbean* could, in other circumstances, reach the threshold of an “armed attack.”<sup>98</sup>

In 2019, a Panama-flagged oil tanker and a Marshall Islands-flagged oil tanker struck a mine in the Strait of Hormuz. If we apply our interpretation of the ICJ judgment in the *Oil Platforms case* to the 2019 maritime incidents, we cannot exclude the conclusion that the attacks against these oil tankers could be respectively considered as each reaching the threshold of an “armed attack” within the meaning of Article 51 of the UN Charter. This means that the 2019 mine attacks against the oil tankers may have amounted to an “armed attack” against each of the flag states, namely, Panama and the Marshall Islands. However, this does not immediately mean that the United States was entitled to resort to the use of force against Iran in response to the 2019 mine attacks against the two oil tankers. In order to resort to the use of force against Iran, the United States was required to demonstrate that the attacks in question were attributed to Iran. In the next section we analyze the “armed attack” requirement *ratione personae*.

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<sup>94</sup> Ibid.

<sup>95</sup> See, for example, Dominic Raab, “‘Armed Attack’ After the Oil Platforms Case” (2004) 17 *Leiden Journal of International Law* 719, 726; James A. Green, “Self-Defence: A State of Mind for States?” (2008) 55 *Netherlands International Law Review* 181, 202–203.

<sup>96</sup> This evaluation is also true for the attack against the *Bridgeton*. As regards the attack against the *Bridgeton*, the ICJ also stressed that it did not involve the specific intention of attacking that particular merchant vessel. The ICJ opined that “similarly it has not been established that the mine struck by the *Bridgeton* was laid with the specific intention of harming that ship.” *Case Concerning Oil Platforms*, note 72, 192 [64]. Therefore, the reason why the ICJ did not consider the attack against the *Bridgeton* as an “armed attack” was that it did not involve the specific intention of attacking this merchant vessel. Taking into consideration this line of reasoning, the ICJ also left room for the possibility that the attack against the *Bridgeton* in itself could reach the threshold of an “armed attack.” To put it another way, the implication of this part of the judgment of the ICJ is that an attack against a single merchant vessel might potentially reach the threshold of an “armed attack.”

<sup>97</sup> Ibid., 191–192 [64] (emphasis added).

<sup>98</sup> See, for example, James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009), 40–41.

### **The “Armed Attack” Requirement *Ratione Personae***

It is not clear who perpetrated the 2019 mine attacks against oil tankers. The United States has claimed that the Iranian armed forces perpetrated the attacks. By contrast, Iran has rejected the allegation. In this situation we need to assume some possible scenarios for our analytical framework. In our view, the following two possible scenarios are practicable. The first possible scenario is that Iranian armed forces perpetrated the attacks as claimed by the United States. The second possible scenario is that a nonstate actor perpetrated the attack. Needless to say, these two possible scenarios are not exhaustive.<sup>99</sup> However, given the current situation of the Strait of Hormuz, we consider these two possible scenarios as realistic hypotheses.<sup>100</sup>

#### ***The First Possible Scenario: Iranian Armed Forces Perpetrated the Attack***

In the first possible scenario, we need to ask ourselves whether the attack perpetrated by Iranian armed forces can be attributed to Iran. It is firmly established under customary international law that the conduct of any state organ is attributed to that state.<sup>101</sup> Iranian armed forces can be regarded as a state organ of Iran and their conduct is therefore attributable to Iran. By this logic, if the attacks were perpetrated by Iranian armed forces, then they can be attributed to Iran. Hence, in this first possible scenario, the United States could, in principle, resort to the use of force against Iran by exercising collective self-defense to protect each of the flag states whose single oil tanker was attacked, that is, Panama and the Marshall Islands.

#### ***The Second Possible Scenario: Nonstate Actors Perpetrated the Attack***

In the second possible scenario, we must examine what degree of Iran’s involvement in the attacks is required for the attacks to be attributed to Iran if the attacks were carried out by nonstate actors.<sup>102</sup> The ICJ delivered its seminal judgment on this question in the *Military and Paramilitary Activities in and against Nicaragua case*.<sup>103</sup> In this case,

<sup>99</sup> For example, there might be the possibility that the armed forces of third states perpetrated the 2019 mine attacks against oil tankers in the Strait of Hormuz.

