Loyola of Los Angeles International and Comparative Law Review

Volume 11 | Number 1 Article 6

1-1-1989

Policing the Persian Gulf: Protecting United States Interests and Freedom of Navigation through Military Force

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INTRODUCTION

In 1986, Iran and Iraq attacked over one hundred ships in the Persian Gulf during the war between those two nations. Over thirty ships were attacked in the first three months of 1987[1] and between May 1, 1987 and July, 1987, Iran attacked five vessels of non-belligerent nations navigating in international waters.[2] On July 31, 1987, the Bridgeton, a Kuwaiti owned supertanker flying the United States flag,[3] struck an unanchored underwater mine in international waters while being escorted by the United States Navy.[4] During the first four months of 1988, Iran continued its aggressive tactics and attacked fifty-one vessels.[5] Iran laid underwater mines in sea-lanes of the Persian Gulf[6] and employed speed boats armed with missiles to facilitate its attacks on neutral vessels in an attempt to frustrate the freedom of navigation.[7]

In order to protect the interest of the United States, Congress initially authorized the reflagging of eleven Kuwaiti vessels with the United States flag to provide these ships with United States military protection against Iranian attacks while on the high seas.[8] Other nations followed the United States in reflagging Kuwaiti vessels and deploying their navies to the Persian Gulf to insure the freedom of

1. *Statement by Assistant Secretary of State Murphy* (May 19, 1987), 87 Dep't St. Bull., No. 2124, at 60 (July 1987). The non-belligerent vessels which were attacked by Iran were all engaged in commerce with Kuwait. *Id.* Iran facilitated these attacks through the use of small boats armed with light weapons and helicopters launched from Iranian warships. *Id.*

2. *Id.*

3. Anderson, *A Sting in the Gulf*, NEWSWEEK, Aug. 3, 1987, at 24.

4. *Id.* Although the damage caused by the mine was minimal, the "detonation underneath any of the more vulnerable warships might have increased the American death toll beyond the 37 who died in the Iraqi attack on the USS Stark. . . ." *Id.*

5. L.A. Times, Apr. 23, 1988, Part I, at 12, col. 1.

6. Watson, *The Mines of August*, NEWSWEEK, Aug. 24, 1987, at 22. It is believed that Iran also deployed mines in the Gulf of Oman and off the coast of Saudi Arabia. *Id.* A Swedish owned supply ship, the Anita, struck an underwater contact mine in the Gulf of Oman, and sank, killing one and five others were listed as missing. *Id.*

7. *Id.* It was estimated that Iran had 1,000 mines in reserve with a capability of holding the free flow of commerce at its mercy. *Id.*

8. *Statement of Assistant Secretary of State Murphy, supra* note 2, at 61.

navigation. By late 1987, the Soviet Union reflagged three Kuwaiti vessels[9] and Great Britain had two Kuwaiti ships under its protection.[10] By mid-October, 1987, Western European navies had deployed more military ships in the Persian Gulf region than the United States.[11]

The United States attacked Iranian military vessels, oil platforms and territories between 1987 and 1988 in its effort to secure its freedom of navigation.[12] The first incident of overt United States military involvement took place on September 18, 1987 when the United States, a non-belligerent to the Iran-Iraq War,[13] attacked an Iranian naval vessel, Iran Ajr. At the time of attack the Iran Ajr was deploying underwater mines in gulf sea-lanes.[14] Five Iranian sailors were killed and twenty-six were captured, and later returned to Iran. Ultimately, the United States destroyed the Iran Ajr.[15]

United States policy of escorting vessels flagged by the United States failed to prevent Iran from mining the Persian Gulf.[16] On April 14, 1988, an Iranian planted underwater mine struck and crippled the United States frigate Samuel B. Roberts.[17] In retaliation, the United States destroyed Iranian oil platforms at Sassan and Sirri.[18] United States military personnel were sensitive to any Iranian military action during this period. As Iranian naval vessels approached United States forces, the United States either destroyed or damaged these vessels.[19] When the battle of April 18, 1988 ended, Iran had lost

9. Armacost, *U.S. Policy in the Persian Gulf and Kuwaiti Reflagging*, 87 Dep't St. Bull., No. 2125, at 78 (Aug. 1987). The United States shared the burden of policing the Persian Gulf with Japan, the Soviet Union and Western Europe. *Id.* This cooperation went beyond protecting neutral ships through naval escorts and included a coordinated attempt to achieve peace through diplomatic channels. *Id.*

10. *Infra* note 49, at 44.

11. *They're not all wimps*, THE ECONOMIST, Sept. 26, 1987, at 60. In the Persian Gulf region, France deployed fifteen naval vessels; Great Britain deployed ten naval vessels; Italy deployed eight military vessels; and Belgium/Holland deployed five naval vessels; and as of October, 1987, the United States deployed 35 naval vessels. *Id.*

12. L.A. Times, July 4, 1988, Part I, at 9.

13. Armacost, *supra* note 9 "[T]he United States remains formally neutral in the war. With one aberration, we have sold weaponry to neither side; we will not sell to either." *Supra* note 9, at 80.

14. Watson, *A United States Ambush in the Gulf*, NEWSWEEK, Oct. 5, 1987, at 24. United States military helicopter personnel witnessed the actual deployment of mines from Iran Ajr into the Persian Gulf. *Id.*

15. *Id.*

16. L.A. Times, Apr. 9, 1988, Part I, at 1, col. 5.

17. *Id.*

18. *Id.*

19. *Id.*

six naval vessels.[20]

The United States initially attacked the oil platforms in response to the assault on the Samuel B. Roberts.[21] Pentagon officials claimed the attack upon the platforms was targeted because it was least likely to provoke an escalation.[22] While such action was stronger than a symbolic show of force, it was less aggressive than attacks on military or civilian targets on Iranian soil, likely to result in high casualties and a worldwide outcry.[23]

In response to Iran's continued harassment of vessels, the United States extended its military aid to neutral vessels.[24] President Reagan authorized the United States to aid neutral vessels under attack.[25] Congress did not voice any opposition to the extension in policy.[26] This policy did not authorize United States naval vessels to escort neutral ships, but rather to aid them only if they were under attack and the United States was in a position to help.[27] By aiding neutral vessels, the United States attempted to throw Iran off guard and curb Iranian attacks.[28] The prior policy of aiding only vessels flying the flag of the United States allowed Iran to attack neutral vessels in plain view of United States military personnel.[29]

As the war between Iran and Iraq comes to a temporary conclusion in 1988, this Comment questions the United States policy regarding the use of military force to insure the freedom of navigation. The specific actions[30] taken by the United States between 1987 and 1988

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20. *Id.*
21. *Id.* at 7, col. 3.
22. *Id.* at 7, col. 2.
23. *Id.*
24. L.A. Times, Apr. 23, 1988, Part I, at 1, col. 5.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. A chronology of major military events in the Persian Gulf naval warfare that involved the United States from 1980 to July, 1988: September 22, 1980, Iran and Iraq declared war and the United States declared its neutrality. On December 10, 1986, Kuwait requested from the United States protection against Iranian attacks in the Persian Gulf through a flagging program. On March 7, 1987, the United States offered military escorts to eleven Kuwaiti tankers when Iran deployed Chinese made Silkworm missiles near the strategic Strait of Hormuz. On May 7, 1987, Iraq accidentally attacked the USS Stark and killed thirty-seven military men. On July 24, 1987, The Bridgeton, a United States flagged Kuwaiti tanker, was damaged by a mine while in the Persian Gulf. On August 20, 1987, Iran admitted the placing of mines in the Gulf. Iran claimed that the placing of mines in the sea-lanes of the Persian Gulf would protect its borders. On September 21, 1987, the United States captured an Iranian

will be used to analyze the general policies pursued by the United States. Part I of this Comment is an examination of the United States presence in the Persian Gulf; the escorting of foreign ships flying the flag of the United States, and the military actions taken therein. The central concern addressed in Part I is whether the military actions taken by the United States were within the bounds of international law.

Part II addresses the constitutional authorization for President Reagan's use of naval forces in the Persian Gulf. More specifically, whether the Commander-in-Chief Clause[31] provided President Reagan with the authority to use military force in the Persian Gulf. This Comment will further explore whether Congress could have invoked the War Powers Resolution[32] or the To Declare War Clause[33] to limit the President's use of military force.

