

THE LEGAL REGIME OF INTERNATIONAL STRAITS:  
A CASE STUDY OF THE LEGAL AND POLITICAL  
IMPLICATIONS FOR THE STRAIT OF HORMUZ

By

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## ABSTRACT

This Thesis is an analytical study of the legal and political aspects of the Strait of Hormuz. It involves an evaluation of the policies of the Gulf States towards the applicable legal regime of passage through the Strait of Hormuz and their reactions towards both the 1958 and 1982 Conventions on the Law of the Sea. Special attention is made to the practice of the States bordering the Strait of Hormuz as contained in their national laws. Our analysis of the applicable legal regime of passage through the Strait of Hormuz is conducted in the light of the prevailing international rules governing passage through international straits. Extensive discussion is devoted to the principal sources of threats to the Gulf's security and to the safety of navigation through the Gulf Sea lanes, including the Strait of Hormuz.

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## INTRODUCTION

Navigation through international straits is of fundamental importance in ocean law. Its importance is derived from the global recognition of their role in international trade and the interest of the entire community of nations. International straits such as Gibraltar, Hormuz, Malacca and Bab el Mandeb serve as the trade routes of seaborne commerce as well as sea lines for military vessels.

The failure to establish an adequate international regime governing international straits will frustrate the legitimate common interests of the international community. Any attempt to restrict passage through international straits or discriminate among foreign vessels under the pretext of national security may seriously increase political tensions or perhaps military confrontation. Throughout the history of international relations such results have occurred. Some examples are: the Crimean War (1853-1856) which flared due to the Bosphorus and Dardeanelles Straits; the Corfu Channel case (1945); the War of 1956, between Israel and Egypt, occurred due to the Tiran Strait and fear of closing the Strait of Hormuz was highlighted during the Gulf War (1980-1988).

Since most nations have claimed a 3 mile territorial sea, the legal regime of almost all the important international straits was not affected because most of them were beyond that limit. However, with the expansion of the territorial sea

since World War II, the fear of restriction and control of navigation through straits has been felt throughout the user states, particularly the maritime powers.

Thus in an attempt to resolve the issue, multilateral conventions have been held. The U.N. Convention held in Geneva in 1958, produced The Convention on Territorial Sea and Contiguous Zone (1958 Geneva Convention). However, neither the right of innocent passage, nor the criteria for prohibition of innocent passage were precisely defined. The 1958 Geneva Convention also came to no agreement on the maximum limit of the territorial sea.

The unsettled issue of the breadth of territorial sea and the continued increase of the number of nations claiming a territorial sea of 12 miles and beyond, led the U.N. to convene a new multilateral convention that would fix the maximum breadth of the territorial sea to 12 miles and provide an acceptable regime of transit through international straits. The Third U.N. Conference adopted a new Law of the Sea Convention. It provides, among other things, a 12 mile territorial sea and codifies a transit passage regime in international straits as well as innocent passage through territorial sea. Although the 1982 Convention has not escaped critical commentary, especially those provisions relating to the transit passage regime, the navigational articles are still widely believed to provide a minimal satisfactory balance between the interests of commercial and military navigation on the one hand, and the interests of straits States in safeguarding their security and resources on the other.

As to the Strait of Hormuz, both Iran and Oman have claimed 12 miles territorial seas in their municipal laws before the 1982 Convention codified the limit. The extension of the territorial seas to 12 miles would mean that the Strait

of Hormuz has lost its central belt of high sea. In addition, since both Iran and Oman have not ratified or acceded to the 1958 Geneva Convention and there is no specific international agreement governing passage through the Strait, the issue which arises is how would the regime of passage apply to the Strait of Hormuz. Furthermore, there is much fear that the political stability of the Gulf States and the maintenance of the Strait's security might be threatened. The Gulf Sea lanes are not only unguarded, but their safety is shrouded in ambiguity. Several factors, both external and regional, have contributed to the instability and volatility of the region. Competition between the major powers, in seeking influence and presence in the region has led to the speculation that this struggle might be transformed into an active threat to the Gulf region. In addition, various kinds of threats have emerged from within the region. The vulnerability of the Gulf Sea lanes as a result of illegal military activities has raised serious concern about the maintenance of the Strait's security. The problems of unresolved territorial disputes as well as the Iranian claim to some strategic islands at the entrance to the Strait have highlighted the challenges to this strategic region. Any cessation of international shipping from the Gulf region, by any means of threats, could destabilize the economies of the oil importing as well as the exporting states. Such an action would, in fact, threaten the entire international community.

In light of the conclusions drawn from the discussion of these legal and political problems, we should be able to provide some answers to the question of the legal status of the Strait of Hormuz as well as evaluate the overwhelming challenges to the stability and security of the Gulf region and the Strait. To fulfill these objectives, the study is divided into the following sections:

Chapter I describes the Gulf region, the geography of the Gulf and the Strait of Hormuz, and examines the significant role of the Strait in both economic and political-strategy for the international community.

Chapter II basically discusses and analyses rules governing passage through international straits with main focus on the navigational provisions of the 1982 Convention particularly with those provisions related to transit passage regime.

Chapter III outlines the perspective of the Gulf states towards the applicable legal regime of passage through the Strait of Hormuz and their reactions to both the 1958 and 1982 Conventions on the law of the sea. A special attention is made to the practice of the States bordering the Strait of Hormuz as contained in their national laws.

Chapter IV describes and analyses the principal sources of threats to the Gulf's security and to the safety of navigation through the Strait of Hormuz. It will ascertain the real challenges to the stability and security of the region and conclude that ensuring safety of navigation through the Gulf sea lanes is inseparable from maintaining the overall stability of the region.

In the conclusion, the study seeks to identify the regime of passage that is applicable to the Strait of Hprmuz as contained under the prevailing international rules governing passage through international straits. It asserts that such regime is in the national interest of all the concerned Gulf States. It also seeks to propose solution aimed at minimizing threats of instability and disruption of international shipping. It will argue that such solution might, in the long run, further advance efforts toward effective regional cooperation which is vital to the stability of the region.

## CHAPTER 1

### THE PHYSICAL CHARACTERISTICS OF THE REGION:

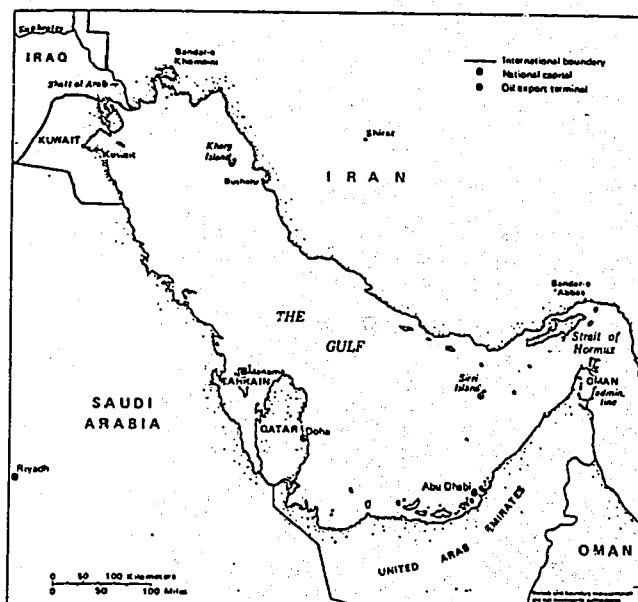
It is appropriate to examine the Gulf region in terms of its geographic, economic and political-strategic features which collectively characterize the inherent dimension of the Strait of Wormuz.

#### A. The Geographical Setting of the Gulf

The Gulf area<sup>1</sup> is regarded as a semi-enclosed sea which lies between the Arabian Peninsula in the West and Iran in the East. It has an area of **92,500** square miles [**240,000** k.m.], "slightly larger than the Gulf of St. Lawrence and about two-thirds the size of the Baltic".<sup>2</sup> Its length, from the Shatt-al Arab at its northern extremity to the Gulf of Oman at its southern extremity, is about **615** miles and its width varies from a maximum of **210** miles to a minimum of **35** miles at the Strait of Hormuz. The Gulf is a relatively shallow basin, namely deeper than 300 feet, although depths extending to 360 feet at its mouth. (Map 1)

Throughout the Gulf are numerous islands. Although the great majority of them are barren and uninhabited, they have given rise to a number of legal disputes such as the delimitation of offshore boundaries and the controversy over the sovereignty of some of these islands?

Map 1: The Gulf Area



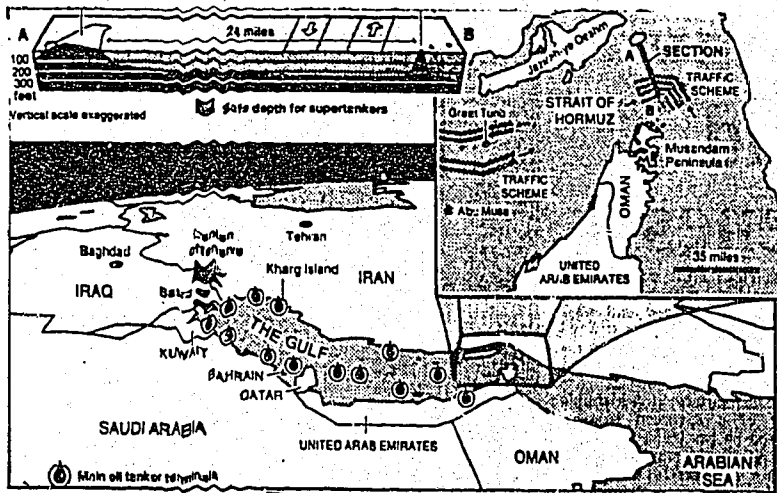
Source: H.R. Sindelar and J.E. Peterson, ed., *Crosscurrents in the Gulf* (London: Routledge Press, 1988).

The Gulf region is bordered by eight littoral states: Iran, Iraq, Saudi Arabia, Kuwait, Qatar, Bahrain, Oman and the United Arab Emirates (U.A.E.), two of these states (Iran and Oman) border the Strait of Hormuz while the others are located variously adjacent to it.

The Gulf connects with the Arabian Sea-Indian Ocean via the Strait of Hormuz. The Strait is located between Iran on the north and northwest and Oman on the south. The general width of the Strait is slightly more than 28 miles between the Iranian Island's Qishm-Larak, to the north of the Strait, and the Omani Musandam Peninsula to the south. Nine miles from the Musandam Peninsula there are a group of three islands known as the Quoins, under the sovereignty of Oman. Between these islands and the Larak Island, the Strait is at its narrowest, less than 21 miles wide. The depths of the Strait are applicable for navigation, varying between 32 and 50 fathoms. The main shipping lanes in the Strait are located north of the Quoins Islands and are entirely within the territory of Oman.<sup>5</sup> (Map 2)

Although navigation in the Gulf and in the Strait is possible, the narrowness of the Strait, together with the many islands close to the navigable channel, make oil tankers and other ships of goods vulnerable to attack.<sup>6</sup>

Map 2: The Strait of Hormuz ...



Source: Al-Sysah (a daily newspaper) Kuwait, 6 March, 1982, at 7.

These physical features created economic, political and legal concerns for the littoral states as well as for the international community.

#### B. The National and International Importance of the Strait and Its Strategic Significance

Apart from the physical dimensions of the region, the gulf has derived its importance, for both the international community and the coastal states of the Gulf, from economic and political-strategic factors.

The Gulf region, including the Strait of Hormuz, is considered vital for communication purposes in the international scene. Its significance derived from its geographical position. Historically, the gulf has been viewed as an avenue between the East and West particularly as a land-bridge to Africa-Europe and the Indian Ocean. It is not surprising therefore that the area was a place of conflict between the European powers, Portugal, France and Holland, in the sixteenth century.<sup>7</sup> However, Great Britain tightened its domination on the gulf and the Strait of Hormuz at the beginning of the nineteenth century. This was largely for strategic reasons, to protect the "lifeline" to India and other countries in the East. After World War I, However, the British interest in the gulf intensified as a result of oil discovery and it "negotiated additional treaty provisions assuring that oil concessions would not be given to outside parties without its consent".<sup>8</sup> The political changes in the gulf since the end of World War II have led to an increase in the importance of the Strait as an international waterway.<sup>9</sup> This makes the region of special concern to the major powers both economically and strategically.

The Gulf has emerged as a major focus of international rivalry, especially between the major powers. The United States has been engaged in the area for a long time. This was due to political and strategic interests, namely to ensure that the region does not come under the control of a power hostile to itself or to its Western and Japanese allies and to prevent the Gulf from falling under the Soviet influence.<sup>10</sup> Equally important, the Soviet Union has also strategic objectives. Since the region is close to Soviet territory and has a long border with Iran and Afghanistan, the Soviets see the Gulf as being a potential launching point for attacks.<sup>11</sup> From the Soviet national security perception, fears about the massive

arms sales by the U.S. to the client states in the regions are possible which could be used by the U.S. in wartime.<sup>12</sup> Moreover, the geopolitical centrality of the area, as a land-bridge to Africa and the Indian Ocean, is critical to the Soviet interest in establishing a presence and foothold.<sup>13</sup> Hence, control of the Strait of Hormuz would advance Soviet goals of controlling the whole gulf area. Needless to say, the Soviet objective is to reduce American influence and to enhance its own role in the region.<sup>14</sup> These conflicts of interests have, to some extent, affected the regional stability. It is worth noting that the super powers also have clear strategic interests in international maritime security of passage, particularly through international straits which could seriously corrupt the suppleness of the conventional forces and the fleet ballistic missile submarines which depend on complete mobility in the oceans and unimpeded passage through international straits.<sup>15</sup>

Economically, the strait is considered as the most important waterway to the international community because through it goods, services, resources and technology are shipped to and from the Gulf region, together with the numerous oil tankers using the sea route to distribute oil to the major oil-consuming nations. The Gulf provides access to the world's largest oil reserves. It is estimated that the Gulf contained about 63% of the world's oil reserves in the first quarter of 1989 (Table 1).

Table 1: Proved Oil Reserves in Selected Region, 1989

Million of Barrels

Region	Reserves	Percentage
Middle East <sup>(1)</sup>	571,518.8	63.0
Latin America	121,950.7	13.0
Africa	56,963.8	6.27
North America	33,285.5	4.0
West Europe	18,556.6	2.0
Communist Nations <sup>(2)</sup>	83,800.0	9.2
Asia	21,367.4	2.35
Total World	907,442.8	

(1) Non-Gulf States contain only 0.5 percent.

(2) Include the Soviet Union.

Source: Basic Petroleum Data Book, Petroleum Industry Statistics, V.IX, No. 2, May 1989.

All Gulf States hold oil reserves, but their reserves differ significantly in size (see Table 2). Oil productions of the littoral states are also significant. Total gulf oil productions in the first quarter of 1989 amounted to over 13 million

barrels per day as compared with over 20 million b/d for OPEC countries (see Table 3).

Although estimates of world oil reserves and productions in different years may give an impression of certainty, this is not the case in the gulf region where new oil and gas discoveries have been added to the estimates.<sup>16</sup>

**Table 2: Proved Oil Reserves in the Gulf**  
**Thousand of Barrels**

Country	Reserves	Percentage
Saudi Arabia	169,970.000	30.84
Iraq	100,000.000	18.14
Iran	92,850.000	16.85
Kuwait	91,920.000	16.68
Abu Dhabi	92,205.000	16.73
Oman	4,071.160	0.73
Total	551,016.160	

**Source:** B.P. Data Book, Petroleum Industry Statistics, V.IX, No. 2, May 1989.

Table 3: World Crude Oil Production in Selected Areas

Thousand Barrels Per Day

Area	Year	
	1979	1989
OPEC	30,998	20,957
Gulf Area *	21,066	13,761
U.K.	1,568	1,797
U.S.	8,552	7,783
U.S.S.R.	11,187	11,735

\* The production from the Neutral Zone, between Kuwait and Saudi Arabia, is included.

Source: Monthly Energy Review, March 1989, Energy Information Administration, U.S. Department of Energy, Washington, D.C.

Given this share of Gulf States in the world oil supplies, the importance of the Strait of Hormuz to the international community becomes obvious. The Gulf countries supply over 25% of all oil moving in the world trade and most of it passes through the Strait. In 1986, about 30% of Western Europe's oil imports came from the Gulf region. The comparable figures for Japan was about 60%. Whereas only about 5% of U.S. oil consumption originated in the gulf, this level is certain to rise significantly in the future as the U.S. reserves decline.<sup>17</sup> Thus, the U.S. and

its allies have unquestionable "vital" economic interests in ensuring that they have unimpeded access to and from the area both now and in the future.

Although the Soviet and the socialist states have few interests in Gulf oil at present, there are indications that they will become a net importer of oil in the near future. In such a case the Gulf will be an obvious **source**.<sup>18</sup> It should be noted here that the communist states have developed significant economic and commercial ties with Iran and Iraq and to some extent with other gulf states. However, it is by no means as significant as the overall trade of the West with Gulf States.<sup>19</sup>

The Strait of Hormuz is equally vital to the Gulf States themselves. Iraq, Kuwait, Bahrain and Qatar have no outlet to the high seas but via the Strait. All of them in general depend on the large oil revenues which constitute the backbone of their **economy**.<sup>20</sup> They depend heavily not only on the uninterrupted flow of oil exports but also on the non-oil maritime trade. The flow of capital goods for economic and social development as well as military strength are **clearly critical** to the economic health of these states. Any interruption of the **free movement** of crude oil or other commodities would threaten the **economies of the gulf states**. In other words, the Strait is rapidly becoming a trade "lifeline" for them.<sup>21</sup>

It is for these economical and political factors that the Strait can be characterized as the most vital artery for the international community as well as the littoral states of the Gulf. Any attempt of a de jure or even a de facto closure of the Strait would be devastating to the economies of the concerned countries.

