

# Iranian Potential Countermeasures to US Acts: In Conformity with International Law?

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## Abstract

When the Trump administration withdrew from the nuclear deal in May 2018, Iran not only remained in the legal framework, but it also took its grievance with the US as a legal dispute to the ICJ, specifically in relation to the breach of the nuclear deal and the reimposition of sanctions, as well as the freezing of Iranian assets in US jurisdiction. The killing of Qassim Soleimani has made things worse between the two countries putting the region in a turmoil. While the Biden's administration tries to rejoin Iranian nuclear deal, Iran still maintain that it will take intelligent and proportionate countermeasures. The fear of escalation of the tension is growing day by day. Iran can close the Strait of Hormuz in which exist a legal vortex as neither the US nor Iran are signatories of the 1982 United Nations Conventions on the Law of the Sea (UNCLOS). It threatened also to enrich uranium declaring that it had the capacity to enrich uranium to 20% if needed.

**Keywords:** Countermeasures – Strait of Hormuz – Uranium Enrichment – US extraterritorial Sanctions – International Law Commission – Iran's Nuclear Deal - United Nations Conventions on the Law of the Sea (UNCLOS)

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## 1. Introduction

The tensions between the US and Iran are not new, they go back to 1953, when the United States overthrew the democratically elected government of Mossadegh which was followed later by the famous hostage crisis, which was the subject of the ICJ advisory opinion: "Case Concerning US Diplomatic and Consular Staff in Teheran of 1979.

Under the presidency of Barack Obama, American Iranian relations seemed to have subsided. The international community had managed to reach an agreement with Tehran on civil nuclear power. The United States and Iran have many common interests in the region, first and foremost the pacification of Afghanistan and Iraq, two States bordering Iran in which the American army is present.

However, President Donald Trump, who has nothing but contempt for everything his predecessor undertook, replaced diplomacy with "maximum pressure", threw out the agreement on nuclear nettles (while Tehran respected it) and imposed suffocating economic sanctions on the country. This US retreat from the nuclear agreement was followed by the killing of General Soleimani in violation to international law, which has been described by the UN's special rapporteur Agnes Callmard as '*extrajudicial killing*' arguing that '*it is hard to imagine that a similar strike against a Western military leader would not be considered as an act of war*'.<sup>1</sup>

Iran promised to take "intelligent" and "proportionate" countermeasures. These latter may be the closure of the Strait of Hormuz or the enrichment of uranium to obtain the nuclear bomb.

The recognition of countermeasures in international law is controversial but they are common practices in international relations and are prevailingly regarded as an instrument of self-help aimed at inflicting a social cost for the wrongdoing. They fill a legal lacuna for encouraging compliance with international law, in the absence of a centralized enforcement authority or a universal mechanism for dispute resolution.<sup>2</sup>

This study will examine the US acts against Iran :US retreat from the Iran's nuclear deal and the killing of General Qassim Soleimani in Part I, and the potential countermeasures to be taken by Iran: the closure of the Strait of Hormuz and the uranium enrichment in Part II.

## 2. US Acts Against Iran

In this first part, this study will analyze the US retreat from the agreement on the Iranian nuclear deal as it considers that the agreement is a major detriment to the long-term security interests of the United States and Europe, rather than an advantage, before it questions the legality of the Soleimani killing under international law

<sup>1</sup> UN Report: Soleimani drone killing a 'watershed' for rule of law'. International Bar Association, the global voice of the legal profession. <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=45C796CC-3EAD-4F7C-BF63-5CC66C984079> .

<sup>2</sup> Gabcikovo-Nagymaros Project (Hung. V. Slov.) 1997 ICJ 7, 220-22 Sept 25 (recognizing entitlement to countermeasures).

## 2.1 US Retreat from JCPOA

A contrasted legal situation<sup>1</sup> resulted of the US withdrawal from the Vienna Agreement on the Iranian nuclear. In an international context marked by increasing uncertainty and instability in relations between States, it is more than ever necessary to return to international law, as it defines and frames of these relations. The confusion was caused by the US withdrawal from the Joint Comprehensive Plan of Action (JCPOA) also known as the Iranian nuclear deal, which had been endorsed with the UN Security Council resolution 2231 (2015). The US withdrawal which was followed by the threat of extraterritorial sanctions applying to European companies in compliance with the law, put the European sovereignty at stake.

In fact, it was the former US President Obama agreed and approved the JCPOA in Vienna, and he lifted the American sanctions that had weakened the Iranian economy. The Vienna agreement has produced very concrete results: the parties, including the US, have fulfilled their commitments, Iran has frozen the development of its nuclear program to confine it to civilian purposes and other signatories have partially lifted the nuclear sanctions regime.