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vessel laying mines in the gulf. Three Iranian sailors were killed and twenty-six were captured. On October 8, 1987, four Iranian patrol boats fired at United States armed forces. United States naval forces attacked and sank at least one of the vessels. On October 16, 1987, Sea Isle City was struck by an Iranian Silkworm missile in Kuwaiti waters. Eighteen crewmen were injured in this first Iranian attack on a reflagged Kuwaiti ship. On October 19, 1987, the United States Navy attacked two of Iran's offshore oil platforms in retaliation for Iran's October 16, 1987 attack of the Sea Isle City. On October 22, 1987, an Iranian Silkworm hit a Kuwaiti loading terminal for tankers. On November 1, 1987, the United States Navy attacked three Arab civilian fishing boats it had mistaken for Iranian patrol boats. In February, 1988, the United States reduced its naval presence in the Persian Gulf to twenty-nine vessels. On April 14, 1988, a mine damaged the Navy frigate Samuel B. Roberts. Ten members of the crew were injured. On April 18, 1988, United States forces retaliated for the attack upon the Samuel B. Roberts and attacked two Iranian oil platforms. The United States' attack fueled daylong battles where Iran lost six naval vessels. One United States Marine helicopter was lost and two United States servicemen were killed. On July 2, 1988, a United States frigate came to the aid of Danish supertanker fired on by Iranian gunboats. On July 3, 1988, the United States destroyed two patrol boats that fired on a United States helicopter near the Strait of Hormuz and the USS Vincennes mistakenly destroyed an Iranian civilian airliner. L.A. Times, July 4, 1988, Part I, at 9, col. 6.

31. U.S. CONST. art. II, § 2, cl. 1. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ." *Id.*

32. 50 U.S.C. § 1541 (1973).

33. U.S. CONST. art. I, § 8, cl. 11. "The Congress shall have Power . . . To declare war, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.*

PART I: A NATION'S RIGHT TO USE MILITARY FORCE UNDER INTERNATIONAL LAW

A. Limits on the Use of Military Force by Nations Engaged in War

Although the United Nations Charter prohibits the use of military force as a means of settling international disputes,[34] Article 51 of the United Nations Charter provides an exception. Article 51 states: "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[35]

Between the general prohibition of military action and the permissible use of military force in self-defense lay rules of customary international law by which nations must conduct warfare. For example, the Hague Convention (XIII) of 1907 Concerning The Rights and Duties of Neutral Powers in Naval War mandates that "[b]elligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."[36]

The Hague Convention (VIII) of 1907[37] severely restricts the use of automatic contact mines.[38] It is forbidden "[t]o lay unanchored

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34. U.N. CHARTER art. 2, para. 4. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . ." *Id.*

35. Combacau, *The Exception of Self-Defense in U.N. Practice*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9 (1986).

> Art. 51 states a "right", or, to be more exact, an exception to a legal obligation, and it is as the "exception of self-defence" that we shall henceforward refer to this so called right. Implicitly linked to the rule it derogates from, Art. 51 need say nothing about the content of the exception, which can be deduced without difficulty from the terms of Art. 2(4): it is evident that the use of force which the exception permits is the same as that which the rule forbids. The text only deals with the legal regulation of self-defense, that is the fundamental and procedural conditions necessary for the exception to be operative.

Id. at 11.

36. The Hague Convention (XIII) of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War, art. 1 [hereinafter, The Hague Convention (XIII)].

37. The Hague Convention (VIII) of 1907 Relative to the Laying of Automatic Submarine Contact Mines [hereinafter The Hague Convention (VIII)]. Although the Hague Convention was not signed by the existing government of Iran, the Convention recognizes that the international community highly disfavors placing underwater mines in international waters.

38. Thirty-eight nations signed The Hague Convention (VIII), one of which was Persia (Iran), and twenty nations ratified the treaty including the United States. The Hague Convention (VIII), *supra* note 37, art. 13.

contact mines. . . ."[39] It is also forbidden "[t]o lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."[40] It is irrelevant that the above provision refers to the "coast and ports of the *enemy*." The fact that Kuwait is not a belligerent in the Iran-Iraq War will not prevent the application of the above principles. Since the Hague Convention forbids the laying of mines in an enemy's coast or port, it may be reasonably inferred that the laying of mines off the coasts or ports of neutral nations is also forbidden. The deployment of underwater contact mines in neutral waters clearly restricts international commerce and defeats the purpose of the Hague Convention.[41]

The Hague Convention also stipulates that "[w]hen anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping."[42] Iran has continued to disobey this provision by insisting an "invisible hand" has placed the mines in sea-lanes.[43] Furthermore, Iran has attempted to keep the location of the mines a secret by placing them in sea-lanes during the night, under the cover of darkness.[44]

The policy reason behind the prohibition of laying automatic underwater contact mines is to encourage and facilitate international commerce during both peace and wartime.

> "Seeing that, although the existing position of affairs makes it impossible to forbid the employment of automatic submarine contact mines, it is nevertheless desirable to restrict and regulate their employment in order to mitigate the severity of war and to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war. . . ."[45]

Iraq attacked Iran in November, 1980 and both nations were in a state of declared war until 1988. Arguably, Iran deployed underwater mines in the Persian Gulf as part of its military strategy against Iraq, attempting to disrupt Iraq's access to sea-lanes to prevent Iraq from marketing its oil. By denying Iraq revenue from its oil production, Iran sought to destroy Iraq's ability to finance its military effort.[46]

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39. *Id.* art. 1, para. 1.
40. *Id.* art. 2.
41. The Hague Convention (XIII), *supra* note 36, Purpose of Convention.
42. The Hague Convention (VIII), *supra* note 37, art. 3.
43. *A Day in the Gulf*, THE ECONOMIST, Sept. 26, 1987, at 50.
44. *Id.*
45. The Hague Convention (XIII), *supra* note 36, Purpose of Convention.
46. From Iran's viewpoint, the deployment of underwater mines in the Persian Gulf did

Iran's justification for mining sea-lanes of the Persian Gulf fails to account for the fact that Iraq started to use the Persian Gulf as a means of transporting its oil only after Iraq's war with Iran ended in 1988.[47]

Placing underwater mines in sea-lanes used for international commerce frustrates the free use of the high seas and defeats the policies which the Hague Convention seeks to achieve. For example, the cost of insurance for sailing ships in the Persian Gulf has increased astronomically and there is the threat of a *de facto* closure of the Persian Gulf because the maritime industry fears attack.[48] A *de jure* or *de facto* closure of the Straits of Hormuz would be devastating to the economic interest of the United States and Western Europe. The gulf countries supply twenty-five percent of all oil in the petroleum market and they have sixty-three percent of the world's known oil reserves.[49] Thirty percent of Western Europe's oil consumption came from the gulf region in 1986.[50] While only five percent of United States' oil consumption came from the gulf region in 1986, by the mid-1990's that figure may double.[51]

B. Genuine Link Requirements

The United Nations Convention of the Law of the Sea[52] stipu-

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not violate any rights available to Kuwait because, arguably, Kuwait was not neutral in the Iran-Iraq War. Kuwait transported oil from Iraq which assisted Iraq's ability to finance its war effort against Iran. Iran could argue that Kuwait's actions were in direct violation of the Hague Convention. "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden." The Hague Convention (XIII), *supra* note 36, art. 6. However, Kuwait was not a signatory to the Hague Convention. Hence, the Convention did not bind Kuwait.

47. A.P. Plus News, August 20, 1988.

48. After United States engaged with Iran in the Persian Gulf on April 18, 1988, Lloyds of London doubled their insurance rate for ships passing through the gulf. L.A. Times, Apr. 23, 1988, Part I, at 12, col. 1.

49. Schloesser, *U.S. Policy in the Persian Gulf*, 87 Dep't St. Bull., No. 2127, at 38 (Oct. 1987).

50. *Id.*

51. *Id.*

52. Although the United States is not a signatory of the United Nations Convention on the Law of the Sea 1982 (also referred to as the LOS Convention), the United States has the right to the freedom of navigation on the high seas. Ambassador James L. Malone, Chairman in 1982 of the U.S. Delegation to the Third Conference stated that:

> [N]on-parties to the LOS Convention will continue to have navigational rights and freedoms recognized in customary international law, including all of the navigational rights and freedoms recognized in the Convention. . . . This is because the Convention cannot deprive non-parties of their existing rights, either commercial or military. The United States, in particular, will not alter the operations of its maritime forces as a result of its decision not to sign the LOS Convention.

lates that all nations have the right to sail ships on the high seas,[53] without interference by another nation.[54] A nation has the right to insure ships flying under its flag free access to the high seas and to protect the freedom of navigation.[55]

Ships belonging to foreign nations or foreign companies may fly the flag of another nation.[56] The 1982 Convention delegates to each nation the power to "fix the conditions for the grant of its nationality to ships . . . and for the right to fly its flag."[57] Under United States law if foreign vessels meet ownership and technical requirements, then they can be registered under the United States flag.[58]

The United States Coast Guard inspected the eleven Kuwaiti vessels reflagged with the flag of the United States to determine that they complied with United States technical requirements for registration. Although the crew members were not required to be United States citizens, because the eleven Kuwaiti vessels did not stop at any ports in the United States, the captain of each vessel was a United States citizen as required.[59] Because Kuwait satisfied United States registration procedures as required by the 1982 Convention, establishing a "genuine link" between the United States and Kuwait, the United States legally provided these eleven Kuwaiti vessels with naval protection.[60]

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, 376 (1986).

53. United Nations Convention on the Law of the Sea 1982, art. 90, *reprinted in* 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 244 (M. Nordquist ed. 1985) [hereinafter 1982 Convention].

