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by Ronnie Ann Wainwright*

I. THE LAW OF THE SEA CONFERENCES

Then Israel sent messengers to Sihon, King of the Amorites, saying, "Let me pass . . . ; we will go by the King's highway until we have passed through your territory."

Numbers 21:21-22 (R.S.V.)

As this verse from the Old Testament indicates, even thousands of years ago passage through sovereign territory was a problem. When the King of the Amorites refused to grant the Israelites innocent passage through his territory, they fought their way through.

Hugo Grotius described a parallel between the land and the sea, and suggested that not only the ancient Hebrews and Greeks, but all peoples have a customary right of passage through territory which is otherwise sovereign. Grotius, a seventeenth century Dutch lawyer who is often referred to as the father of the Law of the Sea, stated: "[B]y the law of Nations, navigation is free to all persons . . . . Every nation is free to travel to every other nation and to trade with it."¹

Three United Nations Conferences on the Law of the Sea have been held in order to determine the issues of freedom and accessibility of the oceans and world's waterways. The First Conference, held in Geneva in 1958, produced a Convention on the Territorial Sea and the Contiguous Zone (the 1958 Convention).² This Convention came into force on September 10, 1964 after it was ratified by the requisite twenty-two states.

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The views expressed herein are those of the author and do not necessarily represent the views of the U.S. government.


Among other things, it codified the right of innocent passage through territorial seas, which is a well-established principle of customary international law.\(^3\) Included in the regime of innocent passage is the right of nonsuspendable innocent passage through international straits.\(^4\) The First Conference treated other sea-related issues as well, but came to no agreement on the maximum limits of the territorial seas. It also left ambiguous the concept of "innocence," although "innocent passage, as an internationally accepted principle and right, was never really an issue at the 1958 . . . conference."\(^5\)

A Second Conference on the Law of the Sea convened in 1960 to find an agreeable limit to a state's territorial seas. Unfortunately, the Second Conference was also unsuccessful in determining a territorial sea limit. The Second Conference did not deal with the regime of innocent passage since this had already been codified in the 1958 Convention. Both Conferences were unsuccessful in reaching agreement about territorial sea limits because by increasing such limits, questions of sovereignty over living resources had to be resolved. The members of the conferences were unable to resolve such issues.\(^6\)

After the breakdown of the Second Conference, technological developments from increased use of the seas exacerbated old issues and created new ones. States began imposing laws primarily in response to congestion in straits and increased pollution from ships. There was a serious danger that if present trends continue[d] unchecked the greater part of ocean space would soon be covered by sometimes conflicting national claims . . . . \(^7\) The fragmentation of ocean space between more than a hundred different sovereignties with sharply differing policies and capabilities would significantly hamper vital transnational uses of the sea such as overflight, military and civilian navigation and scientific research.

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\(^4\) 1958 Convention, art. 16, para. 4.


\(^6\) See Clingan, *Freedom of Navigation in a Post-UNCLOS III Environment*, 46 LAW & CONTEMP. PROBS. 107 (1983). The traditionally recognized "concepts of the territorial sea and the high seas were inadequate to accommodate the legitimate interests of coastal states with respect to the management of resources in adjacent areas. To solve this particular problem, the concept of The Exclusive Economic Zone was developed" but not adopted in the first two conferences. Id. at 109.

\(^7\) A. Pardo, Preliminary Analysis of the 1975 Geneva Single Negotiating Text on the Law of
The need to establish policies to deal with these issues led the United Nations General Assembly at its 1970 session to convene a Third Conference on the Law of the Sea (hereinafter referred to as the Third Conference), pursuant to General Assembly Resolution 3067 (XXVIII), adopted on November 16, 1973. The Third Conference held eleven sessions from 1973 to 1982. Professor Bernard H. Oxman, who chaired the United States drafting committee in 1970 and participated in the negotiations, described the object of the negotiations as a codifying of the rules of international law as they apply to the sea.

Like much of the rest of modern international law, the international law of the sea evolved largely in unwritten form as “customary international law,” a term used by international lawyers to distinguish it from international law in written treaty form. The traditional evidence of customary international law is the custom and practice of states.8

After a decade of deliberations and difficult negotiations, the required two-thirds majority of participant states adopted a new Law of the Sea Convention on April 30, 1982 (1982 Convention).9 The United States voted against the adoption of this Convention because of the deep seabed mining provisions. Despite the opposition of several other major states, the Convention was adopted, and it was opened for signature on December 10, 1982.10 Over 125 states signed the Convention; nonsignatories included the United States, Israel, Saudi Arabia and Jordan.11

The Convention remained open for signature for two years from December 10, 1982, pursuant to article 305. States, and certain international organizations, could have become signatories during that time at the Ministry of Foreign Affairs of Jamaica.12 In addition, the Convention was open for signature at United Nations Headquarters in New York.
York from July 1, 1983 until December 9, 1984. The Convention remains open for an unlimited time for accession by states, pursuant to article 307.

Before the Convention enters into force, however, it is subject to ratification or accession by sixty states.\(^{13}\) As of April 1986, less than half the required number of states have ratified the Convention. Naturally, states which have not signed, or which do not ratify or accede, are not bound by the Convention, except in those areas in which customary international law has evolved.

Professor Oxman points out that a "general allergy to [customary] international law has been apparent in the negotiation of the Convention as a whole from the outset."\(^{14}\) Oxman suggests that the drafters did not want new portions of the text to appear as a narrowing or altering of certain law. Rather, he states that references to international law are set forth where the text "is not particularly controversial, where delegations desire to avoid the controversy inherent in dealing with the matter, or where the international law in question is outside the scope of this Conference."\(^{15}\)

Tommy Koh of Singapore, President of the Third Conference, at the opening of the Convention for signatures, stated that the argument that "the Convention codified customary international law or reflects existing international practice is factually incorrect and legally insupportable."\(^{16}\) President Koh cited the regime of transit passage as an example of a new, not customary, concept. His statement was a reaction to the fact that certain large, economically developed countries, such as the United States, United Kingdom, Spain and Germany, did not sign the Convention. The view of the United States was that "while it could not accept the seabed provisions of the Convention, most other parts reflected prevailing international practice and would endure."\(^{17}\)

The Middle East states, as well as the Soviet Union, reacted to the refusal of the United States and other states to sign the Convention. Ambassador Timofey Gouzhenko, Minister of Merchant Marine of the Soviet Union (U.S.S.R.), exclaimed that the United States sought "to

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\(^{13}\) *Id.* art. 308. "This Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." *Id.*


\(^{15}\) *Id.* The references to international law in part III of the Convention are few. See 1982 Convention, art. 34, para. 2, and art. 39, para. 1(b).


\(^{17}\) U.N. Press Release, SEA/514, at 8 (Dec. 10, 1982).
torpedo the Convention” and that “the Convention is not a basket of fruit from which one can pick only those [articles] which are fancies.” He warned that a nonparty “is naturally deprived of the rights which are provided for in the Convention for its participants.”

During the Third Conference negotiations, the Soviet Union, the United States, and other maritime states argued for, and won, the right of freedom of navigation to be included in the Convention. The Soviet Union signed the Convention despite its reluctance to be bound to certain provisions, such as those concerning deep seabed mining. However, it reacted swiftly to the refusal of the United States to sign by agreeing that only signatories could benefit by the rights contained in the Convention.

Iraq’s representative at the Third Conference, Mohammad al-haj Hamoud, stated that “[a]ny internal legislation or arrangement among a few States outside the Convention would lack any legal validity.” Iran’s representative, Hodjtaba Mirmehdi, at Iran’s signing, placed on record the “understanding . . . that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.” Ambassador Mirmehdi stated specifically that this applied to the right of transit passage through international straits. This interpretation is disputed by the United States and other countries which perceive the transit passage regime in Part III of the Convention as reflecting customary international law. Both the Iranian and Soviet Union delegates suggested that the world community defend itself against “the threat by a handful of countries to conclude a separate arrangement” outside the Convention. The arrangements alluded to are bilateral or multilateral treaties concerning deep seabed mining, or in some cases, freedom of navigation. But for the first time, the 1982 Convention codified a transit passage regime in international straits.

In addition, the Third Conference accomplished what the previous

19 Id.
22 Id.
23 See 1982 Convention, at part III; Infra notes 58-61 and accompanying text.
25 Since the subject of this article is navigation through international straits in the Middle East, the subject of deep seabed mining is not covered. For an overview of seabed mining issues at the Third Conference, see A. HOLLICK, supra note 10.
two conferences could not: the 1982 Convention established a territorial sea limit not to exceed twelve nautical miles.\textsuperscript{26} In many cases, as in the three Middle East straits of Hormuz, Bab el Mandeb and Tiran, a twelve-mile territorial sea limit had been claimed many years before the 1982 Convention codified the limit. However, the issue which arises is whether a transit passage regime or innocent passage regime applies to the Straits of Hormuz, Bab el Mandeb and Tiran, which are all used for international navigation.

II. INTERNATIONAL STRAITS AND THE REGIMES OF INNOCENT AND TRANSIT PASSAGE

A. International Straits

International straits are natural maritime passages used for international navigation. A “strait may be defined as a contraction of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated at least in that particular place by the territories in question.”\textsuperscript{27} The issue of navigation through straits “has been of concern since 222 B.C., during the Peloponnesian War. The issue of ‘innocent’ or ‘free’ passage through narrow water bodies has continuously occupied for centuries the attention of political, military, and commercial interests.”\textsuperscript{28}

Pursuant to the 1982 Convention, international straits are those which connect one part of the high seas or an exclusive economic zone to another part of the high seas or an exclusive economic zone or to the territorial sea of a foreign state.\textsuperscript{29} International straits can be divided

\textsuperscript{26} 1982 Convention, art. 3. All references to miles in this article refer to nautical miles.

\textsuperscript{27} E. Brüel, I INTERNATIONAL STRAIGHTS: A TREATISE ON INTERNATIONAL LAW 19 (1947). Brüel's definition of international straits distinguishes straits from canals; he states that straits are different from canals because canals are artificially created. \textit{Id.} at 18. \textit{But see} R. Baxter, THE LAW OF INTERNATIONAL WATERWAYS 184 (1964) (Canals and straits are treated similarly for purposes of explaining rights of free passage through waterways).

\textsuperscript{28} R. Hodgson & T. McIntyre, Maritime Commerce in Selected Areas of High Concentration, in HAZARDS OF MARITIME TRANSIT 1, 8 (T. Clingan & L. Alexander eds. 1973) [book hereinafter cited as HAZARDS OF MARITIME TRANSIT].

\textsuperscript{29} For purposes of this article, the exclusive economic zone (E.E.Z.) and high seas regimes are treated similarly. Though not the subject of this paper, it should be explained that the 1982 Convention sets forth the E.E.Z. regime in part V. The E.E.Z. is an area beyond and adjacent to the territorial sea which “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” 1982 Convention, art. 57. This regime contains the same freedoms of navigation and overflight as the High Seas regime. \textit{See id.} at part VII. Although no state sovereignty exists in the high seas, states have sovereign rights in the E.E.Z. over their natural resources. However, this sovereignty is not as exclusive as that in internal waters or territorial seas, where, in the latter, it is limited only by the right of innocent passage. The sovereign rights in the E.E.Z. “are economic rights.” Oxman, supra note 14, at 68.
into four categories by customary international law and as codified in part III of the 1982 Convention.

The first category of straits includes straits which historically have been regulated by specific international conventions. For example, "Article 1 of the Treaty of Lausanne of 1923, which established peace with Turkey, expounded a principle already in existence before the signing: freedom of transit and navigation 'by sea and by air' in the straits." After the Treaty of Lausanne, the Montreaux Convention of 1936 came into force to regulate the Straits of the Dardanelles, the Sea of Marmora, and the Bosporus. Such straits are exempt from coverage by the 1982 Convention on the Law of the Sea because of these specific treaties.

A second category of international straits, as defined in article 36 of the Convention, includes those straits in which there exists "a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." Thus, a strait which is wider than twenty-four miles, for example, would contain a high seas or exclusive economic zone passage pursuant to this second category. Such a strait is not covered by part III of the Convention since it is broad enough to contain a strip of high seas, and the high seas regime would apply. Normally no jurisdictional issues arise with regard to these straits since no state is sovereign in the high seas.

A third category of straits is covered by the regime of transit passage which applies to straits "used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." Hence, this regime provides for transit passage through straits subject to an exception: if a strait is formed by the same state's island and mainland and a route seaward of the island exists "through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and

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30 1982 Convention, art. 35(c).
31 CAMPBELL, Navigation, in MAJOR ISSUES OF THE LAW OF THE SEA 128 (1976), paraphrasing The Treaty of Peace with Turkey, July 24, 1923, art. I, 28 L.N.T.S. 115 (Lausanne), and the Convention Relating to the Regime of the Straits, July 24, 1923, 28 L.N.T.S. 115 (Lausanne). However, with reference to airspace, it has been stated that "[n]o general principle of international law provides for innocent passage for aircraft through the airspace above territorial waters, although art. 5 of the Chicago Convention gives such a right to nonscheduled civil aircraft flights" if they are states parties to the Convention. M. WHITEMAN, 9 DIGEST OF INTERNATIONAL LAW 321-22 (1968); Convention on International Civil Aviation, Dec. 7, 1944 (Chicago), 15 U.N.T.S. 295.
32 Convention Regarding the Regime of Straits, July 20, 1936, 173 L.N.T.S. 213 (Montreux).
33 1982 Convention, art. 36.
34 Id. part III, § 2.
35 Id. art. 37.
36 Id. arts. 38, 44.
hydrographical characteristics," then the regime of nonsuspendable innocent passage, not transit passage, applies to the strait.37

A fourth category, involving customary international law and codified in both the 1958 and 1982 Conventions, is the regime of innocent passage through straits used for international navigation.38 However, the 1982 Convention applies this regime only to straits which connect "a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state."39 Article 45 also mandates that "there shall be no suspension of innocent passage through such straits."40

Except for nonsuspendable innocent passage through this fourth category of straits, as set forth in article 45, the strait states may adopt laws and regulations concerning: safety, the protection of cables and pipelines, conservation, marine scientific research and "the prevention of infringement" of laws and regulations41; surface passage of submarines42; sea lanes and traffic separation schemes43; and special measures for foreign "nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances."44

The only infringement on national sovereignty is that of nonsuspendable innocent passage as applied to the fourth category of straits.45 The delegates at the Third Conference reached an agreement, not reached in either the First or Second Conferences, that the maximum breadth of the territorial sea would be twelve miles, measured from baselines.46 It was thought that, despite this extension, the regimes of transit passage and innocent passage through international straits would ensure continued, unimpeded passage through waters which had been part of the high seas, and with the Convention's ratification would become territorial seas.