<sup>100</sup> In addition to the fact that it has been suggested that Iranian armed forces were behind the 2019 mine attacks against oil tankers in the Strait of Hormuz, it is reported that the Houthi rebel forces have now expanded their field of operations to the Gulf area. Martin Chulov, “Suspected drone attack in Abu Dhabi kills three and raises tensions” 17 January 2022, *The Guardian* at: <https://www.theguardian.com/world/2022/jan/17/drones-explosions-three-oil-tankers-airport-abu-dhabi> (accessed 19 February 2022).

<sup>101</sup> Article 4 of the International Law Commission’s Articles on State Responsibility provides that the conduct of a state organ is attributed to that state: “The conduct of any State organ shall be considered as act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.” James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 94.

<sup>102</sup> Self-defense against attacks of nonstate actors is a controversial topic and debated by a number of scholars. This article addresses the right of self-defense against a state that is responsible for attacks launched by nonstate actors, not self-defense against nonstate actors. On the current discussions of self-defense against nonstate actors, see Anne Peters and Christian Marxsen (eds), “Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War” (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 1–93. On the other hand, this topic goes back to the incidents in the 19th century such as the *Caroline* incident: see Claus Krefß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Duncker & Humblot, 1995), 219–220.

<sup>103</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 103.

Nicaragua challenged the legality of U.S. support for nonstate actors in the Nicaraguan conflict. The ICJ found that the United States had no right to use force in self-defense against Nicaragua. Importantly, in coming to this conclusion, the ICJ relied on Article 3(g) of the UN General Assembly Resolution on the Definition of Aggression.<sup>104</sup> Deciding that “there appears now to be general agreement on the nature of the acts which can be treated as constituting armed attack,” the ICJ opined as follows:

An armed attack must be understood as including ... “*the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to*” (inter alia) an actual armed attack conducted by regular forces, “*or its substantial involvement therein.*” This description, contained in *Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX)*, may be taken to reflect customary international law.<sup>105</sup>

In this context, the ICJ made it clear that the two types of involvement, namely, “the sending by or on behalf of a State” and “its substantial involvement therein,” required a closer relationship than certain types of support such as provisions of weapons.<sup>106</sup> In this sense, the ICJ established a stringent standard for the purpose of the “armed attack” requirement *ratione personae*. However, in particular since the 9/11 terrorist attacks, a number of scholars have advocated that the ICJ’s standard is too stringent and should be relaxed so as to encompass broader types of support.<sup>107</sup> For example, Albrecht Randelzhofer and Georg Nolte have commented that “the original formulation of the ICJ in the *Nicaragua* judgment today appears to be too narrow,” adding that “it is not appropriate to exclude certain types of support of irregular organized armed groups *a limine* from being qualified as ... an ‘armed attack.’”<sup>108</sup> Moreover, in the Afghanistan War after 9/11 the United States resorted to the use of force in self-defense against Afghanistan, which supported Al-Qaeda,<sup>109</sup> and the international community appeared to endorse such a use of force as self-defense.<sup>110</sup> Nevertheless, we argue that the ICJ’s standard in the *Nicaragua* judgment is still appropriate under the current state of the law on the use of force.

<sup>104</sup> UNGA Resolution A/RES/3314 *Definition of Aggression* (14 December 1974).

<sup>105</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, note 103, 103 [195] (emphasis added).

<sup>106</sup> Indeed, the ICJ observed that “the Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.” *Ibid.*, 103–104 [195].

<sup>107</sup> See, for example, Christine Gray, “The Use of Force and the International Legal Order” in Malcolm D. Evans (ed), *International Law* (Oxford University Press, 2003), 604; Terry Gill, “The Eleventh of September and the Right of Self-Defense” in Wybo P. Heere (ed), *Terrorism and the Military: International Legal Implications* (T.M.C. Asser Press, 2003), 24–32; Albrecht Randelzhofer and Georg Nolte, “Article 51” in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, et al. (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2012), 1415–1416.

<sup>108</sup> Randelzhofer and Nolte, note 107, 1415–1416.

<sup>109</sup> Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (2001).