54. M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1071 (1962). "The claim to equal and unrestricted access to, and enjoyment of, the oceans is of course the most important of all the claims of states, and the most fundamental community policy is that of protecting this claim." *Id.*

55. *Id.* at 1072. "While the more limited modern assertions of authority also raise issues involving freedom of the seas, it is now taken for granted that ships of all states may traverse the ocean free of prohibition by any state or group of states." *Id.*

56. *Id.*

57. 1982 Convention, *supra* note 53, art. 91.

> Every 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 State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Id.

58. *Statement by Assistant Secretary of State Murphy*, *supra* note 2, at 60.

59. *Id.*

60. *Id.*

C. Principles of Self-Defense

Under the United Nations Charter all nations have the right to use military force in self-defense.[61] A nation using such force must notify the Security Council of the United Nations.[62] Some scholars argue that self defense, as defined by the United Nations Charter, is ambiguous and subject to abuse.[63] However, the use of military force in self-defense is permissible under customary principles of international law. Three elements characterize the use of force as self-defense, as opposed to an offensive armed attack: (1) *grounds* for the use of force; (2) the aim of the force is to *repulse the assailant*; and (3) the level of force used in self-defense is proportional to the force used by the aggressor.[64]

The first element, *grounds* for the use of force, is established when one nation *reacts* to another nation's *armed attacks*.[65] The nation that acts only after initial aggression by another country is using force as self-defense.[66] *Armed attack* is also used in Article 51 of the United Nations Charter. *Armed attack* may include *acts of aggression*,[67] but the United Nations Charter has failed to adequately define *armed attack*.[68]

Scholars interpret the second element, *repulse the assailant*, as

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61. U.N. CHARTER art. 51.

62. Combacau, *supra* note 35, at 11.

63. J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 243-44 (1954). "[S]elf-defence under general international law is as vague as it is unquestioned, and as liable to abuse in its application as it is indispensable in the present phase of international society." *Id.*

64. Combacau, *supra* note 35, at 20-25.

65. *Id.* at 20.

66. *Id.* This is a more complicated process than it would seem. As Combacau states:

> It would seem that nothing could be easier than to determine, when confronted with two acts of the same nature attributable to two States, which is lawful and which is not. All that need be done is to establish the facts of the case and the state which came first and which second. In practice, however, things are not so simple, because it is often hard to decide what the first unlawful act was.

Id.

67. *Id.* at 22. The definition that is given to "armed attack" will determine the scope of self-defense.

> [I]f one admitted that armed attack as in Art. 51 was the same thing either as "aggression" or "use of force" as defined in these resolutions, this would mean a considerable extension of the grounds for self-defense, because they refer to forbidden uses of force not covered by the concept of armed attack.

Id.

68. *Id.* at 23. "This notion [armed attack] remains as indeterminate legally as it was when the Charter was drawn up, and can be freely construed case by case by its authorized interpreters." *Id.*

"force used to reinstate a legal right that was taken away."[69] This definition requires that there be a "necessity" to use self-defense. Some scholars have defined necessity in absolute terms: "[I]nstant, overwhelming, leaving no choice of means and no moment for deliberation."[70] The strict definition of necessity may be designed to protect against extravagant claims.[71]

The third element, the rule of proportionality, requires that the amount of force used in self-defense must be proportional to the force used by the aggressor. "The customary right of self-defense involved the assumption that the force used must be proportionate to the threat."[72] The force may not involve anything "unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept within it."[73] The rule of proportionality attempts to limit the use of force to only what is essential for protecting rights which are under threat by the aggressor. This is an attempt to eliminate arbitrary decisions to use force.[74]

Every nation has the right to use military force to protect its right to freedom of navigation on the high seas. "[T]he use of force . . . to guarantee free navigation beyond a three-mile limit . . . would seem to be at the most appropriate areas for the threat or application of force."[75] Furthermore, scholars have argued that a nation may use force to reinstate a legal right which was unjustifiably taken from them. "The essence of self-defense is a wrong done, a breach of a

69. *Id.* at 25. Combacau argues, "[i]f in particular self-defence cannot legally have any aim other than to repulse the assailant, this must be considered as the only criterion for judging the lawfulness of measures which claim to be performed in self-defence." *Id.*

70. M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217 (1961)(quoting Mr. Webster to Mr. Fox, Apr. 24, 1841, in 29 *British and Foreign State Papers* 1129, 1138 (1840-41)) [hereinafter MCDOUGAL & FELICIANO].

71. *Id.*

72. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261 (1963).

73. *Id.*

74. MCDOUGAL & FELICIANO, *supra* note 70, at 218. "What remains to be stressed is that reasonableness in [a] particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion." *Id.*

75. Knight, *Alternatives to a Law of the Sea Treaty*, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 133, 144-42 (1976). *But see* I. BROWNLIE, *supra* note 72, at 283-86. Brownlie rejects the right of nations to use force to protect existing legal rights. Brownlie argues that to use force to protect a nation's rights is contrary to international principles developed after World War II which hold that nations must settle disputes by peaceful means. *Id.*

legal duty owed to the state acting in self-defense."[76]

D. Anticipatory Attack as Self-Defense

Under customary international law, a nation has the right to employ self-defense in anticipation of an imminent attack.[77] "A State may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended [sic]."[78] The policy reason for this rule includes a belief that it is illogical to wait until attacked to protect one's rights.[79]

Scholars supporting the Doctrine of Anticipatory Self-Defense maintain that the legitimacy of this privilege is not eliminated by Article 51 of the United Nations Charter.[80] As Professor McDugal states:

> There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states. In fact, Professor Bowett summarizes, the preparatory work suggests only that the article should safeguard the right of self-defense, not restrict it.[81]

There are scholars, however, who argue that self-defense should only be invoked in cases of actual physical attack.[82] The right of an-

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76. D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 9 (1958). Bowett further states, "this element is predominant in the writings of the early jurists and is clearly essential if self-defence is to be regarded as a legal concept. The breach of duty violates a substantive right, for example the right of territorial integrity, and gives rise to the right of self-defence." *Id.*

77. I. BROWNLIE, *supra* note 72, at 257.

78. *Id.* (quoting WESTLAKE, INTERNATIONAL LAW 299 (1904)).

79. "Common sense dictates that it is unrealistic to expect a state to wait until an actual armed attack has occurred before taking steps to defend itself." Comment, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 595 (1963).

80. *See, e.g.*, L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 344 (3d. rev. ed. 1969).

81. Comment, *The Soviet-Cuban "Quarantine" and Self-Defense*, 57 AM. J. INT'L L. 597, 599 (1963).

82. H. KELSEN, THE LAW OF THE UNITED NATIONS 797-98 (1950).

> [T]he Charter restricts the right of self-defence by stipulating that the right applies only against 'an armed attack,' and only as long as the Security Council 'has not taken the measures necessary to maintain international peace and security.' It is of importance to note that Article 51 does not use the term 'aggression' but the much narrower concept of 'armed attack,' which means that a merely 'imminent' attack or any act of aggression which has not the character of an attack involving the use of

ticipatory self-defense has recently been criticized on three grounds.[83] First, the nation asserting its right to self-defense may not be able to *reasonably* determine that the alleged aggressive nation is planning an attack.[84] However, many factors can be taken into account in order to determine whether anticipatory self-defense is *reasonable*: recent deployment of armed forces, diplomatic relations between the nations involved, statements made by government officials and the degree of tension between the nations involved are factors that can be used to decide reasonableness. Second, the nation invoking anticipatory self-defense may not follow the Rule of Proportionality due to an inability to determine the amount of force the alleged aggressor plans to use.[85] In order for the unilateral use of force to be legitimate, it must be proportional to the threat imposed.[86] The force employed must be comparable to the coercion posed by the alleged aggressor.[87] In order to decide whether the magnitude and intensity of the self-defense is proportional, all relevant factors must be considered.[88] These factors go beyond a mere analysis of the "qualitative similarity or dissimilarity of the weapons employed by one and the other contending participant."[89] Furthermore, it is implicit in the Rule of Proportionality that the objectives sought to be protected must be permissible goals of self-defense.[90] Third, the nation invoking anticipatory self-defense

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armed force does not justify resort to force as a exercise of the right established by Article 51.

Id.

83. I. BROWNLIE, *supra* note 72, at 258-60.

84. *Id.* at 258-60.

85. *Id.*

86. MCDOUGAL & FELICIANO, *supra* note 70, at 217-18.

87. *Id.* at 241.

The principal reference here is to the degree of intensity and scope exhibited in this coercion—factors long recognized to be of special relevance in judgments about the lawfulness of particular claims to self-defense. It is primarily in terms of its magnitude and intensity—the consequentiality of its effects—that alleged responding coercion must be examined for its 'proportionality.' 'Proportionality' which, like 'necessity,' is customarily established as a prerequisite for characterizing coercion as lawful defense, is sometimes described in terms of a required relation between the alleged initiating coercion and the supposed responding coercion: the (quantum of) responding coercion must, in rough approximation, be reasonably related or comparable to the (quantum of) initiating coercion.

Id.

88. *Id.* at 243-44.

89. *Id.* at 244.

90. *Id.* at 241-42.

