

Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective

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Since September of 1986, Iranian air attacks upon Kuwaiti ships and ships entering or leaving Kuwaiti ports in the Persian Gulf have increased. In order to legalize the naval protection of these ships, which supply oil to the United States, the U.S. government has placed eleven Kuwaiti tankers under American flag, to be escorted by U.S. naval forces.¹ Both the reflagging of these ships and U.S. naval escort operations raise significant issues under international law.² Moreover, because the acts of reflagging and escort are closely linked (the U.S. government reflagged the Kuwaiti ships in order to legalize its naval escort operations), the international law issues raised by each act are similarly linked. Accordingly, this commentary will first address the validity of reflagging under international law so that the legality of naval escort may be properly analyzed.

I. THE REFLAGGING OF KUWAITI SHIPS BY THE U.S. GOVERNMENT

The reflagging of Kuwaiti ships by the U.S. government raises two questions under international law: 1) whether a State may grant a

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1. For a detailed analysis of reflagging and escort operations in the Persian Gulf, see Nordquist & Wachenfeld, *Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf* 31 (unpublished manuscript) (forthcoming article in *Ger. Y.B. Int'l L.*).

2. The reflagging of Kuwaiti ships and U.S. naval escort operations will be analyzed only under international law although the laws of Kuwait and the United States are also relevant. For an examination of domestic U.S. standards, see Nordquist & Wachenfeld, *supra* note 1.

ship the right to fly its flag; and 2) whether other States are obligated to respect such reflagging.

The flag of a merchant ship serves three significant purposes under international law. First, the flag indicates the nationality of the ship and thus identifies the State having jurisdiction over that ship. Such jurisdictional power is, at least partly, an exclusive enforcement jurisdiction; other States are prohibited from exercising enforcement jurisdiction over ships not flying their flag.³

Traditionally, however, the ship's flag did not identify the nationality of the ship under international law. The question arose in *Muscat Dhows*,⁴ decided by the Permanent Court of Arbitration in 1904, and in *Barcelona Traction*,⁵ decided by the International Court of Justice in 1970. In *Barcelona Traction*, Judge Jessup in a separate opinion argued: "If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction, and control, other States are not bound to recognize the asserted nationality of the ship."⁶

In contrast, the U.S. Supreme Court in *Lauritzen v. Larsen*⁷ acknowledged the identity of flag and nationality when it ruled: "Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag. Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship."⁸ The Court's position, which equates flag with nationality, is now accepted under international law.⁹

3. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 25-27 (Oct. 7) (stating that "a ship on the high seas is assimilated to the territory of the state, the flag of which it flies, just as in its own territory, the state exercises its authority upon it and no other state may do so"); see also 5 J.B. Moore, *History and Digest of International Arbitrations to which the United States Has been a Party* 4948, 4952 (1897) (describing the "Costa Rica Packet" case of 1897, a dispute between Great Britain and the Netherlands, in which the arbitrator decided "[t]hat on the high seas even merchant vessels constitute detached portions of the territory of the state whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas").

4. *Muscat Dhows (Fr. v. Gr. Brit.)*, Hague Ct. Rep. (Scott) 93 (Perm. Ct. Arb. 1905), reprinted in 3 *Cases on the Law of the Sea* 333-36 (K. Simmonds ed. 1980).

5. *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 4 (Judgment of Feb. 7).

6. *Id.* at 188.

7. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

8. *Id.* at 584.

9. See B. Boczek, *Flags of Convenience* 102 (1962); 2 D. O'Connell, *The International Law of the Sea* 756 (I. Shearer ed. 1984); N. Singh, *Maritime Flags and International Law* 23 (1978).