<sup>110</sup> The use of force in self-defense by the United States in the Afghanistan War was endorsed especially by the North Atlantic Treaty Organization, the European Union, and the Organization of American States. Statement by the NATO Secretary General Lord Robertson 2 October 2001 at: <https://www.nato.int/docu/speech/2001/s011002a.htm> (accessed 19 February 2022); Conclusion and Plan of Action of the Extraordinary European Council Meeting 21 September 2001 at: <https://www.consilium.europa.eu/media/20972/140en.pdf> (accessed 19 February 2022); OEA/Ser. F/II. RC. 24/RES. 1/01 21 September 2001 at: <https://www.oas.org/oaspage/crisis/rc.24e.htm> (accessed 19 February 2022). On the reaction of international community to the use of force in self-defense by the United States in the Afghanistan War, see in detail Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing, 2006), 211–218.

In this context, two questions merit examination. First, we need to examine whether the ICJ has relaxed its own standard in case law subsequent to the Afghanistan War after 9/11. In the *Armed Activities case*,<sup>111</sup> the ICJ maintained the *Nicaragua* judgment standard. In this case, as in the *Nicaragua case*, the legality of the force used in self-defense by Uganda against the Democratic Republic of Congo (DRC), which supported nonstate actors, was disputed. As in the *Nicaragua case*, the ICJ concluded that the use of force could not be justified as self-defense. Importantly, the ICJ again relied on Article 3(g) of the UN General Assembly Resolution on the Definition of Aggression in coming to this conclusion. The Court found that “there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC,” and observed that

The attack did not emanate from armed bands or irregulars *sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression*, adopted on 14 December 1974.<sup>112</sup>

Second, we need to examine whether state practice since the Afghanistan War after 9/11 supports a relaxation of the ICJ’s standard so as to encompass broader types of support. In order to advocate that the ICJ’s standard is now relaxed as a matter of *lex lata*, we need to demonstrate that the international community reacts in a similar way to attacks by nonstate actors as to attacks by states following the Afghanistan War. For instance, Marcelo Kohen has suggested that “in order to invoke an evolving interpretation or change in the rules, it would be necessary to show the same reaction in other, similar situations.”<sup>113</sup> There are a number of relevant precedents since the Afghanistan War,<sup>114</sup> but for the purposes of this article we focus on the 2003 Israel–Syria War.

In October 2003, a suicide bomb attack by the members of a terrorist organization took place in the Israeli city of Haifa and resulted in the death and injury of a number of Israeli civilians.<sup>115</sup> In response to this attack, Israel launched military operation against that terrorist organization located in Damascus in Syria.<sup>116</sup> As regards this military operation, Israel explained in the debate of the UN Security Council as follows:

*The encouragement, safe harbour, training facilities, funding and logistical support offered by Syria to a variety of notorious terrorist organizations is a matter of public knowledge ... Israel’s measured defensive response to the horrific suicide bombings against a terrorist training facility in Syria is a clear act of self-defence in accordance with Article 51 of the Charter.*<sup>117</sup>

In this example, Israel clearly resorted to the use of force in self-defense against Syria, which supported the terrorist organization that attacked targets in Israel. However, in

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<sup>111</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 223.

<sup>112</sup> *Ibid.*, 223 [146] (emphasis added).

<sup>113</sup> Marcelo Kohen, “The Use of Force by the United States After the End of the Cold War, and Its Impact on International Law” in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundation of International Law* (Oxford University Press, 2003), 225.

<sup>114</sup> On the careful examinations of these relevant precedents, see in detail Olivier Corten, “Self-Defence against Terrorists: What Can be Learned from Recent Practice (2005–2010)?” (2010) 109 *Journal of International Law and Diplomacy* 22, 27–43.

<sup>115</sup> Lindsay Moir, “Israeli Airstrikes in Syria—2003 and 2007” in Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), 662.

<sup>116</sup> *Ibid.*

<sup>117</sup> UN Doc. S/PV. 4836 (2003), 5–7 (emphasis added).