In extending the territorial seas up to twelve miles, the Convention

37 Id. art. 38.
38 1958 Convention, art. 16, para. 4; 1982 Convention, art. 45.
39 1982 Convention, art. 45, para. 1(b).
40 Id. art. 45, para. 2. The regime of innocent passage through the territorial sea would apply in straits which are not used in international navigation, and a coastal state would have the right to suspend innocent passage for security reasons. See M. Maduro, Passage Through International Straits: The Prospects Emerging From the Third United Nations Conference on the Law of the Sea, 12 J. MAR. L. & COM. 65, 75 (1980).
41 1982 Convention, art. 21.
42 Id. art. 20.
43 Id. art. 22.
44 Id. art. 22, para. 2.
45 See Robertson, Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, 20 VA. INT'L L. 801 (1980). "Subject only to the right of free transit, territorial waters in international straits would retain their national character in each and every respect." Id. at 810 (quoting Stevenson, U.S. Draft Articles on Territorial Sea, Straits and Fisheries, Submitted to U.N. Seabeds Committee, 65 DEP'T. ST. BULL. 261, 263 (Sept. 6, 1971)).
46 1982 Convention, art. 3.
seemed to provide more room for states to flex sovereign muscles. Allegedly some 116 international straits which are smaller than twenty-four miles in width would be affected by coastal state jurisdiction because their previously high seas waters would become territorial seas. In practical terms, the three Middle East straits which are discussed in this article would not be affected. These straits are Hormuz, which connects the Gulf of Oman and Indian Ocean with the Persian Gulf; Bab el Mandeb, which connects the Gulf of Aden and Indian Ocean with the Red Sea; and Tiran, which connects the Red Sea with the Gulf of Aqaba.

Parts of the Strait of Hormuz and all of the Straits of Bab el Mandeb and Tiran are less than twenty-four miles. Ordinarily, the extension of territorial seas up to twelve miles by article 3 of the 1982 Convention would affect these straits. However, their status would not be affected because the strait states bordering all three straits have claimed twelve-mile territorial seas for at least the past ten (and in some cases over twenty-five) years. The United States considers straits greater than six miles wide as containing high seas, and it has navigated freely through these straits despite the claims of the strait states. Further, the transit passage regime under the 1982 Convention is not dependent on width. United States vessels transiting these straits in times of peace will continue to experience freedom of navigation, impinged only by coastal state regulation of shipping channels.

B. Innocent Passage Regime

The 1982 Convention reconfirmed the right of innocent passage through straits used for international navigation which connect the high seas with the territorial sea of a foreign state. The Convention also clarified certain ambiguities in the 1958 Convention, particularly regarding the criteria of what type of passage is innocent.

Innocent passage refers to passage through a state's territorial sea for the purpose of either crossing the sea or entering or leaving internal waters. Although passage should be continuous, stopping and anchoring is permitted if these are necessary to render assistance or "are incidental to ordinary navigation or are rendered necessary by force majeure or by distress." The 1982 Convention, unlike the 1958 Convention, clarifies the meaning of "innocent" in article 19. It lists twelve activities which, if engaged in by a foreign ship, would be considered prejudicial to a coastal state's "peace, good order or security," thereby permitting the

47 See Appendix for a list of territorial sea limits for Middle East Coastal states.
48 1982 Convention, art. 18.
49 1958 Convention, art. 14; 1982 Convention, art. 18. "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state." 1958 Convention, art. 14, para. 4; 1982 Convention, art. 19, para. 1.
coastal state to take action against the offending ship.\textsuperscript{50} P. Jessup, in his treatise on the law of territorial waters, states unequivocally that the regime of innocent passage needs no supporting documentation because it is part of customary international law.\textsuperscript{51}

Innocent passage through territorial seas is not absolute since a coastal state may stop a vessel temporarily to protect the state’s security.\textsuperscript{52} However, innocent passage through territorial seas in international straits is nonsuspendable under customary international law.\textsuperscript{53}

The 1982 Convention treats separately the concepts of innocent passage in the territorial sea and innocent passage through straits used for international navigation.\textsuperscript{54} Initially, “innocent passage” referred to surface passage.\textsuperscript{55} In practical terms, however, the passage of vessels in the Middle East straits in times of peace has included submerged passage and aircraft overflight by the acquiescence of the strait states. United States vessels and aircraft have used these straits with the consent of the strait states, but also as a right under customary international law.

C. Transit Passage Regime

The regime of transit passage was codified in part III, section 2, of the 1982 Convention, and applies to international straits which connect “one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone [E.E.Z.].”\textsuperscript{56} The regime of transit passage applies to aircraft as well as to ships. It includes a presumption that submarines are permitted submerged passage through international straits connecting high seas or E.E.Z.s.\textsuperscript{57}

There are two views on the application of the transit passage regime.

\begin{itemize}
\item \textsuperscript{50} 1982 Convention, art. 19.
\item \textsuperscript{51} P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927).
\item \textsuperscript{52} 1958 Convention, art. 16, para. 3; 1982 Convention, art. 25, para. 3.
\item \textsuperscript{53} 1958 Convention, art. 16, para. 4; 1982 Convention, art. 45.
\item \textsuperscript{54} 1982 Convention, part II, § 3; part III, § 3.
\item \textsuperscript{55} “And since the concept of innocent passage evolved before the development of the airplane or submarine, it does not embrace the right to overfly or navigate submerged through the territorial sea.” Richardson, Law of the Sea: Navigation and Other Traditional National Security Considerations, 19 SAN DIEGO L. REV. 553, 560 (1982) [hereinafter cited as Richardson, Law of the Sea].
\item \textsuperscript{56} 1982 Convention, art. 37.
\item \textsuperscript{57} Id. art. 38. International law scholars disagree as to whether, in the 1982 Convention, submarines are permitted submerged passage through straits. Professor H. Robertson states that the transit passage regime includes submerged passage because of the term “normal modes” of transit in article 39, para. 1(c). Robertson, supra note 45, at 843. See also, G. SMITH, supra note 5, at 138; Richardson, Law of the Sea, supra note 55, at 564-66. This writer agrees with the above scholars, although several others argue that the right of transit passage is not sufficiently clear in the text. See Ratiner, The Law of the Sea: A Crossroads For American Foreign Policy, 60 FOREIGN AFF. 1006, 1019 (Summer 1982); Reisman, The Regime of Straits and National Security: An Appraisal of International Lawmaking, 74 AM. J. INT’L L. 48, 75 (1980).
\end{itemize}
One view considers this regime a new concept, with the likelihood that only parties to the 1982 Convention will be able to apply it. Under this view, nonparties to the Convention would have to operate pursuant to the innocent passage regime with no rights of submerged passage or overflight. The second view, a more practical approach, is that transit passage merely reflects customary international law through the usage of the high seas principle of submerged passage and overflight in international straits.\footnote{58}

In a discussion that ocean shipping was a neglected issue at the Third Conference, Professor Edgar Gold of Dalhousie University of Nova Scotia, Canada states:

Transit right appears to be well established in international law and appears in little danger to have changed in principle from the rule as expressed by Grotius to be: "lands, rivers and any part of the sea that has become subject to ownership of a people ought to be open to those who, for legitimate reasons, have need to cross over them."\footnote{59}

Ambassador James L. Malone, Chairman in 1982 of the United States Delegation to the Third Conference, agrees:

Particularly with respect to navigation rights, the history of the law of the sea has been predominately a history of customary rules evolving through state practice. In this area the Convention incorporates existing law, which will continue to apply to all states, not because of the treaty, but because of the customary law underlying the treaty.\footnote{60}

In discussing the Third Conference's Informal Composite Negotiating Text (ICNT), which was incorporated in the final draft of the 1982 Convention, Professor Oxman stated:

The ICNT approach to transit reflects more accurately the actual practice of states than theoretical assumptions about extension of the more restrictive regime of innocent passage, whether such practice is based on a theory of a three-mile territorial sea or a view that the ICNT transit principle is declaratory of existing law.\footnote{61}

The issue of whether the transit passage regime applies to nonpar-


\footnote{60 Malone, supra note 58, at 3.}

\footnote{61 Oxman, supra note 14, at 63.}
ties, such as the United States, is an important one. If it does not apply, then usage of straits could be regulated by coastal states beyond existing regulations for traffic separation, safety and pollution prevention. A strait state could use the regime of innocent passage, as described in article 19 of the 1982 Convention, to hamper traffic.

It is the policy of the United States that the transit passage regime is a matter of customary international law. Over ten years ago, Ambassador John R. Stevenson, then Chairman of the United States Delegation to the Third Conference, stated:

We [the United States] believe we now have — and have always had — full high seas freedoms such as freedom of navigation and overflight beyond the three-mile territorial sea. We find the existence of these rights in straits used for international navigation confirmed by their historical and continuing exercise.62

One scholar suggests that if the transit passage regime does not reflect customary international law now, then "it is entirely possible for certain norm-creating provisions of the Law of the Sea Convention to evolve into customary international law . . . ."63

The United States, in recognizing only a three-mile territorial sea, has treated all straits wider than six miles as having a high seas regime. Generally, strait states with twelve-mile territorial seas, such as Oman and Iran bordering the Strait of Hormuz, have not objected to this view. The United Kingdom also maintains a three-mile territorial sea limit, and the Soviet Union adhered to a three-mile limit until it became a signatory to the 1982 Convention which set a territorial sea limit up to twelve miles. The maritime users have navigated freely through the Middle East straits by means of a tacit understanding with the strait states. A regime providing freedom of navigation exists in these straits; and submerged passage, where depth makes it possible, and overflight have been permitted.


63 Lee, The Law of the Sea Convention and Third States, 77 AM. J. INT’L L. 541, 566 (1982). Mr. Lee suggests that "special customary rights" might apply to submerged passage and overflight, Id. at 560. See also A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 233-68 (1971). This writer is intrigued by the concept of special customary rights, particularly with regard to United States vessels transiting the straits in the Middle East. "General customary law applies to all states, while special custom concerns relations between a smaller set of states." Id. at 234. It is possible that if a claim regarding submerged passage or overflight were made against the United States by one of the Middle Eastern strait states, the United States might argue that if general custom does not apply, then special custom international law applies because United States vessels and aircraft have traveled unhampered through and over the straits for over twenty-five years.
As a consequence of usage, this writer concludes that the customary international law of transit passage has developed in the area of the Middle East straits. An issue of whether the territorial sea limits in these straits are three or twelve miles is not a practical consideration. Certain traffic separation schemes in the Straits of Hormuz and Bab el Mandeb require traffic to move closer to the mainland of the strait states than either the three- or twelve-mile limit permits. In the Strait of Bab el Mandeb, for example, "the traffic separation scheme . . . requires ships to pass within three miles of the coast."64

Eric Brüel, emphasized that "the right of merchant vessels to pass through international straits in time of peace is . . . definitely recognized as a principle of existing law."65 With almost thirty years of usage and states' practice, it appears that the 1982 Convention did not change the straits' regime in the Middle East straits; rather, it codified the existing regime. This regime of unimpeded navigation, with the rights of submerged passage and overflight, has been ratified by the strait states through acquiescence. "The extent to which the international community employs the great international waterways and to which the territorial sovereign and operators of the waterways have acquiesced in such usage is in itself sufficient refutation of the contention that rights of free navigation may be acquired only by treaty."66 "More research on this score — and more opportunity to test and ascertain state practice — is clearly necessary,"67 before any definitive conclusion is reached. The United States position seems to be clear with regard to the transit passage regime. Although the United States is not a party to the 1982 Convention, its vessels and aircraft will freely navigate through and over international straits in the Middle East. Further, the navigation provisions of the 1982 Convention "are already regarded by some government and private experts, including the authors of the new draft Restatement of the Foreign Relations Law of the United States, as generally authoritative statements of existing 'customary' international law applicable to all states."68

III. THE UNITED STATES POSITION AS A NONPARTY TO THE 1982 CONVENTION ON THE LAW OF THE SEA

After participating in approximately ten years of negotiations at the Third Conference on the Law of the Sea, the United States did not sign

65 E. Brüel, supra note 27, at 216.
66 R. Baxter, supra note 27, at 177.
67 Richardson, supra note 58, at 14.
the 1982 Convention which resulted from the Third Conference. The United States did sign the Final Act, which is the formal record of the Conference, and observer status is available to the United States if it wishes to participate in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. This status entitles the United States to take part in deliberations of the Commission although it does not permit the United States to vote.

The Convention remained open for signature until December 1984. Although the United States did not sign the Convention at the closing of the Conference in Caracas, Venezuela on December 10, 1982, nor did it sign before December 1984, it nevertheless may accede to the Convention at any time. Therefore, it should be made clear that the status of the United States as a nonparty is not necessarily a permanent status. The possibility exists, if policy permits, for the United States to accede to the 1982 Convention in the future.

As of this writing, the United States has taken a firm position not to accede to the Convention primarily because the deep seabed mining provision "does not satisfy the objectives sought by the United States." The Reagan Administration determined that, for navigational purposes, signature is unnecessary because customary international law permits United States vessels and aircraft to navigate freely through and over international straits.

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70 Statement by President Ronald Reagan, Why U.S. Votes Against LOS Treaty, in 82 DEP'T ST. BULL. 71 (Aug. 1982). It is not the intent here to take a position either for or against the United States policy regarding the Third Conference. For an overview of United States policy, see A. HOLLiCK, supra note 10. It should be noted that although the United States is not a party to the 1982 Convention, United States corporations will be able to operate, for purposes of deep seabed mining, under the foreign flags of states which are parties to the 1982 Convention. In addition, the United States signed a multilateral agreement with the United Kingdom, France, Italy, Japan, the Netherlands and West Germany concerning sites of deep seabed commercial mining operations. Wash. Post, Aug. 4, 1984, at A19, col. 5.

71 But see, supra notes 57, 58. See also, Hailbronner, Freedom of the Air and the Convention on the Law of the Sea, 77 AM. J. INT'L L. 490 (1983). Professor Hailbronner agrees that customary international law does not recognize innocent passage for overflight but that the 1982 Convention provides for overflight of international straits in art. 38. However, the provisions of the Convention do not apply to military or state-owned aircraft. Overflight of straits is normally carried on by special arrangements or treaties between the strait state and the state seeking passage. For those nations in which the United States has its own bases or regular access to foreign bases, the United States has interpreted overflight rights to be implicit in permission to use the bases. If there are no such base rights, permission for overflight is supposed to depend on diplomatic clearances (received by filing one-time transit requests with the defense attaches three or four days in advance of the flights). In emergencies the United States practice has been to get clearance, go around, or, infrequently, fly over without clearance. In practice, the distribution of American bases has obviated serious overflight restrictions.
Throughout the Third Conference, the deep seabed mining provisions were negotiated almost as a trade-off for navigational provisions. Between the time of the First Conference in 1958 and the beginning of the Third Conference in 1973, many colonies in the world became independent states. Changes became necessary to accommodate these new, less developed states, including a need to provide more control over waterways and more involvement in the resource exploitation of the oceans.