It is useful to make completely explicit that concealed in this shorthand formulation of the requirement of proportionality are references to both the permissible objectives of self-defense and the condition of necessity that evoked the response in coercion. Proportionality in coercion constitutes a requirement that responding coercion be

will not be motivated to seek a peaceful settlement of the dispute because it will resolve its dispute through force.

It should be noted that the above rules of anticipatory self-defense apply to vessels on the high seas and are not restricted to the use of military force on land. Thus, ships on the high seas have a right to use military force to protect themselves against attack, to keep the shipping sea-lanes open for free navigation and to prevent the forceful closure of the sea-lanes. "It seems clear that vessels on the open sea may use force proportionate to the threat offered to repel attack by other vessels, or by aircraft. This right must rest on general principles whether the analogy of vessel and state territory is accepted or not."[91]

Furthermore, the analogy that the use of military force as self-defense and in response to the armed-attack of another nation constitutes war is unsupported by international law. As Justice Jackson stated: "[the] exercise of the right of legitimate self-defense—that is to say, resistance to an act of aggression . . . shall not constitute a war of aggression."[92]

E. Application of International Law to Military Actions taken by the United States in the Persian Gulf between 1987 and 1988

1. An Act of Self-Defense

The attack of the Iran Ajr provides a factual setting to apply abstract principles of international law in analyzing United States policy in the Persian Gulf. There must be *grounds* for the use of military force in order to justify a nation's use of force as self-defense.[93] As noted above, if a nation reacts with military force to another nation's initial use of force, then there are *grounds* for the use of force.[94] Kuwait approached the United States and requested military protection of eleven Kuwaiti vessels.[95] Furthermore, in the spring of 1984 the

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limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion.

Id.

91. I. BROWNLIE, *supra* note 72, at 305.

92. *Id.* at 252 (quoting Justice Jackson, American Chief Prosecutor before the Nuremberg Tribunal).

93. Combacau, *supra* note 35, at 20.

94. *Id.* at 20-22.

95. Armacost, *supra* note 9, at 79.

United Nations Security Council passed a resolution calling for the protection of vessels sailing the Persian Gulf.[96] The United States did not initiate its program of escorting shipping and of providing military protection until 130 ships were attacked.[97]

The United States reacted to Iran's mine laying activities in the Persian Gulf. As President Reagan stated in his letter to the Congress concerning the Iran Ajr incident: "[t]his hostile action [the laying of mines in the Persian Gulf] posed a direct threat to the safety of United States warships and other United States flag vessels. Accordingly, acting in self-defense and pursuant to standing Peacetime Rules of Engagement . . ." the United States engaged in a military attack upon the Iran Ajr.[98]

Military force must only be used to *repulse the assailant* to satisfy the second element necessary to invoke the principles of self-defense.[99] Through its presence in the Persian Gulf, the United States sought to keep the "freedom of navigation [open] for nonbelligerent shipping in and through the gulf, in line with our worldwide policy of keeping sea-lanes open."[100] The aim of the United States was and is to protect ships flying the flag of the United States as they sail through the Persian Gulf.[101]

Iran may argue that the United States naval task force was only present in the Persian Gulf to export and protect the political and economic interest of the United States and not to ensure the freedom of navigation. This claim may have limited validity. The United States was safeguarding its strategic interest and attempting to ensure that the Persian Gulf region did not come under the control of powers hostile to the United States.[102] The United States was also protecting its economic interest through the military task force present in the Persian Gulf.[103] In addition, the United States was preserving its relations with friendly gulf states in order to minimize Soviet influence.[104]

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96. *Id.*

97. *Statement by Assistant Secretary of State Murphy*, *supra* note 2, at 60.

98. *Letter from President Reagan to the Congress of the United States*, (Sept. 4, 1987), 87 Dep't St. Bull., No. 2128, at 44, (Nov. 1987) [hereinafter *Letter from President Reagan*].

99. Combacau, *supra* note 35, at 25.

100. Armacost, *supra* note 9, at 78.

101. *Statement of Assistant Secretary of State Murphy*, *supra* note 2, at 60.

102. Schloesser, *supra* note 49, at 38.

103. *Id.* "[W]e have a vital and unquestionable economic stake in ensuring that oil flows unimpeded from the gulf to the free world, both now and in the future." *Id.* at 39.

104. *Id.* "Our policies have long been aimed at promoting regional security and stability while assisting our friends in their resistance to increased Soviet influence and presence." *Id.*

However, these objectives were not the primary aims pursued by the United States. The military presence of the United States Navy was expanded when Kuwait requested United States assistance and only after Iran initiated its mining program. Thus, under these circumstances, the main objective of the United States was to provide United States vessels with a shield of self-defense.[105]

The fact that the United States did not attack or retaliate against Iran for Iran's attack on a Kuwaiti owned, but Liberian flagged, supertanker on October 15, 1987 indicated that the United States was only protecting vessels.[106] Since the supertanker was not flying the flag of the United States and it was not in international waters, the United States was not permitted under international law to use force against Iran in the name of self-defense.

In order for the use of force to be justified as self-defense, the reacting nation must use force which is proportional to the force used by the aggressor. The force must not be *unreasonable* or *excessive* in relation to the aggressor's force. For example, in the Iran Ajr incident, the United States only attempted to prevent Iran from placing underwater mines in sea-lanes.[107] Consequently, the United States did not endeavor to sink the Iran Ajr, but only attempted to disable the ship.[108] This use of force could be construed as reasonable in relation to Iran's mine laying activities.

The United States attacked the Iran Ajr in two military operations.[109] After witnessing the Iran Ajr laying underwater contact mines in the Persian Gulf, two United States helicopters operating off the USS Jarrett attacked the Iran Ajr.[110] After this initial attack, the Iran Ajr resumed deployment of underwater contact mines in international waters.[111] It was not until after the Iran Ajr continued to deploy underwater contact mines did the United States disable the Iran Ajr. Furthermore, the United States did not board the Iran Ajr until September 22, 1987, the next day.[112]

105. It should also be noted that the United States is seeking to prevent the expansion of Iran's 1979 revolution to the moderate states of the Persian Gulf. Interview of Richard W. Murphy, *Meet the Press*, (Aug. 23, 1987) by C. Wallace, R.W. Apple and R. Reeves, *reprinted in* 87 Dep't. S. Bull., No. 2127, at 45 (Oct. 1987).

106. N.Y. Times, Oct. 16, 1987, at 1, col. 5.

107. Watson, *supra* note 14, at 24.

108. *Id.*

109. *Letter from President Reagan, supra* note 98, at 44.

110. *Id.*

111. *Id.*

112. *Id.*

Thus, the attack on the Iran Ajr by the United States was a justified and legal act under the rules of international law because the United States satisfied all the necessary elements of self-defense before resorting to the use of military force in order to protect its rights.

2. Anticipatory Attack

The history of the Iran-Iraq War and attacks upon neutral vessels indicated that Iran was determined to frustrate the freedom of navigation in the Persian Gulf. Iran constructed military facilities, armed with Chinese-made Silkworm anti-ship missiles, along the narrow Strait of Hormuz where it could attack vessels sailing through that passage.[113] "These missiles with warheads three times larger than other Iranian weapons, can range the strait. They could severely damage or sink a large oil tanker or perhaps scare shippers from going through the [Strait of Hormuz], leading to a *de facto* closure."[114]

Under these circumstances, could a nation have conducted a preemptive military strike to destroy the deployment site armed with Chinese-made Silkworm missiles, located on the mainland of Iran and near the Strait of Hormuz, in order to pass freely?

Every nation has the right to pass freely through the straits without any interference.[115] If there was a *de jure* closure of the Strait of Hormuz by Iran or another nation, the United States would be justified in using military force to re-open that passage in order to invoke its right of freedom of navigation.[116]

It should be noted, however, that the use of force as an anticipatory means of self-defense has been condemned by the Security Council of the United Nations, but the condemnation may result from the finding that the nation invoking the right to anticipatory attack was not in imminent danger.[117]

Before a nation may use military force in an anticipatory manner, the nation using such force must be able to *reasonably* determine that the alleged aggressive nation is planning an attack. The facts of the Iran-Iraq War, however, indicated that international commerce was not only in imminent danger, but was actually under attack. Iran's assaults upon neutral vessels indicated that the Silkworm mis-

113. Armacost, *supra* note 9, at 79.
114. *Id.*
115. Wainwright, *supra* note 52, at 377.
116. *Id.* at 378-79.
117. Combacau, *supra* note 35, at 24-25.

siles near the Strait of Hormuz posed an imminent threat to non-belligerent shipping. These are anti-ship missiles, and they are located in an area where their only logical purpose would be to destroy shipping. Iran gained access to Chinese Silkworm land-to-ship missiles, which contain 1,100 pounds of explosives, and are one of the most successful and powerful anti-ship missiles in the world.[118] These missiles are capable of sinking any merchant vessel while such ships transit the Strait of Hormuz.[119] As of October 31, 1987,[120] Iran had seventy-five such missiles.[121]

The range of the Silkworm missiles located near the Strait of Hormuz could not assist Iran in its war against Iraq because the Silkworm missiles could not strike Iraq's mainland[122] and Iraq did not use the Persian Gulf to export its oil during its war with Iran. Iraq exported its oil through pipelines and overland transportation through Turkey and Saudi Arabia. Yet, Iran continuously used Silkworm missiles on neutral vessels. This is evidence that Iran intended to employ these missiles near the Strait of Hormuz for that purpose. Furthermore, Iran used Silkworm missiles to facilitate its attacks throughout the Persian Gulf. For example, on October 16, 1987, Iran attacked a Kuwaiti oil tanker (Sea Isle City) in Kuwaiti territorial waters. The tanker was under protection of the United States until the tanker reached Kuwaiti territorial waters.[123] Iran used a Chinese-made Silkworm missile to facilitate the attack.[124] The attack blinded the American Captain of the Sea Isle City, and seventeen crew members were injured in the incident.[125]

It is important to note, however, that Iran did not use and has yet to use these missiles on vessels passing through the strait. These missiles may have served as a deterrent to Iraqi shipping and not as a deterrent for all neutral vessels. Until Iran uses these Silkworms located on the Strait of Hormuz against neutral vessels, it may not be reasonable to infer that Iran has deployed its Silkworm missiles near the Strait of Hormuz to attack neutral shipping.