## Footnotes

1. There has been controversy between Iran and Arab countries over the name of the Gulf, as the Arabian or Persian Gulf. Many international lawyers and scholars have been using both terms interchangeably. For simplicity, this writer uses the term "Gulf" which refers to the term Arabian/Persian Gulf. For a discussion of the controversy over it, see: S.H. Amin, *International and Legal Problems of the Gulf*, (London: Middle East and North African Studies Press, 1981), 31-42.
2. Richard Young, "The Persian Gulf", in *New Directions in the Law of the Sea*, V. III, eds. Churchill R. Simmonds and J. Welch, (New York: Ocean Publications, 1973), 231.
3. Ibid., 234. A good example is the dispute over the Abu Musa and the Tunbs Islands between Iran and the U.A.E. See: Hussein Sirriyeh, "Conflict Over the Gulf Islands of Abu Musa and the Tunbs, 1963-1971", *Journal of South Asian and Middle Eastern Studies*, VIII (1984), 73.
4. For a more detailed description of the geographic setting of the Gulf and the Strait of Hormuz, see: Young, Ibid., 231; United Nations Conference on the Law of the Sea, Preparatory Documents (v.1, 1958), pp. 129-130; The New Encyclopædia Britannica (USA: 15 ed. 1979), v.14, 106.
5. Oman Government insisted, for environmental reasons, on the use of shipping lanes east of the Quoins Islands in 1979, instead of the previous lanes which were west of the Quoins Islands.
6. This difficulty has been seen recently during the Iran-Iraq War (1980-1988).
7. Hassan el-Bassas, "The Red Sea and the Arabian Gulf: Strategic and Economic Links", in *The Red Sea: Prospects for Stability*, ed. Farid Abdel Majid, (London: Croom Helm Publisher, 1984), 98.
8. Joseph Wright Twinn, "American and the Gulf Arabs", *American-Arab Affairs*, 25 (1988): 131.
9. The extensive petroleum resources found in the Gulf, the U.K. withdrawal of military presence, the Iranian revolution in 1979, the Soviet invasion of Afghanistan, and the Iraqi-Iranian War have played a significant role in the transformation of the region. See in general, George Lenczowsk, "The Soviet Union and the Persian Gulf: An Ancircling Strategy", *International Journal* 37, (1982), 308.

10. Jeffrey Schloessen, "U.S. Policy in the Persian Gulf", **U.S. Department of State Bulletin**, v. 87, No. 2127. (1987), 38.
11. Dennis Ross, "Considering Soviet Threats to the Persian Gulf", **International Security** 6, (1981), 166.
12. Alasdair Drysdale and Gerald H. Blake. **The Middle East and North Africa, A Political Geography**, (New York: Oxford Univ. 1985), 30.
13. Dennis Ross, 168.
14. See in general: S. Chubin, "Soviet Policy Towards Iran and the Gulf". in **Regional Security in the Middle East**, ed. C. Tripp, (New York: St. Martin's Press, 1984), 125.
15. Elliot L. Richardson, "Power, mobility and the Law of the Sea", **Foreign Affairs**, 58 (1980): 905.
16. **For example, the Saudi Arabia oil company (Saudi Aramco) announced on June 7, 1989, a new oil discovery in Al Hawtah region. It has an estimated production potential of 8,000 barrels b/d of crude oil. Saudi Arabia, The Monthly News Letter of the Royal Embassy of Saudi Arabia, Wash., D.C., v.6 (1989); 4. Also, the Iraqi Minister of Oil has announced that it has discovered new oil fields through the last twenty years and the potential oil reserves of these fields reach about 280 million barrels. Asharq Al-Awsat, [Middle East] The International Daily Newspaper of Arabs, July 18, 1989, at 7.**
17. Jeffery Schloessen, 38.
18. Fred Halliday, **Soviet Policy in Arc of Crisis** (1981), 46.
19. Recently, Iran concluded an agreement with the Soviet Union to export about 3 million gas to them in 1990. **Asharq Al-Awsat [Middle East] The International Daily Newspaper of Arabs, July 18, 1989, at 8.**
20. R.K. Ramasani, **The Persian Gulf and the Strait of Hormuz**, (Netherlands: Sijthoff & Noordhoff International Publishers, 1979), 16-20.
21. Charles G. MacDonald, **Iran, Saudi Arabia and the Law of the Sea**, [London: Greenwood Press. 1980), 69. Recently, certain factors have influenced the political-strategy of the Strait; massive pipelines have been built or planned to be built as an alternative to the Strait of Hormuz. This policy was due to the impact of the Gulf war in the 1980s.

## CHAPTER II

### RULES GOVERNING PASSAGE THROUGH INTERNATIONAL STRAITS

#### A. The 1958 Convention and the Regime of Non-Suspendable Innocent Passage

Some efforts were made, before the Convention on the Territorial Sea and the Contiguous Zone of the 1958 (the 1958 Geneva Convention), to codify international rules for straits. Different methods were discussed as to what formed a legal strait. These ranged

"from mere "use" of a strait to the strait being "indispensable" for communications, and whether innocent passage through legal straits was an exceptional right or an application of the rule relating to the territorial sea".<sup>1</sup>

None of these methods were adopted? It is generally conceded that the innocent passage through territorial sea is firmly entrenched in customary international law and required no supporting argument or quotation of authority as being established in international law.<sup>3</sup> However, could the situation be different if a territorial sea contains a strait or at least if the navigable channel falls within the territorial sea? In other words, should the passage through a strait be regulated by a specific regime? Or should the principle of innocent passage in proper territorial sea apply?

'It is worth mentioning that the width of the territorial water constituted one of the major problems under international law, before the 1982 Convention as will be seen, in relating to the law of the sea generally and in particular as the law applies to international straits.' Although there was strong support during the 1958 Geneva Convention for the three-mile rule as the maximum limit for the territorial sea, as it was the traditional rule, there was no agreement on it or a universally accepted limit among nations at that time.<sup>5</sup> However, while no agreement was reached on the limit of territorial sea, the 1958 Geneva Convention established rules governing the right of passage through territorial sea as well as through international straits? The 1958 Geneva Convention also codified the customary principle governing the use of the high seas where its area is defined in relation to the territorial seas whose limits were left undefined and ambiguous.'

Within this ambiguity, passage through international straits was, however, codified in article 16.4 of the section pertaining to the right of innocent passage through territorial water. It states:

"There shall be no suspension of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state"?

This provision is grounded in the decision of the International Court of Justice in the Corfu Channel Case<sup>9</sup> in which the Court held that the principle of innocent passage through international straits could not be suspended in straits used for international navigation between one part of the high sea and another.<sup>10</sup> However, there are inherent controversial interpretations facing this rule.

Before the adoption of this article there were significant changes *to* the International Law Commission (I.L.C.) draft of article 17.4, which became article 16.4 in the final text of the Convention. The Conference dropped the word "normally" before the word "used" which was suggested by the I.L.C.<sup>11</sup> The justification of the I.L.C. of recommending the word "normally" was that it based on the decision of the International Court of Justice in the Corfu Channel Case.<sup>12</sup> In any case, the omission of the word "normally" by the Conference **was to make** passage through such a strait more applicable and avoiding such arguments **relating to the actual use of traffic in each particular case.**<sup>13</sup> Therefore, the elimination of the word normally met little **objection.**<sup>14</sup>

Another important change was the inclusion of the phrase " . . . or the territorial sea of a foreign state" to article 16.4 of the 1958 Geneva Convention. Despite the political implications of this addition, it was basically a legal question. Opinions of legal commentators vary as to the origin of the concept of providing a regime of non-suspendable innocent passage through a strait linking the high seas to a territorial sea of a foreign state. Some have argued that it is a new established rule and has no root in international customary law.<sup>15</sup> In supporting their views, they contended that neither the International Law Commission nor the International Court of Justice had dealt with such matters, and therefore, no certain jurisdiction or actual practice exists which could support the viewpoint that straits providing access to territorial waters of foreign states are subject to the right of non-suspendable innocent passage.<sup>16</sup> Others are of the view that this rule, in fact, has a customary base.<sup>17</sup>

The critical importance of the strait for international trade, especially when there is no other possible means of ocean communication except through straits connecting the high seas, has been identified as an influencing factor. Therefore, it is generally recognized all the changes that have been made by the Conference, were obviously meant to promote more inclusive use of straits and limit the competence of coastal states.<sup>18</sup>

What is more relevant here is that most of the Arab states and in particular the riparian states of the Arabian-Persian Gulf have not ratified the 1958 Geneva Convention. The justifications for this action differ from one state to another.<sup>19</sup>

Another significant issue of the 1958 Geneva Convention is the controversial issue of whether the right of innocent passage through straits is identical to the concept of innocent passage through territorial seas which do not encompass a strait or is it an autonomous regime? This is a rather crucial issue because if the right of passage through straits is regarded only as an assimilation of the right of passage through the territorial sea, there could be serious questions as to whether the Convention formula would apply in such cases.<sup>20</sup> According to article 16.4, it has been generally recognized that the difference between both concepts is that the authority of a coastal state to suspend passage of foreign ships through straits is less than through territorial sea.<sup>21</sup> Yet, this situation is rather controversial. Some writers have argued that because the rules governing access to straits dealt with articles that mainly pertain to the rules governing the principle of innocent passage in ordinary territorial waters, passage in a strait area is

equivalent to the regime in all other parts of the territorial sea of a coastal state.<sup>22</sup>

In addition, the failure of the Conference to differentiate between the characteristics of straits linking two parts of the high seas and leading to territorial waters

"brought the whole question of straits into the context of innocent passage in the territorial sea, for which there was no warrant in history or in the judgment of International Court in that case".<sup>23</sup>

Even before the adoption of the 1958 Geneva Convention, doubts concerning an autonomous regime of international straits had existed. Judge Azevedo, in the Corfu Channel Case, emphasized that straits have no special regime and that they are governed by the same normal rules applicable to the territorial water.<sup>24</sup> Another doubt was voiced by Judge Krylov, in the same case, where he asserted that it made no difference that territorial waters constituted an international strait because:

"contrary to the opinion of the majority of the judges, I consider that there is no such thing as a common regulation of the legal regime of straits. Every strait is regulated individually."<sup>25</sup>

The general consequence of this view is that although article 16.4 provides for innocent passage through straits, paragraph 3 of the same article permits a coastal state to suspend temporarily the right of innocent passage of foreign ships in specified area of its territorial sea if such suspension is essential for the protection of its national security. Thus, a coastal state has the ability to suspend the right of innocent passage of foreign ships in a strait as in a territorial sea for the ostensible purpose of protecting its security. A further ambiguous position over warships

under the 1958 Geneva Convention was also voiced. According to article 23, the only rule applicable to warships, passage of warships might be subject to the laws and regulations of a coastal state and to any requests to leave the territorial sea in case of non-compliance. Would this rule apply to international straits? Extensive debate has existed between scholars as to whether warships have the right of non-suspendable innocent passage through straits.<sup>26</sup> However, while the uncertainty was clarified in the judgment of the Corfu Channel Case where the Court asserts the right of innocent passage for warships through international straits without previous authorization of a coastal state, the first United Nations Conference was not unanimous in accepting the decision of the International Court of Justice in the said case with regard to the right of innocent passage of warships through international straits. Perhaps the dispute between jurists with regard to access of warships through the territorial sea was reflected in the 1958 Geneva Convention. Hence the Convention was

"both willing and able to obscure the depth of disagreement on the issue without involving incompatible interests of critical importance to participating states"?

In any event, the unanimous opinion is that even though the 1958 Convention dealt with the question of straits in the context of innocent passage in the territorial sea, passage through straits have remained autonomous and more absolute than through ordinary territorial seas. The right of innocent passage of foreign vessels through an international strait is non-suspendable.<sup>28</sup> Since international straits are regarded as the shortest and most convenient means of communication, formulation of regulation governing passage through them is crucial to a large number of states. For this reason, straits should be treated as having a legal position "sui

juri~" and not assimilated with other parts of the territorial seas where the law allows a coastal state greater measure of territorial sovereignty. This distinction seems to be found in practice of states. Professor O'Connell, after analyzing the practice of states in most of the world's major straits, has asserted:

"In consequence, the legal situation in customary law is that straits constitute an autonomous institution. Passage through them is neither high seas passage, because the liberty of choice as to route and behaviour is not as great as in the high seas, nor innocent passage, because that liberty is greater than it is in the territorial sea."<sup>30</sup>

Although the 1958 Geneva Convention was eventually ratified by many states of the international community, the previous contradictory interpretation coupled with the major unsettled issue of the width of the territorial sea showed that the application of the doctrine of non-suspendable innocent passage as the only comprehensive regime of regulation for transit through straits would meet neither the interests of the straits users nor the straits states. In addition, the subject of international straits became a serious international issue in the late 1960's and 1970's, particularly with the increasing number of states adopting a 12 miles or more territorial sea. The expansion of territorial waters within the straits meant that many straits that had been international waterways became subject to national jurisdiction. Moreover, the emergence of nuclear ships, submarines, and the improvement of supertankers led to legitimate concern by the coastal states for the passage of foreign ships through the territorial seas and straits. This situation led to the adoption of a new international convention to fill the gap in the 1958 Geneva Convention and to deal with these changing international circumstances.

**B. Rules Governing Passage through International  
Straits Under the 1982 Convention**

After more than a decade of considerable debate and diplomatic activity, the United Nations adopted a new and comprehensive law of the sea. Virtually all aspects of the ocean have been covered in the 320 articles and nine annexes.<sup>31</sup> It solves problems in some long-disputed issue as well as establishing new concepts of international law.<sup>32</sup> Despite the rejection of a few states,<sup>33</sup> the Convention seems to have acquired a wide acceptance. This is evident from the number of states that have signed the treaty since it was opened for signature and ratification in 1982. However, the 1982 Convention has not yet come into force. Pursuant to article 308(1) it will enter into force after 12 months from the "date of deposit of the sixtieth instrument of ratification or accession". As of February 1990, only 42 states have ratified the Convention.<sup>34</sup>

Although it appears that the legal status of international straits has been settled, considerable debate exists between international law scholars regarding the application and interpretation of the straits provisions, particularly those related to the transit passage regime. This concern emerged during the opening of the Convention for signature and has continued to exist. It is our view that the controversial opinions of the various scholars are influenced by their respective countries interests. However, the consequences of this controversial issue may affect the situation of the states bordering the Strait of Hormuz and other gulf states that have not ratified the Convention.

### 1. General Rules and Straits Regimes:

Realising the importance of international straits for the international community, the 1982 Convention makes great progress by providing for an autonomous regime and differentiating between transit through mere territorial seas and international straits. This has been achieved by separating the rules governing straits used for international navigation from the rules governing navigation in ordinary territorial sea, except for certain categories.<sup>35</sup> Hence, this distinction settled the controversy that took place over the 1958 Geneva Convention. At the same time, establishing a *sui generis* regime for straits does not affect either the legal status of the water forming straits used for international navigation or the sovereignty and authority of states bordering such straits to exercise their jurisdiction over " . . . such water and their airspace, bed and subsoil".<sup>36</sup> The intention of this provision is to give a desire to the function of international navigation with respect to passage and to "remove an additional psychological barrier to coastal state acceptance of this part".<sup>37</sup> In any case, it seems to strike a balance between the interests of the straits users and coastal states.

The provisions on international straits in the straits chapter (Part III) of the Convention, particularly articles 37-38-45 reflect the criteria that were used in the Corfu Channel Case and the 1958 Convention. They include the functional criterion which defines international straits as those "used for international

navigation" and the geographical criterion stipulating such straits as "connect two parts of the high seas".<sup>38</sup> However, there has been no clarification of what constitutes an international strait.<sup>39</sup> Many alternatives have been suggested by the participating states, during negotiations on straits, such as those defining such straits being "traditionally", "customary", or "normally" used for international navigation, while others took the volumes of traffic as a test.<sup>40</sup> Yet, none of these formulations were adopted. The reason, perhaps, being that most of the states bordering straits were interested in precluding their own straits from such a definition. There is no precise written rule laying down what actual use or prerequisite that may be satisfied to constitute a strait used for international navigation; in addition, the functional element of a certain strait may shift its classification from being international to non-international and vice-versa, following the political, economic and technological circumstances.<sup>41</sup> Therefore, the adoption of a general definition would be seen as a wise step towards the stabilization of international law governing straits.

Furthermore, recognizing the geographic and economic differences of the international straits and their strategic dimensions, the 1982 Convention provides two main legal regimes in the straits chapter. These can be divided into the following regimes:

- Transit Passage Regime: applies to straits that are only "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"<sup>42</sup> and are governed by prescribed rules in section 2 of part III of the Convention.

Innocent Passage Regime: applies to straits that are "used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state".<sup>43</sup> This regime also applies to a strait that is formed by an island and the mainland of the strait state where 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 hydrographical characteristics".<sup>44</sup> The restricted term "convenience" relates for such a strait only "to navigational and hydrographical characteristics. Thus, economic, military or political convenience is irrelevant and user states cannot invoke transit passage for such purposes."<sup>45</sup>

However, it should be mentioned that some straits are entirely excluded from the said regimes and hence from the application of straits chapter. These straits are those which have been governed in whole or in part by binding international treaties (article 35(c)). The other exempt straits are those which contain a corridor "through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics". (article 36). Such straits are governed by the high seas regime.