By the time of the Caracas Conference in 1973, 149 invitations were issued, and 137 states actually participated. The major maritime states remained important, but the fragmentation of the Western bloc and the importance of leaders in African, Latin American, Asian and land-locked states increased the number of important states to a score or more. These less developed states exercised substantial clout during the negotiations, and many of the deep seabed mining provisions in the 1982 Convention are a result of the efforts of these states.

The United States, however, has determined that despite its rejection of the deep seabed mining provisions, it may "[gain] the benefits of other treaty provisions," particularly those dealing with navigation. The United States maintains a three-mile territorial sea limit. Its policy provides that the "United States will respect only those territorial sea claims of others in excess of three nautical miles, to a maximum of twelve nautical miles, which accord to the United States its full rights under international law in the territorial sea."

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73 Richardson, Superpowers, supra note 58, at 14. See also Ratiner, supra note 57 and Reisman, supra note 57 (authors who conclude that if the United States does not become a party to the 1982 Convention, it will not be permitted to benefit from other treaty provisions). Ratiner believes that the Convention embodies new international law and that the United States did not give "serious consideration" to this point. Further, he claims that "[w]hat is dangerous for the United States is the existence of the argument and the potential uncertainty of United States military rights in narrow seas during times of crisis." Ratiner, The Cost of American Rigidity, in POLICY DILEMMAS, supra note 8, at 27, 39-40.

74 Proclamation of President Reagan, Exclusive Economic Zone of the United States of America, Fact Sheet, United States Oceans Policy 2 (the White House, Office of the Press Secretary. March 10, 1983).
Ambassador Malone, as spokesman for the United States, stated that non-parties to the LOS Convention will continue to have navigational rights and freedoms recognized in customary international law, including all of the navigational rights and freedoms recognized in the Convention. . . . This is because the Convention cannot deprive non-parties of their existing rights, either commercial or military. The United States, in particular, will not alter the operations of its maritime forces as a result of its decision not to sign the LOS Convention.75

The United States Secretary of the Navy also has been quoted as stating that the Convention is not necessary for either the Navy's or the nation's security.76

President Reagan made it clear in his statement accompanying the proclamation of a United States Exclusive Economic Zone that "[t]he United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."77 Mutuality and reciprocity underlie the decision by the United States not to sign the 1982 Convention. President Reagan emphasized that the "United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."78

Treaty-made law is preferential to sometimes vague or ill-defined customary international law. However, the United States and other major powers have not hesitated to use "muscle" to support their policies, if no treaty exists in an area. For example, in 1951 during an attempted blockade by Egypt in the Gulf of Aqaba, the presence of British destroyers in the Red Sea helped to promote agreement between Egypt and the United Kingdom on behalf of freedom of shipping in the Gulf. After the Strait of Tiran was closed by Egypt during the 1967 Middle East War, both the United States and the United Kingdom deployed warships in the Mediterranean Sea to display their military power to warn against further incidents. Another example occurred in June 1984 when United States military vessels escorted United States merchant vessels to ports in the Persian Gulf at the height of the Iran-Iraq war. It is evident that, due to economic necessity as in the Persian Gulf or to military security as in the Gulf of Aqaba, maritime states will back their interests militarily,

75 Malone, supra note 58, at 4.
77 Statement by President Reagan, 19 WEEKLY COMP. PRES. DOC. 383 (March 10, 1983).
78 Id.
with or without a law of the sea treaty, based on customary international law.

During a 1975 United States conference concerning navigational issues in the Third Conference, Professor Myres McDougal stated that the "present law is customary law based on retaliation and reciprocity. This customary law is an important base of power, and it should not be overlooked or undercut in the . . . negotiations." 79 Ultimately, customary international law was the basis by which the United States declined to sign the 1982 Convention.

The customary international law, that all vessels have a right to free and unhampered passage through straits used for international navigation, "is generally recognized . . . and must be taken as a basis, when determining the legal status" of international straits unless this principle is "excluded by positive rules to the contrary." 80 No such "positive rules to the contrary" are contained in the 1982 Convention and, broadly interpreted, the Convention codifies existing law regarding navigation. The United States relies on this approach. Its policy is that the transit passage regime reflects the actual practice of states and is law declaratory.

In the Middle East, a twelve-mile territorial sea limit has been claimed for over twenty-five years in most strait states. During this time, United States vessels and aircraft have freely traversed the straits in the Middle East. Although dependent upon strait states which are allies, the United States has maintained a policy of free passage through Middle East straits in times of peace. Once, during the 1967 war, the United States was denied overflight privileges. 81 At the time of this writing, United States vessels and aircraft continue to navigate freely through the Strait of Hormuz, despite the Iran-Iraq war in the Persian Gulf.

Ambassador Elliot Richardson cautions that the United States "can ignore or openly contest the claims of non-friends and discount in some cases the price we may pay, but persistent challenges to a friend on an issue of importance to both states can in the long run incur serious costs." 82 As regards the straits in the Middle East, the strait states have not been challenged by the United States' use of the strait. Instead, the strait states have acquiesced in the free and unhampered passage of United States vessels. Except for traffic separation schemes and regulations concerning safety or pollution control which affect passage, freedom of navigation in straits has been ratified by Middle East strait states, and customary international law has evolved in this area.

79 McDougal, Editor's Notes, INTERESTS AND ALTERNATIVES, supra note 71, at 117.
80 Briel, supra note 27, at 197.
81 Osgood, supra note 71, at 30.
82 Richardson, Law of the Sea, supra note 55, at 563.
In addition to the rights provided by customary international law, bilateral and multilateral agreements provide navigational rights to the United States and other maritime powers. As a nonparty to the 1982 Convention, the United States is in no worse a position than it was before the Convention. Strait states which have treaties with, and are friendly to, the United States will in all probability maintain these relationships.

“For foreign policy, perhaps the most important legal mechanism is the international agreement, and the most important principle of international law is *pacta sunt servanda:* agreements shall be observed. This principle makes international relations possible.”

Ambassador Richardson suggests that in payment for giving the United States treaty rights to navigate freely through international straits, states may exact a price “in the form of . . . political or economic concessions [which] could be exorbitant, especially if we have to conclude a number of agreements.” However, the United States has not yet been coerced into concluding any adverse unilateral or multilateral treaties in the Middle East, and it has been operating on the customary international law principles of freedom of navigation for at least a quarter of a century.

Naturally, the most stable and unambiguous position is for the United States to be a party to a treaty. Absent a treaty, and if necessary, the United States can take unilateral action by means of force to defend its freedom of navigation. This is not as desirable an alternative as treaty-making, but as former Secretary of State Henry Kissinger stated, the United States will “defend . . . [its] oceans interests — and we are better prepared than most to do so.”

The threat of the use of force was used by the major powers during the negotiations at the Third Conference on the Law of the Sea. “The knowledge that great powers can and would, at least in principle, assert and defend their naval rights of passage through contested waters certainly played a useful background role in the bargaining at the LOS Conference.” During the July 1974 debate over transit passage, it was pointed out by a representative of the United States that the United Nations Charter recognizes the right of self-defense. The Soviet Union

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84 Richardson, Law of the Sea, supra note 55, at 555.
86 J. Nye, supra note 72, at 35.
agreed, adding that all ships have the right of free transit through straits and "that the maintenance of transit rights for warships and military aircraft was not only consistent with the [United Nations] Charter but was the only policy consistent with global realities and international stability."\(^8\)

Both the United States and the Soviet Union have been concerned with the prospect of "creeping jurisdiction," characterized as the increase by coastal states of their territorial sea limits, with a concomitant increase in state sovereignty over the seas.\(^8\) This increase in jurisdiction decreases the area in which freedom of navigation can be exercised. Creeping jurisdiction is feared because it may lead to limitations in the superpowers' military maneuvering.

To dispel this fear, states need only to review the show of force used by major powers in the past. "Force remains the most effective form of power in many issues and in many situations. But it often proves to be the most costly form of power" in light of economic costs and the possibilities of nuclear arms escalation.\(^9\) Further, the use of force could undermine United States policy objectives in promoting global peace.

The sixty ratifications necessary for the 1982 Convention to enter into effect are likely to occur, according to Ambassador Richardson. He predicts that because the United States has not signed the Convention, "[t]his will to a significant degree undercut the position of the United States as world leader. . . ."\(^10\) This "in turn will reduce [the United States'] . . . capacity to influence the shaping of other multilateral undertakings in ways optimally compatible with our long-term interests."\(^9\)

This writer agrees that the United States should, and perhaps will,

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\(^4\) (1975); U.N. CHARTER arts. 51 and 2(4) (minimum world order enabling states to use force under limited circumstances). Professor McDougal states that he sees "nothing in the Charter to preclude the [United States] use of force, if this appears to be advisable to protect our existing rights." McDougal, supra note 79, at 156. But see Henkin, Old Politics and New Directions, in III NEW DIRECTIONS IN THE LAW OF THE SEA 3 (R. Churchill, K. Simmonds, J. Welsh eds. 1973) [book hereinafter cited as NEW DIRECTIONS] and Ratiner United States Oceans Policy: An Analysis, 2 J. MAR. L. AND COM. 225, 231-32 (1971) (view that the use of force is illegal in this context). See also, Editorial Comments, 78 AM. J. INT'L L. 642, 642-50 (1984) (arguments for and against the use of force pursuant to article 2(4) of the U.N. Charter, by M. Reisman and D. Schaeter, respectively).


\(^9\) For an overview of the superpowers' concerns about the principle of creeping jurisdiction, see F. LAURSEN, THE LAW OF THE SEA AND INTERNATIONAL SECURITY: ASPECTS OF SUPERPOWER POLICY, TOWARD A NEW INTERNATIONAL MARINE ORDER 71-83 (1980). See also, R. ECKERT, supra note 7, at 318-23 (the validity of creeping jurisdiction is questioned).


\(^9\) Richardson, Superpowers, supra note 58, at 10.

\(^9\) Id. See Ratiner, supra note 57, at 1020-21.
reconsider and decide to become a party to the 1982 Convention. But if the United States does not accede to the Convention, it is likely that it nevertheless will maintain its powerful position, particularly because of its military capabilities. Although interdependence is a necessary part of the international system of world order, military power is also a requirement for stability.

The best solution remains a treaty that protects navigation and overflight, improves the existing innocent passage regime and gives at least an arguable legal basis for acting with such force as necessary to defend all these rights. This is not to say that absent a treaty the United States could not or would not defend its perception of high seas freedoms. It is merely saying that if a choice exists, the treaty is the better way than the claim, counter-claim and customary law route that has led us to the extended jurisdictional claims we see today.93

IV. CASE STUDIES OF THREE INTERNATIONAL STRAITS IN THE MIDDLE EAST AND THE UNITED STATES ROLE WITH REGARD TO THESE STRAITS

The United States has a substantial strategic and economic interest in the maintenance of security and stability in the Middle East. The role of the Soviet Union increased dramatically in this area after its move into Afghanistan in December 1979. Only Pakistan and Iran remain as buffers between the Soviet Union and the Persian Gulf, from which the Western world receives over half of its petroleum resources.

Since the overthrow of the Shah by the Ayatollah Ruhollah Khomeini in 1979, the government of Iran has been hostile to the United States. It is no longer the pillar of United States policy it was under the Shah. At the time of this writing, Iran is engaged in a war with Iraq. Persian Gulf shipping since the Iran-Iraq war began in September 1980 has been interrupted and has at times appeared on the brink of being blockaded completely.

The Strait of Hormuz is the entrance for shipping in the Persian Gulf and the exit for oil tankers plying sea routes to distribute their oil. One major oil route leads from the Gulf through the Strait of Hormuz into the Indian Ocean and through the Strait of Bab el Mandeb into the Red Sea. Much of the Western world's oil is carried from the Red Sea by way of the Suez Canal to the Mediterranean Sea. However, oil and other commodities are also shipped through the Strait of Tiran into the Gulf of Aqaba which is the location of Jordan's and Israel's only ports open to the Red Sea. Thus, the Middle East Straits of Hormuz, Bab el Mandeb

93 Morris, supra note 85, at 78.
and Tiran play a vital role in the shipping of oil as well as in the shipping of other commodities.

The United States and its allies have a significant interest in these straits. The Eisenhower Doctrine, set forth in House Joint Resolution 117, on March 25, 1957, is as valid today as it was over twenty-five years ago. It states that "the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the Nations of the Middle East."94 This policy, along with the "containment policy of the United States . . . [which was] given solemn official expression in the Truman Doctrine of 1947, was intended not just as an American or Western enterprise but as a collaborative effort with the states of the Middle East and the Gulf."95 It was an attempt to contain Soviet expansion in the Middle East by means of United States support of Iran and Turkey. With the collapse of the Shah’s regime, the United States has turned to Saudi Arabia and Egypt for help.

In addition to the need for Soviet "containment," the free flow of oil is crucial to United States allies in Europe and Japan. They depend largely on Middle East oil for their existence, while the United States is becoming less dependent. Unfortunately, there is a "growing capability of radical regional states to attack and destroy critical oil facilities . . . and to attempt to block Western access to the [Persian] Gulf itself."96 Ethiopia, the People’s Democratic Republic of Yemen (PDRY) and, as stated above, Iran are examples of such radical states; the PDRY and Ethiopia border, in part, the Strait of Bab el Mandeb and Iran borders the Strait of Hormuz on the north. If these straits are blockaded or controlled by states hostile to United States interests, it would be a moot point to consider whether the United States, as a nonparty to the 1982 Convention, would be permitted to navigate through the straits. Regardless of permission, United States policy would dictate the defense of the straits.

In the case of a blockade, the United States would do whatever necessary to open the straits, particularly if requested to do so by a nonbelligerent state in the area. During the May 1984 escalation of the Iran-Iraq war in the Persian Gulf, President Reagan stated that the United States was ready to help, but it would not intervene unless requested to do so by one or more of the Persian Gulf states. Since the Eisenhower Doctrine, and as recently as ten years ago, the United States has not

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ruled out the use of force in the Middle East if, for example, there were a significant interruption in the flow of oil.

When a secretary of state can note with alarming candor that the United States government will not allow itself to be strangled economically by Middle East oil restrictions and will use whatever force necessary to avert such an occurrence, it is but natural to presume that such an exercise of military power will be asserted if vital national security goals are threatened by restrictive policies concerning the use of international straits.97

Where no hostilities exist, "it is highly unlikely that serious impairments of naval or merchant shipping will result from the actions of strait states in a nonagreement situation [e.g., if the United States does not become a party to the 1982 Convention].98 Bilateral or multilateral treaties can be negotiated, if needed, between the United States and strait states which are friendly to the United States, such as Oman on the Strait of Hormuz; the Yemen Arab Republic (YAR) and Djibouti on the Strait of Bab el Mandeb; and both Egypt and Saudi Arabia bordering the Strait of Tiran.