Later, in 2017, President Trump, for whom the JCPOA was the “worst deal ever negotiated” and a disaster that could lead to a nuclear holocaust<sup>2</sup>, withdrew from it and reinstated the sanctions. The resulting legal situation is contrasted and very confusing. The reaction of the European Union was quick, it has not only confirmed Iran’s compliance with its commitments, but also called for resolution 2231 to be respected, having taken the necessary measures in EU law to protect the rights of EU companies making legitimate business with Iran.

The US justified its exit from the JCPOA by the unsatisfactory nature of the latter, because it does not include Iran’s waiver of its ballistic missile program or its development, in addition, the duration of the agreement should be extended beyond 18 October 2025. However, these motivations seem to be political, and in a strictly legal sense, they do not constitute grounds for initiating the dispute settlement procedures referred to in the Vienna Agreement.

This withdrawal and the reimposition of sanctions pushed Iran to bring the case before the ICJ. The court argued that this decision violated the 1955 Treaty of Amity between the two States. claiming that the US reasons for re-imposing sanctions are unfounded as the IAEA had repeatedly confirmed the compliance of Iran with the terms of JCPOA.

The ICJ “*considers that the US, in accordance with its obligations under the 1955 treaty, must remove, by means of its choosing, any impediments arising from the measures*” relating to humanitarian needs, medicines, foodstuff and agricultural commodities and civil aviation. “*To this end, the US must ensure that licenses and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to above*”. The decisions of the UN judicial organ are binding but the ICJ has no power to enforce them.<sup>3</sup> This dispute could have been avoided had the US adhered to its commitments under resolution 2231 (2015).

The unilateral reimposition of the US extraterritorial sanctions poses a sufficiently significant threat to European companies trading with Iran, that many of them decided to interrupt their business with their Iranian partners and disinvesting with this country. Those unilateral sanctions are unlawful under international law and are like the measures imposed by acts of US domestic legislation adopted in 1996, such as the Helms-Burton Act (against Cuba) and the D’Amato-Kennedy Act (against Iran and Libya).<sup>4</sup>

While the US, like other States, recognized the five principles of jurisdiction under international law: the territorial, nationality, protective, universality, and passive nationality principles, it extends its economic punishment legislations to third States parties by interpreting its own jurisdictional authority much wider than most States.<sup>5</sup>

When it took office a year ago, the Biden’s administration inherited a questionable legacy of its predecessor’s policies, including the Iranian issue. The new administration took some time to deliberate on how to formulate a new American approach before settling what should have been clear along: that rejoining the JCPOA would be the best way to restore its clear non-proliferation benefits and keep open the possibility of engaging Iran on other issues. So, the two States have engaged in months of indirect negotiations aimed at restoring the 2015 nuclear deal. These talks have failed to deliver a framework for mutual compliance. The

<sup>1</sup> Club des juristes, Synthèse du Rapport : le retrait des Etats-Unis de l’accord de Vienne sur le programme nucléaire iranien : une situation juridique contrastée. [https://www.leclubdesjuristes.com/wp-content/uploads/2018/07/CDJ\\_Synth%C3%A8se-du-Rapport\\_Le-retrait-des-USA-de-laccord-de-Vienne-sur-le-programme-nucl%C3%A9aire-iranien\\_Juillet-2018\\_FR.pdf](https://www.leclubdesjuristes.com/wp-content/uploads/2018/07/CDJ_Synth%C3%A8se-du-Rapport_Le-retrait-des-USA-de-laccord-de-Vienne-sur-le-programme-nucl%C3%A9aire-iranien_Juillet-2018_FR.pdf)

<sup>2</sup> Yaganeh Torbati, Analysis: Trump election puts Iran nuclear deal on shaky ground, November 9, 2016, <http://in.reuters.com/article/usa-election-trump-iran/analysis-trump-election-puts-iran-nuclra-deal-on-shaky-ground-idINKBN13427L>.