Any preemptive strike by the United States must be within the

118. *Id.*
119. *Id.*
120. Schloesser, *supra* note 49, at 39.
121. *Id.*
122. *Id.*
123. *The Silkworm Route*, THE ECONOMIST, Oct. 24, 1987, at 50.
124. *Id.*
125. *Id.*

Rule of Proportionality. One component of proportionality is the necessity of defining the objectives a nation seeks to protect through the use of anticipatory coercion.[126] The second component demands that the coercion employed as anticipatory force must be equal to the threat posed. The strike could only inflict damage at the missile site and could not inflict any damage in civilian areas. In other words, any preemptive military strike must be narrowly designed to destroy only the missile silos armed with Silkworm missiles.

The various exercises of military strength by the United States between 1987 and 1988 indicated that the United States was prepared to use limited force and comply with customary international law. For example, after Iran's attack on the Sea Isle City, the United States retaliated against Iran.[127] On October 19, 1987, the United States destroyed two Iranian oil installations situated in international waters.[128] The oil installations were also used by Iran as bases for assaults on shipping;[129] nonetheless, the United States gave the occupants a twenty minute warning before attacking the platforms.[130]

The nation using anticipatory force must also seek peaceful avenues in an attempt to alleviate tensions between itself and the threatening nation. The United States continued to seek peaceful avenues for the settlement of the Iran-Iraq War and for the removal of the Silkworm missiles from the Strait of Hormuz area. The United States worked for a negotiated settlement of the Iran-Iraq War through the United Nations Security Council. Through these efforts the United

126. "Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense." MCDOUGAL & FELICIANO, *supra* note 70, at 242.

127. This attack could also be viewed as anticipatory self-defense to prevent Iran from using the platforms to facilitate Iranian attacks on non-belligerent vessels in the future. The military forces located on these platforms monitored the movement of United States convoys by radar, assisted small vessel attacks against non-belligerent shipping, coordinated mine laying in the path of United States convoys and fired at United States military aircraft. *Secretary Weinberger's Statement* (Oct. 19, 1987), 87 Dep't St. Bull., No. 2129, at 74 (Dec. 1987). The United States has also complied with the United Nations Charter concerning this incident. *U.S. Letter to the U.N. Security Council* (Oct. 19, 1987), 87 Dep't St. Bull., No. 2129, at 74 (Dec. 1987).

> In accordance with Article 51 of the Charter of the United Nations, I [Vernon A. Walters] wish, on behalf of my government [United States], to report that U.S. forces have exercised the inherent right of self-defense under international law by taking defensive action in response to attacks by the Islamic Republic of Iran against U.S. vessels in the Persian Gulf.

Id.

128. *The Silkworm Route, supra* note 123, at 50.

129. *Id.*

130. *Id.*

States sought to provide for "independence and territorial integrity" of both Iran and Iraq.[131] The United States supported several efforts by the Nonaligned Movement and the Organization of the Islamic Conference.[132] The United States called upon both Iran and Iraq to cease fire immediately, withdraw to their pre-war borders and to begin negotiations.[133] Additionally, the United States pursued diplomatic channels in an attempt to convince the Chinese not to sell Silkworm missiles and to persuade Iran to remove these missiles from the Strait of Hormuz area.[134]

It was not completely reasonable to conclude that Iran deployed Silkworm missiles near the Strait of Hormuz in an effort to close the strait to neutral ships. Hence, anticipatory self-defense was not a feasible alternative for the United States. However, if Iran uses these Silkworm missiles in the future to attack neutral vessels and Iran fails to settle its differences with neutral nations in a peaceful manner, the United States, or any nation threatened by these missiles, may conduct a preemptive military attack and destroy Silkworm missile sites located near the Strait of Hormuz. Such force must be in proportion to the threat posed; it must not promote geo-political interest, it must be limited to the missile silos and it must seek to minimize civilian casualties.

PART II: THE PRESIDENT'S POWER TO USE ARMED FORCES OF THE UNITED STATES

The United States Constitution designates the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[135] The Commander-in-Chief Clause provides the President with the authority to use the armed forces of the United States "to execute the laws, to maintain peace, and to resist foreign invasion. . . ."[136]

The Executive Branch was delegated the power to command the armed forces of the United States because the President can best util-

131. Schlosser, *supra* note 49, at 38.

132. *Id.*

133. *Id.* at 41.

134. *Id.*

135. U.S. CONST. art. II, § 2, cl. 1.

136. J. STORY, COMMENTARIES ON THE CONSTITUTION, *reprinted in* 4 THE FOUNDERS' CONSTITUTION 11 (1987).

ize the armed forces in times of invasion or insurrection.[137] Although the President's powers as Commander-in-Chief are not unrestricted,[138] he is not bound to wait for legislative action before employing military force when the United States is attacked.[139] The Framers sought to distribute the war powers equally between the executive and legislative branches.[140] As the Supreme Court remarked in *In Re Neagle*,[141] the President may use the armed forces of the United States without an act of Congress.[142] Furthermore, the degree of military force used by the President is within his discretion.[143] "It is equally settled that it is constitutionally proper—indeed inevitable—that the President can use or threaten to use the armed forces without any action by Congress both in support of his diplomacy and in situations where international law justifies the limited and propor-

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137. *Id.*

138. Congress has the power: "To declare war," U.S. CONST. art. I, § 8, cl. 11; "To raise and support Armies," *id.* art. I, § 8, cl. 12; "To provide and maintain a Navy," *id.* art. I, § 8, cl. 13; "To make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14; and "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," *id.* art. I, § 8, cl. 15.

139. Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

140. Although the Constitution has distributed the war powers among the executive and legislative branches, Congress' war powers are limited in scope and exceptions to the executive powers delegated to the President. THE WORKS OF ALEXANDER HAMILTON 432-89 (H. Lodge ed. 1903).

> It deserves to be remarked that as the participation of the Senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general 'executive power' vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

Id. at 437-43.

141. 135 U.S. 1 (1890).

142. *Id.* at 64. The Supreme Court posed the question:

> Is this duty that the laws be faithfully executed] limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

Id. In its response, the Supreme Court made clear that the Executive Branch could use the military forces of the United States in carrying out its duties without prior approval by Congress. *Id.*

143. The Prize Cases, 67 U.S. (2 Black) 635 (1863), indicate how much freedom of movement the President is allowed. The facts surrounding the Prize Cases, however, are different from the facts surrounding United States action in the Persian Gulf. In the former, President Lincoln authorized a blockade of Southern ports following the attack upon Fort Sumter in 1861. President Lincoln was responding to an invasion of the United States. Nevertheless, the reasoning of the Prize Cases can be applied to the situation in the Persian Gulf. The United States Navy is responding to attacks upon United States military vessels that have been in the Persian Gulf for over forty years. Under international law a flagged vessel is similar to the territory of the nation the flag represents. *Id.*

tional use of force in times of peace in order to deal with forceful breaches of international law by another state."[144]

In *Youngstown Sheet & Tube v. Sawyer* the Supreme Court held that the President's power to use the armed forces must stem from the Constitution or from Congress.[145] In his concurring opinion, Justice Frankfurter argued that the executive power is vested in the President of the United States, but the executive powers are not enumerated and

144. Rostow, *"Once More Unto the Breach:" the War Powers Resolution Revisited*, 21 VAL. U.L. REV. 1, 17 (1986).

145. 343 U.S. 579, 585 (1952). Under the facts of *Youngstown* President Truman seized steel mills operating in the United States. Congress did not authorize the seizure and President Truman based his action on all the powers vested in the President by the Constitution and by the Commander-in-Chief Clause of art. II, § 2, cl. 1. At the time the order was issued the United States was engaged in the Korean War. In December, 1951, the steel companies and their employees failed to come to a collective bargaining agreement. The United Steelworkers of America, C.I.O, intended to go on strike on April 10, 1952. President Truman directed the Secretary of Commerce to seize the steel mills to assure the availability of steel that would be necessary to support United States Armed Forces in the Korean War. The Supreme Court held that the Commander-in-Chief Clause did not delegate to the President the power to seize the steel mills in order to support the war effort. *Youngstown*, 343 U.S. at 587. The Court further held that the President's power to see that the laws be faithful executed refutes the idea that he is to be a law maker. *Id.*