Freedom of navigation through these Middle East straits has not depended on a high seas corridor. A twelve-mile territorial sea limit has been claimed in all three straits for over twenty-five years. Customary international law has enabled vessels of maritime states to pass freely through the straits. The United States government advises its naval vessels not engaged in espionage activities (a category of ocean use presently beyond the reach of world ocean order, whether produced by treaty or otherwise) to tacitly observe the twelve-mile limit. . . . In cases of espionage, the presence or absence of a treaty will be largely irrelevant, and the consequences of such acts will not be likely to turn on the source of the international law of the sea.99

The United States denies that it has specific agreements with states to provide advance notice of surface warships. "In practice, however, the United States evidently provides advance notice. . . ."100

97 G. SMITH, supra note 5, at 83. (referring to former Secretary of State Henry Kissinger). See also, Kissinger on Oil, Food and Trade, BUS. WK. Jan. 13, 1975, at 66.
99 Id. at 49.
100 Osgood, supra note 71, at 13. Professor Osgood considers in detail United States security interests as well as submerged passage and overflight of international straits. He concludes that the best alternative to protecting U.S. security interests in a comprehensive treaty is probably not seeking protection through bilateral or regional treaties but simply through informal arrangements under existing law, leavened by international agreements that littoral states, along with great maritime users, should have a fair share of control over the increasingly congested commercial ocean lanes.
Further, strait states are as dependent economically as maritime states on freedom of passage through international straits. The high density of shipping traffic has created a need for health and safety regulations and traffic separation patterns. The 1982 Convention provides for strait states to designate sea lanes and traffic separation schemes "to promote the safe passage of ships."\textsuperscript{101} All proposals, before adoption, must be referred to the competent international organization, which is the International Maritime Organization (IMO), formerly known as the Inter-Governmental Maritime Consultative Organization.\textsuperscript{102} As one of the United Nations' specialized agencies, IMO works closely not only with maritime states but also with groups of states, such as the Arab League, to promote conventions on pollution control, health and traffic safety.

"Whatever regulations are devised, however, must be balanced with the right of nations to communicate by air and by sea."\textsuperscript{103} Over half of the world's oil trade passes through the Strait of Hormuz, with much of the trade then traveling through the Strait of Bab el Mandeb on its way to the Mediterranean Sea and from there to Western Europe. Conventions dealing with pollution, safety and traffic patterns operate to limit "the lawmaking competence in the maritime field of individual, particularly coastal, states."\textsuperscript{104} Despite this limit on sovereignty, "[m]utual cooperation and tolerance are being practiced by Arab regimes. . . ."\textsuperscript{105} Middle East states are cooperating with the United Nations, as demonstrated by the large numbers of Arab states which participated in the Third Conference.

Although the West is dependent on Middle East oil, the Middle East states are dependent on world trade and specifically on United States economic and military aid. The fact that the United States is not a party to the 1982 Convention will have no effect on commerce through the three straits in the Middle East. Even during the Iran-Iraq war, these straits have not been blockaded. It has been suggested that:

[T]he oil-rich states of the [Persian] Gulf . . . might, in fact, operate against the vital interests of the United States either on their own, or in concert with each other, or in concert with the Soviet Union in the case of radical regimes attempting to come to power under the aegis of

\textsuperscript{101} 1982 Convention, art. 41, § 1.
\textsuperscript{102} For a history of the role of the IMO in Maritime Law, see W. Lampe, \textit{The 'New' International Maritime Organization and its Place in Development of International Maritime Law}, 14 J. MAR. L. AND COM. 305 (1983); R. Eckert, supra note 7, at 81-84).
\textsuperscript{104} Lampe, supra note 102, at 328.
\textsuperscript{105} Khoury, \textit{The Pragmatic Trend in Inter-Arab Politics}, 36 MID. E. J. 374, 386 (1982).
the Soviets.\textsuperscript{106}

In fact, the superpowers have not been involved in the Iran-Iraq war, except to the extent of providing technicians and military aid. The Persian Gulf states have not requested the superpowers to help but have joined together to form a more powerful Gulf Cooperation League. Such cooperation is unique in the Middle East and, one hopes it will be long-lasting.

\subsection{The Strait of Hormuz}

\textit{Physical Characteristics.} The Strait of Hormuz joins the high seas of the Persian Gulf with the high seas of the Gulf of Oman and the Indian Ocean. The strait at its narrowest is twenty and three-fourths miles, and it opens to a width of approximately twenty-eight miles.\textsuperscript{107}

The states bordering the Strait of Hormuz are Iran on the north and northwest and Oman on the south. The strait is formed on the north by Iran’s Qeshm Island, the largest island in the Gulf which belongs to Iran, and several smaller islands. On the south, the Musandam Peninsula of Oman juts into and forms the strait. The depths on this side are greater than on the Iranian side. Three small islands known as the Quoins or Salamah wa Binatahen lie in the strait within nine miles of the Musandam Peninsula.

The length of the Persian Gulf is approximately 430 miles from its head at the mouth of the Shatt al-Arab River to its entrance at the Strait of Hormuz. Its maximum width is approximately 160 miles. Once the 1982 Convention on the Law of the Sea enters into force, the Gulf states which are parties will be able to claim 200-mile E.E.Z.s, unless they do so earlier pursuant to their own state laws. If this is done, the Gulf will be overlapped by E.E.Z.s. The high seas freedoms of navigation and over-flight will not be affected, but there will be more coastal state control over resources.

The littoral states of the Persian Gulf are, clockwise from the Strait of Hormuz: Oman, The United Arab Emirates, Qatar, Bahrain (the only island state in the Gulf), Saudi Arabia, Kuwait, Iraq and Iran. Of these, all but Bahrain, Qatar, and the United Arab Emirates (except Sharjah) claim twelve-mile territorial seas.

\textsuperscript{106} Morris, \textit{supra} note 85, at 76.

\textsuperscript{107} See R. Ramazani, \textit{The Persian Gulf and the Strait of Hormuz} (1979) [hereinafter cited as R. Ramazani, Strait of Hormuz]. Arab nationalists refer to the Persian Gulf as the Arabian Gulf. This writer uses the historical name, the Persian Gulf, as conventional Western usage. Also, for simplicity, the term “strait” will be used consistently in the singular as applied to all three Middle Eastern straits. This writer has read numerous inconsistencies, often in the same article, and offers an explanation that in all of these straits there are several channels, leading authors to use the plural form. However, most of the U.N. documents use the singular and, therefore, it will be used in this article as well.
"Navigation is possible on both sides of a median line through the Strait and its approaches." A channel to the south of the median, between the Musandam Peninsula and Little Quoin Island is also navigable and is used frequently by transiting ships. This channel is approximately four and three-fourths miles wide and is entirely within the territory of Oman. Oman has claimed twelve-mile territorial seas since 1972, Iran since 1959, and their territorial seas overlap in most of the main channel, although some high seas remain.

Jurisdictional Disputes. The importance of the Strait of Hormuz as an international waterway has increased rapidly since World War II due to the development of petroleum resources in the area of the Persian Gulf. "In 1973 it was shown that an average of one oil tanker every fourteen minutes passed through it, and that about seventeen billion barrels of oil — roughly a third of the non-communist world's consumption — left the ... Gulf through this narrow strait daily." In terms of tonnage, the Strait of Hormuz is one of the busiest international straits in the world.

Some 250,000 tons of shipping in about 300 tankers and cargo ships, carrying both oil and dry cargoes, pass through the strait each month. These statistics demonstrate that freedom of navigation through the Strait of Hormuz is vital to the national interests of the Gulf states, as well as to the entire industrial world, especially Western Europe and Japan, which depend on the Gulf region's oil.

With the growing awareness that control of the strait means control of oil, the world's focus on the Gulf has led to stricter scrutiny of safeguarding oil installations and sea lanes. The need for continued unimpeded passage and nondiscrimination of ships is essential to exporters, maritime states and importers. For example, "[n]early half of Israel's oil requirements are met by ships coming from Iran to the Israeli port of Eilath" via the Straits of Hormuz, Bab el Mandeb, and Tiran. Since Egypt has regained its Sinai oil fields, Israel's reliance on Iranian oil has increased substantially.

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109 Id.
110 Id.
Naturally, the enormous increase in oil production has contributed to a greater volume of tanker traffic which, in turn, has created the necessity for regulations covering navigation, pollution, and protection of the marine environment.\textsuperscript{114} The International Convention for the Prevention of Pollution from Ships was signed in 1973.\textsuperscript{115} It provided for inspection of ships, actually carried out by Iran, to discover pollutant-causing problems. It also helped Iran with its own security. "In the event that requirements were not met, ships would be prevented from transiting until the problems were corrected."\textsuperscript{116} This Convention also recognized the Persian Gulf as a "special zone," requiring strict measures for the protection of the marine environment.\textsuperscript{117}

In terms of national legislation, Iran "has taken the initiative to establish pollution control regulations for its territorial sea, and has 'temporarily' extended the pollution control regulations to the limits of the superjacent waters of its continental shelf."\textsuperscript{118} Iran will extend these regulations to the limits of its E.E.Z. if it ratifies the 1982 Convention on the Law of the Sea. Here, also, the regulations provide Iran with the authority to inspect ships for prevention of pollution and, incidentally, to check for evidence of sabotage. However, since a new regime was established in 1979, Iran is no longer playing its role as protector of the Strait of Hormuz. "No sooner had the Ayatollah Ruhollah Khomeini come to power in Iran than he announced that his country would no longer serve as the Watchman of the Gulf. . . ."\textsuperscript{119}

The Arab states of the Gulf have been cooperating since the late 1970s. They established a Regional Organization for the Protection of the Marine Environment in addition to establishing various conventions regulating control of pollution.\textsuperscript{120} These regulations could have been used to combat the large oil spill caused by Iraq's March 2, 1982 attack on Iran's Nowruz oil field at the head of the Gulf. However, since the war has still not abated at the time of this writing, no decision has been made to clean up that spill for fear that Iraq might attack once more and cause another spill. All of the states, as oil-producing countries, have a

\textsuperscript{114} For a list of international conventions and regulations concerning the prevention and control of pollution from ships, see HAZARDS OF MARITIME TRANSIT, supra note 28, at 40-43, app. table 3-1.


\textsuperscript{116} Id.

\textsuperscript{117} MacDonald, The Roles of Iran and Saudi Arabia in the Development of the Law of the Sea, 1 J. So. ASIAN AND MID. E. STUDIES 3, 6 (1978).

\textsuperscript{118} MacDonald, Iran's Strategic Interests and the Law of the Sea, 34 MID. E. J. 302, 319 (1980) [hereinafter cited as MacDonald, STRATEGIC INTERESTS].

\textsuperscript{119} CONFLICT IN THE PERSIAN GULF 4 (M. Gordon ed. 1981) [hereinafter cited as Gordon].

\textsuperscript{120} See generally, MacDonald, Strategic Interests, supra note 118, at 302-22 for comprehensive coverage of this topic.
common interest in preserving the safety and security of the sea lanes in the strait. "Despite the 44-month-old gulf war, Iran and Iraq participated [in April 1984] . . . in a meeting of the regional organization" for the Protection of the Marine Environment in Kuwait.\(^\text{121}\)

Historically, Iran has exercised its sovereignty over the strait by policing the entire Gulf area to preserve freedom of navigation. Although Iran signed the 1958 Convention on the Territorial Sea and Contiguous Zone, it never ratified it. When Iran extended its territorial sea to twelve miles in 1959, it was challenged by the United Kingdom, the superpower then most involved in the Persian Gulf.

The British Note of Oct. 12, 1959 stated that the United Kingdom could not recognize unilateral claims to a breadth of territorial sea greater than three miles as valid under international law. Iran, countering the United Kingdom’s protest, stated that she regarded the twelve mile extension of the territorial sea as essential for national security.\(^\text{122}\)

Iran’s territorial sea limit has remained at twelve miles since 1959.

Before the United Kingdom withdrew from the Gulf area in 1971, the United States and the Soviet Union recognized the strategic significance of the Strait of Hormuz for purposes of both petroleum exports and military needs. Iran and Oman, the strait states, require permission or notification for the passage of warships through the strait, contrary to the international Court of Justice’s decision in the Corfu Channel Case.\(^\text{123}\) The superpowers are concerned that such control could establish a choke on their competing interests. Strategically, “control of [this] . . . choke point by regional or extraregional powers underlies the military value of the ocean . . . [and] has provided the initial grounds for naval rivalry between the United States and the Soviet Union.”\(^\text{124}\)

In 1971 one of the most destabilizing events in a relatively stable area was Iran’s seizure of the three islands immediately southwest of the Strait of Hormuz, namely Abu Musa and the Greater and Lesser Tunbs. The seizure occurred the day before the United Kingdom’s formal withdrawal, and an Arab-Iranian conflict erupted. The three islands are strategically important since a state which controls these islands actually controls the strait. At that time, the Shah of Iran claimed that a recent attack on a Liberian tanker bound for Israel in the Strait of Bab el Mandeb would be a disastrous precedent for the Strait of Hormuz. This rationale and the specter of a terrorist attack gave Iran legitimate reasons


\(^{122}\) Amin, *supra* note 112, at 389.


\(^{124}\) KOURY, *supra* note 11, at 26.
for policing the strait and controlling the islands.125

The Arab states’ response to Iran’s 1971 seizure of the islands in the Strait of Hormuz was a hostile condemnation of Iran. This new conflict led to further cooperation among Arab coastal states. One suggestion made in 1971 by Arab strategists was to build a canal through Oman’s Musandam Peninsula in order to reduce Arab dependency on the strait.

By 1979, another disruption occurred in the Persian Gulf due to the overthrow of the Shah of Iran. Iranian troops had been located in the strait state of Oman since its 1974 Civil War to help Oman and to ensure further Iranian control of the strait. Two of the strait’s three deep-water tanker channels lie solely in Oman’s territorial waters. In 1979, the Iranian troops were ordered removed by Iran’s new regime. Up to this time, both Iran and Oman had supported a “closed-lake concept involved in a joint naval supervision proposal. . . .”126 This concept supposedly would have promoted free passage, not hindered navigation, through the strait. However, other Gulf states, Iraq in particular, objected to this idea. Further, “[i]t is unlikely that the concept of a closed-lake would be acceptable to non-littoral naval powers. Such a concept could establish a precedent in international law that could be extended to other closed seas, such as . . . the Red Sea.”127 The “closed-lake” concept has been largely ignored since the overthrow of the Shah’s regime. Iran repudiated its membership in CTO (Central Treaty Organization), “an American conceived defensive pact that was designed to block Russian expansion into the Middle East.”128 Iran also renounced its past policy of protecting and policing the Gulf. By 1980 Iran was in the throes of the war with Iraq which has been the most disruptive occurrence in Persian Gulf history thus far.

