

**WEAPONISING WATERWAYS: TRANSIT PASSAGE,
SOVEREIGN CHOKEPOINTS, AND THE LIMITS OF UNCLOS IN
TIMES OF CONFLICT**

by

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ABSTRACT

The world's oil, gas, grain and manufactured goods are concentrated in a handful of narrow straits. They are protected by the regime of transit passage under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) that cannot be suspended or obstructed by the coastal states. That guarantee has been tested in 2026 with the closure and conditional reopening of the Strait of Hormuz, and the attacks on the Red Sea started in late 2023. In this paper, the author considers whether passage through a strait is now customary international law that binds states outside UNCLOS, and if a coastal state may use Article 51 of the UN Charter to justify closing a strait. It also raises questions about the remedy available in neutral states, especially in the Global South, for indirect economic harm. In doctrinal analysis of ICJ jurisprudence and a global justice perspective, I claim that the core rule of transit passage is customary and that it can never be suspended, and that any limitation of a transit passage in armed conflict must be necessary and proportional.

CHAPTER I: INTRODUCTION AND THEORETICAL FRAMEWORK

1.1 Why a few straits matter?

The narrowest part of the Strait of Hormuz is approximately twenty one nautical miles across, and the shipping channel itself is only a couple of miles wide in either direction. Before the 2026 war, about one-fifth of the world's oil and LNG transited through it.¹ A proportionately greater percentage of sea-borne trade goes through the Strait of Malacca. Bab-el-Mandeb leads into the Suez Canal (Asia/Europe), and the straits of the South China Sea are in dispute. Until 2026, the law safeguarding passage through all of these waters was rarely challenged.

1.2 The bargain in UNCLOS

The regime of transit in Part III of UNCLOS (Articles 37-44) is the result of an agreement reached in the 1970s.² Coastal States were also seeking 12 miles of territorial seas, which would have surrounded many of the straits.³ Maritime powers were scared of loss of freedom of movement. The compromise granted the coastal states their twelve miles, but provided for continuous and expeditious transit without need to obtain permission, and for submarines to transit submerged and aircraft to overfly.⁴ Under Article 44, the arrangement is "locked in," as bordering states shall "not hamper transit passage" and there shall be "no suspension of transit passage."⁵ The coastal state can temporarily stop the right of innocent passage in its territorial sea for security reasons.⁶ There's no such "release valve" for transit passage.

1.3 Two views of a strait.

One view is that a strait is sovereign territory; the state on either side of the strait carries the security burden and has discretion in determining who passes in a crisis. The other regards it as a global public good, more like a common thoroughfare than a private driveway, whose value to the world is much greater than any one neighbour's. The closure's victims are often not the combatants. They import fuel and fertiliser into South Asia and East Africa and pay higher costs for them due to a closure of a waterway thousands of miles away. It is a matter of legal order,

¹ Liron A. Libman, What Can Be Done About Iran's Closure of Hormuz?, Lawfare (Sept. 18, 2026), <https://www.lawfaremedia.org/article/what-can-be-done-about-iran-s-closure-of-hormuz>.

² United Nations Convention on the Law of the Sea pt. III, arts. 37–44, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

³ See UNCLOS, *supra* note 3, art. 3 (fixing the maximum breadth of the territorial sea at twelve nautical miles).

⁴ UNCLOS, *supra* note 3, arts. 38(1), 39(1)(c).

⁵ UNCLOS, *supra* note 3, art. 44.

⁶ *Id.* art. 25(3) (permitting temporary suspension of innocent passage for security reasons); *id.* art. 45(2) (prohibiting suspension of innocent passage in straits).

which is concerned with justice and order, and has to account for that harm. The approach in this method is doctrinal, working with two live case studies, and global justice lensed.

CHAPTER II: TRANSIT PASSAGE IN TREATY AND CUSTOM

2.1 What does the treaty say?

Part III applies to international straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another. The use of the freedom of navigation/overflight for continuous and expeditious transit is transit passage. No vessels should delay, threaten or use force to enter the strait, and they are subject to generally accepted rules of safety and pollution prevention. States bordering each other are permitted to regulate traffic safety and pollution but only when non-discriminatory and otherwise does not "have the practical effect of denying, hampering or impairing" transits. Article 43 requests the user states and their contiguous states to cooperate in the field of navigational aids and pollution prevention, "by agreement".