Second, a ship's flag identifies the State responsible for the vessel under international law.¹⁰ Because a State's liability under international law is directly related to its jurisdictional power, this second purpose of flagging is the counterpart of the first purpose; a State that is vested with the power to exercise enforcement jurisdiction over ships flying its flag assumes the concomitant duty to ensure that such ships comply with international law. Third, the ship's flag designates the municipal law that governs the affairs of the ship.¹¹

Given the significance of a ship's flag, it is not surprising that international law contains rules specifying when a State may allow a ship to fly its flag. In fact three international law instruments establish such rules: the Geneva Convention on the High Seas of 29 April 1958¹² ("High Seas Convention"), the United Nations Convention on the Law of the Sea of 10 December 1982¹³ ("Law of the Sea Convention"), and the United Nations Convention on the Conditions for the Registration of Ships of 8 February 1986¹⁴ ("Registration Convention"), the latter two having not yet entered into force. Although each of these instruments was negotiated after the Second World War, the issue of reflagging has attracted the interest of the international community since 1896.¹⁵

A. *Reflagging under the High Seas Convention*

According to Article 5 of the High Seas Convention

each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the

10. N. Singh, *supra* note 9, at 33.

11. See Diena, *Principles du Droit International Privé Maritime*, 51 *Academie de Droit International Recueil des Cours [R.D.C.]* 405, 424 (1935); C. Hasselman, *Die Freiheit der Handelsschiffahrt* 8 (1987); N. Singh, *supra* note 9, at 3.

12. Geneva Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter High Seas Convention].

13. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. A/Conf.62/122 (1982), reprinted in 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea Convention].

14. United Nations Convention on the Conditions for the Registration of Ships, Feb. 8, 1986, U.N. Doc. TD/RS/CONF/19/Add.1, reprinted in 26 I.L.M. 1229 (1987) [hereinafter Registration Convention].

15. See 2 D. O'Connell, *supra* note 9, at 758. O'Connell states that:

The question arose in the Institut de Droit International in 1896, when the rapporteurs of the Committee on Usage of National Flags for Merchant Ships agreed that the laws of countries concerning nationality of ships, if they were to be generally recognized, ought not to dilute the criteria which most States had adopted, and which formed, in this respect, the basis of international law.

Id.

state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.¹⁶

The discussion of the terms of Article 5 took place primarily within the International Law Commission in 1958 when it prepared the first U.N. Law of the Sea Conference in Geneva.¹⁷ The resulting provision represents a compromise between two distinct approaches. The traditional school of thought, whose proponents include Oppenheim/Lauterpacht,¹⁸ Fauchille¹⁹ and Calvo,²⁰ holds that a State's sovereignty implies the State's unlimited right to set conditions for the registration of ships and the right to fly its flag. The followers of this traditional school proposed to formulate a general rule on nationality that would include this principle. The modern view, adopted by Francois,²¹ Neumeyer,²² Verdross,²³ Gidel²⁴ and Quadri,²⁵ holds that principles of international law may impose limitations on the exercise of a State's sovereignty. Therefore, the extent of a State's freedom to set registration conditions depends on the existence of such principles. Hence, the traditional theory supported the views of the proponents of open registries, whereas the modern doctrine served the opponents.

The modern view prevailed in the International Law Commission's draft of 1955, which conditioned the validity of registration upon the

16. High Seas Convention, *supra* note 12, art. 5.

17. See Report of the Special Rapporteur of the International Law Commission on the Regime of the High Seas, [1951] 2 Y.B. Int'l L. Comm'n 76, U.N. Doc. A/CN.4/42. For further development, see also Report of the Special Rapporteur for the Regime of the Territorial Seas, [1954] 1 Y.B. Int'l L. Comm'n 127-32, U.N. Doc. A/CN.4/85; Report of the Special Rapporteur on the Regime of the High Seas, [1954] 2 Y.B. Int'l L. Comm'n 9-10, U.N. Doc. A/CN.4/79; Report of the Special Rapporteur on Provisional Articles on the Regime of the High Seas, [1955] 2 Y.B. Int'l L. Comm'n 22, U.N. Doc. A/2934; Report of the Special Rapporteur on the Regime of the High Seas, [1956] 2 Y.B. Int'l L. Comm'n 15, U.N. Doc. A/CN.4/85; Report of the Special Rapporteur on the Regime of the High Seas, [1956] 1 Y.B. Int'l L. Comm'n 38, U.N. Doc. A/2935.