## 2. Transit Passage Regime: The Controversial Aspects

As has already been mentioned, the transit passage regime refers only to navigation through straits that satisfy the requirements of article 37. Section 2 of part III of the Convention (articles 37-44) is devoted to governing the transit

passage which is regarded as the basis of the straits chapter.<sup>46</sup> Although the concept of transit passage was introduced to accommodate conflicts of interests between the coastal and maritime states,<sup>47</sup> the transit passage provisions do not escape criticism particularly those provisions related to the type of vessels permitted within the straits under transit passage and the extent of regulatory competence of the coastal states provided within.

#### a. Scope of the Transit Passage:

By virtue of article 38(1) "all ships and aircraft" have the right to transit through and over international straits. This right is affirmed in several places in the section of transit passage. However, because the text of the transit passage provisions does not expressly provide for the right of submerged passage, considerable debate as to whether the right of submerged passage for submarines embraces within the straits under transit passage exists.<sup>48</sup>

Those who argue that transit passage would not permit submerged passage maintain that although a right of submerged transit can be inferred from the absence of prohibition of such transit, the opposite inference is also possible, particularly when such a right "is not explicit" and would be "a derogation from sovereignty".<sup>49</sup> They contest also that there is an ambiguity in the words "normal modes" as they are used in article 39(1)(c).<sup>50</sup> The meaning of this term could vary according to circumstances such as "type of channel, density of traffic, safety factors, nature of mission, rules of the road, and so on. What may be normal in

internal or territorial waters would be "abnormal" on the high seas, and so on".<sup>51</sup> Thus, it would be possible for the coastal states to determine that submerged passage is not a normal mode of transit and requires such passage be surface passage.<sup>52</sup> Furthermore, it is argued that even though the right of transit passage (in article 38(2)) includes a reference to "freedom of navigation" which may embrace the right of submerged passage, there are so many qualifications and requirements under the transit passage regime, particularly the restrictions imposed on ships in articles 39-40, that it is obvious that the right of submerged transit clearly cannot be included.<sup>53</sup> With submerged transit, the fulfilment of these requirements would not be easy to monitor. It would be difficult, for example, for the coastal state to verify that the underwater vehicles are not inconsistent with the requirements of their "normal modes of continuous and expeditious transit". It is not easy for the coastal state to supervise the compliance of regulations, procedures and practices for the safety and prevention from pollution, particularly with those foreign nuclear-powered ships and ships carrying nuclear or other hazardous substances for the environment if the passage is submerged. The most difficult perhaps is how the coastal states would verify whether a submarine had refrained from testing weapons of any kind during its passage through straits if it remained submerged or control unauthorized research and survey activities that is asserted under article 40 of the transit passage regime.

Other writers do not agree with the above view arguing that, although there is no explicit provision conferring such a right for submarines, the right is clearly included. They contend that the phrase "freedom of navigation", in article 38(2) which reads in part "Transit passage means the exercise in accordance with this

Part of the freedom of navigation "...", in international law has always contained the right of submerged passage.<sup>54</sup> To support their contention, they argue that the same phrase was used in article 2 of the 1958 Convention on the High Seas and in the high seas chapter of the 1982 Convention, where there is no express provision confirming such a right. Yet it is certain no one can seriously argue that those rights were even meant to exclude submerged transit.<sup>55</sup> In addition, transit of submerged vessels in straits was understood by all the participants to be recognized during the negotiation of the Conference.<sup>56</sup> The maritime powers intended to include such a right under the transit passage provisions otherwise any treaty not recognising such a right would be unacceptable to them.<sup>57</sup> An examination of the negotiation history supports this view and reveals that even those who opposed the idea of submerged passage accepted the fact that it existed under transit passage.<sup>58</sup>

The various criteria set forth in article 39(1)(c) are not incompatible with submerged passage. The said article "contemplates vehicles which differ in their method of movement insofar as they operate in their 'normal mode'".<sup>59</sup> Submerged passage is the normal mode of transit for submarines therefore, the drafters must have had submarines in mind when they drafted such an article.<sup>60</sup> Thus, they maintain that textual and contextual interpretations of the transit passage provisions provide the right of submarine under the said regime.

However, it is worthwhile to notice that the right of overflight is explicitly recognized under transit passage although received opinion denies such a right under general principles of international law. Prof. R. Jennings states:

"There is no right of innocent passage for aircraft analogous to that enjoyed by merchantmen in territorial water. Herein lies the only essential difference between the legal status of aircraft and the legal status of shipping . . . . The practice of states does not even warrant any suggestion that there is . . . any right of innocent passage for aircraft over territorial straits".<sup>61</sup>

Neither has such a right been recognized in the 1958 Convention. Even the Convention on International Civil Aviation of 1944 grants innocent passage for civil aircraft only to signatories. The complete and exclusive sovereignty of a state over its own airspace is generally accepted under international law as a principle of international law.<sup>62</sup> Furthermore, opposition by some straits states emerged, during the negotiations of the transit passage text, against recognizing any right of aircraft over international straits. Indeed some have continued efforts to reject such a right.<sup>63</sup> Yet, because of the maritime power's insistence on according explicit and full rights for aircraft, the Convention states explicitly that transit passage includes the right of overflight.<sup>64</sup> In addition, article 39(3)(b) imposes duties at all times on aircraft, in the course of transit, to "monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency". Whereas there are no such duties required of submarines or other underwater vehicles, though it is easier to control disregard of the radio frequency requirements on the part of aircraft than by underwater vehicles.<sup>65</sup>

To conclude, it could be argued that the above analysis of the disagreements, with regard to the right of submerged passage under the transit passage provisions, may indicate that there are doubts that such a right may not be

included under the said regime, and that the treaty drafters have resorted to ambiguous language when faced with unresolved issues. Prof. Koh states:

"The argument of 'inclusio' and 'exclusio' cannot ipso facto suffice to lend the interpretation that submerged passage was clearly contemplated by the drafters".<sup>66</sup>

The issue may be cleared up by the actual practice of states and the interpretations and applications of the Treaty, especially by those states bordering international straits who emphasised their security interests during the negotiations.

#### **b. The Regulatory Competence of the Strait States and the Extent of its Enforcement**

Under the transit passage regime, states bordering straits are empowered to make laws and regulations enumerated in articles 41 and 42 concerning: "the safety of navigation and the regulation of maritime traffic, as provided in article 41";<sup>67</sup> "the prevention, reduction and control of pollution . . . regarding the discharge of oil, oily waters and other noxious substances";<sup>68</sup> "the prevention of fishing including the stowage of fishing gear";<sup>69</sup> "the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of States bordering straits".<sup>70</sup>

This prescriptive authority, however, is limited in scope as compared with the lengthy and detailed prescriptive powers of the coastal state in its territorial sea not composing an international strait.<sup>71</sup> In these areas, the coastal state is

allowed to implement certain measures in order to ensure compliance with its laws and regulations. For example, under article 25(1), the coastal state is empowered to "take the necessary steps in its territorial sea to prevent passage" that is non-innocent. Article 25(3) provides that the coastal state may "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises". A physical inspection and institute proceedings are given to the coastal state when a vessel has violated its laws and regulations relating to prevention, reduction and control of pollution within the territorial sea or exclusive economic zone of the coastal states.<sup>72</sup> There are no equivalent to these authorities under transit passage provisions permitting the strait States such authorities. In addition to this limitation of power under transit passage provisions, certain conditions must be fulfilled when a strait State exercises its regulatory competence. For example, with regard to the competence to designate sea lanes and traffic separation schemes, article 41(3) stipulates that such schemes "shall conform to generally accepted international regulations". Article 41(4) also provides that any proposals related to that designation shall be referred "to the competent international organization with a view to their adoption". The regulatory control over pollution granted to the strait States in article 42(1)(b) is also limited to "giving effect to applicable international regulations".

Even with these conditions, there was a fear that if a strait State enacted such laws and regulations it could unilaterally enforce its laws and regulations in a way that might obstruct transit passage.<sup>73</sup> It is possible for the strait State, for example, to disregard the restrictions on its applicative power under the transit

passage provisions by simply declaring a passage of foreign ships as non-transit, just as a passage can be deemed non-innocent under innocent passage provisions.<sup>74</sup> Reisman has pointed out that broad regulatory and applicative competence are given to the strait States through articles 39-42. He believes that

"though article 39 speaks of user duties, it necessary imports coastal state rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence . . . unless we are to assume that the 'duties' are not more than normal imprecation".<sup>75</sup>

Yet, it has been argued that these rights cannot be exercised arbitrarily by the strait States to hamper or impede passage and have to be resolved through diplomatic channels and third-party mediation.<sup>76</sup> The broad discretion given to the coastal states in applying their regulatory power under the innocent passage provisions of the 1958 Geneva Convention was one of the maritime power's major criticisms that made it unacceptable to them.<sup>77</sup> The maritime powers would not have gone along with the concept of transit passage if it vested any significant amount of prescriptive competence to the strait States.<sup>78</sup> Furthermore, among the more important provisions safeguarding transit passage from the possibility of coastal states abuse of the prescriptive power is article 42(2) which states: "such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage".<sup>79</sup> This is confirmed by article 44 which reads in part; "There shall be no suspension of transit passage". These are indicative of adequate safeguards of the transit passage. Moore states"

"As a result of both the narrowness of coastal state regulatory competence and the strong safeguard provisions of the UNCLOS text,

coastal states are not given authority to suspend or hamper ... the transit passage".<sup>80</sup>

Nonetheless, the transit passage provisions do not precisely express how regulatory competence is to be enforced. Yet examination of such enforcement provisions under the transit passage and other relevant provisions may lead to some clarification. It has been suggested that the enforcement provisions which may be interpreted as authorizing a strait State's enforcement are the following articles: Article 41(7) provides "ships in transit passage shall respect applicable sea lanes and traffic separation schemes"; article 42(4) provides "foreign ships exercising the right of transit passage shall comply with such laws and regulations"; and the important provision of article 38(3) which provides "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention". These provisions do not make clear how a strait State may react if a foreign ship or aircraft has committed a violation of its laws and regulations or any of the duties imposed on them in the course of transit. In such a case, Prof. Burke is of the view that:

"The enforcement provisions of the text are expressed in the indirect fashion that seems to characterize provisions on this aspect of laws concerning navigation. It is not expressly stated who is to enforce the prescription against unlawful use of force, although it can be presumed that the coastal state is permitted to exercise self-defense and generally to take actions permitted by the U.N. Charter".<sup>81</sup>

However, he interprets article 42(4) together with article 38(3) that has just been mentioned as an extension of strait State enforcement competence to apply its laws against any such activity that infringes such law. In this regard full coastal enforcement power appears to be conceded in straits for those certain activities.<sup>82</sup>

This interpretation, however, may not be consistent with the other strong safeguard provisions that have just been mentioned. In this regard, it can be said that treaty adherents maintain that States bordering a strait cannot unilaterally enforce their laws and regulations that would have the potential effect of preventing or hampering the transit passage, especially with the silence of the transit passage provisions on the right of prohibition of passage for infringement of rule.<sup>83</sup> The whole structure of the transit passage provisions seems to be in favour of constraining the strait States from making passage burdensome or impossible. If any ship or aircraft, entitled to sovereign immunity, violates the requirements of the provisions imposed on them in transit, coastal states have the right to invoke other available remedies to deal with such violation, e.g., the flag-state responsibility for any damage.<sup>84</sup>

However, the question of protection and preservation of marine environment was discussed at the Third Convention on the Law of the Sea. This fact explains the extensive provisions on the protection and preservation of the marine environment found in Part (XII) of the resulting Convention. Yet, with regard to navigation through international straits, straits States are concerned about the enormous increase in oil production which has contributed to a great volume of tanker traffic. They have also sufficient concern for the passage of foreign nuclear-powered ships and ships carrying other dangerous materials. At straits, the possibility for destructive pollution from vessels is much higher particularly in narrow and shallow straits.<sup>85</sup> Most of the straits States draft articles proposal tend to view these harmful vessels as belonging to a special

category.<sup>86</sup> Thus, necessity for adequate regulations covering pollution and protection of environment creates the need for effective control and enforcement provisions. For these reasons, strait States managed to add a certain enforcement provision.<sup>87</sup> According to article 233, if a foreign ship, without sovereign immunity, has violated the laws and regulations of a strait State referred to in article 42, causing or threatening major damage to the marine environment of the straits, the State concerned may take "appropriate enforcement measures".<sup>88</sup> In such a case, the strait State has the right to prohibit passage of a vessel that was in violation of, for example, an agreed-upon underkeel clearance.<sup>89</sup> In addition, the right of a strait State to enforce its laws and regulations may be extended under article 216 which empowers coastal states to enforce laws and regulations adopted in accordance with the Convention and applicable international rules or through competent international organizations for the prevention, reduction and control of pollution of marine environment by dumping.<sup>90</sup> Where a strait used for international navigation is within the coastal state's jurisdiction, these preventative powers may be exercised over the strait.

This interpretation appears to be supported under customary law. Jessup writes

"It seems clear that even transit vessels must obey reasonable rules and regulations laid down by the littoral states in the interests of safety of navigation".<sup>91</sup>

Bruel is of the view that:

"... regulations regarding navigation must be prompted ... by a regard for the safety of navigation and not out of regard for the

littoral State itself, at least not exclusively, not even subject to 'passage inoffensif' not being prevented."<sup>92</sup>

Regardless of the absence of clear and unambiguous language of an express provision to laying down enforcement procedures under the transit passage regime, a broad interpretation of the regulatory authority together with the other relevant provisions would appear to support the inherent right of a strait State to preserve its vital interests. This fact is explained by a textual reading of article 38(3) which provides:

"Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention".

Thus, this article clearly expresses that activities which are not exercises of the right of transit passage are subject to the other provisions of the Convention and are not subject only to the provisions of Strait Chapter. The intention of the framers was clearly not to deprive coastal states of their inherent rights of protecting their national security that has been recognized under the U.N. Charter. Hence, it is submitted that States bordering straits have the power to ensure compliance with their regulatory competence, particularly as regards serious infringement of the requirements imposed upon foreign vessels.

### 3. Innocent Passage Regime

As has been discussed earlier, specific categories of straits used for international navigation are exempted from the regime of transit passage.<sup>93</sup> These

straits are governed by article 45 section 3 of part III of the Strait chapter which deals with the regime of innocent passage. This article stipulates that the legal regime of innocent passage in territorial sea shall apply to such straits.<sup>94</sup> Thus, the regime of innocent passage applied in such straits is identical to the general rules that are applicable to the territorial sea.

What is significant about this regime is that the ambiguities of the innocent passage doctrine are clarified, particularly the criterion of "innocence".<sup>95</sup> This clarification is an attempt to make the criterion of innocence more specific by spelling out a comprehensive list of activities that would be considered prejudicial to a coastal state's "peace, good order or security" if a foreign ship commits such activities.<sup>96</sup>

This tendency of the new rules of innocent passage is intended to prevent the likelihood of coastal states invoking a subjective interpretation of innocent passage.<sup>97</sup>

Another significant improvement to this regime is the exemption of straits that link part of the high seas or exclusive economic zone to the territorial sea of a foreign state. This was one of the long-disputed issues concerning the regime applicable to such straits. Although this issue was discussed from the legal point of view in both the 1958 and 1982 Conventions, it has had political consequences, easing tension and offering a widely accepted regime of international straits.<sup>98</sup>

# Footnotes

1. D.P. O'Connell, *The International Law of the Sea*, ed., A. Shearer, v. 1 (New York Clatendon Press, **1982**), 305.
2. Ibid.
3. P.C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, (New York: G.A. Jennings and Co., **1927**), 120.
4. R.B. McNees, "Freedom of Transit through **International Straits**", *Journal of Maritime Law and Commerce* **6** (1975): 180.
5. M.M. Whiteman, *Digest of International Law*, v. 4 (Washington, DC: Department of State Publication, **1965**), 14-20; ~~Max~~ Sorensen, "Law of the Sea", *International Conciliation* **520** (1958): 242.
6. For the text see: *United Nation, Treaty Series*, v. 516 (1958), 206.
7. Article 1 of the *High Sea Convention of 1958* defined "high seas" as "all parts of the sea that are not included in the territorial seas or in the internal waters of the States".
8. **1958 Geneva Convention Art. 16.4.**
9. A. Dean, "The Geneva Conference on the Law of the Sea: What was accomplished", *American Journal of International Law* **52**, (1958): 621.
10. *International Court of Justice Reports* (1949), 28.
11. Whiteman, 463.
12. Ibid. However, this justification in the opinion of Professor R.P. Anand is rather curious because the Court had said that the "essential criterion" of a strait was geographical and had rejected the volume of traffic or the importance of the strait for international navigation as "the test" or "the decisive criterion". "Freedom of Navigation Through Territorial Waters and International Straits", *Indian Journal of International Law* **14** (1974): 179.
13. A. Dean, 623. McDougal and Burke state that "The Conference decision to delete "normally" apparently was intended to mean . . . that the right of access of both warships and merchant vessels applies to a very wide category of straits, including those seldom or irregularly used for navigation". *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: Yale Univ. Press, 1962), 212.