Article 26 does not allow charges to be imposed on foreign ships for passing through the territorial sea. Charges can be imposed only for services provided. The 1936 Montreux Convention continues to govern the Turkish Straits in accordance with the provisions of Article 35(c).⁷ However, there is no such instrument in Hormuz; therefore, the argument that it is special due to its history has no ground.

2.2 Corfu Channel as baseline

The International Court of Justice had previously dealt with the issue, prior to the UNCLOS, in the Corfu Channel case (United Kingdom v. Albania, 1949).⁸ The two British destroyers were damaged by mines in the North Corfu Channel, which is in Albanian territorial waters. In peacetime, the Court determined, a state may deploy a warship through navigable waters between two high seas areas without first asking the permission of the coastal state, and a coastal state may not bar vessels from transiting its waters. It also blamed Albania for not warning ships of a minefield it must have been aware of. The Court based that obligation on "elementary

⁷ UNCLOS, *supra* note 3, art. 35(c); Convention Regarding the Regime of the Straits, July 20, 1936, 173 L.N.T.S. 213 [hereinafter Montreux Convention].

⁸ Corfu Channel (U.K. v. Alb.), Merits, Judgment, 1949 I.C.J. 4 (Apr. 9) [hereinafter Corfu Channel].

considerations of humanity" and that a state ought not "to be privy to acts prejudicial to other states, of which it is not the agent."⁹

There are two reasons why the case is important. It provides a historical precedent for the principle of responsibility for knowledge of mines and silence as well as laying them, before UNCLOS. The Court also considered the geographical location of the channel and the actual use of the channel as a route, and did not pay much attention to the amount of traffic. This functional approach is consistent with the public goods perspective of a strait.

2.3 Is it binding to states outside UNCLOS?

In 1982, Iran signed the Convention but did not ratify it, and it stated that the Convention rights, such as the right of transit passage, are contractual rights of the states parties. There is also no indication that the United States is a party, but that the navigational provisions are based on custom since 1983.¹⁰ I believe that this is the conventional wisdom and there are two reasons for this. The first is that the practice is widespread: more than 160 states are parties, and even rivals agree: the US and China signed off together at their 2026 summit to affirm that Hormuz must remain open. Second, the rule predates the treaty. It is a rule that can be found in treaty and custom at the same time, as the ICJ emphasised in *Nicaragua v. United States*, and is of origin from the *Corfu Channel* case and Article 16(4) of the 1958 Convention on the Territorial Sea.¹¹ The only mode of passage that is acceptable to the world is innocent passage, and that cannot be suspended in international straits; therefore, denial of transit passage is not a purchase of a right of closure.

The most important thing Iran has to do is to keep on objecting. However, the doctrine is very limited in nature: the objection must be raised at the beginning and consistently, and it may not reverse obligations that Iran already had to follow in the pre UNCLOS custom. Iran at best held onto the arguments over peripheral details, not the right to shut the strait. I believe, therefore, that the core guarantee is binding on all states.

⁹ Id. at 22 (stating the principle that a state may not knowingly allow its territory to be used for acts contrary to the rights of other states).

¹⁰ Statement on United States Oceans Policy, 1 Pub. Papers 378 (Mar. 10, 1983).

¹¹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, 175–179 (June 27) [hereinafter *Nicaragua*]; *Corfu Channel*, 1949 I.C.J. at 28–29; Convention on the Territorial Sea and the Contiguous Zone art. 16(4), Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.

CHAPTER III: TWO CASE STUDIES

3.1 The Strait of Hormuz

The strait was closed in 2026 by Iran following US and Israeli attacks on Iran.¹² The White House said a ceasefire on 8 April was subject to tolls being reopened "without restriction. In late April, the strait was partially reopened, and Iran stated that foreign vessels were to be approved by the Iranian authorities and would be charged with transit fees. It subsequently moved a bill to impose "service fees," said to be a cut of the cargo value.