The juridical status of the Strait of Hormuz has also been at issue. A ribbon of high seas exists through some of the strait, thereby ensuring freedom of navigation in part, pursuant to the regime of the high seas. When the 1982 Convention enters into force, it will not affect these high seas areas since, as a second category of straits, the high seas regime would continue to apply.129

In the majority of the strait, Oman’s and Iran’s territorial seas overlap. Upon entry into force, the 1982 Convention will establish these parts of the strait as a third category in which the transit passage regime

126 Koury supra note 111, at 40.
127 Id. at 41. See also, A. El-Hakim, supra note 111, at 65-67.
128 Gordon, supra note 119, at 17.
129 See chapter II. A of this article for the definition of this category of straits which includes international straits containing a ribbon of high seas, pursuant to art. 36 of the 1982 Convention.
As a practical matter, customary international law has evolved in the strait since twelve-mile territorial seas have been claimed on Oman's side of the strait for over ten years and on Iran's side for almost thirty years. During this time, United States and other states' vessels and aircraft have navigated through and over the strait with no suspension of passage and, in practice, the 1982 Convention will not affect any portion of the Strait of Hormuz.

Although Oman was not a signatory and Iran never ratified the 1958 Convention, both states claimed that passage in the strait could be suspended, pursuant to art. 16(3) of the 1958 Convention. They ignored art. 16(4), mandating nonsuspension of passage in international straits, although there has been no evidence of suspension in the Strait of Hormuz and no complaints lodged against either strait state.131

Both Oman and Iran are parties to the 1982 Convention on the Law of the Sea. Although they believe that sovereign interests of the coastal state are of utmost importance, their dependence on international trade underlies the need for freedom of navigation in the strait.

In addition, in the history of the Strait of Hormuz, no aircraft has been suspended from passage over Oman's sovereign territory. Oman is not a party to the 1944 Convention on International Civil Aviation, but Iran was a party to this agreement by December 1973.132 When the 1982 Law of the Sea Convention enters into force, there will be no change, as a practical matter, regarding freedom of navigation since overflight as well as submerged passage is included in the transit passage regime of the 1982 Convention and will apply in the strait. Customary international law, as codified by the transit passage regime, will continue to exist for those states which are not parties.

Submerged passage in the strait will not be affected. With depths in the channel ranging from 160 feet to below 180 feet, submarines are safer to other traffic in the strait by transiting submerged.133 If the Strait of Hormuz is controlled by at least one ally of the United States, such as Oman, United States submarines will continue to transit submerged, no matter what regime is applied in the strait.

This writer disagrees with the assessment of Professor Amin that "there is little guarantee under international law of the right of passage

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130 1982 Convention, part IV, sec. 2. The third category includes straits which connect high seas or E.E.Z.s to another part of the high seas or E.E.Z.s. Id. at art. 37.
131 On April 23, 1986, Iran reported "intercepting tankers in the Strait of Hormuz . . ." Wash. Post, April 23, 1986, at A28, col. 4. This type of search has been conducted on tankers lined up to pass through the strait and should not be considered as a suspension of passage.
through the Strait [of Hormuz] if both Iran and Oman regard any instance of passage as 'non-innocent.' " Customary international law would require nonsuspendable passage through the Strait of Hormuz. However, if a strait state determined to suspend passage, contrary to the dictates of international law, a transiting vessel would have no alternative but to acquiesce or to use force. It is improbable, however, that Oman and Iran would agree as to the innocence of any transiting vessel because these states are politically opposed, although politics change rapidly in the area of the Persian Gulf.

Most of the Arab states did not take part in the First or Second Conferences on the Law of the Sea; however, almost all participated actively in the Third Conference. During the negotiations they "were in a difficult situation. While they wished to close the Strait of Tiran to Israeli shipping, they needed unrestricted passage through the Straits of Hormuz and Gibraltar." Further, Iraq did not want Iran to have control over the Strait of Hormuz. Some Middle East states bordering straits advocated the principle of nonsuspendable innocent passage for foreign ships, even warships. "[T]he majority of them, however, insisted that the regime of straits should be strictly confined to straits which connect two parts of the high seas." This was a reaction to the innocent passage regime established by art. 16(4) of the 1958 Convention, which included in the definition of international straits those straits which connected not only high seas to high seas but also high seas to territorial seas. The 1982 Convention eliminated this problem by not including in the transit passage regime straits which connect high seas to territorial seas.

During the negotiations several Middle East states objected to the transit passage regime. Egypt's representative stated that ". . . such a freedom which allows submerged submarines, nuclear or otherwise, to pass unseen cannot be called anything other than licensing for the spread of terror." By way of compromise, the Middle East states accepted the transit passage proposal only as it applied to international straits connecting high seas or E.E.Z.s to other high seas or E.E.Z.s. International straits, such as the Strait of Tiran, which connect high seas to territorial seas were not included in the regime of transit passage. The majority of

134 Amin, supra note 112, at 403.
135 A. Hollick, supra note 10, at 294. For references to the Arab States' views on the straits issue at the Third Conference, see A. El-Hakim, supra note 111, at 49-52; MacDonald, Iran Saudi Arabia and the Law of the Sea 168-97 (1980); Maduro, supra note 40, at 75.
136 A. El-Hakim, supra note 111, at 78.
137 1958 Convention, art. 16, para. (4). This article specifically helped the State of Israel because its port of Eilath is located on the Gulf of Aqaba and is accessible by water only through the Strait of Tiran. The Arab states refused to sign the 1958 Convention because it included art. 16(4).
138 A. El-Hakim, supra note 111, at 51.
the Arab states signed the 1982 Convention, with the exceptions of Saudi Arabia and Qatar, although the situation in the Persian Gulf is now more volatile than it has ever been.

Many factors contributed to this instability and volatility. With the advent of the Khomeini regime, the United States in 1979 considered a show of force in the Gulf to pressure Iran to release United States hostages. A hostile atmosphere also erupted in 1980 when, after the Soviet intervention in Afghanistan, it was suspected that the Soviet Union would blockade the Strait of Hormuz "as the prelude to a Soviet occupation of Gulf oil fields." 139

The Iran-Iraq war began in September 1980 with Iraq's crossing the Shatt al-Arab waterway and claiming sovereignty over it. Since the sixth century B.C., Iranian (Persian) and Arab conflicts have erupted over dominance of the Gulf. The earliest dispute over sovereignty of the Shatt al-Arab waterway goes back to the sixteenth century. 140 However, in recent years it was believed that the Gulf states were "hostages of each other. The vulnerability of their most precious natural resource ... [was] one of the most fundamental deterrents to their use of military force." 141 This is no longer the case. Past enmity among the Arab states has eased into a condition of mutual cooperation in order to aid Iraq in its war with Iran.

The Gulf Cooperation Council was formed in 1981 and is composed of the Persian Gulf states of Saudi Arabia, Kuwait, Oman, Qatar, the United Arab Emirates (U.A.E.), and Bahrain. The Council is cooperating "to ensure the safety of oil installations and pipelines" and to consider security arrangements for the Strait of Hormuz. 142 It established a joint command for its combined military forces and has not asked the United States or any state outside the Gulf area to intervene in the Iran-Iraq war, except to provide technical assistance and arms. 143 From the beginning of the war, the United States has "pledged to do what is necessary to protect free shipping in the Strait of Hormuz from any interference." 144

It has been suggested that the oil-producing states can and have

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139 Amin, supra note 112, at 393.
140 Notes from Lecture of Ambassador M. Farhang, 37th Annual Conference of the Middle East Institute (Oct. 1, 1983).
141 R. Ramazani, Strait of Hormuz, supra note 107, at 98.
144 Address of Secretary of State Muskie, U.S. Position in the Persian Gulf, 80 Dep't St. Bull. 2 (Dec. 1980) (Before General Pulaski Assoc. in Buffalo, N.Y.).
used oil as a "weapon," for example, during the 1973 oil embargo.\footnote{For a thorough study of the use of oil resources in the Persian Gulf as a strategy for Arab states' foreign policy, see Brown, The Oil Weapon, 36 MID. E. J. 301, 316 (1982).} However, the United States has not been providing aid to the Gulf states in response to coercion but, rather, to support the Arab states against Iran, a mutually hostile power. The United States does not acknowledge siding with either Iraq or Iran. Publicly the United States maintains a neutral stance.\footnote{See White House Statement of July 14, 1982, 18 WEEKLY COMP. PRES. DOC. 903 (July 19, 1982), affirming "The United States government has remained from the beginning, and will remain neutral in the war between Iran and Iraq." Iran-Iraq War, 82 DEP'T ST. BULL. 59 (Sept. 1982).} Privately the United States sides with the Arab states.

The sudden loss of Persian Gulf oil for a year could stagger the world's economy as did the depression of the 1930's. A [United States] Department of Energy study estimates that the annual losses of three, ten and twenty mbd [million barrels per day] (which correspond roughly to the annual loss of production from Iraq, Saudi Arabia, or the entire Persian Gulf) could cost the United States economy $84 billion, $323 billion, and $686 billion respectively. The cost to [United States] . . . allies would be even greater.\footnote{Supra note 72, at 17 (citing 1980 statistics of the Department of Energy in The Energy Problem: Costs and Policy Options, Wash., D.C. (March 1980)). The price of shipping is increasing yearly. Lloyd's of London, the largest insurer of commercial vessels, stated that war risk insurance covering ships but not cargo in the Persian gulf has increased steadily since the beginning of the Iran-Iraq war. This is particularly true of vessels navigating in the military zone around Kharg Island. As of May 1984, approximately "twenty-two supertankers reportedly are anchored just outside the Strait of Hormuz, unwilling to enter it, although several have been there for some time, waiting for prices on the world market to rise." Getter, Shipping Insurers Raise Rates, Wash. Post, May 17, 1984, at A29, col. 5.}

Since the beginning of the war, Iran has repeatedly threatened to close the Strait of Hormuz. It has warned that it "'holds the key to the Persian Gulf. The Hormuz Straits are a gate' that Iran could easily shut."\footnote{Wash. Post, Sept. 28, 1983, at A1, col. 4 (quoting Iran's President Ali Khamenei). This writer regrets the fact that most information concerning the Iran-Iraq war is classified information. Understandably, this is necessary for United States security in the area. However, it has caused this writer to rely heavily on the Washington Post and other newspapers as sources of information for this portion of the article.} It is not clear that Iran actually has the military capability to close the strait, but if it does have this capability, closure is unlikely because it would be counterproductive to Iran's own economic interests. Iran's oil exports would cease if the strait were closed, and imports would not be as readily available.\footnote{Approximately ninety-eight percent of Iran's oil exports are carried through the Strait of Hormuz, and Iran has developed a thriving import trade with Pakistan since the fall of the Shah. See Wash. Post, Feb. 28, 1984, at A11, col. 1; Kahn, With Its Ports Periled by War, Iran Boosts Trade with Pakistan, id., Dec. 8, 1983, at A34, col. 2. Even Western states, including United States corporations, are doing business with Khomeini's government in Iran. Id., Apr. 6, 1984, at A1; id. Aug. 4, 1984, at A1, col. 2. Further, many countries are getting as much commercial "mileage" as}
In 1980, Iran threatened to close the Strait of Hormuz, and it diverted transiting ships from its twelve-mile territorial sea in an attempt to hamper strait traffic. Oman, with the help of naval forces from the United States and United Kingdom, prevented a closure by permitting transit through the southern channel within Oman's jurisdiction.

The United States sold arms to Oman as early as 1975, and it now contributes economic and military support to Oman as a guarantee for keeping open the Strait of Hormuz. The United States "courts" Oman by means of its Foreign Military Sales program because Oman holds the key to the Strait of Hormuz from the United States perspective. The value of the Persian Gulf was enunciated by a spokesman for the United States government: the "region remains of great importance to the global strategic balance and to our national interests." The United States and Oman reached an agreement on June 4, 1980 concerning "a framework for bilateral cooperation relating to economic development and trade and to defense . . . in order to enhance the capability of Oman to safeguard its security. . . ." When President Reagan feted the Sultan of Oman in 1983, the Sultan said that it was imperative to "develop" Oman because of "the importance of the geo-political position we occupy at the mouth of the Gulf."

Iran continues to threaten to close the Strait of Hormuz. However, as "[v]ulnerable as this passage is to threat or interdiction . . . some reports have exaggerated the problem. . . . Blockage of the Strait by sunken vessels . . . would not prove workable" because the entire strait is deep and navigable, and Oman has already permitted transit through

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the southern channel. Mines, such as those planted in the Red Sea during the summer of 1984, might be used and “actual interdiction by warships or aircraft could, of course, be employed to blockade the strait.” This writer doubts that there will be any attempted blockade by Iran due to Iran’s own dependence on navigation through the strait. But Iran continues to threaten.

After each Iranian threat, the United States reacts with statements that it “is committed to keeping the sea lanes in the Strait of Hormuz open,” by means of force, if necessary. Former President Carter, in his January 23, 1980 State of the Union address, made the commitment to preserve and protect freedom of navigation through the strait as a reaction to the Soviet invasion of Afghanistan. President Reagan extended this “Carter Doctrine” by making the same commitment in 1981 and thereafter, whenever Iran threatened to close the strait. The United States maintains warships on both sides of the strait to give weight to these pledges of support.

To exacerbate problems, and to help Iran, in April 1982 Syria closed the Iraq-Syria pipeline to the Mediterranean Sea, contrary to pan-Arab interests. At the same time, Iran threatened tankers carrying Iraqi oil out of the Gulf. Iraq’s exports were reduced from a normal three million barrels per day to 650,000 barrels.

By July 1984, Iraq was negotiating for the construction of three new pipelines to extend from Iraq across Turkey to the Mediterranean Sea, across Saudi Arabia to the Red Sea, and across Jordan to the Gulf of Aqaba, and as recently as April 1986, Iraq announced the second phase of these pipelines. The pipelines have taken the pressure off the Iraqi economy placed on it by Syria and Iran. United States corporations are involved in the construction of the pipelines and, therefore, stronger economic and political relationships with the West will result. Additional pipelines will also mean the lessening of dependence on the Strait of Hormuz. In addition, the Straits of Bab el Mandeb and Tiran are affected by the new pipelines. Outlets in the Red Sea and the Gulf of Aqaba will help to ensure freedom of navigation through these straits.

153 J. NOYES, supra note 133, at 51.
154 Id.
159 See KOURY, supra note 111. Arab “leaders may still differ on the goals of security arrangements, but strategy and tactics are being adopted to promote new changes in the environment. . . .
In August 1982, Iraq declared a zone of military operations extending from the mouth of the Shatt al-Arab river to approximately thirty to thirty-five miles south of Iran’s port of Bushehr. Iraq warned all ships that they would be subject to Iraqi attack if they were found within the zone.\textsuperscript{160} Iran’s Kharg Island oil depot, in the northern Gulf, is within the zone, but the Strait of Hormuz, at the southern end, is not. Nevertheless, if the war escalates to include the strait, the United States is ready to intervene if requested by the Gulf Cooperation Council.