In concurrence, Justice Douglas noted that the President can act more quickly than Congress in a national emergency. *Id.* at 629. However, simply because the President can act more efficiently than Congress, the executive branch can not act in a way that the Constitution does not authorize. *Id.*

In concurrence with the majority, Justice Jackson held that the powers that are delegated to the President and Congress "are not fixed but fluctuate." *Id.* at 635. When the President acts under an implied or express authorization of Congress, his power is the strongest. *Id.* When the President acts in absence of a grant or denial or authorization by Congress it is uncertain whether the President's action is valid and the President must rely on his own powers. *Id.* at 637. When the President acts in a way that is incompatible with Congress the President's "power is at its lowest ebb." *Id.* Under this analysis, President Reagan's use of force in the Persian Gulf falls within the third category. Therefore, President Reagan's actions can "be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject." *Id.* at 640. The President's use of military force is valid if that right is within his "domain" and beyond control of Congress. *Id.* Justice Jackson noted that the Commander-in-Chief Clause does not authorize the President to seize private property to support the armed forces. *Id.* at 643. "He has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the Command of the army and navy, only Congress can provide him an army and navy to command." *Id.* at 644.

It is important, however, to note that Justice Jackson distinguishes the President's power under the Commander-in-Chief Clause when he uses his powers in the domestic arena versus in the foreign arena. "I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should no such indulgence." *Id.* at 645.

may be developed over time.[146] Justice Frankfurter used a structural accommodation argument indicating that the powers delegated to the executive and legislative branches may be interpreted through executive powers historically claimed by past Presidents, and by the conduct of past Chief Executives. Justice Frankfurter noted Justice Marshall's often cited phrase: "[I]t is a Constitution we are expounding upon."[147] As Justice Frankfurter further stated:

> To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by Section 1 of Art. II. . . .[148]

Thus, a particular course of action that has been repeatedly and systematically pursued by Presidents of the United States may be used as a means and guide to interpret what powers the executive branch has been delegated by the Constitution.

Throughout the history of the United States, Presidents have used military force to implement American foreign policy and to protect the national interests abroad.[149] "Congress shares with the President his authority over the armed forces. It supplies the money and makes regulations for their governance. It has the power to 'declare war', *but the President is able to give orders to the Army, Navy, and Air Force that may lead to hostilities, as well as to direct our foreign relations to that end.*"[150] President Polk deliberately sent troops into a

146. *Id.* at 597-98.

147. *Id.* (quoting Justice Marshall, McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

148. *Id.* at 610-11.

149. E. CORWIN & J. PELTASON, UNDERSTANDING THE CONSTITUTION 98 (1958).

150. *Id.* (emphasis added).

disputed territory which caused the Mexican War; President Theodore Roosevelt deployed the Navy abroad after Congress threatened to withhold appropriations; President Truman ordered United States troops into Korea to resist communist aggression;[151] President Andrew Johnson sent 50,000 troops to the Mexican border, before an act of Congress, in order to persuade France to withdraw from Mexico.[152] Furthermore, the armed forces of the United States have been used abroad more than two hundred times since 1789, but Congress has only declared war on five occasions.[153]

The Barbary Coast Crisis of 1801 to 1805 is one example where the President of the United States used military force abroad and engaged in a military action with foreign troops. More importantly, the Barbary Coast Crisis of 1801 to 1805 is analogous to the situation in the Persian Gulf. The United States Navy was deployed in both cases to protect United States shipping in international waters. By analyzing the debates that took place in 1797 concerning the President's power to deploy the armed forces, one can better understand the original interpretation[154] of the Commander-in-Chief Clause and the President's powers under that clause in circumstances similar to the Persian Gulf crisis. Furthermore, past implementation of presidential powers under the Commander-in-Chief Clause provides a means to interpret the Clause under Justice Frankfurter's "gloss on Executive

151. *Id.*

152. Bancrof, *The French in Mexico and the Monroe Doctrine*, 2 POL. SCI. Q. 30 (1896).

153. J. ROGERS, WORLD POLICING AND THE CONSTITUTION 46-47 (1945); *see also* A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER, THE ORIGINS (1976); Javits, *War Powers Reconsidered*, 64 FOREIGN AFFAIRS 130 (1985).

154. The Supreme Court has recognized that original intent analysis is suspect. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 442-43 (1934). As was stated by the Court:

> If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *Constitution* we are expounding" (McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819))—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.* at 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433 (1920), "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetter. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Id. Some scholars have argued that one cannot determine the Framers' intent because there is no such thing as original intent. *See* Dworkin, *The Forum of Principle*, 56 N.Y.U.L. REV. 469, 477 (1981).

Power" analysis.[155]

A. Barbary Coast Crisis of 1797 to 1805

During the latter part of the Nineteenth and early Twentieth centuries, the Barbary Coast States in the Mediterranean Sea were havens for pirates who attacked international commerce. The United States in the late 1790's paid an annual tribute to the rulers of the Barbary States. The Barbary States then granted vessels from the United States immunity from the Barbary States piratical acts.[156] In 1801, the United States refused to pay an increased tribute to the Bashaw of Tripoli, so the latter declared war against the United States on June 10, 1801.[157] On February 6, 1802, Congress authorized President Jefferson to employ the armed forces of the United States as he deemed necessary to protect commerce and trade in the Atlantic Ocean and Mediterranean Sea.[158] Congress further authorized the President to seize and make prizes of all vessels belonging to the Beg of Tripoli.[159]

However, on December 12, 1801, two months before Congress took action against the Barbary Coast states and before Congress authorized President Jefferson to use military force against Tripoli, President Jefferson ordered the United States Navy to the Mediterranean Sea to insure that commerce would not be interrupted.[160] Although President Jefferson's action was intended to maintain peace against threatened attack by the Barbary States,[161] the United States Navy engaged in acts of hostilities with Tripolitan military vessels.[162] The United States captured a Tripolitan vessel and inflicted casualties upon its crew.[163] President Jefferson recognized that he only had the power to deploy military vessels to insure the freedom of navigation and to act in self-defense against any threatened attack upon United States military vessels or commercial vessels, but that he was not empowered by the Constitution to take offensive steps. As President Jefferson stated to Congress:

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155. The Prize Cases, 67 U.S. (2 Black) 635, 638 (1863).

156. J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 633 (1901).

157. *Id.*

158. Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers, ch. 4, 1 Stat. 126, 129 (1802).

159. *Id.* § 2.

160. J. RICHARDSON, *supra* note 156, at 326-27.

161. *Id.*

162. *Id.* at 327.

163. *Id.*

> Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise*, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part. The bravery exhibited by our citizens on that element will, I trust, be a testimony to the world that it is not the want of that virtue which makes us seek their peace, but a conscientious desire to direct the energies of our nation to the multiplication of the human race, and not to its destruction. Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew . . . . I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.[164]

The importance of the above analysis indicates that the Framers interpreted the Constitution to empower the President to deploy United States armed forces in situations similar to the Persian Gulf crisis of 1986 through 1987 and to engage, in the name of self-defense, in hostilities with foreign nations without a declaration of war from Congress. Congressional debate over what course of action was available to the President in the Barbary Coast Crisis indicates that the Framers of the Constitution intended the Commander-in-Chief Clause to vest in the President the power to use the armed forces of the United States to protect shipping. Furthermore, the debate indicates that the system of "checks and balances" which the Constitution sought to establish was not disrupted by presidential use of armed forces to protect commercial shipping. The debate concerned whether Congress may specify the way the President could use frigates commissioned by Congress to be employed against the Barbary Coast States.

Congressman Gallatin argued that normally the President would not be restricted in the use of naval forces, but since there was the potential of war he would be so restricted.[165] However, Congressman

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164. *Id.*

165. House of Representatives, Protection of Trade 22 June 1797, *reprinted in* 4 THE FOUNDER'S CONSTITUTION 8 (1987).

> Mr. Sewall was in favor of striking out the clause [limiting the use of the three frigates]. If the President were to be limited at all he should have no objection to limit

Sewall argued that Congress could not limit the President's power in the Mediterranean Sea.[166] Likewise, Congressman Harper asserted that Congress did not have the authority to tell the President how to use force.[167] If the President abused his power, then the responsibility was his.[168] Harper's argument indicates that there were other checks upon the President, and that Congress did not have to provide a check in this situation.[169] For example, if the President abused his authority, he would pay for his abuse of power at election time. Congressman Otis argued that it was not convenient for Congress to authorize how the President used military force because such a restriction would not enable the President to act quickly and in defense of American interest.[170]

The Barbary Coast Crisis of 1801 to 1805 is almost identical to the Persian Gulf Crisis of 1987 to 1988. In both situations the Presidents sought to insure the freedom of navigation on the high seas through the use of the United States Armed Forces. Congress did not give prior approval for the use of such military action. The United States engaged in military battles with foreign navies in which foreign vessels were destroyed and foreign military personnel were captured, and the United States was attacked first and reacted in a defensive manner.