18. 1 L. Oppenheim, *International Law* 595 (H. Lauterpacht 8th ed. 1955).

19. 1 P. Fauchille, *Traité de Droit International Public* 899 (8th ed. 1923).

20. 2 C. Calvo, *Le Droit International Theorique et Pratique* 522 (5th ed. 1896).

21. See Report of the Special Rapporteur of the International Law Commission on the Regime of the High Seas, *supra* note 17, at 75.

22. 3 K. Neumeyer, *Internationales Verwaltungsrecht* 87 (1926).

23. A. Verdross & B. Simma, *Universelles Volkerrecht* 796 (3d ed. 1984).

24. 1 G. Gidel, *Le Droit International Public de la Mer* 81 (1932).

25. R. Quadri, *Le Navi Private Nel Diritto Internazionale* 39-41 (1939) (stating that international law in conjunction with municipal law establishes the principles that regulate the nationality of ships).

existence of an "economic link" between the registering State and the ship flying its flag. The relevant provision stated:

Each state may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other states, a ship must either: (1) be the property of the state concerned; or (2) be more than half owned by: (a) nationals of or persons legally domiciled in the territory of the state concerned and actually resident there; or (b) a partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the state concerned and actually resident there; or (c) a joint-stock company formed under the laws of the state concerned and having its registered office in the territory of that state.²⁶

However, in its 1956 draft,²⁷ the International Law Commission rejected the economic link concept in favor of the genuine link concept, which conditions the validity of registration upon the existence of a "genuine link" between State and ship.

The first U.N. Law of the Sea Conference, by formulating Article 5 of the High Seas Convention, again shifted the emphasis by adding that the State must effectively exercise its jurisdiction and control in administrative, technical and social matters. However, this addition is not formulated as a precondition for registration, and more importantly, no sanction is provided for if the State concerned fails to exercise jurisdiction and control.²⁸ Thus, in spite of its language that purports to limit a State's registration and flagging rights,²⁹ Article 5 in practice codifies the freedom of registration advocated by the traditional school.

This interpretation of Article 5 of the High Seas Convention was affirmed in a 1960 advisory opinion issued by the International Court of Justice ("ICJ") in *Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultive Organization*

26. See Report of the Special Rapporteur on Provisional Articles on the Regime of the High Seas, *supra* note 17, art. 5, at 22.

27. See Report of the Special Rapporteur on the Regime of the High Seas, [1956] 1 Y.B. Int'l L. Comm'n 38, U.N. Doc. A/CN.4/85; Report of the Special Rapporteur on the Regime of the High Seas, art. 29, [1956] 2 Y.B. Int'l L. Comm'n 278, U.N. Doc. A/2935.

28. See International Law: Cases and Materials 1238 (L. Henkin, R. Pugh, O. Schachter & H. Smit eds. 2d ed. 1986).

29. See *supra* note 16 and accompanying text.

("IMCO").³⁰ IMCO did not involve Article 5 but instead dealt with a provision of the IMCO-Convention that entitles the eight largest ship-owning nations to membership in the IMCO Maritime Safety Committee. Nevertheless, the ICJ determined that the term "ship-owning nations" referred to the act of registration without taking into consideration Article 5's limitations on registration.³¹ In doing so, the ICJ implicitly affirmed that Article 5 does not require a State to "effectively exercise its jurisdiction and control . . . over ships flying its flags" as an international law precondition for registration.