The Gulf states have resisted publicly from asking for help from the United States. However, crises have induced the Saudis to accept an escalated United States military relationship. Oman, with its historical isolation in the Arabian Peninsula and from the mainstream of Arab politics, agreed to permit the United States to improve and utilize military facilities short of using actual combat troops. This fluidity calls for sensitive diplomacy free of cumbersome formed alliances and agreements.\textsuperscript{161}

The fact that the United States is not a party to the 1982 Convention on the Law of the Sea is not an issue. The politics of the Gulf states frequently change and a Convention on the Law of the Sea will not make a significant difference, if any, during the Iran-Iraq war.

Neither the United States nor the Soviet Union has intervened with force since the war began in September 1980. One scholar suggests that “lacking leverage with either belligerent, the United States was helpless to stop the war.”\textsuperscript{162} The Soviet Union has been wooing Iraq with military aid, and their relationship is becoming stronger.\textsuperscript{163} Both superpowers have naval forces in the Indian Ocean near the Strait of Hormuz and in the Persian Gulf. This show of force has been used with constraint and is limited to maintaining a global balance in the area. The Soviet Union, like the United States, wants to keep open its options and not side too obviously with Iraq, in the event that Iran should win the war.

The superpowers have parallel interests in maintaining freedom of navigation through the Strait of Hormuz, just as they had parallel inter-
ests during the negotiations at the Third Conference on the Law of the Sea. Unlike the United States, however, the Soviet Union is a party to the 1982 Convention. Nevertheless, if the Convention were in force, the defense of the Strait of Hormuz probably would be handled no differently by the Gulf states or the superpowers.

For example, during the northern Gulf escalation of the Iran-Iraq war in the late Spring of 1984, some Gulf states permitted, perhaps requested, the United States Navy to establish a defense zone in the Gulf. By June 1984, four Navy warships formed a protective escort for tankers entering the Persian Gulf from the Strait of Hormuz. Any attack on the tankers would be construed as an attack on the warships, and retaliation by the United States, in that case, would be defensible.164 United States Navy vessels have not been attacked in the Gulf.

Since June 1, 1984, Iran has devised its own method of controlling the Strait of Hormuz. Iran has declared a “stop and search zone” in the strait.165 No maritime states have complained about this tactic and although ships are backed up going through the strait, traffic has not been impeded. It is not clear whether the “stop and search” is imposed before entry into the strait, but this appears to be the situation. Pursuant to customary international law, passage through straits used for international navigation cannot be impeded.166 If Iran is stopping ships in passage through the Strait of Hormuz, it is doing so contrary to international law. However, since no complaints have been lodged against Iran in this regard, this writer believes that the “stop and search” is being exercised at the entrance to the strait.

Thus far, diplomacy and political maneuvering have been used in the Persian Gulf during the Iran-Iraq war, both by the superpowers and the littoral states which are not combatants. Although the navies of the superpowers are in evidence in the area, they have not been overtly involved in the conflict. “Judiciously used (or threatened), military force can play a critical role in regime formulation.”167 The United States “escort” of United States vessels, its military aid to Saudi Arabia and Oman, and the Soviet Union’s aid to Iraq and Kuwait are efforts to manipulate the war in the Gulf without outright intervention.

Hopefully, when the Iran-Iraq war ends, stability will reign in the Gulf and both the strait states of Oman and Iran will support freedom of navigation through the Strait of Hormuz. The economic benefits to all

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164 U.N. Charter, art. 51.
166 As codified in 1958 Convention, art. 16, para. 4; 1982 Convention, art. 38.
167 J. Nye, supra note 72, at 35.
states dependent on Persian Gulf oil as exporters, carriers or recipients are also important.

It is clear that the focus of the United States and of the world is on the Middle East. “President Reagan might well decide, after careful review . . . , that the interest of his country might better be served by placing a greater emphasis on diplomacy than on military power.” Since the United States has chosen not to sign the 1982 Convention, United States diplomatic relations, along with customary international law, will have to suffice. Despite the fact that Oman and Iran claim that the regime of innocent passage applies in the Strait of Hormuz, Oman is a friend of the United States and has control over the southern channel of the strait. The United States is dependent on this friendship. As of this writing, Iran has mounted another ground offensive, while Iraq sporadically bombs ships in the Persian Gulf. Negotiations to end the war continue at the United Nations based on a proposed agreement initiated by Japan, the state with perhaps the most to lose by interruption in the flow of Gulf oil, although global economics and Middle East stability are also at stake. “In the long run the problems of peace and security in one part of the Middle East cannot be separated from the same problem in another part of the area, for in the last analysis they are rooted in the fundamental problem of order in this region.”

B. The Strait of Bab el Mandeb

Physical Characteristics. The Strait of Bab el Mandeb, translated from the Arabic as the Gate of Tears, is the western entrance to the Red Sea. The strait joins the high seas of the Gulf of Aden and the Indian Ocean to the high seas of the Red Sea. The narrowest part of the strait is a passage between Ras Bab el Mandeb on the eastern or Arabian shore, and Ras Si Ane on the western or African side. The distance between these areas is approximately fourteen and one-half miles and the strait is divided into two channels by the island of Perim: an eastern channel, approximately one and one-half miles wide named Small Strait, and a western channel, approximately nine and one-half miles wide known as Large Strait. Most of the traffic uses the western channel along a half-mile route that lies two miles from Perim Island and about seven miles from the African coast.
Four strait states adjoin Bab el Mandeb: on the African side are Ethiopia and the Republic of Djibouti, formerly known as French Somalia or the French Territory of Afars and Issas. On the Arabian side are the Yemen Arab Republic (YAR), to the north, and the People's Democratic Republic of Yemen (PDRY), to the south, formerly known as South Yemen and under British control until 1967. Perim Island, in the narrowest part of the strait, is strategically critical to the area since control over the island means control over the strait. When the British relinquished sovereignty over Perim Island in 1967, it became part of the territory of PDRY.\textsuperscript{173} The Red Sea's littoral states are: Egypt, Ethiopia, Saudi Arabia, Somalia, Sudan, YAR, PDRY and Djibouti.

**Jurisdictional Disputes.** The Strait of Bab el Mandeb provides the only access to the Indian Ocean from the Gulf of Aqaba and the Red Sea. Like the Strait of Hormuz, it is characterized under the third category of straits covered by the transit passage regime.\textsuperscript{174} If the Suez Canal is closed again, as it was in 1967, Bab el Mandeb provides the only route to the high seas.\textsuperscript{175}

With the opening of the Suez Canal, riparians of the Red Sea use the strait as a “gate to the East” and and as an “important station on the great thoroughfare from the Mediterranean to the Indian Ocean.”\textsuperscript{176} Because the Red Sea serves as a major trade route, there is a large amount of traffic through the strait. Much of this is tanker traffic coming from the Persian Gulf through the Strait of Hormuz, and then through the Strait of Bab el Mandeb to the Suez Canal or through the Strait of Tiran to the ports on the Gulf of Aqaba. Maritime states as well as riparians are concerned about continued freedom of navigation through the strait, particularly with the linkage between straits.

The Strait of Bab el Mandeb has created problems for Israeli and Arab protagonists. Israel is too far from the strait to be able to ensure its own freedom of navigation; its territory is over 1200 miles away. “After the Six-Day [1967] War, when the short-lived Egyptian blockade of the Strait of Tiran was broken, Israel became even more determined to establish its freedom of navigation in the Red Sea.”\textsuperscript{177} With the occupation of the Sinai, Israel developed into an industrious exporter and importer,

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\textsuperscript{173} A. EL-HAKIM, supra note 111, at 20.
\textsuperscript{174} See 1982 Convention, art. 37.
\textsuperscript{175} See, CAMPBELL, supra note 31. The importance of a Strait may shift whimsically with advances in shipping technology, changes in trade patterns, or may be affected by political, economic, or strategic factors. An example was the closing of the Suez which increased traffic from the Middle East to Europe, and gave new importance to the Strait of Gibraltar and the Strait of Bab el Mandeb. Id. at 136.
\textsuperscript{176} R. LAPIDOTH, supra note 171, at 67.
\textsuperscript{177} See KOURY, supra note 111, at 21.
enlarging accommodations yearly at its port of Eilath on the Gulf of Aqaba. It became a Red Sea power without being a riparian on the Red Sea.

However, in June 1971, the Liberian-flag oil tanker, the “Coral Sea,” bound for Israel, was fired on in the Strait of Bab el Mandeb, allegedly by a commando unit based on Perim Island. This attack on a civilian vessel in international waters was an indication of the instability in the area. At this time the United States was considering withdrawing from Ethiopia where, for almost twenty years, it had committed itself to supporting that country with economic and military aid. The United States “interests in the Red Sea were minimal. By 1971, the Soviet Union had lost its foothold in the Sudan, and a year later its experts were ordered out of Egypt by President Sadat.” Further, the Arab States were becoming more unified.

By 1973, the attention of the United States was focused not on the Red Sea, but “on the Persian Gulf, where it was determined to safeguard the stability of its local allies and maintain the flow of their oil to the West.” With world attention elsewhere, Egypt, the PDRY and YAR successfully barred Israel’s ships and Israeli-bound cargo from using the Strait of Bab el Mandeb. The PDRY, then called South Yemen, “asserted its sovereignty over the Strait,” and the Arab-Israeli war of 1973 erupted in full. The blockade of the strait was officially undeclared but remained in effect until Israel sent commando units “more than 1200 miles beyond its borders to occupy several uninhabited islands within 85 miles of the Bab el Mandeb.” These islands, known as the Hanish group, including the largest island, Great Hanish, and claimed as sovereign territory by the YAR, are located approximately twenty miles off the coast of the YAR. The Israeli commandos stayed on the islands to prevent any further attack at the strait until a cease-fire was reached.

After the 1973 war, a major Arab objective was to minimize any influence in the area by the United States and the Soviet Union. In this connection, guidelines were recommended during the Third Conference on the Law of the Sea.

On Straits, the Committee of Arab Experts recognized that its members have overwhelmingly supported the principle of “freedom of navigation” through Straits which are used for international navigation.

179 Id. at 20.
181 At the Gates of Tears, TIME, Mar. 19, 1973, at 27. “United States aircraft flying to Israel on resupply missions were forced to fly through the Straits of Gibraltar rather than overfly the territory of allied states that were unwilling to grant overflight rights in time of crisis.” Robertson, supra note 45, at 841 n. 198.
between parts of the high seas but only insofar as merchant shipping and civil aviation were concerned. As to noncommercial navigation such as the passage of warships, submarines and military aircraft, the Committee arrived at no decision.\textsuperscript{182}

In 1975 the United States and Israel signed a Memorandum of Agreement regarding the Red Sea area.\textsuperscript{183} Paragraph fourteen of the Agreement provides that the United States government regards the Strait of Bab el Mandeb as an international waterway, along with the Strait of Gibraltar, "[i]n accordance with the principle of freedom of navigation on the high seas and free and unimpeded passage through and over straits connecting international waters. . . ."\textsuperscript{184} The United States also supports "Israel's right to free and unimpeded passage through such straits . . . [recognizing] Israel's right to freedom of flights over the Red Sea and such straits. . . ."\textsuperscript{185} Although the Memorandum has no force in international law, it demonstrates the policy of the United States regarding the Strait of Bab el Mandeb and its support of Israel's and all states' rights to freedom of navigation through the strait. One scholar suggests that the wording of paragraph fourteen implies "that the parties intended by it to recognize a pre-existing right . . . [and that this paragraph] was not abrogated when the agreement was superseded by the 1979 Treaty of Peace between Egypt and Israel. Moreover it has specifically been stated that it has not been terminated or altered by the conclusion of the Peace Treaty."\textsuperscript{186}

By 1978, the PDRY specifically recognized the regime of transit passage by confirming "its respect for the freedom of maritime and air traffic of ships and aircraft of all coastal and non-coastal States, without prejudice. . . ."\textsuperscript{187} This is substantiated by the nondiscriminatory treatment of ships through the Strait of Bab el Mandeb. Except for incidents during the early 1970's relating to Israeli shipping, maritime and air traffic have been unimpeded in the strait. However, when the YAR signed the 1982 Convention, in addition to emphasizing its policy of adhering "to the concept of general international law concerning free passage," it stated that its signature "in no way implies that we recognize Israel. . . ."\textsuperscript{188} The Arab strait states appeared unified in strengthening

\textsuperscript{182} A. EL-HAKIM, \textit{supra} note 111, at 46.
\textsuperscript{183} SEN. COMM. ON FOREIGN RELATIONS, ISRAELI-UNITED STATES MEMORANDUM ON MILITARY EQUIPMENT ENERGY NEEDS VIOLATION OF AGREEMENT, H.R. Doc. No. 152, 94th Cong., 1st Sess. 121, reprinted in 14 I.L.M. 1468 (1975) (Memorandum of Agreement between the governments of Israel and the United States; United States - Israeli Assurances).
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} R. LAPIDOTH-ESCHELHACHER, \textit{supra} note 180, at 148.
\textsuperscript{187} Id. at 149; U.N. Communication, U.N. Doc. NV/78/63 (July 12, 1978).
\textsuperscript{188} U.N. Convention on the Law of the Sea, Dec. 10, 1982, Declarations and Reservations -
their control in the Red Sea in the event of another conflict with Israel and in protecting the sea lanes for Arab oil transports in case of attempted disruption. However, the influence of the superpowers was also in evidence in the Red Sea.

In order to control effectively the Strait of Bab el Mandeb, all strait states would have to be in agreement. As with the political differences between Oman and Iran at the Strait of Hormuz, jurisdiction in the Strait of Bab el Mandeb is divided between the YAR and PDRY, on the Arabian side, and Ethiopia and Djibouti on the African shore. Agreement among these states does not appear forthcoming.

“Djibouti’s only importance is its geostrategic position located on one side of the Strait of Bab el Mandeb [and] . . . both Ethiopia and Somalia seem to have annexation intentions toward Djibouti.” Consequently, the Arab states rushed Djibouti through membership in the Arab League in 1977 to discourage annexation attempts. Djibouti remains pro-Western politically, and in August 1984, France announced it would reinforce its military presence in its former colony. In contrast, Ethiopia has been a close ally of the Soviet Union since the overthrow of Emperor Haile Selassie’s government in 1974. Ethiopia established a Communist Party system of government in September 1984, although it has accepted aid from the United States, and recently “has been wooing western business and aid.” The PDRY also is an ally of the Soviet Union, and the United States now warns its vessels against entering the PDRY’s twelve-mile territorial sea because “there have been previous incidents of attack on American ships” by the PDRY. Incident to the PDRY’s threats on YAR sovereignty, the United States has established an economic development and assistance program to benefit the YAR. At the same time, the YAR and the Soviet Union have established a treaty of cooperation and friendship.