B. Congress Has the Power to Declare War, Not to Declare How Military Force May be Used Prior To A Declaration of War

Congress' power to declare war checks the President's war pow-

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him with respect to convoys, from the incompetency of three vessels to that end; but these frigates were to be considered as the public force, as the navy of the United States. It was true, it was a small one; but it was such as Congress had thought proper to raise, and put in the power of the President.

Id.

166. *Id.*

167. *Id.* at 9. "The use of this force must be left to the President; if he abuses it, upon his own head would lie the responsibility. . . ." *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

Mr. O[tis] did not say that Congress had not a right to designate the object of this force; but he believed it would not be convenient; for, said he, suppose either of the Barbary States were to declare war against us [sic]. (and they all knew there was no certain reliance upon their observance of treaties,) should not the President have a right to send those vessels into the Mediterranean? Or, suppose we wanted to send an Ambassador to a foreign country, or despatches [sic] to our Minister residing there, shall we, said he, limit his power in his respect?

Id.

ers under the Commander-in-Chief Clause.[171] However, the power to declare war does not mean that Congress has the power to *declare* how the President may use military force short of a declaration of war. *to declare War* is different and separate from using military force in a way which may resemble a state of war. The Framers' debate over whether Congress should have the power to *make war*, as it was empowered by the Articles of Confederation, or whether Congress should only have power *to declare war* illustrates the unique responsibilities vested in the power *to declare war*. The power to *make war* implies the power to engage military forces in hostilities. The framers recognized that the President should have this power under the Constitution because the executive branch has the unique qualities required in making decisions on whether to deploy the Armed Forces of the United States.

> Mr. Butler. The Objections ag[ain]st the Legislature lie in a great degree ag[ain]st the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.
>
> Mr. M<adison> and Mr. Gerry moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks . . .
>
> Mr. Sharman thought it stood very well. The Executive sh[oul]d be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.
>
> Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.[172]

The consequences of a declaration of war are much more serious than the consequences[173] of using military force.[174] A declaration of

171. U.S. CONST. art II, § 2, cl. 1.

172. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 424 (1986) [hereinafter STONE & SEIDMAN].

173. In October, 1987, the United States applied new sanctions. It prohibited the export of the following items: mobile communications equipment; boats, including inflatable boats; off-highway wheel tractors; large diesel engines; nonstrategic aircraft parts and components; portable electric generators; all marine engines; other naval equipment; underwater photographic equipment; submersible systems; pressured aircraft breathing equipment; sonar navigation equipment; electronic test equipment; and cryptographic equipment. *U.S. Imposes Trade Measures Against Iran, White House Fact Sheet* (Oct. 26, 1987) 87 Dep't. S. Bull., No. 2129, at 75-76 (Dec. 1987). However, these items are limited to equipment Iran uses in its attacks.

174. William Rawle argued that the President engages in war before Congress declares war. This brings together as one entity acts of aggression and declarations of war as one entity. However, Rawle further stated that "[w]ar should always be avoided as long as possible, and although it may happen to be brought on us . . . without the previous assent of Congress, yet a

war completely interrupts all commercial interaction between the warring nations,[175] and all contracts of commercial dealings with the enemy.[176] Moreover, all the enemy's ships in the United States' ports are detained and the property is confiscated;[177] United States citizens are forbidden to trade with the enemy and may not bring the enemy's products into the United States.[178] Arguably, the Framers realized that a declaration of war should only take place after full consideration and consultation because of these serious consequences. This is what the power to declare war seeks to achieve. It did not seek to prevent the President from using military forces short of a declaration of war. Furthermore, the distinction made between a "declaration of war" and a use of force in time of peace is supported by international law.[179]

There is the argument that certain acts, such as capturing and detaining military personnel of another nation, are acts of war. This argument further holds that the President is not authorized to commit these acts of war without a declaration of war by Congress. However, some framers argued that the "To declare war" clause was not designed to frustrate the President's freedom in using military force. Alexander Hamilton argued it is an "absurdity" that the President may not use military force to "seize the property of the enemy" without a declaration of war, but has to restrict the use of force to only

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regular and formal war should never be entered into, without the united approbation of the whole legislature." W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 109-11 (2d ed. 1829), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 119-20 (1987).

175. J. KENT, COMMENTARIES 53-67 (1826), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 118 (1987).

176. *Id.*

177. *Id.*

178. *Id.*

179. Rostow, *supra* note 144, at 6:

> The phrase 'to declare war' in the Constitution has a specific meaning in international law. Under international law, force may be used between states both in time of war and in time of peace. All international uses of force are not 'war' in the legal sense of the word, however bloody and extended the conflicts may be. The older treatises on international law generally appeared in two volumes, one devoted to the Law of War, the other to the Law of Peace. A 'declaration of war' transforms the relationship between the belligerents into a state of war and challenges the relation of non-participants to the belligerents. The state of war contemplates unlimited hostilities between the belligerents, the internment or expulsion of enemy aliens, the termination of diplomatic relations, the sequestration or even confiscation of enemy property, and the imposition of regulations—censorship, for example—which would be unthinkable in liberal-minded states during peacetime.

Id.

protect the United States.[180] Congress had the power to declare war, which means to "go to war."[181] But this does not prevent the President from using military force in self-defense or from capturing and detaining the enemy's property, although the United States has not declared war.[182]

C. War Powers Resolution of 1973

Congress enacted the War Powers Resolution of 1973[183] during the Vietnam War. Congress, under its power to make all laws that are necessary and proper,[184] attempted to re-define the President's power under the Commander-in-Chief Clause and Congress' responsibilities when armed forces are introduced into hostilities.[185] The War Powers Resolution was enacted to prevent a situation similar to the Vietnam War where the United States was engaged in a war without a congressional declaration.[186]

The War Powers Resolution seeks to allow the President to introduce United States Armed Forces into hostilities only in limited situations.[187] The President is also required to submit a written report

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180. A. Hamilton, *The Examination*, No. 1, 17 Dec. 1801, Paper 25: 454-57, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 101 (1987).

181. *Id.*

182. *Id.*

183. 50 U.S.C. § 1541 (1973).

184. *Id.* § 1541(b).

> Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

Id.

185. *Id.* § 1541(a).

> It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the Untied States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Id.

186. Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355, *cert. denied*, 104 S.Ct. 3533(1984).

187. 50 U.S.C. § 1541(c) (1973).

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

to the Speaker of the House of Representatives and the President Pro Tempore of the Senate whenever United States Armed Forces are introduced into hostilities or into situations where imminent involvement in hostilities is "clearly indicated by the circumstances."[188] The President must inform Congress of the circumstances necessitating the introduction of armed forces,[189] the constitutional and legislative authority under which the President introduced the armed forces[190] and the estimated scope and duration of the hostilities or involvement.[191] The President must keep Congress fully informed[192] and provide periodic reports to Congress as long as armed forces of the United States continue to be engaged in hostilities or in situations where imminent involvement in hostilities is evident.[193] Each report shall be referred to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate for appropriate action.[194]

Congress may compel the President to remove United States armed forces from hostilities or situations where involvement in hostilities is imminent if Congress passes a concurrent resolution.[195] If Congress has not passed a joint resolution compelling the removal of armed forces from hostilities, the President has up to sixty days to remove those forces unless Congress has: (1) declared war or has enacted a specific authorization for such use of armed forces; (2) extended the sixty day period by law; or (3) is physically unable to meet as a result of an attack upon the United States.[196]

The essence of the War Powers Resolution gives Congress the power to control United States military involvement in foreign wars. President Reagan refused to invoke the War Powers Resolution and maintained that the United States military contingent in the Persian

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Id.

188. *Id.* § 1543(a).
189. *Id.* § 1543(a)(3)(A).
190. *Id.* § 1543(a)(3)(B).
191. *Id.* § 1543(a)(3)(C).
192. *Id.* § 1543(b).
193. *Id.* § 1543(c).
194. *Id.* § 1544(a).
195. *Id.* § 1544(c).

> [A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id.

196. *Id.* § 1544(b).

Gulf was not involved in the Iran-Iraq War and was not introduced into a situation where imminent involvement in hostilities was "clearly indicated by the circumstances."[197] The United States further argued that Iran's minelaying activities were attempts to frustrate the United States, and Iran did not intend to confront the United States militarily.[198] Furthermore, the United Nations did not declare the Persian Gulf a war zone.