B. *Reflagging under the Law of the Sea Convention*

The Law of the Sea Convention explicitly separates the three elements of Article 5 of the High Seas Convention by placing two elements — the freedom of registration and the genuine link concept — in Article 91 and the third element — the obligation to ensure compliance — in Article 94.³² Article 91 of the Law of the Sea Convention, in language similar to Article 5 of the High Seas Convention, affirms the freedom of every State to fix the specific conditions for the grant of its nationality to ships, for the registration of ships, and for the right to fly its flag. Article 91 further requires a genuine link between State and ship but again like Article 5 of the High Seas Convention fails to define the concept. The obligations of the registering State are set out in an expanded list in Article 94 of the Law of the Sea Convention, which establishes as a kind of *chapeau* the most general obligation effectively to exercise jurisdiction and control in administrative, technical and social matters.

Although separating the elements of registration does not effect a legal change, the rules provided for by the Law of the Sea Convention affirm that the effective exercise of jurisdiction and control is not a precondition for registration. A State's failure effectively to exercise jurisdiction and control over a ship flying its flag therefore cannot invalidate the State's registration of that ship.

C. *Reflagging under the Registration Convention*

The latest regulations of interest in this context emerged from the 1986 United Nations Conference on Conditions for Registration of Ships which resulted in the adoption by consensus of the Registration

30. Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organization, 1960 I.C.J. 150 (Advisory opinion of June 8) [hereinafter IMCO].

31. *Id.* at 170.

32. See Law of the Sea Convention, *supra* note 13.

Convention on February 8, 1986.³³ This Convention also represents a compromise between open registration and registration subject to international law preconditions. Again, the Registration Convention is based upon the freedom of registration; the Contracting Parties only must ensure that the ships they register comply with the laws and regulations of that State concerning registration and with applicable international rules and standards concerning the safety of ships and the prevention of pollution of the marine environment. The conditions which may be introduced by the State concern the participation of its nationals in the ownership of such ships, the manning of ships with nationals, and the national participation in the management of the ship-owning company. Although these provisions reintroduce the concept of an economic link between State and ship, States have wide discretion with respect to such national conditions. States are given the same discretion with respect to the exercise of jurisdiction and control. According to Article 8, paragraph 2 of the Registration Convention, the State's laws and regulations governing registration "should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over ships flying its flag."³⁴

One may conclude from the above analysis of the High Seas Convention, the Law of the Sea Convention, and the Registration Convention that the right of each State to establish its own conditions for the grant of its flag is not limited by international law. Consequently, no State may challenge or refuse to recognize the registration of ships by another State. Moreover, no State has the right to look behind a ship's flag.

This treatment of registration deviates considerably from the tendency under international law to strengthen the link between States and enterprises. For example, under the recently concluded Convention on the Regulation of Antarctic Mineral Resource Activities,³⁵ a

33. See Registration Convention, *supra* note 14. For a detailed analysis of the Registration Convention, see Bettink, *Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships*, 18 *Neth. Y.B. Int'l L.* 69 (1987).

34. Registration Convention, *supra* note 14, art. 8, para. 2.

35. Convention on the Regulation of Antarctic Mineral Resource Activities, *AMR/SCM/88/78* (June 2, 1988), reprinted in 27 *I.L.M.* 868 (1988). Article 1, paragraph 12 provides that:

"Sponsoring State" means the Party with which an Operator has a substantial and genuine link, through being: . . . (c) in the case of a juridical person other than an agency or instrumentality of a Party, the Party: (i) under whose law that juridical person is established and to whose law it is subject, without prejudice to any other law which might be applicable, and (ii) in whose territory the management of that juridical person is located, and (iii) to whose effective control that juridical person is subject.