14. **G.J. Mangone**, "Straits-- used for International Navigation", *Ocean Development and International Law* 18 (1987): 404. . . .
15. **Solomon Slonim**, "The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea", *Columbia Journal of International Law* 5 (1966): 113. See also, **A. Dean**, 623.
16. **Solomon Slonim**, 113-114; **A.L. Zeidan**, "The emergence of the Gulf of Aqaba Problem", *Revue Egyptienne De Droit International* 35 (1979): 25.
17. **R. Lapidoth**, *Freedom of Navigation with Special Reference to International Waterways in the Middle East*, (Jerusalem: Hebrew Univ. Press, 1975), 40-42; See also, **MB. Moser**, "A Survey of the Definition of International Straits and The Issue of "Status Mixtus"", *Israel Law Review* 3 (1968): 51-52.
18. **McDougal and Burke**, 211-212.
19. **The significance of such an attitude is discussed in Chapter III below.**
20. **O'Connell**, 316.
21. **K.L. Koh**, *Straits in International Navigation*, (New York: Oceana Publications, Inc., 1982), 35.
22. **W.G. Grandison & V.J. Meyer**, "International Straits, Global Communications, and the Evolving Law of the Sea", *Vanderbilt Journal of Transnational Law* 8 (1975): 400.
23. **O'Connell**, 316.
24. **International Court of Justice Reports** (1949) 104.
25. *Ibid.*, 74.
26. **For the discussion of right of passage of warships through territorial sea as well as through straits, see: "K.L. Koh**, 41-46; **R.R. Baxter**, *The Law of International Waterways*, (Cambridge: Harvard Univ. Press, 1964), 166-168.
27. **Frederic G. De Rocher**, *Freedom of Passage Through International Straits: Community Interest Amid Present Controversy* (Florida: Univ. of Miami Press, 1972), 95.
28. **K.L. Koh**, 35-36; **Lapidoth**, 49; **G. Fitzmaurice**, "Some Results of the Geneva Conference on the Law of the Sea", *International and Comparative Law Quarterly* 8 (1959): 101-102.
29. **Erik Bruel**, *International Straits*, v.1 (London: Sweet & Maxwell Ltd., 1947), 35-39.

30. O'Connell, 327.
31. U.N. Doc. A/Conf. 62/122, (1982) (Hereinafter cited as UNCLOS.)
32. Tommy T.B. Koh, "The Third United Nations Conference on the Law of the Sea: What was Accomplished?", Law and Contemporary Problems 46 (1983): 5.
33. For varied reasons, the United States, the United Kingdom and the Federal Republic of Germany and others did not sign the Convention. David Larson, "When Will the UN Convention on the Law of the Sea Come Into Effect?", Ocean Development and International Law 20 (1989): 175.
34. K.R. Simmonds, (ed.) New Directions in the Law of the Sea, (New York: Ocean Publications, Inc., 1990), v.3 p.1 (hereinafter referred to as NEW DIRECTIONS.)
35. J.N. Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea", American Journal of International Law 74 (1980): 90.
36. UNCLOS, Article 34(1).
37. H.B. Robertson, "Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea", Virginia Journal of International Law 20 (1980): 827.
38. Moore, 112.
39. R.J. Grunawalt, "United States Policy on International Straits", Ocean Development and International Law 18 (1987): 456.
40. Tadao Kuribayashi, "The Basic Structure of the New Regime of Passage through International Straits", Japanese Annual of International Law 21 (1977): 33.
41. Grunawalt, 456.
42. UNCLOS, article 37.
43. Ibid., article 45.
44. Ibid., article 38(1).
45. K.L. Koh, 150.
46. This section provides: coverage of transit passage (article 37), the rights and duties of ships and aircraft during transit (articles 38-40), the

rights of states bordering straits (articles 41-42-44) and the common duties of users and straits States (article 43).

47. Grunawalt, 454.
48. Such doubts were raised by Prof. H. Gary Knight, Prof. M. Reisman and others. See: Moore, 92. See also, W.T. Burke, "Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text", Washington Law Review 53 (1977): 200.
49. W.M. Reisman, "The Regime of Straits and National Security: An Appraisal of International Lawmaking", American Journal of International Law 74 (1980): 71.
50. Article 39(1)(c) provides: Ships and aircraft, while exercising the right of transit passage, shall:  
(c) - refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.
51. Reisman, 71.
52. Ibid., 70-71.
53. G. Knight, quoted in Burke, 208; Reisman, 72.
54. Moore, 96; Burke, 205.
55. Robertson, 844; Moore, 98.
56. Moore, 102; Burke, 205.
57. K.L. Koh, 155; Moore, 102.
58. Moore, 101; Oxman, "The Third United Nations Conference on the Law of the Sea", American Journal of International Law 72 (1978): 57-64.
59. Burke, 212.
60. Moore, 99-100.
61. R.Y. Jennings, "International Civil Aviation and the Law", British Year Book of International Law 22, (1945): 195.
62. P. de Vries Leentsch, "The Right of Overflight over Strait States and Archipelagic Straits: Development and Prospects", Netherlands Year Book of International Law 14 (1983): 170.
63. Kuribayashi, 37.
64. Robertson, 842.

65. A. Al-Dhahak, *The Law of the Sea and its Application in the Arab Countries*, [in Arabic] (1987), 506.
66. K.L. Koh, 153.
67. Article 41(1) provides " . . . States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits, where necessary to promote the safe passage of ships". UNCLOS article 41(1).
68. *Ibid.*, article 42(b).
69. *Ibid.*, article 42(c).
70. *Ibid.*, article 42(d).
71. Morris, Maduro, "Passage through International Straits: The Prospects Emerging from the Third U.N. Conference on the Law of the Sea", *Journal of Maritime Law and Commerce* 12 (1980): 73.
72. UNCLOS, Article 220.
73. Reisman, 69.
74. *Ibid.*, 70; Burke, 211.
75. Reisman, 69.
76. Moore, 107.
77. Charles E. Pirtle, "Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited", *Ocean Development and International Law Journal* 5 (1978): 481.
78. Moore, 108.
79. Robertson states that article 42(2) "ensures that the principle of non-discrimination among foreign ships must be respected in all coastal state regulations for transit passage", Robertson, 839.
80. Moore, 105.
81. W.T. Burke, R. Legatski and W.W. Woodhead, *National and International Law Enforcement in the Ocean*, (Univ. of Washington Press, 1975), 105.
82. *Ibid.*
83. K.L. Koh, 156.
84. *Ibid.*

85. For example, The International Convention for the Prevention of Pollution from Ships, signed in 1973, recognized the Persian Gulf as a "special zone" requiring strict measures for the protection of the marine environment. C.G. MacDonald, "The Role of Iran and Saudi Arabia in the Development of the Law of the Sea", *Journal of South Asian and Middle Eastern Studies* 1 (1978): 6.
86. K.L. Koh, 131-148.
87. *Ibid.*, 158.
88. UNCLOS, article 233. For a view that the transit passage regime does not adequately protect the legitimate needs of the straits States, see, Maduro, 73-74.
89. K.L. Koh, 158.
90. UNCLOS, article 216.
91. P.C. Jessup, quoted in K.L. Koh, 162.
92. E. Bruel, quoted in K.L. Koh, 162.
93. See pp. 25-27 above.
94. UNCLOS, article 45.
95. One of the principal dissatisfactions of the maritime powers with innocent passage concept of the 1958 Geneva Convention is that it gives too much discretion to the coastal States to determine the meaning of 'innocence' based on subjective element. Robertson, 803.
96. These activities are enumerated in article 19(2).
97. Robertson, 830; S. Ghosh, "The Legal Regime of Innocent Passage Through the Territorial Sea", *Indian Journal of International Law* 20 (1980); 238.
98. Robertson, 831.

## CHAPTER III

### THE JURIDICAL STATUS OF THE STRAIT OF HORMUZ

Having outlined the legal regime of the international straits under international law, this chapter concerns the legal status of the Strait of Hormuz.

As we have previously indicated, the width of the Strait at its narrowest point is about 20-3/4 miles. Both of the states bordering the Strait of Hormuz, Iran and Oman, have claimed 12 miles territorial seas. Consequently, the extension of the territorial sea to 12 miles, would mean that the Strait of Hormuz, along with 115 other straits around the world, has lost its central belt of high seas.<sup>1</sup> Much more extensive portions of the Hormuz Strait now lie entirely within the territorial waters of Oman and Iran and, indeed, within an area of overlap between the two at its narrowest point. The 12 miles territorial sea limit had been claimed by Iran and Oman before the 1982 Convention codified the limit. However, since both Iran and Oman have claimed 12 miles territorial seas in their municipal laws without ratifying the 1958 or 1982 Conventions, and there is no ad hoc international agreement which regulates passage through the Strait, the issue which arises is how would the regime of passage apply to the Strait of Hormuz. In an attempt to identify the nature of the right of passage through the Strait, we shall first examine the policies of the Gulf States towards both the 1958 and 1982 Conventions on the law of the sea and their actual practices.

### A. The Attitudes of the Gulf States Towards the 1958 Geneva Convention

Under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, passage through straits used for international navigation is regulated by Article 16.4.<sup>2</sup> The Gulf States have not ratified or acceded to that Convention, though Iran signed the Convention (See Appendix A). The reluctance of the Gulf States to ratify is mainly due to their dissatisfaction with Article 16.4 which provides for the right of non-suspendable innocent passage for straits used for international navigation as an exception to the general rules of the proper territorial sea. However, their reasons for rejecting Article 16.4 were influenced by political and legal factors.

The Iranian position advocated the right of innocent passage through territorial sea and strait. In 1959 Iran extended its territorial sea up to 12 miles. Even though the extension of the Iranian territorial sea to that limit was primarily due to its economic and security interests,<sup>3</sup> it would not affect legally the status of the Strait of Hormuz, since at that time, Oman had not extended its territorial sea to 12 miles. However, the super powers, particularly the British, challenging the extension of Iranian territorial sea stated that they:

"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 miles extension of the territorial sea as essential for national security".<sup>4</sup>

Iran has exercised its sovereignty over its territorial sea up to that limit since 1958. Contrary to its signature of the 1958 Convention, Iran continues to apply the innocent passage regime through the Strait of Hormuz. Because of the important implication of strategic and political interests of the Strait of Hormuz, the Iranian delegate at the 1958 Geneva Convention voted against Article 16.4 claiming that a right of innocent passage, as opposed to non-suspendable passage, would be the only regime applicable to the Strait of Hormuz.<sup>5</sup> Such claim clearly meant to recognize article 16.3 which entitles a coastal state to suspend temporary foreign ships passing through its territorial sea.<sup>6</sup>

Oman, the other state bordering the Strait, did not go far away from the position of Iran. Due to its national security, it maintained that the regime of innocent passage should prevail within a strait as well as within a territorial sea. It claimed that article 16.4 did not apply to the Strait of Hormuz under the pretext that the regime of the Strait is that of proper territorial sea.<sup>7</sup> It also insisted on requiring prior authorization for particular types of foreign vessels. Oman did not sign or accede to the 1958 Geneva Convention. It should be noted here that Oman had not yet extended its territorial sea to 12 miles at that time, however it was recognized that the traffic lanes were entirely within Oman's territorial sea.

On the other hand, the attitudes of the other littoral states of the Gulf towards the Conference were mainly motivated by political reasons. Saudi Arabia, for example, strongly objected to the particular right of passage through straits as described in article 16.4. The Saudi representative stated

"The amended text no longer dealt with the general principle of international law, but had been carefully tailored to promote the claims of one State".<sup>8</sup>

When voting on the concerned article, Saudi Arabia abstained because it believed that paragraph 4 was designed to satisfy a unique case and is a "mutilation of international law". The delegate concluded that:

"Saudi Arabia would take the necessary steps to protect its national interests against the interpretation and application of paragraph 4".<sup>9</sup>

Although the Kingdom asserted that it was acting only on behalf of general principles and not "regional policies or transient situation".<sup>10</sup> when opposing article 16.4, it was concerned with the Strait of Tiran at the entrance to the Gulf of Aqaba which provides access from the Red Sea to Israel's port of Eilat. The position of Saudi Arabia was in the direction of the Arab states generally and the recommendation of the Arab League to refuse to accept article 16.4 and delay their adherence to the 1958 Geneva Convention.<sup>11</sup> It should be noted here that the opposition of Saudi Arabia to the concerned article has no consequences for the Strait of Hormuz, since the Strait connects two parts of the high seas and has been used for international navigation for a long time rendering unimpeded innocent passage unquestionable.

The other Gulf States, at that time, were not fully independent countries. The United Kingdom's ratification of the four 1958 Geneva Conventions did not extend to the Trucial States of the Gulf, which were under British protection.<sup>12</sup>

## B. The Attitudes of the Gulf States Towards the 1982 Convention

Unlike at the 1958 Geneva Convention, most of the Gulf States actively participated at the Third Conference on the Law of the Sea. However, their views regarding the legal regime of international straits, and particularly the Strait of Hormuz, were varied. The divergence of policies stemmed primarily from the conflict of the Gulf States' national interests as well as from the geographic peculiarities of the Gulf itself.

### 1. The Recommendation of the Arab League and its Affect on the Positions of the Arab Gulf States

In an attempt to unify the policies of the Arab States at the Third Conference with regard to the aspects of the law of the sea particularly with the problem of international straits, the Council of the Arab League, under Resolution 2978 of 13 September, 1972, asserted its acceptance of the freedom of navigation through straits used for international navigation between two parts of the high seas, that had been recommended since 1959, and stated:

"B. Acceptance of the principle of freedom of navigation in Straits and Gulfs - but no other waterways - which link two parts of the high seas and used since the past as routes for international navigation.

C. To work in all international assemblies in co-operation with the friendly states, in order to foil every attempt which would permit freedom of passage in Straits which do not link between two parts of the high seas or through historic Gulfs which, since the past, have not been customarily used for international navigation".<sup>13</sup>

This recommendation reflects views of some of the Arab Gulf States such as Iraq, Kuwait, Qatar and the United Arab Emirates (U.A.E.) who expressed their support of this policy by submitting memoranda to the League advocating the principle of freedom of passage through straits which only connect two parts of the high seas.<sup>14</sup> Their maritime policies are influenced by their limited access to the Gulf waters, as they have access to the open seas only through the Strait of Hormuz. However, Oman has made a reservation to the above recommendation which reflects its attitude that only 'innocent passage' should prevail through international straits.<sup>15</sup>

In 1974, the Arab League, however, recommended the support of the doctrine of 'innocent passage' through international straits.<sup>16</sup> The reasons behind the uncertainty of the League's opinion with respect to the question of straits is a result of the different geographic and economic circumstances of its members. The failure to achieve an unified opinion about the concerned question had its effect upon the policies of the Arab Gulf States, at the 3rd Conference, of not being uniform. It should be mentioned here that Iran's position was not affected by these duplicate recommendations since it is not a member of the League.

## 2. The Attitudes of the States Bordering the Strait

The standpoints of both Iran and Oman have been primarily influenced by their peculiar position on the Gulf. They are the only States bordering the

strategic Strait of Hormuz. In addition, they are also concerned with their security and other national interests. These national interests generally exemplify similar national interests of other Straits states.

Throughout the Conference, Iran's position with regard to passage through straits used for international navigation was ambiguous. At the Caracas Session in 1974, two conflicting views had emerged, namely the right of 'innocent passage' and 'freedom of passage'. Iranian delegate suggested

"a satisfactory solution might be reached without denying the legal nature of the territorial sea. Rules could be devised which would guarantee freedom of passage for foreign vessels while taking account of such questions as the security of coastal states, the protection of the marine environment, and the regulation of passage of vessels through sea corridors".<sup>17</sup>

From such a statement, one could infer that Iran would uphold the principle of free passage through the Strait of Hormuz provided this did not deny the legal nature and sovereignty of the coastal state over its territorial sea or its rights to regulate passage of foreign vessels.<sup>18</sup> However, from another statement it could be implied that Iran would uphold the concept of non-suspendable innocent passage. The Iranian delegate stressed that even though certain exceptions to the authority of the coastal state may be envisaged in the interest of international trade and communication, any proposed rules with regard to passage through straits should be based on the concept of non-suspendable innocent passage.<sup>19</sup> Furthermore, because of the Gulf characteristics, Iran showed its concern with the problems raised by the semi-enclosed seas, particularly with the management and exploitation of the resources including prevention of marine pollution, by claiming "a particular

status" to deal with this matter.<sup>20</sup> As far as international navigation through such seas was concerned, Iran claimed that it would favor a discriminatory regime applicable to foreign vessels of the littoral States of the Gulf and non-littoral States.<sup>21</sup> Freedom of passage should be fully guaranteed to the littoral States while a different regime should apply to the passage of other States whose ships could pass through the Strait only for the purpose of calling at one of the Gulf ports.<sup>22</sup> This policy, sought by Iran, was ignored by the littoral States of the Gulf because they believed that Iran sought a preferential position for the entire water of the Gulf as well as for the Strait of Hormuz.<sup>23</sup> This suspicion between the Iranian and the Arabian side of the Gulf had been increasing since the British withdrawal from the Gulf in 1971.<sup>24</sup> In addition, the proposed scheme does apparently restrict the right of transit passage of non-littoral States. This restriction has been opposed by international community and customary international law.

Despite this policy, Iran seemed to abandon the policy of claiming restrictive passage to non-littoral States and showed its readiness to recognize the principle of transit passage at the final stage of the Conference.