It is difficult to argue the point against each one of Iran's measures. The priority of closure: Article 44 does not allow suspension, and it is pre-UNCLOS.¹³ By allowing and granting, a right becomes a discretionary privilege, the "practical effect" banned by Article 42. Tolls don't fare much better. Article 26 prohibits charges for merely passing through, and on 9 April the Secretary-General of the IMO stated that there is no international agreement on tolls on international straits. Ironically, Iran could cite Article 43, which mentions cooperation by agreement and that costs will be shared between users and States, but provides no licence to collect. How it works is shown in Malacca: a user funded and voluntary navigation aid mechanism.

Hormuz is also not entirely Iranian. The shipping channels traverse Omani waters, and as an UNCLOS signatory, Oman has reaffirmed its commitments. However, on ratification, it stated that only innocent passage is applicable in the territorial sea.¹⁴ The Security Council has accorded transit passage as a general right. Resolution 2817 (2026) is said to have condemned Iran's obstruction and declared any attempt to obstruct lawful transit as an "extremely grave threat" to international peace and security.

3.2 The Red Sea

In this instance, the disruptor is not the state. Houthi attacks and the hijacking of commercial vessels began in November 2023, as shipping diverted around the Cape of Good Hope, which

¹² See Iran Wants to Charge Ships to Use the Strait of Hormuz. Can It Legally Do It?, The National (Apr. 23, 2026), <https://www.thenationalnews.com/news/us/2026/04/23/hormuz-strait-tolls-iran/>.

¹³ UNCLOS, *supra* note 3, art. 44; Corfu Channel, 1949 I.C.J. at 28–29.

¹⁴ See Libman, *supra* note 1 (quoting a statement of the Ministry of Foreign Affairs of the Sultanate of Oman); Declaration of the Sultanate of Oman upon Ratification of the United Nations Convention on the Law of the Sea (Aug. 17, 1989), reprinted in Declarations and Statements, *supra* note 17.

increased voyage time and insurance premiums.¹⁵ The attacks are prohibited under general international law, including Article 44 for the states bordering the strait, and the SUA Convention of 1988,¹⁶ which does not extend to non-state actors. They are not committing to piracy under the provision of UNCLOS Art. 101, which requires private ends. The Security Council responded with Resolution 2722 (2024), which condemned the attacks and reaffirmed navigational rights. There is a common deficiency in the two cases: the law is clear on what is prohibited, but there is no effective mechanism to reopen a strait.

CHAPTER IV: SELF-DEFENCE AND THE LAW OF ARMED CONFLICT

4.1 Article 44 against Article 51

In this paper, perhaps the most difficult doctrinal issue is whether a state at war (or under threat) may use self defence to override Article 44. Article 51 of the UN Charter recognises “the inherent right of individual or collective self-defence in case of an armed attack” until the SC determines otherwise.

Focus on the treaty first. The concept of use of force itself goes in the other direction in UNCLOS. Article 301 forbids States from threatening or using force contrary to the principles of the Charter, and Article 39 forbids the same for ships in transit. There is no general security exception in the Convention to Article 44.

From within, Article 51 is restricted. In Nicaragua, the ICJ considered necessity and proportionality to be customary law elements of lawful self defence. A state closing a strait must provide evidence of an attack and that closure is necessary and proportionate. Restricting a waterway used by half the world's energy supplies, with little involvement of the people who use it, will seldom achieve that end.

4.2 What the ICJ said in Oil Platforms

The Oil Platforms case (Iran v. United States, 2003) is a good model for the Court's treatment of these claims, and is in the same strait. In 1987 and 1988, the U.S. had bombed Iranian offshore platforms in the wake of a missile attack on another reflagged tanker and a mining incident, claiming self defence. The Court has refused the claim. It believed the United States had failed to

¹⁵ See S.C. Res. 2722, U.N. Doc. S/RES/2722 (Jan. 10, 2024) (expressing concern at attacks on merchant shipping in the Red Sea).

¹⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201.

demonstrate an armed attack directly from Iran, that kind which triggers Article 51, and that if there had been, it was not proportionate, especially the bigger 1988 operation.¹⁷ The Court did not exclude, however, that an armed attack might be an attack on a single military vessel, but it did insist on some evidence.