Id. art. 1, para. 12.

strong economic link between a State and an operator is a precondition for Antarctic mineral resource activities. This method of achieving effective national control of such operations facilitates the enforcement of environmental standards. Similarly, the exercise of State jurisdiction and control over ships as a precondition for registration would definitely enhance the protection of the marine environment and facilitate the enforcement of safety standards. Nevertheless, one must conclude that the U.S. reflagging of Kuwaiti tankers was in conformity with present international law.³⁶

II. U.S. NAVAL PROTECTION OF KUWAITI SHIPS FLYING THE AMERICAN FLAG

With respect to the legality of U.S. naval operations in the Persian Gulf, the following issues must be addressed: 1) to what extent U.S. vessels enjoy freedom of transit in the Persian Gulf or in the Strait of Hormuz; 2) whether and by what means the U.S. Navy may protect ships flying the American flag in the Persian Gulf; and 3) whether the U.S. Navy may even protect the ships of American allies or the freedom of international navigation as such.

A. *Freedom of Transit in the Persian Gulf and the Strait of Hormuz*

Approximately two-thirds of seaborne trade in crude oil pass through the Strait of Hormuz which links the Persian Gulf with the Gulf of Oman. Accordingly, the Strait constitutes one of the most vital channels of trade in the world.

The approaches to the Strait of Hormuz are covered by the exclusive economic zones of the Coastal States, Oman and Iran. Shipping presents no difficulty in the approaches to the Strait because the freedom of navigation in the exclusive economic zones is accepted in practice and in law.³⁷ However, the situation becomes more complex once inside the Strait. The Strait's narrowest part measures 20.7 miles. Both Oman and Iran have claimed 12-mile territorial seas that overlap the Strait. Although both States have declared a regime of innocent passage throughout either territorial sea, including the Strait of Hormuz, they have equally stressed the need to protect their secur-

36. Nordquist & Wachenfeld, *supra* note 1.

37. See *id.*; Wolfrum, *The Emerging Customary Law of Marine Zones, State Practice and the Law of the Sea*, 18 *Neth. Y.B. Int'l L.* 121, 140-42.

ity interests.³⁸ Both Oman and Iran have signed the Law of the Sea Convention, though neither State has ratified it. The United States, like the United Kingdom and the Federal Republic of Germany, is one of the few countries that has not signed the Law of the Sea Convention. According to the Law of the Sea Convention, the Strait of Hormuz represents a strait used for international navigation.³⁹ Article 38 provides that in these straits "all ships and aircraft enjoy the

38. The relevant provisions of the declaration of understanding of the Islamic Republic of Iran state:

In accordance with article 310 of the Convention on the Law of the Sea, the Government of the Islamic Republic of Iran seizes the opportunity at this solemn moment of signing the Convention to place on the records its "understanding" in relation to certain provisions of the Convention. 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 disharmony 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 one of general application and of law making nature, certain of its provisions are merely product of *quid-pro-quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties, that only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.

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).
- The notion of "Exclusive Economic Zone" (Part V).
- All matters regarding the International Seabed Area and the Concept of "Common Heritage of mankind" (Part XI).

(2) In light of customary international law, the provisions of article 21, read in association with article 19 (on the Meaning of Innocent Passage) and article 25 (on the Rights of Protection of the Coastal States) recognize (though implicitly) the rights of the Coastal States to take measures to safeguard their security interests including the adoption of laws and regulations regarding, *inter alia*, the requirements of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea.

Declaration of Understanding of the Islamic Republic of Iran, reprinted in Law of the Sea Bulletin No. 5, at 13 (July 1985), U.N. Doc. C.N.348. (1983)

The declaration of understanding of Oman provides:

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.

Declaration of Understanding of Oman, reprinted in Law of the Sea Bulletin No. 5, at 18 (July 1985).

39. For further details on the system of transit passage, see Larson, Innocent, Transit, and Archipelagic Sea Lanes Passage, 18 Ocean Dev. & Int'l L. 411 (1987); Robertson, Passage Through International Straits: A Right Preserved in the Third United Conference on the Law of the Sea, 20 Va. J. Int'l L. 801 (1980); Platzoder, Meerengen, 38 Zeitschrift Fur

right of transit passage."⁴⁰ This regime differs considerably from the innocent passage concept that governs navigation in a foreign territorial sea.