The position of Oman seems to be more certain and more obvious than Iran's. Oman has constantly endorsed the regime of innocent passage through the territorial sea as well as through straits used for international navigation which form part of the territorial sea of one or more states. The Omani delegate has suggested that such straits should not be subject to a special regime, because they were part and parcel of the territorial sea of a coastal state and should be viewed

as an entity.<sup>25</sup> Oman and other states bordering Straits (which might be called 'the Oman group') have submitted detailed draft articles on the territorial sea, including straits used for international navigation. The essence of the proposal was that it gave the coastal state the right to regulate the passage of foreign ships with special characteristics such as nuclear-powered ships, oil tankers, chemical tankers and marine research ships. The coastal state was also given the right to require prior notification or obtain prior authorization from foreign military vessels.<sup>26</sup> The Omani delegate stipulated however, that the draft article contained an important innovation and a new idea where it recognized that the passage of foreign merchant ships through straits should be presumed to be innocent.<sup>27</sup> Yet this doctrine had not been part of international law since the Corfu Channel Case. Nevertheless, it seems that Oman was willing to accept the transit passage regime. In an interview with the Omani Minister of Information, he expressly indicated that his country is satisfied generally with the formula of rules related to international straits.<sup>28</sup>

### 3. The Attitudes of the Other Gulf States

Generally speaking, all the coastal states of the Gulf, excluding Iran and Oman, advocated the principle of free passage through straits used for international navigation which connect two parts of the high seas. Their views are that any proposed rules should distinguish between those straits which connect two high seas and have been customarily used for international navigation and those straits which only connect the high sea to the territorial sea of a foreign state.

Free passage should be guaranteed for the former while the innocent passage regime should apply to the latter. This policy was intended to exclude the Strait of Tiran.<sup>29</sup> The Kuwaiti delegate, speaking on behalf of Iraq, the UAE, Saudi Arabia, and Qatar, stated that they had not acceded to the Convention on the Territorial Sea and the Contiguous Zone of 1958 because of their dissatisfaction with the article 16.4 of that Convention, which treated all straits alike and had been politically motivated to satisfy specific interests in a particular region. He also suggested that the term "straits used for international navigation" should be strictly confined to straits connecting two parts of the high seas.<sup>30</sup> For his country, he maintained that free and unimpeded passage should be guaranteed for all merchant vessels through straits used for international navigation while different formula should be applied to military aircraft and warships and should include prior notification.<sup>31</sup> Iraq also advocated freedom of navigation through such straits particularly to those states who have no access to the other parts of the high seas except through straits.<sup>32</sup>

Generally speaking, all the littoral States of the Gulf except Oman and Iran, have supported the principle of free transit through international straits providing such straits connect two parts of high seas and have been customarily used for international navigation. Political and economic factors are probably behind this policy. The economies of these countries depend largely on international trade and the maintenance of free flow of traffic through the Strait of Hormuz. In addition, vessels moving to and from their shores must pass through the Strait before reaching the open seas. These states would be at the mercy of the States bordering the Strait of Hormuz as long as innocent passage is a subjective decision of the

straits states, particularly in times of tension. Political friendships wax and wane with changes in government and are therefore an inadequate basis on which to protect fundamental national interests. Thus, it is not surprising that these littoral Gulf States supported the dual regime approach to straits. However, only Kuwait, Iraq and Bahrain have ratified the 1982 Convention (See Appendix B).

### C. The Applicable Regime of Passage Through the Strait

Although the principle of freedom of navigation through international straits now enjoys widespread acceptance, the lack of consensus on general crucial issues of navigation policy has led to disagreement that generates tension particularly during periods of conflict. However, the extension of territorial sea to 12 miles has generally been recognized by the international community. Both of the States bordering the Strait of Hormuz, Iran and Oman, have been exercising sovereignty over their 12 mile territorial seas for considerable time. Iran expanded her territorial limit to 12 miles in 1959.<sup>33</sup> Article 3 of the Iranian Act of 12 April 1959, concerning the territorial water and contiguous zone states:

"The breadth of the territorial sea of Iran is 12 nautical miles from the baseline of the said sea. The baseline will be determined by the Government with due regard to established rules of public international law."<sup>34</sup>

Iranian sovereignty also extends to

"... the air space over the territorial seas as well as to the sea-bed and subsoil thereof."<sup>35</sup>

Article 2 of the Iranian Proclamation of 30 October, 1973, concerning the outer limit of the exclusive fishing zone also extended Iranian jurisdiction to 50 nautical miles from the baseline.<sup>36</sup>

In 1972 Oman also extended its territorial sea to 12 miles.<sup>37</sup> The Omani Decree of 1972 was amended by the Royal Decree of 1981 concerning the territorial sea, continental shelf and exclusive economic zone which entered into force on 10 February, 1981. Article 2 of the new Decree affirmed the expansion of the Sultanate's territorial sea up to 12 miles.<sup>38</sup> Article 1 of the said Decree defines the territorial sea as

"The Sultanate of Oman exercises full sovereignty over the territorial sea of the Sultanate and over the airspace, and the sea-bed and the subsoil beneath the territorial sea of the Sultanate, in harmony with the principle of innocent passage of ships and planes of other States through international straits, and laws and regulations of the Sultanate relating thereto."<sup>39</sup> (emphasis added)

This jurisdiction has also been extended by the Omani law on marine pollution to 50 miles, measured from the baseline. This law came into force on 1 January, 1975.<sup>40</sup>

Since the narrowest point of the Strait of Hormuz is only 20-3/4 miles between Iran and Oman, it is obvious that the extension of the territorial seas of these two States overlapped the Strait. This extension, in the specific instance of the Strait, means that both the traditional right of overflight, the principle of freedom of navigation for all ships, have been significantly affected.

The contention of both States is that once the legal status of the Strait is altered by the extension of their territorial seas, the regime of "innocent passage" shall prevail. They also argue that they have the exclusive right to compile regulations regarding the passage of vessels through their territorial waters, including the international Strait of Hormuz.<sup>41</sup>

This stand has already been carried out by their laws and regulations regarding passage through the Strait. However, while the Omani laws make it clear that the principle of innocent passage is the only regime of passage recognized, the Iranian law has made no such statement defining the nature of passage, though article 5 of the Iranian Proclamation of 1973 has made a general statement granting the right of international navigation exercised in accordance with the rules and principles of international law.<sup>42</sup> The tacit understanding of such a statement is that the Iranian law also only recognises the innocent passage regime. Accordingly, passage of foreign vessels are not actually prohibited from the possibility of suspension by the States bordering the Strait as non-innocent passage within their territorial seas. Neither of them has acceded to or ratified the 1958 Geneva Convention, nor have they incorporated its terms into their domestic laws.

The claims by both states that the Strait should be granted the same legal status as the territorial sea seems to find no support either in international norms or in State practice.<sup>43</sup>

The Strait of Hormuz does satisfy the requirement of the new regime of transit passage envisaged in Part III of the 1982 Convention. According to article 37, transit passage would apply to "straits which are used for international

navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone". In addition, since the Strait of Hormuz is not formed by an island and the mainland of both States, the exception to the principle of transit passage, found in article 38, does not apply."<sup>44</sup>

While the transit passage affirms that the extension of the territorial sea will not alter the nature of passage through international straits, it does recognize the sovereign rights of Strait States over such water.<sup>45</sup>

In spite of the statements made by the Iranian and Omani representatives at the Third Conference on the law of the sea regarding the nature of passage through international straits, they appear to agree on the navigational provisions of the Convention. Both countries have signed the final Act of the Convention.<sup>46</sup> However, both have made declarations relating to specific provisions of the Treaty, which stress their intention to protect their laws, regulations and security interests from any misinterpretation of certain provisions of the Convention. The Islamic Republic of Iran, for example, declares that

The main objective for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in dis harmony with national laws and regulations of the Islamic Republic of Iran. It is, . . . the understanding of the Islamic Republic of Iran that:

- 1) Notwithstanding the intended character of the Convention being nature, certain of its provisions are merely products of quid-pro-quo which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character . . . The above considerations pertain specifically (but not exclusively) to the following:

The right of transit passage through straits used for international navigation (Part III, Section 2, article 38) ...<sup>47</sup> (emphasis added)

The declaration of the Sultanate of Oman also stresses certain navigational provisions. It states that:

"It is the understanding of the Government of the Sultanate of Oman that the application of the provisions of articles 19-25, 34, 38 and 45 of the Convention does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interest of peace and security.<sup>48</sup>

The inference which can be drawn from such reservations is that both of them intend to assert their previous position with regard to passage through the Strait of Hormuz as established in their laws and regulations. It can be also inferred that their signatures are not incompatible with their claims of only innocent passage. These reservations however, are not in harmony with the basic premise of the navigational provisions.<sup>49</sup> Such an exception to the Convention is contrary to the particulars of the Convention in which it specifically mandates a right of unimpeded transit passage through international straits.<sup>50</sup> In addition, international law imposes some obligation on States signing not to undermine or violate the objects of the treaty.<sup>51</sup> Thus, the signatures of Iran and Oman create a duty to refrain from any act that would oppose the provisions of the Convention.<sup>52</sup>

It is unlikely that the transit passage provisions as yet reflect customary international law. Prof. Tommy Koh, the president of the Third Conference, states:

"The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit through straits used for international navigation and the regime of

archipelagic sea lanes passage are two examples of many new concepts in **Convention**.<sup>53</sup>

Since the Convention has not yet entered into force and both Iran and Oman continue to claim that passage through the Strait, within the limits of their territorial waters, is subject to their sovereign rights, the exact legal status of the Strait is uncertain. This is a source of major disagreement between the States bordering the Strait and the rest of the Gulf States and distant maritime states. Perhaps, because of this uncertainty, one writer has indicated that State practice through the Strait of Hormuz has ratified unimpeded transit passage through acquiescence, and hence, the 1982 Convention did not alter the Strait's regime but simply codified what existed **already**.<sup>54</sup> However, this rule conflicts with the claims by the States bordering the Strait that they have constantly regarded the water of the Strait as part of their territorial seas, and thus, oppose **any right of** passage other than innocent passage. This is to say that the **practice lacked the** opinion juris necessary to make it a rule of customary international law. The recent practice of the Iranian Government, for example, in announcing the closure of the Strait and in physically attempting to close it, represents **State practice in** the legal **sense**.<sup>55</sup>

These restrictive views of the Strait-states, as **demonstrated in their** domestic laws and in their reservations to certain provisions of the 1982 Convention, will serve only to deepen the uncertainty regarding the **legal status of** the Strait of Hormuz.

### Footnotes

1. Morris F. Maduro, "Passage Through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea", *Journal of Maritime Law and Commerce* 12 (1980): 69. See also, Office of the Geographer, U.S. Dept. of State. No. 564375, Map of World Straits Affected by 12 Mile Territorial Sea (1974).
2. See Chapter 11, pp. 13-19 above.
3. Charles G. MacDonald, "Iran's Strategic Interests and The Law of the Sea", *Middle East Journal* 34 (1980): 308-309. (Hereinafter cited as MacDonald, *Iran's Strategic Interests*.)
4. S.H. Amin, "The Regime of International Straits: Legal Implications for the Strait of Hormuz", *Journal of Maritime Law and Commerce* 12 (1981): 389.
5. Ibid.
6. Ibid, 397. See also 1958 Geneva Convention Article 163.
7. Amin, 397.
8. U.N. Conference on the Law of the Sea, *Official Records*, V.III (1958): 96. See also, Charles G. MacDonald, *Iran, Saudi Arabia and the Law of the Sea*, (London: Greenwood Press, 1980), 170.
9. MacDonald, 171.
10. U.N. Conference on the Law of the Sea, *Official Records*, V.III (1958), 156.
11. Ali, A. El-Hakim, *The Middle Eastern States and the Law of the Sea*, (New York: Syracuse Univ. Press, 1979), 44.
12. See the declaration made by the Government of British on depositing its instrument of ratification in United Nations, Treaty Series 516 at 278.
13. El-Hakim, 44-45.
14. Ibid.
15. Ibid.
16. A. Al-Dhahak, *The Law of the Sea and its Application in the Arab Countries*, (in Arabic) (1987), 479.

17. Third United Nations Conference on the Law of the Sea, Official Records, v. I, (U.N. Publication Sales No. E.75. v. 3, 1974), 71-72. (Hereinafter cited as 3rd U.N. Conference.)
18. Amin, 400. See also, R.K. Ramazani, The Persian Gulf and the Strait of Hormuz, (Netherlands: Sijthoff & Noordhoff Publishers, 1979), 82.
19. 3rd U.N. Conference, v.II, 124.
20. Ibid, 295-296.
21. Ibid, 275.
22. Ibid.
23. S.H. Amin, International and Legal Problems of the Gulf (London: Middle East and North African Studies Press, 1981), 22.
24. Ibid, 19-28.
25. 3rd U.N. Conference, v.I, 152.
26. For the explanation of this proposal, see K.L. Koh, Straits in International Navigation, (London: Oceana Publications, Inc., 1982), 136.
27. 3rd U.N. Conference, v.II, 136.
28. Al-majala, (Arabic weekly political news magazine) London, July 1988, at 17.
29. Ramazani, 87.
30. 3rd U.N. Conference, v.II, 139.
31. Ibid. See also 3rd U.N. Conference, v.I, 155 and 166.
32. Ibid., v.II, 295 and v.I, 148.
33. For the reasons of Iranian expansion of its territorial sea, see C.G. MacDonald, Iran's Strategic Interests, 308.
34. Act of 12 April 1959 Amending the Act of 15 July 1934 on the Territorial Waters and the Contiguous Zone of Iran. National Legislation and Treaties Relating to the Law of the Sea, ST/LEG//SER.B/16, (New York: UN Publication, 1974), 10.
35. Ibid, Article 2.
36. UNLS, ST/LEG//SER.B/18, 1976, 334-335.

37. Article 2 of the Omani Decree, found in UNLS. ST/LEG/SER/B/16, 1974, 23.
38. For the text of the Omani Decree, see K.R. Simmonds (ed.), *New Directions in the Law of the Sea*, v.I (Oceana Publications, Inc., 1983) at c3.
39. Ibid.
40. For the text of the Omani Law on Marine Pollution Control, see UNLS, ST/LEG/SER.B/18, 1976, 74.
41. Amin, 402.
42. See Article 5 of the Iranian Proclamation of 30 Oct. 1973, concerning the Outer Limit of the Exclusive Fishing Zone, UNLS, ST/LEG/SER.B/18, 1976, 334.
43. D.P. O'Connell, *The International Law of the Sea*, ed., A. Shearer, v.I (New York, Clarendon Press, 1982), 327.
44. Ramazani, 81.
45. UNCLOS, article 34.
46. For the signatures of Iran and Oman, see, United Nations (eds.) *The Law of the Sea: United Nations Conference on the Law of the Sea*, U.N. Sales No. E.83 v.5 (1983), 190. (Hereinafter cited as U.N. Convention on the Law of the Sea.)
47. *Multilateral Treaties Deposited with the Secretary-General*, (New York: U.N. Publications 1988), Sales No. E.89, v.3, at 762.
48. Ibid, 763-4.
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50. Ibid.
51. John King Gamble, Jr., "Status of the 1982 U.N. Convention on the Law of the Sea", *Marine Policy Reports* 10 (1988) 1-2.
52. L. Oppenheim, *International Law*, 8th ed., (London: Longmans, Green and Co. 1955) 903-910.
53. U.N. Convention on the Law of the Sea, at XXXIV.

54. . Ronnic A. Wainwright,—"Navigation Through Three Straits in the Middle East: Effects on the United States of Being a Non-party to the 1982 Convention on the Law of the Sea", Case Western Reserve Journal of International Law 18 (1986): 373.
55. Myron, H. Nordquist, 158.

## CHAPTER IV

### THE POTENTIAL THREATS TO THE GULF SECURITY AND ITS IMPLICATIONS FOR THE STRAIT OF HORMUZ

Both the Gulf littoral and non-littoral states have parallel interests in maintaining the security of the entire Gulf region and in particular the security of the sea routes of the Gulf. As has been examined earlier, the strategic and economic potential of the Gulf is of utmost concern to all these states. Not only is the Gulf the main artery for oil and trade between the East and West, it also serves as a major trade outlet for its coastal States. Despite this importance however, there is much fear and suspicion that the security of the region may be threatened by both external and internal manifold challenges. Several factors have contributed to the instability and volatility of the region either external or regional.

This chapter describes and analyzes the principal threats to the Gulf's security. It will argue that ensuring safety of navigation through the Strait of Hormuz is inseparable from the overall security of the Gulf region. In light of the discussion of these numerous threats, we should be able to ascertain the real challenge to the stability of the Gulf and the Strait. We shall also be able, in the conclusion, to suggest a possible solution to minimize the real threats to the security of the Gulf and safeguard the safety of navigation through the Strait.

#### A. External Threats to the Gulf Security

The Gulf region has become the focus of much international rivalry particularly between the superpowers. The Gulf and the adjacent Arabian Sea and the Indian Ocean have received more high level military and political attention than any other region in the Third World. This has contributed to transforming the area into a major arena of instability.