Strategically, both the United States and the Soviet Union favor unrestricted passage through the Strait of Bab el Mandeb in order to be able to move their fleets along the Indian Ocean-Mediterranean route. There

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Yemen, in Multilateral Treaties Deposited With the Secretary-General XX1.6, U.N. Doc. ST/LEG/SER.E/3 (Status as of Dec. 31, 1982).

Koury, supra note 111, at 23.


Special Warning, supra note 160, No. 55.

The U.S., through its Agency for International Development (AID), has promoted an economic and development assistance program to benefit the YAR. Information can be found in the yearly USAID publication for the fiscal years 1981-1985. See Congressional Presentation, Near East vol., Program Justification for the YAR.

have been no indications that the strait states "are disposed to interfere with free passage through the Bab el Mandeb." 195

Yet, as recently as August 1984, mines were sown in the Strait of Bab el Mandeb and the Gulf of Suez. Nineteen ships from approximately twelve countries were struck without serious damage. Egypt's President Hosni Mubarak asked the United Kingdom, France, Italy and the United States to send minesweepers "to help clear the Red Sea's busy shipping lanes." 196 The mining of the Red Sea could have dire consequences to shipping, particularly with regard to linkage because the Red Sea provides an alternate shipping route if the Strait of Hormuz is blockaded. On August 17, 1984, Iran's Parliamentary Speaker, Hojatoleslam Ali Akbar Hasheini Rafsanjani, warned that Iran would delay ships in the Strait of Hormuz "in retaliation" for any delay in Iran's shipping "under the pretext of searching" for mines in the Red Sea and Suez Canal. 197

Several states have been considered as perpetrators, but the strongest allegations are that Iran or Libya caused the mining to warn Arab states against helping Iraq in the Persian Gulf war. Iran and Libya have both warned states against sending arms to Iraq or permitting Iraq to pipe its oil to ports in the Red Sea. Although Iran's leader, the Ayatollah Ruhollah Khomeini, denied that Iran was involved in the mining, Iran's Prime Minister made a statement as early as October 1980, before the United Nations Security Council, warning "all those who, through the port of Aqaba in Jordan, send arms and munitions and spare parts to Iraq." 198 Further, Iran's state-run radio broadcast that the mining was "a blow against the 'arrogant powers' of the world." 199 A reasonable conclusion is that Iran was diverting attention to the Red Sea from the Persian Gulf.

The littoral Red Sea states invited outside states to help in a multinational search for mines. At no time during the search did any issue arise concerning passage through territorial seas. As a practical matter, the 1982 Convention's territorial sea limit of up to twelve miles would have no effect on the Strait of Bab el Mandeb. The strait states of Ethio-

196 Priest, U.S. Helicopters Sent to Egypt to Clear Mines, Wash. Post, Aug. 7, 1984, at A1, col. 1. In the Strait of Bab el Mandeb alone, seven vessels were damaged by mines on Aug. 2, 1984. Id. The PDRY asked for and received help from the Soviet Union to sweep its waters for mines.
197 Gumucio, Iran Threatens to Block Persian Gulf Entrance, Wash. Post, Aug. 18, 1984, at A21, col. 5.
199 Atkinson, Helicopters En Route to Egypt, Wash. Post, Aug. 8 1984, at A1, col. 6. By September 1984 only one mine (Soviet-made) had been found in the Red Sea.
pia, Djibouti, YAR and PDRY have claimed twelve-mile territorial sea limits for many years, in Ethiopia’s case for thirty years.\textsuperscript{200} Nonsuspendable innocent passage has been permitted in the strait, but submerged passage is “ruled out for use by submerged nuclear submarines” because the waters in the strait are too shallow.\textsuperscript{201}

The 1982 Convention provides, in article 37, that the regime of transit passage applies to a strait such as Bab el Mandeb which connects one part of the high seas or E.E.Z. to another part of the high seas or E.E.Z. Since transit passage provides for overflights, again the issue arises as to whether only states which are parties to the 1982 Convention would be permitted such use.\textsuperscript{202} Because the United States is not a party, it would appear that in order for United States aircraft to overfly the Strait of Bab el Mandeb, they would have to be granted permission by the strait states.

However, the same argument made concerning the Strait of Hormuz applies to the Strait of Bab el Mandeb as well. The United States would not agree to a requirement of advance notice because this “would run the risk of leading to coastal-state control of transit.”\textsuperscript{203} The United States position regarding a strait greater than six miles is that, pursuant to customary international law, a high seas regime exists in the strait, and there would be no need to request permission to transit or overfly the strait.\textsuperscript{204}

In any case, it has been the practice of the United States to respect territorial seas of foreign states except in circumstances of overriding interest where the United States has had to penetrate a territorial sea. As with its goals in the Persian Gulf, United States goals in the area of the Red Sea and the Strait of Bab el Mandeb include continued treatment of the strait as an international strait for purposes of freedom of navigation for all vessels and aircraft. The 1975 Memorandum of Agreement between the United States and Israel emphasizes this point.

C. The Strait of Tiran

Physical Characteristics. The Strait of Tiran is the western and principal entrance of the Gulf of Aqaba and joins the Gulf with the Red Sea. The Gulf of Aqaba is ninety-six miles long and is approximately fourteen

\textsuperscript{200} See Appendix.
\textsuperscript{201} Alexander, Coastal State Competence to Regulate Traffic in Straits and Other Areas Near Their Coast Against World Community Needs to Maximize Vessel Mobility, 19 Hazards of Maritime Transit, supra note 28, at 23.
\textsuperscript{202} See supra note 58, and accompanying text.
\textsuperscript{203} A. Hollick & R. Osgood, New Era of Ocean Politics 92 n.10 (1974). “In practice, however, the United States evidently provides advance notice of surface ships.” Id.
\textsuperscript{204} Since the Strait of Bab el Mandeb is shallow, submerged passage is evidently not an issue.
miles wide at its widest part.\textsuperscript{205} The Strait of Tiran is characterized in the fourth category of straits\textsuperscript{206} as a territorial sea connecting high seas to the territories of Egypt, Israel, Jordan and Saudi Arabia. Of these, only Egypt and Saudi Arabia border the strait.\textsuperscript{207} The ports at the head of the Gulf are: Eilath, on the western side, Israel's only outlet to the Gulf and Red Sea, and on the eastern side, the port of Aqaba, Jordan's only outlet.\textsuperscript{208}

The Strait of Tiran is approximately three miles wide and lies between Egypt on the west and Saudi Arabia on the east.\textsuperscript{209} Two main islands are located in the strait, Tiran and Sanafir, which have been under Egyptian control for over thirty years. The navigable waterway lies to the west of these islands and is formed by coral reefs into two channels; one of them, the Enterprise Passage, is the more navigable channel.\textsuperscript{210} It is approximately 1300 yards wide and is exclusively within Egypt's territorial sea.\textsuperscript{211}

Both Egypt and Saudi Arabia claimed twelve-mile territorial seas in 1958, although even before this their territories encompassed the three-mile strait. Thus, the extension of territorial seas by the 1982 Convention\textsuperscript{212} will have no effect on this strait for navigational purposes. The regime of nonsuspendable innocent passage will continue to apply to the Strait of Tiran pursuant to customary international law, the 1958 Convention and the 1982 Convention, because it is an international strait which joins the high seas of the Red Sea to the territorial seas of foreign states.

\textbf{Jurisdictional Disputes.} The Strait of Tiran has been the cause of discontent, even war, between Israel and Egypt, especially after Israel became a sovereign state in 1948. From 1949 until the mid-1970's, ships bound for Israel had a difficult time passing through the strait due to Egyptian regulations. In 1955, Israel completed its port of Eilath, and Egypt affirmed an outright prohibition against Israeli shipping by issuing regulations requiring three-day advance notice for transiting the strait. During the 1956 Sinai campaign, however, Israel occupied the strategic

\textsuperscript{205} ElBaradei, \textit{The Egyptian - Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime}, 76 Am. J. Int'l L. 532 (1982); see also Preparatory Documents, U.N. Doc. A/CONF. 13/6 and Add. 1 (setting forth the length as about 96 miles, the breadth at the entrance as 5 3/4 miles, and the breadth at the head narrowing to 3 miles).

\textsuperscript{206} 1982 Convention, art. 45.


\textsuperscript{208} Id. at 667.

\textsuperscript{209} ElBaradei, \textit{supra} note 205, at 532.

\textsuperscript{210} \textit{See id}; Selak, \textit{supra} note 207, at 660.

\textsuperscript{211} ElBaradei, \textit{supra} note 205, at 532.

\textsuperscript{212} 1982 Convention, art. 3.
islands of Tiran and Sanafir and opened the strait to all ships.\(^{213}\)

The consensus of legal opinion following the 1956 Sinai conflict was that "the Gulf of Aqaba was international in character since it was shared by four states and that the Strait of Tiran was also international in character because it connected the Gulf to the high seas."\(^{214}\) This interpretation was challenged by the Arab states who refused to sign the 1958 Convention because art. 16(4) of that Convention permitted nonsuspendable innocent passage through straits which connected high seas to the territorial sea of a foreign state, and the Strait of Tiran was characterized as such a strait.

One argument put forward, but unconvincing to the Arab states, was the determination made in 1949 by the International Court of Justice in the *Corfu Channel Case* that the passage of a British warship was innocent, although it "had a clear political aim and was accompanied by a manifestation of power."\(^{215}\) The Arab states distinguished this case because it concerned a strait which connected only high seas, unlike the Strait of Tiran, which connects the high seas to territorial seas. Neither would the Arab states agree that the 1958 Convention merely codified customary international law and, therefore, most did not sign the 1958 Convention.\(^{216}\)

In 1957, Israeli forces withdrew from the area of the Strait of Tiran, in compliance with a U.N. General Assembly Resolution,\(^{217}\) and a U.N. emergency force (U.N.E.F.) moved in to control the strait. For almost ten years the strait was open to international navigation.

However, in 1967, UNEF withdrew at the request of the President of the United Arab Republic, and "war inexorably followed."\(^{218}\) Egypt had announced its blockade of the Strait of Tiran for all Israeli ships and for cargo bound for Israel and as a result, the Arab-Israeli conflict escalated into a full-scale war. The President of the United States, then President Lyndon Johnson, stated in 1967 that "the United States considered the gulf [of Aqaba] to be an international waterway and . . . that a blockade of Israeli shipping is illegal and potentially, disastrous to the cause of peace. The right of free, innocent passage of the international

\(^{213}\) For a history of the Arab-Israeli conflict over the Strait of Tiran, see A. El-Hakim, *supra* note 111; R. Lapidoth, *supra* note 171; and Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba, 33 Law & Contemp. Probs. 125* (1968) [hereinafter cited as Gross, *Strait of Tiran*].


\(^{215}\) R. Lapidoth, *supra* note 171, at 14; *Corfu Channel case, supra* note 123.

\(^{216}\) See A. El-Hakim, *supra* note 111, at 4; Robertson, *supra* note 45, at 811.


waterway is a vital interest of the entire international community."\(^2\) However, Israel retook control of the Sinai Peninsula and the strait and, by again occupying the islands of Tiran and Sanafir, reopened the strait to international traffic.\(^3\)

In 1979, a Treaty of Peace was concluded between the governments of the Arab Republic of Egypt and the State of Israel.\(^4\) Art. V(2) of that treaty refers to the Strait of Tiran and Gulf of Aqaba which are considered by the parties "to be international waterways open to all nations for unimpeded and nonsuspendable freedom of navigation and overflight."\(^5\) Since the navigable portion of the strait lies solely within Egypt's territorial sea, the 1979 Treaty can be easily enforced by Egypt.

Saudi Arabia is not a party to the 1979 Treaty, nor did it sign the 1982 Convention of the Law of the Sea. Nevertheless, since the reopening of the strait in 1967, all vessels have enjoyed nondiscriminatory freedom of passage in the strait without protest by the Saudis. If Saudi Arabian and United States ties become stronger, the Saudis should continue to acquiesce in freedom of passage through the Strait of Tiran.

The strait's regime, established by the 1979 Treaty of Peace,\(^6\) conforms to the regime of transit passage set forth in part III of the 1982 Law of the Sea Convention. The "Treaty goes beyond the long-established regime of innocent passage in the territorial sea, a regime that has been regarded as equally applicable to the Strait of Tiran under both the [1958] Geneva Convention and the UNCLOS III . . . [1982] Convention."\(^7\) The 1979 Treaty of Peace, in art. V(2), and the 1982 Convention on the Law of the Sea, in art. 38(2), both use the terms "freedom of navigation and overflight" to denote a regime of transit passage.\(^8\)

The 1982 Convention's part III on transit passage is not applicable to a strait such as the Strait of Tiran, except that art. 45 of the 1982 Convention applies the regime of nonsuspendable innocent passage to the Strait of Tiran. Again, this strait is categorized in the fourth category of straits because it connects high seas to the territorial seas of foreign

\(^{219}\) Statement by President Johnson (Press Release May 23, 1967), in 56 DEP'T ST. BULL. 870, 870-71 (June 12, 1967).

\(^{220}\) As of Jan. 23, 1978, the Embassy of Israel in Washington, D.C. confirmed that Israel maintained control of these islands. See J. Noyes, supra note 133, at 38 n.24.


\(^{222}\) Id. at 4.

\(^{223}\) Id.

\(^{224}\) ElBaradei, supra note 205, at 550.

\(^{225}\) See also, Lapidoth, The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel, 77 AM. J. INT'L L. 84, 105-07 (1983).

Arab states which are parties to the 1982 Convention would insist that the Strait of Tiran has not been "elevated" to a strait in the first category,\footnote{See 1982 Convention, art. 35(c).} since the 1979 Treaty of Peace is not a "long-standing" convention. However, one scholar suggests that by the time the 1982 Convention enters into force, it may be long-standing.\footnote{Lapidoth, supra note 225, at 106. Professor Lapidoth suggests that if United Nations Security Council Resolution (U.N.S.C.R.) 242, adopted unanimously on Nov. 22, 1967, is determinative of customary international law in the strait, then its adoption in 1967 would permit the 1979 Treaty of Peace to be treated as "long-standing," pursuant to art. 35(c) of the 1982 Convention. U.N.S.C.R. 242 emphasized the necessity for freedom of navigation in the area of the Strait of Tiran. See S.C. Res. 242, 22 U.N. SCOR Resolutions and Decisions, at 8, U.N. Doc. S/INF/22 Rev. 2 (1967).}

In addition, Egypt, Israel and the United States reached an agreement on August 3, 1981 on the establishment and maintenance of a Multinational Force and Observers (M.F.O.) for the Sinai Peninsula, including the area of the Strait of Tiran.\footnote{The M.F.O. was established as an alternative to the U.N. Emergency Forces and Observers (U.N.E.F.) set forth in art. VI of Annex I of Protocol Concerning Israeli Withdrawal and Security Arrangements. See Sinai Multinational Force and Observers Established, 20 I.L.M. 1190 (1982) (Protocol Established the Sinai Multinational Force and Observers).} The agreement ensures "the freedom of navigation through the Strait of Tiran in accordance with article V of the [1979] Treaty of Peace."\footnote{Id. at 1191 (Annex, para. 10(d)). See also Lapidoth, supra note 225, at 102.} Since the United States is a party to the 1981 Agreement establishing an M.F.O., freedom of navigation through the Strait of Tiran is assured to the United States. Further, Egypt controls the navigable portion of the strait. If both Egypt and Saudi Arabia remain friendly with the United States, United States vessels and aircraft would be permitted to navigate freely through and over the strait, even without an agreement.