Despite this, the nature of the Persian Gulf crisis indicated that the United States was involved in hostilities. The underwater mines deployed by Iran could not have sunk an oil-tanker, but these weapons were capable of destroying a military vessel.[199] Iran laid mines with the specific intention of interfering with the United States convoy.[200] The oil-tankers became the protectors of the United States vessels, providing a shield against Iranian military attack.[201] The United States also engaged in aerial combat with Iran.[202] For example, in August, 1987, two United States Navy F-14 Tomcats intercepted an Iranian F-4 fighterbomber as it flew near a United States radar plane patrolling the Persian Gulf. One of the F-14's fired a pair of Sparrow missiles at the Iranian F-4 fighterbomber, but did not make a kill.[203] The Reagan Administration attempted to cover-up the incident by denying its occurrence.[204] Some critics argued that the administration attempted to keep the incident a secret to avoid the impression that the Untied States was engaged in a combat situation, which would compel President Reagan to invoke the War Powers Resolution.[205] Furthermore, the United States' destruction of the Iran Ajr and the Iranian oil platforms at Rashadat also indicated that armed forces of the United States were introduced into hostilities or

197. The United States has argued that the War Powers Act can not be invoked by Congress under the Persian Gulf crisis of 1987-88. Schloesser, *supra* note 49, at 44.

> The War Powers Act is not applicable under the present circumstances—this is not a situation where imminent involvement of United States forces in hostilities is clearly indicated. Prior to the attack on the U.S.S. Stark, there had never been an attack on a United States-escorted vessel in the gulf. The attack on the Stark was evidently the result of a targeting error rather than a deliberate decision to attack a United States vessel.

Id.

198. Watson, *supra* note 6, at 23.
199. Anderson, *supra* note 3, at 24.
200. *Id.*
201. *Id.*
202. Watson, *supra* note 6, at 23.
203. *Id.*
204. *Id.*
205. *Id.*

into a situation where imminent involvement in hostilities was clearly indicated by the circumstances. These platforms were used by Iran as a fortress from which Iranian commandos conducted their attacks upon vessels passing through the Persian Gulf.[206] On April 14, 1988, the United States frigate Samuel B. Roberts was crippled by an Iranian planted mine.[207] Before the week's end the United States had destroyed two Iranian oil platforms located in the Persian Gulf and six Iranian military vessels.[208] The United States lost one United States Marine helicopter and two servicemen.[209]

Under the War Powers Resolution's interpretation, the Commander-in-Chief Clause allows the President to introduce United States armed forces into hostilities pursuant to: (1) a declaration of war, (2) specific statutory authorization or (3) a national emergency created by attack upon the United States, it territories or possessions, or its armed forces.[210] There was an attack upon the United States and the armed forces of the United States. Iran placed underwater mines in sea-lanes that were known to be traveled by the United States.[211] Some United States government officials have argued that the assault upon the Bridgeton was specifically conducted by Iran.[212] The placement of underwater mines in sea-lanes is a belligerent attack upon the United States and all nations using those sea-lanes. In this sense, the United States was attacked. Iran's assault of the Sea Isle City is irrefutable evidence that the United States has been victimized by unwarranted Iranian hostility.[213]

The War Powers Resolution suggests the Commander-in-Chief Clause does not give the President a free hand in the use of military force when those forces are engaged in hostilities in absence of a declaration of war. For example, the President is required to keep Con-

206. *A Day in the Gulf, supra* note 43, at 15.

207. L.A. Times, Apr. 19, 1988, Part I, at 1 col. 3.

208. *Id.*

209. L.A. Times, July 4, 1988, Part I, at 9, col. 6.

210. 50 U.S.C. § 1541(c) (1973).

211. For example, United States military and intelligence officials determined "conclusively" that the mine which struck the Samuel B. Roberts on April 14, 1988 was deliberately placed by Iran to strike United States vessels. L.A. Times, Apr. 19, 1988, Part I, at 1, col. 3.

212. Anderson, *supra* note 3, at 23. However, some government officials claimed that the Bridgeton struck a randomly floating mine. *Id.*

213. Although Congress did not statutorily authorize the deployment, such authorization may be inferred because Congress continued to appropriate funds for financing the Persian Gulf Task Force. DeCosta v. Laird, 471 F.2d 1146, 1153 (2d. Cir. 1973), held that Congress constitutionally authorized United States involvement in Vietnam by failing to cut off appropriations for the conflict's financing.

gress fully informed as to the circumstances necessitating the introduction of armed forces. The Executive Branch did keep Congress fully informed as to United States military maneuvers in the Persian Gulf.[214]

The Termination Provision of the War Powers Resolution further requires that the President terminate the use of United States armed forces if Congress has not: (1) declared war or has not enacted a specific authorization for the use of armed forces, (2) has not extended the sixty day period by law or (3) been physically able to meet as a result of an armed attack upon the United States.[215] The constitutionality of this section of the War Powers Resolution is in serious doubt because the Supreme Court has invalidated the legislative veto and required compliance with the presentment and bicameralism clauses of the Constitution.[216] Congress recognized that this section may be deemed a legislative veto and included a Separability Clause in the War Powers Resolution.[217] Under the Separability Clause: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to any other person or circumstance shall not be affected thereby."[218] President Reagan may not have been required to remove United States armed forces from the Persian Gulf because the constitutionality of the Termination Provision of the War Powers Resolution is highly questionable.[219] The courts have

214. Schloesser, *supra* note 49, at 44.

215. 50 U.S.C. § 1544(b) (1973).

216. Weikart, *Applying Chada: the Fate of the War Powers Resolution*, 24 SANTA CLARA L. REV. 697, 733 (1984) (the author argues that the War Powers Resolution is unconstitutional because it provides Congress with a legislative veto and infringes on the President's power); Comment, *Congressional Control of Presidential War Making under the War Powers Act: The Status of the Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1240-41 (1984) (the author argues if it is deemed that Congress has exclusive control over the war powers and the War Powers Act does not delegate power to the Executive Branch, then the passage of a concurrent resolution ordering the end to hostilities would not be unconstitutional under Chada). *But see* Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984) (the author argues that the War Powers Act of 1973 is constitutional and only seeks to define the word "war" in article I, § 8, clause 11, which grants Congress the power to declare war. The author also argues that the mechanisms to enforce the War Powers Act are valid in the face of *Chada*); Rushdoff, *A Defense of the War Powers Resolution*, 93 YALE L. J. 1330 (1984) (the author argues that the President can initiate American involvement in hostilities not based on the Commander-in-Chief Clause, which is not subject to congressional restrictions, but from a general grant of executive power).

217. 50 U.S.C. § 1548 (1973).

218. *Id.*

219. The author will not attempt to resolve this question, for that issue is not within the

been reluctant to render a decision on the constitutionality of the Termination Provision of the War Powers Resolution. The courts have held that the War Powers Resolution involves a political question and, therefore, is not justiciable.[220]

However, if Congress felt that it was in the best interest of the United States to remove its armed forces, it should have taken the initiative and responsibility to pass a concurrent resolution compelling the President to remove the armed forces of the United States from the Persian Gulf. The War Powers Resolution specifically provides Congress with the authority to take affirmative steps, by passing a concurrent resolution, and to compel the removal of United States armed forces.[221] Congress failed to take any action and thereby tacitly approved of President Reagan's deployment of armed forces in the Persian Gulf.

CONCLUSION

All nations have the inherent right to use the high seas freely and without interference. When this right of free navigation has been abridged by the violent attacks of another nation, all nations have the right to use reasonable military force to protect their rights. Under the United Nations Charter and under customary international law, all nations also have the right to protect themselves against military attacks.

The deployment of the United States Navy in the Persian Gulf is not a new policy. The United States has patrolled the Persian Gulf for over forty years. The escorting of United States flagged vessels, the removal of mines located in international waters, the assault on the Iranian oil platforms and assaults on Iran military forces attacking United States ships were all within the President's powers under the Commander-in-Chief Clause. Historically, the President has had a wide latitude of freedom in the use of military forces as long as the force used is in compliance with international law. The original interpretation of the Constitution intended to empower the President with this freedom because only the Executive Branch can act quickly and only that branch has available the expertise of the executive offices to act with full information.

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scope of this article and has been fully addressed by many scholars. See articles identified in *supra* note 216.

220. Lowry v. Reagan, No. 87-2196 (D.D.C Dec. 18, 1987).

221. 50 U.S.C. § 1543(c) (1973).

The War Powers Resolution authorizes the use of armed forces in the Persian Gulf because the United States has been attacked. President Reagan was not required to remove United States armed forces because the Termination Clause of the War Powers Resolution is highly suspect and may be unconstitutional. Nevertheless, the question of the constitutionality of the War Powers Act should not be the main issue. The primary issue in question is whether the United States and other innocent nations should participate as the willing victims of unwarranted, non-provoked Iranian hostility. The answer to this question is an unequivocal no.

This is not such a drastic solution when one considers that the United States exhausted all diplomatic channels in efforts to alleviate tensions between itself and Iran. The Iranian government was consistently unresponsive to any peaceful efforts at negotiation. The President, in keeping with the War Powers Act, kept Congress fully informed of the situation in the Persian Gulf, but because of Congress' hesitancy to make any decisions regarding the crisis, the President was forced into the difficult position of accepting full responsibility for any United States military activity in the Gulf. Regardless of whether the responsibility is shared by Congress or not, these violent and senseless attacks upon innocent vessels were tolerated beyond any reasonable point and had to be stopped before more lives and property were lost. The use of military force is a viable alternative in protecting the freedom of navigation.

Dimitrios P. Biller