Since the end of the 1960s, numerous changes have fundamentally affected the security calculus of the area and intensified the political and military competition of the superpowers in and around the Gulf region. It was often suggested that the United Kingdom's withdrawal of its military presence from East of Suez in 1971 and the termination of its protection treaties with the lower Gulf states had created what became known as a "power vacuum" in the region. This situation had a direct affect on the political and military policies of the major powers, and escalated a serious friction between the United States and the Soviet Union.<sup>1</sup> However, the presence and influence of the two superpowers were well-established in the region long before the British decision to deport its forces from the Gulf littoral states. Immediately after the conclusion of World War II, the USSR was forced to withdraw its troops from Iran in 1946 by the diplomatic pressures of the United States and United Kingdom.<sup>2</sup> The reluctance of Moscow to withdraw its forces and its growing ambition to expand its influence into the Middle East and the Indian Ocean, seeking access to the southern sea lanes, was viewed, particularly by the U.S., as an attempt to control the oil fields and its output? In an attempt to contain Soviet expansion into the region, Washington supported the formation of a regional defence arrangement which was created in

the mid-1950s by countries situated along the southern border of the Soviet Union, namely, Turkey, Iran, Iraq and Pakistan.' When the Communist revolution overthrew the pro-western Iraq Government in 1958, the Central Treaty Organization [CENTO] emerged and was composed of the same above countries precluding Iraq. The main goal of the new defence alliance was to deter the perceived Soviet threat to the Middle East in general and in particular to prevent the Soviets from gaining access to the warm waters in the Indian Ocean/Arabian Sea.<sup>5</sup>

From these early attempts of the major powers to advance their national interests, one can maintain that the disengagement of the British forces from the Gulf did not, in fact, result in the alleged "power vacuum", though the influence and presence at that time was minimal!

Nevertheless, the entire Gulf region has gone through several developments that have had an influence at local and international level since the late 1960s. With the growing importance of the Gulf oil to the world's energy as well as the manifest competition between superpowers in the Third World, the Gulf has been reflected-as a key role by both the U.S. and U.S.S.R. in protecting their interests.

Whatever the Soviet motivation, the pattern of their activities in the Gulf over the past several decades has been usually seen as an attempt to gain influence and control of the oil sea lines of communication.<sup>7</sup> They have sought to gain increased influence in the region through "... energy sources acquisition, military sales, support for national liberation movements, and encouragement of communist

participation in national front governments".<sup>8</sup> In order to achieve strong footholds in the broader Gulf region, Moscow supported and offered assistance programs to the pro-communist governments in and around the Gulf area. Vivid examples were Russian support, both economic and military, provided to the Baathi regime in Iraq since 1958, followed by a Treaty of Cooperation and Friendship in 1972 and the support provided to various other countries such as South Yemen, Ethiopia and Somalia.<sup>9</sup> These policies, it has been argued, Considerably improved access to the Gulf region by utilising the critical facilities and bases at Dahlack, Massawa and Assab in Ethiopia, Aden in South Yemen and Umm-Qasr in Iraq.<sup>10</sup> Thus, the USSR has strengthened its position in the Gulf and the entrance of the Red Sea at the Strait of Bab-ai Mandab that could control or restrict passage into and out of the sea lines, particularly in times of crises, through which the bulk of Gulf oil bound for the rest of the world passes."

In an attempt to contain perceived Soviet threats to the western interests, the U.S. administration acknowledged that the wiser strategy was to support local governments to take charge of security matters within their region instead of committing physical involvement. This policy, Which became known as the "Two-Pillar Strategy", involved Iran and, to some extent, Saudi Arabia to maintain the stability and safety of navigation through the Gulf region.\* In order to fulfill this strategy, the U.S. agreed to militarize Iran with sophisticated and advanced weapons, including military advisors.<sup>13</sup> In addition, the U.S. improved its military facilities and bases in and around the Gulf at several strategic locations such as Diego Garcia Island in the southern Indian Ocean, Barbara in Somalia, Al Khasab in the Musandean Peninsula near the Strait of Hormuz, and others.<sup>14</sup>

Although the **U.S.** policy succeeded in maintaining stability throughout the Gulf region in the 1970s, a series of dramatical events in the Gulf forced the U.S. and USSR to make radical changes to their policies. The Iranian revolution, Soviet invasion of Afghanistan and the Iran-Iraq war further enhanced the supposed fear of instability in the region, particularly with the increased number of foreign navies in the Indian Ocean by outside powers. These developments escalated the tension between the superpowers and brought about increased concern that security of the whole region would be jeopardised. From the U.S. perspective, the invasion of Afghanistan strengthened the widely held perception that Moscow sought to have access to warm-water ports in the Gulf and its invaluable oil **resources**.<sup>15</sup> This action by the Soviets, it was argued, might enable them to threaten all shipping transiting the Strait of Hormuz<sup>16</sup> and facilitate similar military moves into Iran.<sup>17</sup> As a reaction to this atmosphere of destabilizing crises, the **U.S.** abandoned its previous policy and undertook a series of unilateral military interventions in the Gulf. The idea of Rapid Deployment Joint Forces [RDJF] evolved in the early 1980s as a means of ultimate responsibility for regional defence and **commitment**.<sup>18</sup> According to several observers and American officials, this action was designed to signal to the Soviet Union that the **U.S.** possessed the capability for **using** force to defend its vital interest in the region. The justification for U.S. military moves was articulated, by President Carter in 1979:

"Let our position be absolutely clear, an attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by use of any means necessary, including military force."<sup>19</sup>

This is not the place for a political and military analysis of the RDJF. However, it is sufficient to emphasise that the declared function of this strategic framework is to prevent the interruption of oil supplies to the west from the Gulf region and to protect the region from external threat during times of crises by military action.<sup>20</sup> In order to facilitate such U.S. projection forces, the U.S. administration sought to gain bases and support for its policy in the area. Access agreements were reached with several Indian Ocean/Arabian Sea littoral states.<sup>21</sup> In the mid 1980s, the RDJF was apparently transformed into a new command, the U.S. Central Command, and its objective expanded to include military intervention on behalf of U.S. friendly states to deter any possible opposition from internal forces.<sup>22</sup> Nevertheless, the military intention of U.S. towards the Gulf region was seen as an attempt to seize the Gulf oil fields and exercise direct control over the flow, distribution and the price of oil which could invite Soviet intervention rather than deter it.<sup>23</sup>

Although the Gulf states had recognized the superpowers military strategy and ideological designs, they were anxious over the increase of outside threats. Though the Gulf states have different perspectives towards the role of superpowers in the region, they rejected the increased Soviet-U.S. involvement in Gulf affairs. Generally speaking, they opposed any foreign interference whatever its origin and called for the isolation of the whole area from international conflict, and in particular, keeping away military navies and bases from the Gulf region. The strongest response came from the Iraqi government which proclaimed an Arab National Charter to counter foreign military forces and threatened to exclude any Arab regime which fails to adhere to this principle.<sup>24</sup> The Iranian perspective,

under the Shah and the current regime, **was** that the Gulf security should be within the Gulf littoral states **responsibility**.<sup>25</sup>

In an attempt to isolate the region from the atmosphere of outside influence and activities, many attempts were made to achieve an area-wide arrangement of security cooperation among the Gulf states. The Conference of Gulf Foreign Ministers, held in Muscat, Oman in 1376, was primarily aimed at discussing this issue. Its proposals, inter alia, examined: the possibility of keeping foreign fleets out of the Gulf, military cooperation to guarantee free navigation in the Gulf and a possible agreement not to provide military bases to outside **powers**.<sup>26</sup> Another attempt **was** led by Oman which offered a proposal in 1979 for the defence of the Strait of Hormuz to ensure the freedom of navigation. The proposal endorsed the idea of collective defence cooperation between the littoral states of the Gulf and specific outside powers to protect the Strait and maintain the freedom of navigation for all foreign **ships**.<sup>27</sup> However, due to the differences between the Gulf **states** on the type of defence arrangement and on the applicable regime of navigation through the Strait, no regional agreements were reached. **As a result** of the failure to reach any agreement on any formula for ensuring Gulf security, the Arab Gulf states, which constitute the Gulf Cooperation Council,<sup>29</sup> announced on several occasions its implementation of unified rapid deployment forces to protect the member states and to ensure freedom of navigation through the Gulf sea lanes.<sup>30</sup>

Obviously, the struggle between the major powers to **gain influence in the** region has led to the possible conclusion that this struggle may **destabilise the**

security of the region. However, for many reasons the perceived external threats were exaggerated. The motives of the superpowers, in seeking influence in the region, was, and possibly is, primarily to deter one another. Since both the United States and the Soviet Union have identified the Gulf region as "vital" to their national interests, it is in neither of their best interest to destabilize the status quo of the region. Despite their political and military competition, they have indicated their support for upholding the security of the region, particularly in the event of crises. The Soviet's position has been witnessed by several instances of substantial improvements with the Gulf states: The Soviet forces in Afghanistan are now withdrawn from that country, hence removing the immediate direct threat that they could have posed to the security of the region. Even during the crisis over the invasion of Afghanistan, the Soviets indicated its desire to secure the region from outside interference. The Soviet plan of a "Peace Zone", which became known as the Brezhnev Doctrine, called for respect for the region's sovereignty, independent local control over the natural resources, abstention from the threat or use of force against the Gulf states, and non-interference in the use of the Gulf Sea lanes.<sup>31</sup> Whatever the Western interpretation of this proposal, it clarifies Soviet interest. It provides the region with political stability and guarantees the sovereignty of all states of the region. It also clarifies the Soviet Union's particular interest in maintaining freedom of navigation through the sea lane passages of the Indian Ocean and Middle East, the Strait of Hormuz, the Strait of Bab al-mandab and the Suez Canal, which has been a long-standing priority for Moscow. The improved Soviet policy was followed during the crisis of the Gulf War between Iran and Iraq in the 1980s. The Soviet Union, like the U.S., maintained neutral positions, though they increased the size of their navies in the

Gulf and near the Strait of Hormuz.<sup>32</sup> When the war seriously threatened international shipping in the Gulf, Moscow showed its willingness to cooperate with the U.S. to safeguard the maritime trade.

"... obviously merchant vessels must be defended ... the best immediate step would be establishing a U.N. peacekeeping naval force in the region. including, if necessary, the naval ships of both the U.S.A. and the Soviet Union ..."<sup>33</sup>

While the Soviet forces had never participated in protecting the Gulf oil exports, they were involved, for the first time, in protecting the Kuwaiti oil exports by allowing some Kuwaiti oil tankers to sail under their flag.<sup>34</sup> Indeed, the Soviet naval escorts for Kuwaiti shipping highlighted the de facto convergence between the Soviet and Gulf states' interests. Contrary to the arguments that a Soviet incursion into the Gulf remains a possibility in crisis situations, the Soviet position towards the Gulf states has improved politically and economically in the last several years. Despite the crisis in the Gulf, Soviet efforts to establish diplomatic relations with Gulf states have had significant results. Diplomatic relations have been established with Bahrain, Qatar, Oman and the United Arab Emirates. The active dialogue with Saudi high-level officials in the past several years was enhanced by establishment of diplomatic relations.<sup>35</sup> Kuwait, the only GCC state that has maintained diplomatic relations with Moscow since 1963, has further cooperated with Moscow politically as well as economically.<sup>36</sup> The Iraqi-Soviet long-established relationship did not, however, prevent Moscow from cooperating with the other Gulf states including the extreme regime in Tehran.<sup>37</sup> Another major factor that may reduce the perceived Soviet offensive intention toward the region, and is likely to remain so, is the role of Islam. The Gulf region is the heartland of Islam, and hence, all the inhabitants of the region emphatically reject communist ideology as an atheistic creed. The local communist parties in some

Gulf states are politically illegal and in others are small and ineffective.<sup>38</sup> Accordingly, the fear of eventual communist spread through the region, if not contained, is not anticipated. The disruption of the security of the region is also not in the national interest of the Soviets, especially since there are more than 70 million Muslims mainly located in the southern Soviet Union, which might be a political source of resistance to the central communists in Moscow if it involves in such disruption.<sup>39</sup>

The political gains made by the Soviets in the recent years demonstrate the strategic objectives of the Soviet in the region. The new image of the Soviet foreign policy and behavior toward the region may emanate from the fact that the Soviets feel more confident today that potential escalation of political instability in the Gulf is not in the best interest of the Soviet Union. In any case, the outcome of the Soviet-Gulf relation will have a tremendous impact on lowering the Gulf states' perception of Soviet potential threat.

Whatever the ultimate rivalries, the superpowers have demonstrated repeatedly over the past several years their common interests in the Gulf region. The common interest in such a specific area as the uninterrupted access of international ships through the international Strait of Hormuz has been reflected in a unified position between them at the Third United Nations Conference on the Law of the Sea, where both supported the transit passage regime. Without cooperation to maintain stability in the Gulf, such common objectives would not be realised and achieved. Despite the fears generated by outside military presences in the Gulf, all of the recent threats to the security of the region and to the safety of

navigation through the sea lanes have come not from the outside powers but from indigenous political differences. The most dangerous of these threats originate from interstate conflicts including territorial disputes.

#### **B. Regional Threats to the Gulf's Security**

The threats to the Gulf security actually have emanated from within the Gulf itself. In the last several decades there has been friction between the Gulf states, either between the Arab and Iranians, or between the Arab Gulf states themselves. The instability and volatility of the Gulf region contributed to these tensions. The most significant threat to the stability is related to the unresolved maritime and land boundaries. The most notable inter-state territorial disputes are those involving Iran and the United Arab Emirates [UAE] over the islands of Abu Musa and the Greater and Lesser Tunbs, the Iraq-Kuwait boundary conflict, and the Iraq-Iran conflict over the Shah-al Arab waterway. These territorial problems may have been temporarily frozen but have not disappeared. They have resulted in several armed conflicts. The eight year war between Iran and Iraq and the Iraq-Kuwait conflict underscore the ominously fragile bases of stability in the region and, unless finally resolved, will remain the major challenge to the security of the Gulf in general and to the freedom of navigation in specific.

##### **(1) Conflict over the Abu Musa and the Tunbs Islands:**

Although many conflicting claims over the delimitation of the offshore boundaries and over the sovereignty of some islands have been resolved by tacit understandings or express unilateral agreements, a number of troublesome disputes

still exist between the Gulf states.<sup>40</sup> The most significant unsettled case has involved the Tunbs and Abu Musa islands between Iran and the UAE. These islands have strategic locations at the exit of the Strait of Hormuz and contain petroleum resources in the seabed and subsoil beneath its territorial seas.<sup>41</sup> The Abu Musa is located about 32 miles off the coast of the UAE (Sharjah) and approximately 40 miles from the Iranian coast. While the Great Tunb lies about 15 miles from the Iranian island (Qeshm) and about 40 miles from the Arabian mainland, the Lesser Tunb lies only 20 miles from Qeshm island and 45 miles from the Arabian side.<sup>42</sup>

The jurisdictional dispute over these islands erupted in 1971 when the Iranian forces occupied the three islands only one day before the British forces withdrawal from the region.<sup>43</sup>

The Iranian occupation of the Abu Musa island was made in pursuance of the 'Memorandum of Understanding' between the Shah of Iran and the ruler of Sharjah in 1971. However, no such agreement existed in the case of the Tunb islands."

Nevertheless, the Memorandum of Understanding did not resolve the question of sovereignty over the Abu Musa island between the two states, though it recognized equal benefit from the oil exploitation and other related matters (see Appendix C).<sup>45</sup> According to its terms "neither Iran nor Sharjah will give up its claim to Abu Musa nor recognize the other's claim". In addition, immediately after signing the agreement, both of the two states spelled out their fundamental disagreement over

the status of the island. The ruler of Sharjah at the time stated that "the agreement was temporary and was an instrument for overcoming and preventing bloodshed". The Shah of Iran also indicated that "we maintain our position that the whole of the island belongs to us".<sup>46</sup>

The Iranian annexation of the three islands in the Gulf was based on several arguments? Apparently, however, it was primarily concerned with the potential threat to the security of its shipping lanes through the Gulf. The Iranian government argued, among others, that because the islands are close to the Strait of Hormuz, the freedom of navigation to and from the Gulf was dependent upon control of the islands by a regional power committed to the stability of the region. It further argued that the flow of oil and goods through the Strait was a vital interest to Iran as well as to the West which must be ensured by a regional power.<sup>48</sup>

The UAE and other Arab states strongly condemned Iran's action.<sup>49</sup> At the debate of the United Nations Security Council, the Kuwaiti representative argued that

"...Iran cannot adjust itself, apparently, to the undisputed fact that these islands have always been Arab islands, and that the continuation of free passage through the Strait of Hormuz is not only essential to Iran's economic life but also equally essential and vital to Kuwait, Iraq and the other littoral states of the Gulf, the Gulf is our sole economic lifeline."<sup>50</sup>

The Iranian claim of sovereignty over these islands has been legally refuted by a number of Arab and international lawyers.<sup>51</sup> In addition, it is worthwhile to emphasise in this regard that these islands have been recognized as Arab islands by the British practice during the time of her control over the Gulf.<sup>52</sup> With regard to

the Gulf boundaries, a document from UK Public Record Office, dated 9th September, 1938, indicates that

"... As regards Tunb, little Tunb and Abu Musa, the position is as stated in paragraph 7 of your letter viz. in our view they belong to our Arab proteges and must be excluded from the Anglo-Iranian Oil Company's calculation. We note that this position is accepted by the Company.."<sup>53</sup>

Another letter from the British Foreign Office, dated 7th October, 1938, addressed to the Anglo-Iranian Company also affirms this fact.

"... Nabiya Tunb, Tunb and Abu Musa are, in our view, unquestionable Arab and should be excluded from the Company's concession..."<sup>54</sup>

The continuation of Iranian occupation of these islands has remained a major irritant in Arab-Iranian relations. Following the overthrow of the Shah of Iran, the new regime has shown no signs of relinquishing the islands. The status of these islands remains unresolved and will continue to be a potential source of conflict between Iran and the Arab Gulf states, just as the conflict over the sovereignty of Shatt-al Arab boundary between Iran and Iraq which led to armed conflict for more than eight years.