Article V of the 1979 Treaty of Peace states that freedom of navigation and overflight apply to all states using the Strait of Tiran. "Such a right for third states, which is more inclusive in nature and scope than existing customary international law and multilateral treaty rights, could be exercised upon the assent of a third state, which is presumed so long as the contrary is not indicated."\footnote{ElBaradei, supra note 205, at 553. Because the 1979 Treaty of Peace does not set forth coastal state regulations, Professor ElBaradei suggests that the Treaty should be supplemented to} The only other Arab state, besides
Egypt, to endorse the 1979 Treaty of Peace was Oman.\textsuperscript{232} Saudi Arabia, Jordan and the remainder of the Arab world maintain several unresolved issues concerning the State of Israel.

Arguments enunciated before the 1979 Treaty of Peace and the 1981 Agreement have not changed. With the exception of Egypt, Arab states have made several claims regarding the Strait of Tiran. First, Israel has been considered an enemy since 1948, and since there is no innocent passage in time of war, the strait could be blockaded. "By the same token, Israel had an even clearer right to use force to resist Egypt's closure of the Gulf in 1967 than it had in November 1956, when the legal regime of the Egypt-Israel Armistice Agreement was still officially in force."\textsuperscript{233} However, there is no foundation now for the assertion that a state of war has existed since 1948. The 1979 Treaty of Peace abrogates the claim that no peace treaty exists to terminate the state of war. In addition, the United Nations Charter "forbids resort to war, [and] member states may not declare or maintain a state of war between each other, and therefore cannot claim special rights deriving from a pretense of belligerency, particularly not after the cessation of active hostilities."\textsuperscript{234}

A second claim made by the Arab states is that Israel is not a legitimate riparian; however, for purposes of this article, and in light of world consensus and the bilateral treaty discussed above, Israel is deemed a legitimate riparian of the Gulf of Aqaba.\textsuperscript{235}

A third claim for Arab states' control of the Strait of Tiran and Gulf of Aqaba deals with the juridical status of the Gulf. This claim is two-fold: that the Gulf is (1) an internal or closed sea or (2) an historic bay. In customary international law, a closed sea is one in which there is only a single riparian, or if several riparians, all states agree that the juridical status of their territorial waters is "closed." The Gulf of Aqaba has four sovereign states surrounding it. "Certainly the Gulf of Aqaba could be transformed into a closed sea by agreement among all the littoral states and recognition by other nations."\textsuperscript{236} However, it is necessary for Israel to maintain the Strait of Tiran as an international strait in order to retain access to the Red Sea and the Indian Ocean. It would not consider turn-

\textsuperscript{232} Anthony, \textit{The Persian Gulf in Regional and International Politics: The Arab Side of the Gulf, The Security of the Persian Gulf} 170, 196 (1981) (by endorsing the treaty, Oman hoped to gain favor with the United States and to substitute Iranian troops with Egyptian, to help with Oman's Dhofar rebellion).

\textsuperscript{233} Khadduri \& Dixon, \textit{supra} note 195 at 86.

\textsuperscript{234} R. Lapidoth, \textit{supra} note 171, at 62.

\textsuperscript{235} Since the subject of this article concerns straits in the Middle East, political issues such as the legitimacy of the State of Israel will not be discussed.

\textsuperscript{236} Gross, \textit{supra} note 3, at 570. Professor Gross agrees with the view that the Gulf of Aqaba is not a closed sea. \textit{Contra, Selak, supra} note 207, at 693.
ing the Gulf into a closed sea. Again, the Arab states argue that Israel should be excluded as a legal littoral state since its territory was acquired by war.

The claim that the Gulf of Aqaba is an historic bay is based in part on the *Gulf of Fonesca Case*, decided by the Central American Court of Justice on March 9, 1917. In this case, the Court decided that the Gulf of Fonesca had the legal status of an historic bay and "the three riparian States of El Salvador, Honduras, and Nicaragua are, therefore, recognized as co-owners of its waters . . ." The Court's decision was based on the premise that these states had immemorial possession of the Gulf and peaceful, continuous, and total authority (animus domini) which was accepted by all other nations. The situation surrounding the Gulf of Aqaba is not, however, analogous.

The criterion for immemorial possession was set forth by the Arab states to support the claim that the Gulf of Aqaba was the historic route to Mecca; however, this claim was not proposed until 1957, by Saudi Arabia. Further, the remaining criteria set forth by the Court in the *Gulf of Fonesca Case* cannot be met because the Arab littoral states of the Gulf of Aqaba have not maintained peaceful and continuous total control. In fact, scholars generally agree that the Gulf of Aqaba is not an historic bay. Professor Gross suggests that the First Conference on the Law of the Sea "may be deemed to have implicitly rejected" this claim when it adopted art. 16(4) of the Convention, "which has been generally regarded as fitting that particular gulf." "By prohibiting suspension of innocent passage through straits, the Conference rejected decisively the competence of the coastal state 'to control the Strait as a means of projecting its influence for purposes of special national policy, not necessarily reflecting common interest.'" Although a peace treaty has been concluded between Egypt and Israel, the claims discussed above cannot be disregarded since neither of the riparian states of Jordan and Saudi Arabia is a party to the 1979

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238 Id. at 716.


242 Gross, *Strait of Tiran, supra* note 213, at 142.
Treaty of Peace, nor are they signatories to either the 1958 or 1982 Conventions on the Law of the Sea. In fact, one reason for their not signing either Convention is the inclusion of the regime of nonsuspendable innocent passage through international straits which connect high seas to territorial seas.\textsuperscript{243}

Egypt is a party to the 1982 Convention. While Israel is not, it is in part due to that country's protest at giving observer status at the Third Conference to national liberation movements (such as the Palestine Liberation Organization).\textsuperscript{244} However, in the 1979 Treaty of Peace both Egypt and Israel expressly agreed to a regime in the Strait of Tiran which is analogous to the transit passage regime of the 1982 Convention. The bilateral peace treaty expressly supports both the First and Third Conferences on the Law of the Sea. Further, when Egypt ratified the 1982 Convention on August 26, 1983, it set forth a declaration concerning passage through the Strait of Tiran which stated specifically that "[t]he provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the [1982] Convention."\textsuperscript{245}

Since the United States was inextricably involved in arranging the 1979 peace treaty between Egypt and Israel, it naturally supports the international status of the Strait of Tiran, including nondiscrimination in treatment of all ships and aircraft as well as unimpeded passage. As long as the United States maintains its present friendly relations with all of the states on the Gulf of Aqaba, passage through the Strait of Tiran will not present a problem. However, as was stated previously, politics change rapidly in the Middle East and what once appeared improbable may quickly become a reality. Nevertheless, the economic and military support of all four states should assure the United States security in this area.\textsuperscript{246}

\textsuperscript{243} 1958 Convention, art. 16, para. 4; 1982 Convention, art. 45, para. 2.
\textsuperscript{246} See Statement by Deputy Assistant Secretary for Near Eastern and South Asian Affairs, Constable, \textit{U.S. Policy Toward the Middle East and Persian Gulf Region}, 81 DEP'T ST. BULL. 43, 45 (June 1981) (specific amounts of assistance the U.S. planned to contribute in fiscal year 1982 to Israel, Egypt and Jordan). For U.S. assistance to Saudi Arabia, see Twinam, \textit{supra} note 96, at 63-66. This writer conjectures that aid to Saudi Arabia has increased greatly since 1981, based on the improved relationship between the U.S. and Saudi Arabia.
V. CONCLUSION

Linkage between straits is an important concept in the Middle East. Policies which apply to tankers leaving the Strait of Hormuz for the Red Sea or the Gulf of Aqaba will have an impact on all of the straits along the route. If passage is hampered, particularly in the Straits of Bab el Mandeb or Hormuz, the "choke" would be felt throughout the world. In fact, "any imposition by littoral states of restrictions on straits is apt to be . . . an important and . . . (not) easily surmounted obstacle to naval mobility . . . and to the shipping of oil and other resources."247

The view that coastal states would restrict passage through straits, ignores the economic and political costs to the states of closing straits and the dependence of straits states upon international trade and commerce. Just as maritime states derive locational utility from the use of straits, states bordering straits derive economic benefits from their position astride important trade corridors. In many cases, straits states are more dependent upon unimpeded, low-priced transit than the major maritime powers, especially where exports are the major source of national income. To this degree, for example, Iran has as much at stake in keeping the Strait of Hormuz open as the United States.248

In all three Middle East straits a transit passage regime is vital to the free flow of traffic. Although it has been claimed that transit passage is a new regime, the United States claims it is customary international law. Unfortunately, regarding revolutionary activities, terrorists who intend to impede the free flow of navigation through straits will do so in any case, no matter what regime of the seas applies or what national laws or regulations exist. The mining of the Red Sea in the summer of 1984 is just such an example.

Regarding the Strait of Tiran, "[t]he majority of [Middle East states] . . . insist[ed] that the regime of straits [in the 1982 Convention] should be strictly confined to straits which connect two parts of the high seas."249 This would have excluded the Strait of Tiran from having international strait status. However, the rest of the world community considered this strait as an international strait in which the regime of nonsuspendable innocent passage applied.250

Maritime states whose vessels transit the Strait of Tiran have a legal right as well as an economic interest in maintaining unimpeded freedom of navigation in the strait. Further, the 1979 Treaty of Peace between

247 A. HOLLICK & B. OSGOOD, supra note 203, at 115.
249 A. EL-HAKIM, supra note 11, at 78.
250 This is confirmed through the usage of states, pursuant to customary international law, and to arts. 16(4) and 45(2) of the 1958 and 1982 Conventions on the Law of the Sea, respectively.
Egypt and Israel changes the regime of innocent passage in the Strait of Tiran, at least as to parties to the Treaty. By sanctioning a transit passage regime, the parties to the Treaty are aiding the evolution of customary international law in this strait. Since unimpeded passage has existed since 1973, it is possible that the transit passage regime will emerge as the rule of law in the Strait of Tiran for all states. Meanwhile, as a practical matter, freedom of navigation exists in the Strait of Tiran due to Egypt's pledge to maintain the strait as an international waterway for freedom of navigation and overflight.

As to the Straits of Hormuz and Bab el Mandeb, maritime and coastal states look with strict scrutiny at the political instability surrounding these waters. It is of utmost importance to all states, both littoral and nonlittoral, that freedom of passage be unimpeded in these straits. The United States position is that existing customary international law in the Straits of Hormuz and Bab el Mandeb is that of unimpeded passage in, over and under the straits. Since transit passage does not depend on the width of straits, the United States maintains that part III of the 1982 Convention merely codifies the existing law as the regime of transit passage. For over twenty-five years, freedom of navigation and overflight have existed in these straits, with only one interruption in 1973.251

Although the United States is not a party to the 1982 Convention, its ships will be accorded the same deference as the ships of states which are parties because dependence on the trade, commodities, and military power of the United States is significant. "To say that the United States or other maritime nations must subscribe to an unacceptable arrangement concerning deep seabed exploitation in order to retain a right to continued exercise of existing navigational freedoms is to turn international law on its head."252 As to military security,

[c]laims that a right of innocent passage through straits would pose a serious threat to United States security are blatantly overstated: the sea-based deterrent is not dependent on unimpeded passage through straits, and the mission of force projection and presence can be conducted with limited constraints under a regime of innocent passage.253

In 1986, United States policy depends upon a close relationship with Saudi Arabia and Egypt. By 1987, this policy might be dependent upon other Middle Eastern states. In any event, the United States will con-
continue to provide economic and military assistance to promote stability in the Middle East. Approximately fifty percent of the United States "global economic assistance is directed to the Middle East. . . . The West remains dependent upon petroleum supplies from . . . [Middle East] producers, while they have acquired an important stake in access to western technology and capital markets." Again, both maritime and coastal states have a decided interest in maintaining unimpeded passage through the straits.

The regimes of transit passage and nonsuspendable innocent passage through straits allow for the unimpeded movement of vessels. Naturally, laws are useful to states only as long as they are effective. As to the three straits in the Middle East, the laws and regulations concerning the free flow of commodities and ships are vital. The straits in the Middle East are of such importance to the world’s economic order that freedom of passage should undoubtedly be ensured in this troubled area, regardless of whether or not a state is a party to the 1982 Convention on the Law of the Sea. If a strangling blockade against oil shipments occurred in the Middle East straits, “a law of the sea treaty would be irrelevant.” Further, Iran and Iraq have been at war for over five years and the Strait of Hormuz has not yet been closed to traffic. “Problems concerning straits are global — for passage through straits affects not only user and straits states but also other states, which may directly or indirectly be affected from the strategic viewpoint — political, military or economic.” It is hoped, therefore, that these mutual interests together will help to maintain open straits in the Middle East.

254 Constable, supra note 246, at 44.
255 Osgood, supra note 71, at 28.
256 K. Koh, supra note 88, at 3.
### APPENDIX

Middle East Coastal States — Territorial sea limits and dates established and whether or not signatories to the 1982 Convention. From: VI *New Directions in the Law of the Sea* 845-868 (S. Lay, R. Churchill, M. Nordquist, eds. 1973)

<table>
<thead>
<tr>
<th>Territorial Sea limit and date claimed (all references are to nautical miles)</th>
<th>Party to 1982 Convention, as of May 1984</th>
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#### Gulf of Aqaba

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<th>Country</th>
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<tr>
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<td>Yes</td>
</tr>
<tr>
<td>Israel</td>
<td>6 (1956)</td>
<td>No</td>
</tr>
<tr>
<td>Jordan</td>
<td>3 (1943)</td>
<td>No</td>
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<td>Saudi Arabia</td>
<td>12 (1958)</td>
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#### Red Sea

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<td>Yes</td>
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<tr>
<td>Ethiopia</td>
<td>12 (1953)</td>
<td>Yes</td>
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<tr>
<td>Saudi Arabia</td>
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<tr>
<td>Somalia</td>
<td>200 (1972)</td>
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</tr>
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<td>*Sudan</td>
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</tr>
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</tr>
<tr>
<td>*PDRY</td>
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<td>*Djibouti</td>
<td>12 (1971)</td>
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#### Persian Gulf

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