The Iranian government indicates in its declaration of understanding made when signing the Law of the Sea Convention⁴¹ that it does not consider U.S. vessels to be entitled to navigate the Strait of Hormuz because the United States is not a signatory to the Convention. Furthermore, it asserts the right to close that strait whenever its security interests so require. The Iranian government's position proceeds from the assumption that the Law of the Sea Convention constitutes the regime on international straits and thus applies only to the Contracting Parties to the Convention.⁴²

This assumption may be challenged on three grounds. First, the relevant provisions of the Law of the Sea Convention emphasize that *all ships enjoy* the right of free and unimpeded transit passage. Therefore, the Convention's language refutes the assumption that its provisions are to benefit only ships of the Contracting Parties.⁴³

Second, State practice reveals that the regime of transit passage through international straits in general, and particularly with respect to the Strait of Hormuz, has become part of customary international law.⁴⁴ Hence, ships flying American or other flags enjoy the right of free and unimpeded passage through the Strait of Hormuz. Closing that Strait for some ships or navigation in general constitutes a breach of customary international law.

Third, if the regime of transit passage is not a part of customary international law, then neither are those provisions permitting the

Auslandisches Offentliches Recht Und Volkerrecht 710 (1978); Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 *Am. J. Int'l L.* 77 (1980).

40. Law of the Sea Convention, *supra* note 13, art. 38.

41. See *supra* note 38.

42. For a discussion of whether the right of transit only applies to parties to the Law of the Sea Convention, see Wainwright, *Navigation Through Three Straits in the Middle East: Effects on the United States of Being a Nonparty to the 1982 Convention on the Law of the Sea*, 18 *Case W. Res. J. Int'l L.* 361 (1986).

43. The Law of the Sea Convention quite appropriately distinguishes between rules that apply to all States, or all ships, or ships of all States and those that only address parties. It is questionable whether the wording of the former provisions was meant to indicate that the respective rule was international customary law or whether it represented a treaty rule favoring third States. In the latter case Article 34 of the Vienna Convention on the Law of Treaties, A/CONF. 39/11/Add.2, might apply. See Koh, *A Constitution for the Oceans*, U.N., *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea*, at xxiv, U.N. Sales No. E.83.V.5 (1983).

44. According to Wainwright, the Convention on the Law of the Sea "did not change the straits' regime in the Middle East straits; rather, it codified the existing regime." Wainwright, *supra* note 42, at 373.

establishment of a broader territorial sea because both provisions constitute a package under the Law of the Sea Convention. The Iranian government's position thus makes its 12-mile extension of Iranian territorial sea violative of international law. As a result, the Strait of Hormuz, no longer a part of Iranian territorial sea, becomes a part of the High Seas where navigation is unrestricted.

B. *U.S. Naval Protection of Ships Flying the American Flag in the Persian Gulf*

This discussion raises the second issue of whether and to what extent the U.S. Navy may protect ships flying the American flag. Military vessels enjoy equally the right to freedom of navigation within an international strait.⁴⁵ As long as such vessels only engage in "continuous and expeditious transit,"⁴⁶ their presence in the Strait does not require any further justification. However, when ships undertake protective acts that do not fall within the notion of continuous and expeditious transit, such acts do require a legal justification.

Because an attack upon a merchant fleet constitutes an act of aggression under General Assembly Resolution 3314 (XXIX) of 14 December 1974,⁴⁷ any subsequent protective measure may be justified as an act of self-defense. Any act of self-defense must meet the

45. See Wolfrum, *Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?*, 24 Ger. Y.B. Int'l L. 200, 234 (1981); Rauch, *Military Uses of the Oceans*, 28 Ger. Y.B. Int'l L. 229, 244 (1985); Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited*, 5 Ocean Dev. & Int'l L. 477 (1978); 5 J.B. Moore, *supra* note 3, at 95. But see Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 Am. J. Int'l L. 48, 67 (1980).