## (2) The Iraq-Kuwait Conflict

The current problem of the Iraqi occupation of Kuwait is evidence of the consequences of unresolved inter-state boundary conflict which poses a great challenge to the security of the region as a whole.<sup>55</sup> This crisis did not erupt suddenly, however, it goes back over half a century.

In 1961, a few days after the declaration of Kuwaiti independence, the Governor of Iraq, Abdal-Karim Qasim,<sup>1</sup> claimed that Kuwait constituted an integral part of Iraqi territory.<sup>56</sup> The basis of Iraqi claim to sovereignty over Kuwait stemmed from the fact that the Ottoman Empire exercised general sovereign authority over Kuwait under the indirect administration of the governor of the Basrah Province. As a result, the Iraqi government asserted that with the dissolution of that Empire, after the World War 1, Kuwait must be regarded as a part of Iraqi territory.<sup>57</sup> In order to achieve this, the Iraqi leader threatened to use armed force to bring Kuwait under the authority of Iraq. However, this attempt failed because of the prompt response of the British military and then by the joint Arab forces.<sup>58</sup>

The validity of the Iraqi claim to sovereignty over Kuwait, historically and legally, has been refuted by a number of lawyers.<sup>59</sup> The Iraqi historical and legal position in this dispute suffers from a combination of facts. Historically, the first instrument aiming to determine the Kuwaiti frontier with Iraq was a treaty concluded between the Anglo-Ottoman and Anglo-Germans in 1913. By this treaty, Kuwait was regarded as an autonomous country under Ottoman domination.<sup>60</sup> The British practice in the Gulf, after the First World War, affirmed the sovereignty of Kuwait and its frontiers. In 1932, the Iraqi government, at that time under the British mandate, recognized Kuwaiti boundaries which were determined in the 1913 treaty.<sup>61</sup> In addition, the new Iraqi government, which took control in 1963, recognized the independence of Kuwait and confirmed the settlement of the borders as defined in the 1932 Exchange of Letters between the two countries.<sup>62</sup> At that time, and despite opposition from the Iraqi government, Kuwait became a member of the Arab League as well as a member of the United Nations.<sup>63</sup>

For these unequivocal facts, one author concludes

"It is abundantly clear from this examination that such a claim does not stand legal analysis, simply because it is not a legal claim to territory in the real sense of the world. Throughout the period during which this claim assumed its seriousness - a period extending between 19 June, 1961 and 8 February, 1963 - the Iraqi government had failed to convince the nations of the world that it had a legally valid claim to **territory**."<sup>64</sup>

Although the Kuwaiti government has declared, through official statements, that the borders with Iraq had been demarcated according to the 1963 accord, the Iraqi Baathist regime that took power in 1968 has never recognized or accepted the territorial status **quo**.<sup>65</sup> Indeed, the Iraqi territorial interest in Kuwait was revived in the early 1970s. The withdrawal of **British forces** from the Gulf and the increased regional competition between **the active Gulf** states enhanced the Iraqis long-term aspirations and intentions **over Kuwait**. Due to these significant political changes, the intentions of **Iraqis have shifted, however, from historical and legal claims to overtly political considerations**. A combination of factors constrained the Iraqi designs on Kuwait at that time. **Iran, under the Shah regime,** maintained the balance of power in the region and **prevented any unacceptable changes of international boundaries in the region**. It played a major role in preventing Iraqi incorporation of Kuwait or any significant part of its territory. The Iraqis also suffered, militarily as well as politically, from the Kurdish separatist movement in the north of Iraq in the mid 1970s, and from the war between **Iran and Iraq** which lasted for more than eight years. All these events forced Iraq to restrict any hostile intention it may have had toward Kuwait. During that time, official and private Kuwaitis were deeply concerned about the

longstanding Iraqi ambitions toward them. During the Iran-Iraq war, Kuwait provided political and financial support to Iraq. Perhaps the Kuwaiti government hoped that by providing financial and other supports for Iraq, it could buy the Iraqis' goodwill.<sup>66</sup> When these constraints no longer existed, the Baathist regime in Iraq fulfilled its longstanding ambition on the 2nd of August, 1990 and annexed the whole territory of Kuwait.

Several economic and political motives underlie the Iraqi ambition. Kuwait is undoubtedly one of the Gulf states which contains vast petroleum reserves and has invested large revenues in many countries which, in turn, makes it a very rich prize. There was the feeling within Iraq that Kuwait could be used to improve the Iraqi economy as well as become a political asset. In addition, Iraq had suffered geographically, from its limited access to the Gulf waters. The Iraqi attention had focused upon the disputed islands of Warbah and Bubiyan, two islands located at the northern side of the Gulf, as early as 1951.<sup>67</sup> Iraq claimed that the protection of the main Iraqi port of Umm Qasr demand that it exercises control over these islands.<sup>68</sup> The inadequacies of the Iraqi port systems underscored the necessity of obtaining a deep water port through which its oil exports could pass. It was argued, that the deep waters of these islands could provide an oil terminal that could be serviced by pipeline from the Iraqi mainland and provide an extension of the Iraqi coastline at the head of the Gulf.<sup>69</sup> Thus, occupation of Kuwait would solve these problems.

Apart from the economic considerations, Iraq has been seeking to become the undisputed leader of the Arab world since the isolation of Egypt as a result of the

conclusion of the Camp David Accord with Israel in 1979. The occupation of Kuwait is viewed as a way of further enhancing the Iraqi position in the Gulf region and in the Middle East as a major power. It is now, as it never was before, clearly the dominant regional military power. There is no plausible regional counterforce that could impose limits on Iraqi longterm ambitions in the Gulf region.

It is hard to set precise and confident limits to Iraqi interests. Yet the combination of these factors clearly point to the fact that a possible Iraqi withdrawal from Kuwait would not resolve this crisis or preserve the security and stability of the region. The Iraqi territorial disputes with its neighbours are not the only source of instability in the region. Another is linked with the Iraqi political aspirations to control the whole area especially with the disruption of the balance of power in the region since the beginning of the 1980s.

(3) **The Impact of the Iran-Iraq War and the Vulnerability of the Strait of Hormuz**

In addition to the potential threats already examined, the armed hostilities among the Gulf states themselves pose a major regional challenge to the freedom of navigation and to the stability of the region. The special strategic vulnerabilities of the Gulf create another set of factors that shape the stability of the region. The Iran-Iraq War provided a tangible illustration of the seriousness of threats to the sea lanes and their potential importance in any future conflict. The Gulf War showed that there are so many possible forms of restricting international shipping.

In addition, serious questions have been asked about the legality of naval activities of belligerents at sea, particularly as they affect neutral shipping in the Gulf. This is especially true since the Gulf is regarded as the largest source of the world's oil and interruption to transport would have a devastating affect on the world's energy supply.

Prior to the Gulf War, Iran and Oman were responsible for protecting the Strait of Hormuz and the sea lanes. In the mid 1970s, they agreed on the joint defence of the navigable sea lanes in the Strait.<sup>70</sup> At the Third Conference on the Law of the Sea, Iran supported the concept of semi-enclosed sea.<sup>71</sup> This concept would have involved naval supervision by Iran as military protector of the Gulf.<sup>72</sup> However, due to suspicions concerning the intent of Iran's maritime policy, and its attempts to control the Gulf area including the Strait, none of the other Gulf states supported this proposal.<sup>73</sup> Nor was this concept accepted by non-littoral naval powers since it would establish a precedent in international law that could be extended to other closed or semi-enclosed seas.<sup>74</sup>

The question of protection of the freedom of navigation was highlighted during the Iran-Iraq War.<sup>75</sup> The safety of international traffic through the Strait was the subject of international concern when the war extended to the Gulf waters. Threats to block shipments through the Strait were constantly being made. Throughout the Gulf War, Iran in particular threatened a de facto closure of the Strait and announced that it could easily shut the Strait to international shipping.<sup>76</sup>

However, due to the geographical character of the Strait and the lack of military capability of Iran, many analysts had concluded that the actual permanent closure of the Strait was not possible? In addition, a de facto closure of the Strait would have been a direct challenge to the international community, particularly to the maritime powers who had affirmed their intention to keep it open.<sup>78</sup>

Although such actions had not been carried out, the Gulf War revealed the serious vulnerability of the Gulf sea lanes. Both belligerent States relied on certain unlawful activities to reach the same goal of frustrating the free flow of oil and other supplies out of the Gulf, without blocking the Strait physically.<sup>79</sup>

Through the hostilities, the warring States proclaimed war zones in wide areas of the Gulf waters. Pursuant to customary international law, war zones are permissible in times of armed conflicts.<sup>80</sup> Yet this right is not absolute. Exclusive war zones can be justified only if they are implemented in a reasonable manner, where the width of the zone, the degree of control and the convenience to neutral vessels must be observed.<sup>81</sup> Both sides had disregarded the principle of "reasonableness" as a prerequisite for the legality of such action especially with regard to neutral ships.<sup>82</sup> In addition, neither side had made any provision for the safe route of passage, nor did they recognize the right of free navigation for neutral merchant ships, or show any concern for the safety of merchantmen.<sup>83</sup>

Many merchant vessels under neutral flags were hit either inside or outside the exclusive war zones designated by the belligerents.<sup>84</sup> Attacks on neutral shipping occurred also in other parts of the Gulf waters and in the Strait of Hormuz as

well.<sup>85</sup> In addition, since no Iraqi vessels were allowed to navigate through the Gulf sea lanes, Iranian attacks were concerned exclusively and deliberately on neutral ships of third parties transiting to and from non-participant Gulf states.<sup>86</sup> The Iranian attacks occurred even after exercising its right of "visit and search"?<sup>87</sup>

Such naval activities against commercial shipping, both within and outside the proclaimed war zones, were characterised as illegal and a violation of the right of transit passage.<sup>88</sup> The right of neutral merchant ships to navigate on the high seas and in strait used for international navigation is a fundamental principle of the law of maritime warfare. This right cannot be impeded pursuant to customary international law.<sup>89</sup> The U.N. Security Council affirms the principle of the right of free navigation and commerce in international waters and sea lanes.<sup>90</sup> The Security Council condemned the attacks by both belligerents on neutral merchant ships and articulated that there be no interference with shipping to and from the countries not parties to the conflict.

The mines laid indiscriminately throughout a large portion of the Gulf waters were yet another illegal activity. Laying mines is one of the most serious hazard to the movement of oil exports and other supplies especially in enclosed or semi-enclosed seas.<sup>91</sup> A number of mines appeared in the Gulf shipping lanes causing damage to neutral vessels during the hostilities.<sup>92</sup>

The types of activated mines that were used in the Gulf War are prohibited by both international convention and customary law.<sup>93</sup> The requirement of warning or notification of the location of mines was also ignored by the state

which laid the mine. The type of mines that were laid in the international shipping lanes in the Gulf with the specific intention to disrupt and damage neutral shipping are said to be interference with the customary freedom of navigation and violated international law.<sup>95</sup>

" . . . , if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907."<sup>96</sup>

Although the free navigation to and from the Gulf had relatively continued during the war, the practice of the warring States has demonstrated the inherent vulnerability of the Gulf shipping lanes and the impact of this on international trade. There is no reason to assume, however, that such military operations, in a limited area such as the Gulf waters, will remain ineffective in future conflicts or that free navigation will remain uninterrupted.

The fact is that the Gulf states are dependent on a relatively few avenues for sea communication. The Gulf sea lanes are essential to the functioning of most Gulf states. They are dependent on the free flow of both tankers to move oil out of the Gulf and bulk imports. It is also vital to the economic health of oil-consuming countries that the security and safety of the tankers movement be maintained and uninterrupted through this area, particularly in long-term conflicts. Thus, freedom of navigation through the Gulf shipping lanes is fundamental to shipping operations and any denial of this right might have devastating consequences for all interested states.

### Footnotes

1. S.H. Amin, Political and Strategic Issues in the Persian-Arabian Gulf. (London: Royston Ltd., 1984), 30 (hereinafter cited as Amin, Political and Strategic Issues).
2. Paul Jabber and Others, Great Power Interests in the Persian Gulf, (New York: Council on Foreign Relations, Inc., 1989), 18; Robert 3. Hanks, "Oil and Security in U.S. Policy Towards the Arabian Gulf-Indian Area", in Oil and Security in the Arabian Gulf, ed. Abdel Majid Farid, (London: Croom Helm Ltd., 1981), 37-38.
3. R.J. Hanks, 39.
4. This formation was known as "Baghdad Pact". For details, see Bruce A. Kumiholm, The Persian Gulf and United States Policy, (California: Regina Books, 1984), 19-21; Murray Gordon, ed., Conflict in the Persian Gulf, (New York: Facts on File, Inc., 1981), 19-20.
5. Bruce A. Kumiholm, 21; Gordon, 19-20. Due to the overthrow of the Shah of Iran in 1979, the new regime ceased its membership in this Pact.
6. Some, however, indicate that because of British domination of the Gulf, the security and stability of the region was not in real danger from either external or regional threats. Gordon, 28-29; James H. Noyes, The Clouded Lens: Persian Gulf Security and U.S. Policy, (California: Hoover Institution Press, 1982), 27.
7. Dennis Roas, "Considering Soviet Threats to the Persian Gulf", International Security 6 (1981): 166-170.
8. R.K. Ramazani, The Persian Gulf and the Strait of Hormuz, (Netherlands: Sijthoff & Noordhoff, 1979), 44.
9. George Lenczowski, "The Soviet Union and the Persian Gulf: An Encircling Strategy", International Journal 37 (1982): 314-320.
10. Anthony H. Cordesman, The Gulf and the Search for Strategic Stability, (London: Westview Press, 1984), 843, Abdel Majid, 47-49.
11. For more details about the military and political policy of the Soviets, see, Richard B. Remnek, "The Soviet Naval Presence in the Indian Ocean and Western Security", in U.S. Strategic Interests in the Gulf Region, ed., W.J. Olson, (London: Westview Press, 1987), 83-102; Cordesman, 803-848.
12. Nader Entessar, "Superpowers and Persian Gulf Security: The Iranian Perspective", Third World Quarterly 10 (1988): 1430.

13. Paul Jabber, 21.
14. Anthony H. Cordesman. *The Gulf and the West*, (Boulder: Westview Press, 1988), 137-142.
15. S.H. Amin, *International and Legal Problems of the Gulf*, (Colorado: Westview Press, 1981) 50; Abdel Majid, 47.
16. Dennis Ross, 177; Lenczowski, 319.
17. Abdel Majid, 49.
18. For details about U.S. policy during this crisis, see, Olson, 136; Nader Entessar, 1434-36.
19. J. Petras and R. Korzeniewicz, "U.S. Policy Towards the Middle East", in *U.S. Strategy in the Gulf: Intervention Against Liberation*, ed., Leida Meo (Massachusetts: Association of Arab-American, 1981) 83.
20. Abdel Majid, 50.
21. Olson, 173; Paul Jabber, 31.
22. Lenore G. Martin, *The Unstable Gulf: Threats from Within*, (Massachusetts: Lexington Book, 1984), 127.
23. Amin, *Political and Strategic Issues*, 23. Some observers indicate that the idea of U.S. interventionary force dates back to early 1970s as a response to regional developments, such as the Arab oil embargo and the American hostage crises in Teheran, and hence there was no connection at all with perceived external threats to the Gulf. See, *Ibid.*, Nader Entessar, 1432; Abdel Majid, 57-64.
24. H.F. Eilts, "Security Consideration in the Persian Gulf", *International Security* 5 (1980): 95; Shahram Chubin, *Security in the Persian Gulf: The Role of Outside Powers* 4, (England: International Institute for Strategic Studies, 1982), 155.
25. Shirin Hunter, "Gulf Security: An Iranian Perspective", in *The Gulf and International Security*, ed., M.E. Ahrari, (New York: Martin's Press, 1989), 36.
26. Amin, *Political and Strategic Issues*, 47.
27. S. Chubin, 154.
28. *Ibid.*, 151-156; Amin, 48.
29. The Gulf Cooperation Council established in 1981 partly due to the external military threat. See, J.D. Anthony, "The Gulf Cooperation Council: A New

- Framework for Policy Coordination", in *Crosscurrents in the Gulf*, ed., H. Richard Sindela and J.E. Peterson, (London: Routledge Press, 1988), 38-59.
30. Ibid., 54; Chubin, 157.
  31. S. Chubin, 135.
  32. Ronnie Ann Wainwright, "Navigation through Three Straits in the Middle East: Effects on the United States of Being a Nonparty to the 1982 Convention of the Law Of the Sea, Case Western Reserve Journal of International Law 18 (1986): 395.
  33. James Cable, "Outside Navies in the Gulf", *International Relations IX*, No. 3 (1988): 235.
  34. Laurie Mylroie, "The Superpowers and the Iran-Iraq War", *American-Arab Affairs* 21 (1987): 18-19.
  35. J. Cable, 19; Roger F. Pajak, "Soviet Designs and Dilemmas in the Gulf Region", in *Crosscurrents in the Gulf*, eds., H. Richard Sindela and J.E. Peterson, (London: Routledge Press, 1988), 72-80.
  36. James Noyes, "American Perceptions of Iranian Threats to the Gulf Security", in *The Gulf and International Security*, ed., M.E. Ahrari, (New York: Martin's Press, 1989), 143.
  37. Extensive military and economic cooperations have been established between the Soviet Union and the Islamic Republic of Iran. See, R.F. Pajak, 69.
  38. Examples of these ineffective parties are the Tudeh Party in Tehran and the Iraqi Communist Party which have been treated severely by the official governments. See, Joseph Wright Twinam, "U.S. Interests in the Arabian Gulf", *American-Arab Affairs* 21 (1987): 2-3.
  39. For more discussions about the Soviet Moslems, see, Miron Rezun, "The Soviet Moslems: A Re-Assessment", *Middle East Focus* 9 (1987): 10-15.
  40. For details, see, Ali El-Hakim, *The Middle Eastern States and the Law of the Sea*, (New York Syracuse University Press, 1979), 86-106; Amin, 97-112; L.G. Martin, 31-73.
  41. Will D. Swearingen, "Sources of Conflict Over Oil in the Persian-Arabian Gulf", *Middle East Journal* 35 (1981): 326; El-Hakim, 128.
  42. Ramazani, 4.
  43. R.A. Wainwright, 387.
  44. El-Hakim, 129; Ramazani, 73.