<sup>3</sup> <https://www.theguardian.com/world/2018/oct/03/international-court-of-justice-orders-us-to-lift-new-iran-sanctions>

<sup>4</sup> Elena Chachko, “The Unlawfulness of extraterritorial measures adopted by the United States”, (2019) The American Society of International Law, <https://doi.org/10.1017/ilm.2019.2>

<sup>5</sup> Kristina Larsson, US extraterritorial application of economic sanctions and the new international sanctions against Iran, Master thesis, Master programme in Maritime and shipping Law, Faculty of Law, Lund University 2011, p.51

JCPOA is, at present rates, with weeks of reaching the point of no return.<sup>1</sup>

According to Ian Brownlie, a State cannot take measures on the territory of another country by means of enforcement of national laws without the consent of the latter.<sup>2</sup> It is also accepted that a State has enforcement jurisdiction abroad only to the extent necessary to enforce its legislative jurisdiction.<sup>3</sup>

On the other hand, the Permanent Court of International Justice (PCIJ) held in the *Lotus* case that international law does not blankly prohibit to States to extend the application of their laws and the jurisdiction outside their territory. International law leaves the States with a certain amount of discretion when it comes to adopting extraterritorial measures.<sup>4</sup> The PCIJ further conclusion was that : “All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty”.<sup>5</sup> It is a universal rule: A State cannot become a judge of another State without its consent for an act performed in the exercise of its sovereignty.

Steve Coughlan stresses that if jurisdictional countermeasures are accounted as legitimate under international law, this can preclude any wrongfulness in the relations between the injured State and the responsible State. Measures taken against extraterritorial laws are countermeasures when illegality of that extraterritorial law is recognized. As many extraterritorial laws breach principles of international law regarding the law of jurisdiction, they are assumed to be illegal.<sup>6</sup> For a researcher at Lowey Institute of International Policy, “the US by making pressure to make Iran giving up and imploding from within through social unrest, continue its hegemony beyond international law. With Iran, the US is undermining much more than just the nuclear deal, but faith in international law, too.”<sup>7</sup>

What can Iran do with this contrasted legal situation? Iran could refer the matter to the Joint Commission to find that the United States “does not meet its commitments under this Action Plan”. However, such a referral would be of little use since it would only allow Iran to oppose to the United States (and *de facto* to the other signatories) an exception of non-performance which would certainly allow it to resume its nuclear programs, a recovery that would in turn trigger the reimposition of UN sanctions. Iran could also ask the UN Security Council to take sanctions against the United States, which is in practice impossible given the veto power that this State has within the Security Council. Finally, Iran could table a draft resolution for a Security Council vote to maintain the lifting of UN sanctions, which would again be in vain since the US would refuse to vote such a resolution, which would give full legal effect to the UN resolutions lifted by the Vienna agreement, and therefore also to the American extraterritorial sanctions. Iran can therefore hardly directly provoke a sanction against the exit of the United States.<sup>8</sup>

Seven years after Iran and World powers reached the JCPOA, the negotiations are back since the end of last November 2021. Both parties try to assess whether it was still possible to reactivate the 2015 nuclear deal, but the hope of reaching an agreement seems unlikely. The constraints imposed by this agreement were to be lifted in 2030. The Europeans were convinced that it would be possible to ensure the complete demilitarization of the Iranian nuclear program and the normalization of relations with Teheran.<sup>9</sup>

## 2.2 Questioning the legality of Soleimani killing

On several occasions since the American intervention in Iraq in 2003, George W. Bush and Barak Obama, but also the Israeli secret services, had had Qassim Soleimani in sight. But until now, both Washington and Tel Aviv had always renounced to eliminate him, fearing that its death would trigger an open and explosive conflict with Teheran. At this stage, there is no way to say whether the American president and his national security team have anticipated Teheran’s possible responses and will manage to face them.<sup>10</sup> the killing of Soleimani raises the question on the legality of the political assassination in international law. The invoked relevant principles are the prohibition of use of force, legitime defense and preventive self-defense.

The use of force (*ius ad bellum*) is prohibited by international law under article 2 (4) of the United Nations Charter. However, there are exceptional circumstances where the use of force is allowed: the authorization by

<sup>1</sup><https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iran/230-iran-nuclear-deal-six-now-never>

<sup>2</sup> Ian Brownlie, *Public International Law*, Oxford 2008, p. 309.

<sup>33</sup> Id, pp. 310-311

<sup>4</sup> S.S ‘Lotus’ (France v. Turkey), 1927 -PCIJ, Ser A NO. 10, pp. 18-19

<sup>5</sup> Id, p. 19.

<sup>6</sup> Steve Coughlan and al., *Global Reach. Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, Canadian Journal of International Law and Technology, 49 (2007).