the debate in the UN Security Council, a majority of states condemned Israel's use of force in self-defense. The Arab states considered it an act of aggression and a violation of the UN Charter and international law.<sup>118</sup> Pakistan, Morocco, and Jordan qualified it as a violation of the prohibition of the use of force under the UN Charter.<sup>119</sup> Morocco expressly stated that "Syria ... was a victim of Israel's recourse to the use of force, in violation of the Charter," adding that "the concept of legitimate self-defence has nothing to do with the deliberate attack against Syrian territory."<sup>120</sup> Moreover, several Western states also regarded Israel's actions as a violation of state sovereignty and of international law.<sup>121</sup> Germany, Spain, and France characterized it as such.<sup>122</sup> Germany characterized it as "a violation of the sovereignty of a neighbouring State,"<sup>123</sup> while Spain asserted that "the attack is clearly a patent violation of international law."<sup>124</sup> France commented that "the Israeli operation today that targeted a site near Damascus is ... an unacceptable violation of international law and the rules of sovereignty."<sup>125</sup> Taking into consideration this condemnation by a majority of states, the legality of the use of force in self-defense by Israel against Syria, which supported nonstate actors, was not accepted. Christine Gray has concluded that in the Israel–Syria War in 2003, "no general support was expressed for a wide right to use force against terrorist camps in a third state."<sup>126</sup> This evaluation allows us to observe that there was not the same reaction of the international community to the 2003 Israel-Syria War as there was with respect to the Afghanistan War.

On the basis of the examination of these two questions, it is reasonable to conclude that the ICJ's standard is still appropriate under the current state of the law on the use of force even in the wake of the Afghanistan War after 9/11.<sup>127</sup> This means that either of the two types of involvement, that is, "the sending by or on behalf of a State" or "its substantial involvement therein," is required for the purpose of the "armed attack" requirement *ratione personae*.

In the second possible scenario, we assume that a nonstate actor perpetrated the 2019 mine attack against oil tankers in the Strait of Hormuz. If we apply the ICJ's standard to this scenario, in order to resort to the use of force against Iran, the United States must demonstrate that Iran either sent a nonstate actor to attack the tankers or was substantially involved in that attack within the meaning of Article 3(g) of the UN General Assembly Resolution on the Definition of Aggression. It is not sufficient for the United States to demonstrate that Iran provided a nonstate actor with weapons or logistical or other support for the attack. If the United States demonstrates that there was a close relationship such as "the sending by or on behalf of a State" or "its substantial

<sup>118</sup> Ibid, 2–4 (Syria), 14 (League of Arab States), 16 (Lebanon), 20 (Kuwait), 20 (Saudi Arabia), 21 (Iran), 24 (Yemen).

<sup>119</sup> Ibid, 8 (Pakistan), 17 (Morocco), 18 (Jordan).

<sup>120</sup> Ibid, 17 (Morocco).

<sup>121</sup> Ibid, 9 (Spain), 10 (Germany), 10–11 (France). The United Kingdom and the United States did not necessarily evaluate the Israeli military operation from a legal point of view, but called for restraint. Ibid, 9 (United Kingdom), 13–14 (the United States).

<sup>122</sup> Ibid, 9 (Spain), 10 (Germany), 10–11 (France).

<sup>123</sup> Ibid, 10 (Germany).

<sup>124</sup> Ibid, 9 (Spain).

<sup>125</sup> Ibid, 10 (France).

<sup>126</sup> Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2018), 212.

<sup>127</sup> See, for example, Olivier Corten, *Le Droit contre la Guerre: l'Interdiction du Recours à la Force en Droit International Contemporain* (Pedone, 2020), 698–746.

involvement therein” between Iran and a nonstate actor perpetrating the attack, the United States could use force against Iran by exercising the right of collective self-defense to protect each of the flag states whose single oil tanker was attacked, namely, Panama and the Marshall Islands. Thus, in comparison with the already-discussed first possible scenario, the scenario involving nonstate actors poses a more complicated question as to whether Iran is responsible for the 2019 mine attacks against oil tankers in the Strait of Hormuz.

## Conclusion

Non-state-owned foreign ships, including oil tankers, are obliged to follow the TSS and the relevant compulsory routing measures during transit passage through the Strait of Hormuz. On the other hand, a breach of these routing measures does not entitle Iran or Oman as the coastal states of the Strait of Hormuz to arrest a foreign ship. By arresting, in 2019, the United Kingdom-flagged oil tanker *Stena Impero* owing to its alleged breach of routing measures, Iran appears to have unlawfully impeded the ship’s right of transit passage. The United Kingdom is a state party to UNCLOS and thus enjoys the right of transit passage in the Strait of Hormuz. Iran as a signatory state to UNCLOS needs to respect the right of transit passage in the Strait of Hormuz at least vis-à-vis states parties to UNCLOS. This means that Iran is entitled to take measures short of the arrest of a ship when a ship in exercising its right of transit passage has violated the routing measures. Such measures may include, for example, issuing a warning to the ship that has breached the routing measures and, potentially, seeking a compensation for the damage inflicted or imposing a fine.