The Court will not accept self defence in general and will not be satisfied by a “security panic”, but with real proof of attribution and gravity. It also evaluates proportionality when the response is actually given. It would be more difficult to defend a blanket closure of an international strait than a targeted defensive action.

4.3 Sea mining and the Nicaragua precedent

The Court concluded that the United States had violated customary law in Nicaragua by laying mines at ports and in waters in Nicaragua, including violations of the rights of sovereignty and interference with maritime commerce. Typically the case is presented in opposition to the mining State, but the reasoning also extends to other States. Mining a strait, whether to keep out an enemy or all of them, affects the freedom of commerce of third states, and the Corfu Channel duty to warn of minefields is in addition.¹⁸ In some situations, a state can place defensive mines in its waters, but cannot practically close an international strait using this method.

4.4 The law of naval warfare

The most authoritative, and non-binding, restatement of this type of international law is the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994).¹⁹ It deems passage rights for the straits to be perpetual in times of war, and does not allow a neutral coastal state to interfere with the passage. It has strict requirements for blocking rules. The blockade should be declared and notified; it should have effect; it should be non-discriminatory, in that vessels from all states should be allowed to pass through; and it should not, and should not be, used to deny access to neutral ports and coasts. It is illegal if it is done for the purpose of starving the civilian population or if the damage to civilians is disproportionate to military gains. The boundaries of the zones of exclusion are no excuse for a belligerent to be exempt from obligations arising from neutral shipping.

¹⁷ Oil Platforms, 2003 I.C.J. 51–78.

¹⁸ Corfu Channel, 1949 I.C.J. at 22; Nicaragua, 1986 I.C.J. 215.

¹⁹ San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1995) [hereinafter San Remo Manual].

If applied to Hormuz, the rules prevent Iran's closure. They also question the U.S. naval blockade of Iranian ports, which was removed under the June memorandum but was apparently renewed.²⁰ A blockade is legal provided that it is properly declared and enforced and provided that it meets the proportionality limits and neutral rights requirements. This paper does not resolve that issue. The same standard, neutral-shipping rules, should apply to both sides' conduct.

4.5 A provisional response to second question

An armed attack is just what a coastal state could do by invoking Article 51 to protect itself. On the strength of that right alone, it may not suspend transit passage through an international strait. If the restriction on third state shipping is to be considered legitimate, it will be necessary to demonstrate an armed attack by the enemy and a necessity and proportionality in the closing. Those conditions won't be nearly ever satisfied for neutral commercial traffic. The law of armed conflict does not give belligerents any right to take measures against enemy vessels, but it does give them some latitude of action when it comes to measures against enemy vessels with whom they have a legal connection.

CHAPTER V: GLOBAL JUSTICE AND REMEDIES

The price of a closure is not uniform. Most of India's crude oil, and many developing economies' inputs of energy and fertiliser come from the Gulf, and Malaysian and Indonesian ships were stuck in the Gulf in 2026 until they negotiated with Iran for passage. Hence the importance of the problem to global justice, as well as maritime order.

Remedies are limited, and the framework is provided by State responsibility. Iran's actions amount to internationally wrongful acts for which it is responsible under the ILC Articles on State Responsibility.²¹ It has been argued that the necessity defence does not apply if the act seriously deprives any essential international interest. There is the possibility of Article 48, where other states may call upon responsibility in the collective interest.²² It's the indirect damage that's hard. Price effects suffered by all importers are hard to identify with the culprit and damages were limited to direct damage by Corfu Channel. Nor is there an obvious forum. Part XV dispute settlement (ITLOS) is available between parties to the Convention, which Iran is not. The ICJ

²⁰ Libman, *supra* note 1.

²¹ Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26 (2001) [hereinafter ILC Articles], annexed to G.A. Res. 56/83 (Dec. 12, 2001); *id.* arts. 1, 2, 4.

²² *Id.* art. 48; Libman, *supra* note 1.

requires consent, and the most plausible approach might be for the General Assembly to request an advisory opinion. Proportional countermeasures are generally legal, but depend on political will.