46. Law of the Sea Convention, *supra* note 13, art. 38, para. 2.

47. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). The Security Council seems to regard the attacks upon shipping in the Persian Gulf as acts according to Article 24 of the U.N. Charter. See T. Bruha, 66 *Die Definition Der Aggression, Schriften Zum Volkerrecht* 117 (1980). According to Rainer Lagoni, attacks upon shipping do not constitute attacks within the meaning of Article 51 of the U.N. Charter or acts of aggression as defined by General Assembly Resolution 3314 (XXIX). R. Lagoni, *Gewaltverbot, Seekriegsrecht Und Schifffahrtswfreiheit Im Golfkrieg, Festschrift Fur Wolfgang Zeidler 1833, 1840* (1987).

Nevertheless, the view that an attack upon one ship or a few ships does not constitute an act of aggression does not foreclose counter-measures. However, any act of self-defense in response to such an attack must be taken on the same level as the attack. See W. Friedman, *The Changing Structure of International Law* 260 (1964); R. Higgins, *The Development of International Law through the Political Organs of the United Nations* 206 (1963). For a totally different approach, see Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 Yale J. Int'l L. 278 (1985) (suggesting that the nature of the coercive act be examined in order to determine whether it was in support of community order and basic policies).

The International Court of Justice's position on this issue is unclear. See *Military and Paramilitary Activity in and against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 147.

requirements of customary international law, namely that the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁴⁸ Moreover, because the act is justified by the necessity of self-defense, it must not be unreasonable or excessive.⁴⁹

Based on these criteria, it is doubtful whether the shooting of the Iranian civil airplane was a valid act of self-defense under customary international law. However, U.S. naval escort of ships flying the American flag, which may be viewed as a necessary protective response to Iranian air attacks, does conform with customary international law.

The Iranian government may not in turn invoke its rights as a belligerent State *vis-à-vis* ships flying the American flag. According to international law of sea-warfare, a belligerent State may capture or sink enemy ships. However, because Iran and the United States are not in a state of war, neither U.S. ships nor Kuwaiti ships flying the American flag⁵⁰ qualify as enemy ships. Moreover, because Iran is not at war with Kuwait, recourse to the established doctrine that a prize court may penetrate the ostensible nationality of a ship⁵¹ does not lead to a different result. Thus, the United States may protect ships flying the American flag via naval escort operations.

C. *U.S. Naval Protection of Ally Ships and the Freedom of International Navigation*

This conclusion gives rise to the third and final issue of whether the United States may defend ally ships not flying the American flag or the freedom of international navigation in the Strait of Hormuz. International law is based on the principal of equal sovereignty of States. No State, even in the best interest of the world community, may exercise military force upon another State if it is not required to do so. To that extent the reasoning of Judge Story in *The Marianna Flora*⁵² remains valid: "Upon the ocean, then, in time of peace, all possess an entire equality. . . . No one can vindicate to himself a supe-

48. 2 J.B. Moore, *Digest of International Law* 412 (1906) (quoting note of April 24, 1841 from Mr. Webster, U.S. Sec'y of State, to Mr. Fox, British Minister at Washington); see also D. Bowett, *Self-defence in International Law* 59 (1958).

49. See J. Delbruck, *Proportionality*, 7 *Encyclopedia of Public International Law* 396 (R. Bernhardt ed. 1984); M. Shaw, *International Law* 549 (1986).

50. The nationality of a ship is indicated by its flag. See *supra* note 3 and accompanying text.

51. See 2 D. O'Connell, *supra* note 9, at 1113 (with additional citations).

52. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826).

rior or exclusive prerogative there.”⁵³

Therefore, the United States may defend ally ships not flying the American flag or shipping in general in the Strait of Hormuz if its assistance is requested. If no such request is made, however, any U.S. protective measure violates international law. Military actions thus may be taken only by those States concerned or upon the order of the Security Council.

53. *Id.* at 19.