Ships flying the flag of a state that is a party to UNCLOS enjoy a greater degree of legal certainty in exercising their right of transit passage through the Strait of Hormuz as compared to ships flying the flag of states that are not party to UNCLOS. Iran has not ratified UNCLOS and maintains that under customary international law, the legal regime of innocent passage applies in the Strait of Hormuz. This implies that until it becomes unequivocally established that the right of transit passage forms part of customary international law, ships flying the flag of a state that is not a party to UNCLOS, such as the United States, cannot rest entirely assured that they are entitled to the right of transit passage when navigating through the Strait of Hormuz.

In any event however, ships of non-state parties to UNCLOS can still invoke the customary right of nonsuspendable innocent passage, as confirmed unequivocally by state practice and by the ICJ in the *Corfu Channel case*, for transiting the Strait of Hormuz. The legal regime of nonsuspendable innocent passage prevents the suspension of passage owing to, inter alia, the coastal state’s military exercises in a strait. But distinct from the right of transit passage, Article 25(1) of UNCLOS enables the coastal state to adopt necessary steps in its territorial sea to prevent passage that is not innocent. In addition, unlike the right of transit passage, the right of nonsuspendable innocent passage does not apply to aircraft.

From a legal perspective, the 2019 mine attacks against oil tankers in the Strait of Hormuz are mired in even greater ambiguity than the passage regime(s) of the Strait of Hormuz. Based on state practice, case law, and the relevant legal literature, it is not

clear whether an attack against a merchant vessel reaches the threshold of an “armed attack” under Article 51 of the UN Charter. While the United States claimed that Iran was responsible for the 2019 mine attacks against the oil tankers at the approach to the Strait of Hormuz, states have refrained from using force against Iran. States have not provided sufficient evidence that would demonstrate that Iran’s responsibility for these mine attacks is beyond reasonable doubt. It is also possible that the perpetrator of the mine attacks was a nonstate actor.

Under these circumstances, we analyzed whether the United States was, hypothetically, entitled to use force against Iran by exercising collective self-defense to protect the flag states whose oil tankers were attacked, namely, Panama and the Marshall Islands. We approached this question from two angles, that is, the “armed attack” requirements *ratione materiae* and *ratione personae*. From the first angle, we discussed whether an attack against a single merchant vessel could, in principle, reach the threshold of an “armed attack” under Article 51 of the UN Charter. On this question, while there have been considerable ambiguities in state practice, the judgment of the ICJ in the *Oil Platforms case* provides some guidance, although judgment did not expressly address this question. However, a careful interpretation of this judgment supports a line of reasoning that does not exclude the possibility that an attack against a single merchant vessel could reach the threshold of an “armed attack” under Article 51 of the UN Charter. Hence, by applying our interpretation of this judgment to the 2019 mine attacks against oil tankers in the Strait of Hormuz, we conclude that the attacks against these oil tankers could potentially reach the threshold of an “armed attack” under Article 51 of the UN Charter.

From the perspective of the *ratione personae* requirement, we assume two possible scenarios in light of the fact that it is not clear who perpetrated the 2019 mine attacks. The first possible scenario is that Iranian armed forces carried out the attack. In this scenario, the attack could, hypothetically, be attributed to Iran. Iranian armed forces are a state organ and their conduct can be attributed to Iran. On the other hand, the second possible scenario is that a nonstate actor perpetrated the attack. In this scenario, we need to examine the degree of Iran’s involvement in order to attribute the attack by nonstate actors to Iran. The judgment of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua case* regarded Article 3(g) of the UN General Assembly Resolution on the Definition of Aggression as an established standard. As is well known, especially since the 9/11 terrorist attacks, many scholars have argued that this standard should be relaxed to encompass broader types of support. However, we have argued that the ICJ’s standard is still appropriate under the current state of the law on the use of force. Neither the ICJ nor state practice supports an argument to relax the ICJ’s standard even in the wake of the Afghanistan War after 9/11. Therefore, if we apply the ICJ’s standard to this scenario, then for using, hypothetically, force against Iran, the United States must demonstrate that Iran either sent a nonstate actor to attack the vessels or was substantially involved in the attack under Article 3(g) of the UN General Assembly Resolution on the Definition of Aggression.

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