CHAPTER VI: ENFORCEMENT DEFICITS AND THE INDIAN PERSPECTIVE

Freedom of navigation means what it says: whoever has the ships has the freedom of navigation. The Oil Platforms dispute was the result of the confrontations and the escorts of the 1980s, the Tanker War. That's the pattern of convoys and disputed safety claims which has been seen in the 2026 war. Escorts are legal based on the concept of collective self defence of flag vessels, which calls for an armed attack to be established. In April 2026, China and Russia vetoed a draft proposed by the Security Council that had requested coordinated defensive measures.²³ The institutions can denounce and explain, but no one can open a strait. The Security Council is restricted by the veto, and the IMO doesn't have any power of compulsion. Consent is a prerequisite for ITLOS and the ICJ.

There are two cases involving India which are border cases on this topic. In *Right of Passage over Indian Territory (Portugal v. India, 1960)*, the Court ruled that there was a local custom of passage for civilians and goods, but not armed forces, and upheld India's right to determine the security risks of an armed transit.²⁴ The *Enrica Lexie* case was *Republic of Italy v. Union of India (2013)*, in which Indian fishermen were shot by the *Enrica*.²⁵ It subsequently evolved into an international arbitration. It also demonstrates that one of the biggest states in the Global South is seriously applying zonal principles of UNCLOS in its court system. It also indicates that one of the biggest states in the Global South is adhering seriously to UNCLOS's zonal principles in its court system. India is heavily reliant on Hormuz and at present cannot accompany its shipping vessels to the extent needed, thus having a direct interest in passage protected by rules.

CHAPTER VII: CONCLUSION AND RECOMMENDATIONS

7.1 Findings

The principle of non-interruption of the peaceful passage of goods through international waters has become customary law. It is a route from the Corfu Channel to the 1958 Convention to Part III of UNCLOS, and it is confirmed by the practice and statements of States and of the Security

²³ Libman, *supra* note 1 (discussing the draft resolution, U.N. Doc. S/2026/273, and the vetoes).

²⁴ *Right of Passage over Indian Territory (Port. v. India)*, Merits, Judgment, 1960 I.C.J. 6, 39–45 (Apr. 12).

²⁵ *Republic of Italy v. Union of India*, (2013) 4 S.C.C. 721 (India).

Council. But Iran's obdurate refusal may allow the inclusion of some side-scatter arguments. Does not cover closure or tolls.

Article 51 does not say that transit passage can be suspended. A state would have to be attacked and respond with actions that are necessary and proportionate, and that is precisely the issue that Oil Platforms highlights. But state responsibility provides a framework, because the breach is obvious and the right belongs to everyone, and remedies are lacking in practice.

The two hypotheses are well confirmed. The first requires one modification. There is no exception whatsoever in Article 44, and necessity and proportionality are interpreted as conditions on any restriction in armed conflict, not as a licence to suspend. The second is for good functional reasons: strategic straits are global public goods, and the law has not created the institutions to adequately address them.

7.2 Recommendations

1. The General Assembly shall take steps to request an opinion from the ICJ on whether passage by transit obligations all states about passage and whether tolls and permit regimes are permissible. An opinion would resolve issues where everyone just now comments.
2. The right of free passage in war and peace in the Suez Canal is guaranteed by the Constantinople Convention (1888), and detailed regimes are feasible as explained in the Montreux Convention.²⁶ A protocol may make important straits exceptions to the international right to pass, ensuring that they remain open in times of armed conflict and prohibiting any toll except appropriate service fees. It might include notification and mine-clearing responsibilities and an independent monitoring entity.
3. The IMO should establish guidance on the use of straits in times of armed conflict, and maintain an open register of lawful service charges, to prevent the use of "service fees" as tolls. The Malacca approach to cooperative mechanisms could be scaled up to other straits.

The Security Council should adopt the language of standing Resolutions which include the provisions of Resolution 2817 and its forerunners, which define transit passage as a threat to peace. The issues of the sceptical members can be addressed with a better structure of lawful escorts.

²⁶ Convention Respecting the Free Navigation of the Suez Maritime Canal art. I, Oct. 29, 1888, 171 Consol. T.S. 241; Montreux Convention, *supra* note 12.

5. There should be a compensation or contingency mechanism, possibly associated with insurance markets and/or development finance for low-income importers to accommodate shocks of closures. Global South states need to coordinate legal, proportionate countermeasures, so as not to rely solely on large navies to defend the regime.

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