45. For more details about this case, see, Hussein Sirrigeh, "Conflict over the Gulf Islands of Abu Musa and the Tunbs", *Journal of South Asian and Middle Eastern Studies* 8 (1984): 73-86; Amin, 163.
46. Ramazani, 74.
47. Amin, 163.
48. Ibid.; Ramazani, 74.
49. H. Sirriyeh, 76; R. Wainwright, 388.
50. El-Hakim. 130.
51. Ibid. 122-130; Amin, 162; Robert Litwak, *Security in the Persian Gulf 2: Sources of Inter-State Conflict* (England: Gower Publishing Company Ltd., 1981), 56-57.
52. Richard Young, "The Persian Gulf", in *New Directions in the Law of the Sea*, V.III, eds., Churchill R. Simmonds and J. Welch, (New York: Ocean Publications, 1973), 234; El-Hakim, 128.
53. MS. Al-Khateeb, *the Legal Status of the Territorial Sea*, [in Arabic] (Cairo: Ein-Shams University Press, 1975), 591.
54. Ibid.
55. As of this writing, the Iraqi forces are occupying Kuwait. Whatever the consequences of this crisis will be, the real problem will continue unless a permanent agreement, which is acceptable to the conflicting parties, is reached.
56. S.H. Amin, *Political and Strategic Issues*, 52.
57. Ibid. See also, H.M. Albaharna, *The Legal Status of the Arabian Gulf States* (New York: Ocean Publications Inc., 1968), 256.
58. Amin, *Political and Strategic Issues*, 52.
59. H.M. Albaharna, 252-254; Amin, 51-52, R. Litwak, 25-33.
60. Amin, *Political and Strategic Issues*, 51.
61. Albaharna, 254.
62. Ibid., 252.
63. Ibid., 251.
64. Ibid., 257.

65. El-Hakim, 120.
66. Hermann Frederick Eilts, "Foreign Policy Perspectives of the Gulf States", in *Crosscurrents in the Gulf*, eds. H. Richard Sindelar and J.E. Peterson, (New York: Routledge, 1988), 24.
67. For details see, El-Hakim, 118; Amin, 120-121.
68. El-Hakim, 118.
69. Lenore G. Martin, 46.
70. Ramazani, 110; See, p. 140 for the text of this agreement. These joint patrols over the Strait, however, ceased in 1979 when the Shah of Iran was **deposed**.
71. Amin, 19-22; El-Hakim, 64-65.
72. R. Wainwright, 388.
73. Amin, 19; El-Hakim, 65.
74. R. Wainwright, 388.
75. **For details on the background of the conflict, see, Amin, 65-93; L.G. Martin, 34-41.**
76. R. Wainwright, 392.
77. **For a consideration of the feasibility of the threats to close the Strait, see, William L. Dowdy, "The Strait of Hormuz as a Secure International Waterway", in *The Arab Gulf and the West*, ed., B.R. Pridham, (London: Croom Helm, 1985), 162-170; James H. Noyes, *The Clouded Lens*, (Stanford, California: Hoover Institution Press, 1982), 50-51; *Oil and Gas Journal*, Aug. 31, 1987 at 20-21.**
78. William L. Dowdy, 160-167; R. Wainwright, 394-395.
79. In 1977, the Strait of Hormuz was blocked for several hours before ships could move. This action was believed to be related to the radical movement of the 'Popular Front for the Liberation of Oman and the Arab Gulf' which was traditionally supported by Iraq and South Yemen at that time. See, Amin, 52.
80. The rules of customary international law governing the use of war zones are extensively examined in, Ross Leckow, "The Iran-Iraq Conflict in the Gulf: The Law of War Zones", *International & Comparative Law Quarterly* 37 (1988): 629-644; Boleslaw Adam Boczek, "Law of Warfare at Sea and Neutrality: Lessons from the Gulf War", *Ocean Development & International Law* 20 (1989): 243-252; W.J. Fenrick, "The Exclusion Zone

- Device in the Law of Naval Warfare", Canadian Yearbook of International Law **24** (1986): **91-115**.
81. Ross Leckow, **635-640**; Boleslaw Boczek, **250**.
  82. Francis V. Russo, "Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law", Ocean Development & International Law **19** (1988): **384-393**; B. Boczek, **257-258**.
  83. Ross Leckow, **643**; W.J. Fenrick, **118-119**.
  84. For more data on the attacks on neutral vessels, see, Ademuni Odeke, "Merchant Shipping and the Gulf War", Marine Policy Reports **10** (1988): **6-12**; and in general, "Conference Report: The Persian-Arabian Gulf Tanker War: International Law or International Chaos," Ocean Development & International Law **19** (1988): **299-321**.
  85. Boleslaw Boczek, **250**.
  86. Ibid., **252**; Francis, **392**.
  87. Boczek, **241**.
  88. Ibid., **258**; Ross Leckow, **644**. The U.S. Court of Appeals for the Second Circuit has determined "... that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violate international law. Indeed, the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of high seas. Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law." See International Legal Materials, 1987, at **1378**.
  89. As codified in the 1958 Convention, art. **16-4** and the 1982 Convention, art. **38**.
  90. The U.N. Security Council adopted several resolutions affirming the right of free navigation in the Gulf, particularly for those vessels that did not participate in the conflict, and also condemned strikes at neutral vessels. For details see, Francis, **395**; Boczek, **260**.
  91. In August 1984, mines were laid throughout a large area in the Red Sea and in areas near the Strait of Bab el-Mandeb and the Gulf of Suez. Many ships from different countries were damaged. This incident occurred, however, in peace time and no states declared responsibility for this action. The mining of the Red Sea caused serious concern about the safety and security of the shipping lanes among the littoral states because the Red Sea provides an alternative to the shipping route of the Persian Gulf if the Strait of Hormuz is seriously threatened or blocked. See Ahmad Muhammed, "The Laying of Mines in the Gulf and the Red Sea and its effect on the Kingdom of Saudi Arabia", Saudi Studies **3** (1988): **127-130** (in Arabic).

92. **U.S. Dept. of State Bulletin, v. 88 (1988), 35-36.**
93. Myron H. Nordquist and Margaret G. Wachenfeld, "Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf", **German Yearbook of International Law 31 (1988): 160**; For the rules governing the use of mine at warfare, see, A.G.Y. Thorpe, "Mine Warfare at Sea: Some Legal Aspects of the Future", **Ocean Development & International Law 18 (1987): 255-277.**
94. Myron H. Nordquist, 161. According to the U.S. letter to the U.N. Security Council on April 18, 1988, the type of mines laid in the shipping lanes were deployed by the Iranian forces, **see, U.S. Dept. of State Bulletin, v. 88 (1988) at 35.**
95. Article 2 of the 1907 Hague Convention No.VIII states: "It is forbidden to lay automatic contact mines off the coast and ports of enemy, with the sole object of intercepting commercial shipping". It is a fortiori forbidden to interfere with international shipping. **For the text, see, Thorpe, 274.**
96. **Nicaragua Case, I.C.J. Reports, 1986, 112.** Cited from Myron H. Norquist, 160-161.

## CHAPTER V

### CONCLUSION

The economic and political-strategic importance of the Strait of Hormuz is self-evident. Any policies applying to vessels leaving or entering the Strait have an impact on the world's economic order. If passage is hampered, the effect would be felt throughout the world. Thus, it is important to all States, both littoral and non-littoral, that the freedom of passage should undoubtedly be ensured. In fact, the unimpeded passage through the Strait of Hormuz should be particularly considered by the States bordering the Strait because they "are more dependent upon unimpeded, low-priced transit than the major maritime powers, especially where exports are the major source of national income".

Since there is no regional legal regime governing the passage through the Strait as well as the uncertainty surrounding the general legal norms with regard to passage through international straits, the concept of transit passage would be in the best interest of the international community if its provisions prevail through the Strait of Hormuz.

From the reactions of the Iranian and Omani governments, it seems that they are primarily interested in ensuring that their national security is protected, largely with regard to military vessels and pollution control. The provisions of the transit passage would reflect these basic national interests. As previously

indicated, ships and aircraft, both military and merchant, exercising the right of transit passage are bound to refrain from the threat or use of force against strait States which may violate the principles of international law embodied in the UN Charter. In addition, the obligation to refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit indicates that any activity threatening a strait State **would** render ships or aircraft under the general regime of 'innocent passage', and in extreme cases, straits States action might be justifiable on the ground of the right of self-defence. The naval provisions under the regime of transit passage **represent a carefully balanced compromise between the maritime powers' interest and the legitimate national interest of the strait States.** Passage of military vessels through international straits is by no means offensive to the sovereignty or the security interest of strait States! In fact, it could be of political benefit because:

"It keeps the littoral States bordering straits with great strategic value out of the vicious circle of escalation in times of tension and crisis. If transit through such straits were subject to the discretion of the coastal States, they would unavoidably become involved, even if the discretionary power were to be exercised evenhandedly."<sup>2</sup>

On the other hand, marine safety and pollution control is also protected under the Convention generally and particularly under the transit passage concept. The duty to comply with international safety and pollution standards is independent of coastal legislation. The implementation of such legislation is to give directly enforceable powers to strait States authorities. The exercise of enforcement jurisdiction in case of pollution causing or threatening major pollution, indicated in article 233 as well as other relevant provisions, may be evidence of a general understanding that enforcement jurisdiction is obtainable to the strait States.

These benefits, however, are linked with the prohibition of any unreasonable attempt to hamper or impede the right of transit passage or any attempt to discriminate among foreign ships by the strait States.

Thus, it seems that the transit passage concept is the best regime applicable to the Strait of Hormuz. The reservations made by Iran and Oman are incompatible with their desired intentions to settle the legal regime of the Strait. The signatures of both States are hoped to be followed by their ratification as well as by the other Gulf States who have not yet ratified the Convention. This desire will promote the stability of the legal status of the Strait in particular, and achieve a body of rules for using the sea whose legitimacy is globally recognized.<sup>3</sup>

In addition to the uncertainty of the legal status of the Strait of Hormuz, the danger to international shipping and to the political stability add a new dimension to the security needs of the navigational channel and to the Gulf region as a whole. It is evident that the maintenance of passage through the Gulf waters is inseparable from the political stability of the Gulf region. Any threat to the freedom of navigation is a direct threat to the Gulf States' stability. As we have observed, the real challenges to the stability of the region and the safety of navigation originate from within the region itself. Various underlying threats to the Gulf security, include: the threat of hostilities over conflicting territorial disputes, the threat of conflict resulting from a destabilization of a regional equilibrium brought about by the altering of strategic military balances between the Gulf States, and the threat of conflict from the inherent vulnerability of the Gulf Sea lanes resulting from the illegal military activities, including the illegal

interference with international shipping transiting the navigational channel in the **Gulf** waters.

In the Gulf area, territorial disputes are viewed as more politically destabilizing. They represent precisely the kind of threats to the security of the region since some Gulf States resort to military force to settle their conflicts rather than use peaceful means. Further, expansionist claims might be viewed not only as attempts to acquire further economic and strategic resources, but generally as part of the currency of the international politics of some radical **Gulf** States.

Because of the particular characteristics of the **Gulf** region and despite the increase in political turbulence across the region, many observers have come to regard the formation of an indigenous security arrangement as the most effective means of creating a legal regime governing maritime security as well as containing **Gulf** differences.

Collective security among the **Gulf** States is, of course, a durable goal. However, such regional collaboration cannot be predicted with the rooted ideological and political differences among the **Gulf** States.<sup>4</sup> The deterioration of relations between them as a result of rooted hostility is one overriding factor which reduces any prospect of such cooperation at least in the near future. Furthermore, the experience of the Gulf crisis serves to highlight the limited utility of bilateral and multilateral efforts for conflict management where those states involved in disputes remain unreceptive to such efforts. This is exactly why the often-stated ideal of local security cooperation has failed to date.

What could be done to maintain stability in the region and protect the safety of navigation through the Gulf Sea lanes? Considering the magnitude of the major powers' interests in the region, including the other oil-consuming nations, along with the absence of any grounds for regional frameworks for collective security arrangement, it is more concrete and perhaps more practicable to create a common patrol authority. This would guarantee freedom of navigation through the Gulf Sea lane to all states and provide a kind of protection to the stability of the region in general. To achieve this goal, all the interested external powers should participate in this measure, including the major powers. The vital economic and strategic importance, not only to the Gulf States but also to the international community, necessitate the immediate establishment of such a measure. Collective cooperations between the interested and capable external powers in protecting the Gulf Sea lanes are expected. This is especially true since none of the interested states would benefit from the disruption of international shipping or the destabilization of the region. However, given the great suspicion and sensitivity of some Gulf States about the foreign powers' intentions and presence in the region, it would be practicable and effective that such a common patrol authority operate directly under the auspices of the United Nations. The creation of a Common Patrol Authority would hopefully reduce local differences particularly in times of crisis, and minimize tensions between the Gulf States. It would also make the Gulf States realize that their goal of economic and political stability cannot be achieved by an increase in tensions.

Footnotes

1. C.E. Pirtle, "Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate", *Ocean Development and International Law* 5 (1978): 489.
2. Elmar Ranch, "Military Uses of the Oceans", *German Yearbook of International Law* 28 (1985): 247.
3. H. Oxman, "The New Law of the Sea", *American Bar Association Journal* 69 (1983): 135.
4. For more details about ideological conflicts, see R.K. Ramazani, "The Arab-Iranian Conflict: The Ideological Dimensions", in *International Security in Southwest Asia*, ed., Hafeez Malik (London: *Journal of S. and M. Eastern Studies*, 1984), 77-106; Lenore G. Martin, *The Unstable Gulf* (Lexington: Lexington Books, 1984), 96-106.

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**APPENDIX A: The Position of the Gulf States Towards the Convention on the Territorial Sea and Contiguous Zone.**

Done at Geneva on 29 April, 1958.

States	Signature	Ratification
Iraq	Yes. 28 May, 1958	No
Saudi Arabia	No	No
Bahrain	No	No
Iraq	No	No
Oman	No	No
Qatar	No	No
United Arab Emirates	No	No
Kuwait	No	No

Source: Multilateral Treaties Deposited with The Secretary-General, (New York: United Nations Publication 1988), Sales No. E.89 V.3, at 729.

**APPENDIX B:      The Position of Gulf States Towards the 1982 Convention**  
**Concluded at Montego Bay, Jamaica, on 10 December, 1982.**

	Signature	Ratification
Bahrain	10 Dec. 1982	30 May 1985
Iran	10 Dec. 1982	No
Iraq	10 Dec. 1982	30 July 1985
Kuwait	10 Dec. 1982	2 May 1986
Oman	1 July 1983	No
Qater	27 Nov. 1984	No
Saudi Arabia	7 Dec. 1984	No
United Arab Emirates	10 Dec. 1982	No

**Source:** Multilateral Treaties Deposited with The Secretary-General, (New York: United Nations Publication 1988) Sales No. E.89 v.3, at 753-754.

# APPENDIX C MEMORANDUM OF UNDERSTANDING BETWEEN IRAN AND SHARJAH, 1971

Neither Iran nor Sharjah will give up its claim to Abu Musa nor recognise the other's claim. Against this background the following arrangements will be made:

1. Iranian troops will arrive in Abu Musa. They will occupy areas the extent of which have been agreed on the map attached to this memorandum.
2. (a) Within the agreed areas occupied by Iranian troops, Iran will have full jurisdiction and the Iranian flag will fly.  
(b) Sharjah will retain full jurisdiction over the remainder of the island. The Sharjah flag will continue to fly over the Sharjah police post on the same basis as the Iranian flag will fly over the Iranian military quarters.
3. Iran and Sharjah recognise the breadth of the island's territorial sea as twelve nautical miles.
4. Exploitation of the petroleum resources of Abu Musa and the sea bed and subsoil beneath its territorial sea will be conducted by Buttes Gas & Oil Company under the existing agreement, which must be acceptable to Iran. Half the governmental oil resources hereafter attributable to the said exploration shall be paid direct by the Company to Iran and half to Sharjah.
5. The nationals of Iran and Sharjah shall have equal rights to fish in the territorial sea of Abu Musa.
6. A financial assistance agreement will be signed between Iran and Sharjah.

**Source:** Ali, El-Hakim, *The Middle Eastern States and the Law of the Sea* (New York: Syracuse University Press, 1979), 208; S.H. Amin, *International and Legal Problems of the Gulf* (London: Middle East and North African Studies Press Limited, 1981), 22.