<sup>7</sup> Melinda Rankin (2019, May 13), *The looming international law paradox between the US and Iran. The interpreter*, Lowey Institute for International Policy, Sydney. <http://www.loweyinstitute.org/the-interpreter/looming-international-law-paradox-between-us-and-iran>

<sup>8</sup> Club des juristes, *Synthèse du Rapport* p. 15

<sup>9</sup> Michel Fortmann, *L’Iran, une puissance nucléaire : une réalité incontournable*, <https://www.lapresse.ca/contexte/2021-12-19/international/l-iran-puissance-nucleaire-une-realite-incontournable.php#:~:text=International%20L%27Iran%2enrichissement%20d%27uranium.&text=La%20question%20nucl%C3%A9aire%20iranienne%20est%20de%20retour%20dans%20l%27actualit%C3%A9>

<sup>10</sup> Pierre Alonso and Frederic Autran, *Liberation* N0. 11999, Saturday 4 and Sunday 5 2020, pp. 1-2.

the UN Security Council, and when the State is acting in self-defense, as provided in article 51 of the UN Charter. Article 51 allows the use of force in such as the Hellfire missiles carried by Reaper drones, if “an armed attack occurs”.<sup>1</sup> The International Court of Justice (ICJ) has emphasized that the attack must be ‘grave’. In the *Oil Platforms case* the Court stated that:

*“In order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.”*<sup>2</sup>

American authorities claimed that they were acting in preventive self-defense, they justify the assassination of Soleimani as an act of war since they classify him as a combatant. They argue that General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region.<sup>3</sup> Under international humanitarian law (IHL), those who kill in international armed conflict cannot incur rules of criminal responsibility, but if IHL is not the applicable law because there was not a shooting war between Iran and the US, so human rights law applies, under which assassination is a murder and therefore illegal and therefore a *prima facie* breach of international law.

In addition, the invoked argument of preventive self-defense fails to justify itself as it lacks important elements such as necessity, immediacy, proportionality, and evidence to support these requirements. Moreover, this military strike lacks effective consent which means prior consent from Iraqi authorities; therefore, it constitutes a flagrant violation of the territorial sovereignty of Iraq.

US authorities have confused the rules of legal use of force (*jus ad bellum*), with those of international humanitarian law applicable in armed conflict (*jus in bello*). Under the latter set forth by article 2 (4) of the UN Charter, the use of force is prohibited unless it is in case of self-defense in conformity with article 51 of the UN Charter. In fact, the isolated acts of violence are not the kind of armed conflict that would trigger the applicability of international humanitarian law.<sup>4</sup>

In the United States, then President Gerald Ford, acting on a report from the American Senate, issued an order prohibiting assassination. The Senate had concluded that “the assassination was incompatible with American principles, international order and morality”.<sup>5</sup> The US Senate was referring to the commitment of their Constitution to both the right to life and due process.<sup>6</sup>

UN Special Rapporteur on Extra-Judicial Executions, Agnes Callamard, made this very point :*“The targeted killings of Qassim Soleimani and Abu Mahdi Al-Muhandis are most likely unlawful and violate international human rights law: outside the context of active hostilities, the use of drones or other means of targeted killing is almost never likely to be legal”*.<sup>7</sup>

One of the important principles of the UN Charter is the peaceful settlement of international disputes, set forth in article 2 (3). Iran and the US have the obligation to respect this principle, and the US, as a permanent member of the Security Council -the organ responsible of maintenance of international peace and security- has the obligation to discuss threats against it instead of using illegal force and violating the UN Charter.

### 3. Iran’s Potential Countermeasures

In this second part we will make a legal analysis as well the assessment of the Iranian potential countermeasures; the closure of the Strait of Hormuz and the enrichment of uranium.

#### 3.1 Closing the Strait of Hormuz

To prevent the threats of sanctions, Iran constantly threatens to close the Strait of Hormuz, but it has never blocked it so far. In this respect, one of the most important questions is whether Iran can do it according to applicable rules of international law. In other words, the question is whether the related practices of Iran in its territorial waters can be considered justifiable under the rules of international law and customary rules of the applicable law of the sea. This question requires a closer observation of the legal status regarding the Strait of Hormuz.<sup>8</sup>

<sup>1</sup> Mary Ellen O’Connell, The Killing of Soleimani and International Law, in Blog of the European Journal of International Law. Published on January 6, 2020 <https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/> Retrieved ON February 16, 2020.

<sup>2</sup> *Oil Platforms* (Iran v. United States), Merits, Judgement of 6 November 2003, ICJ Reports 2003, para 51.

<sup>3</sup> Ibidem

<sup>4</sup> Harry Roque, Assassination and international law, <https://opinion.inquirer.net/126609/assassinations-and-international-law>

<sup>5</sup> Harry Roque, Assassination and international law, <https://opinion.inquirer.net/126609/assassinations-and-international-law>

<sup>6</sup> Ibid

<sup>7</sup> Dave Inder Komar, The United States’ Assassination of Iranian Military Leader Violates International Law <https://www.commondreams.org/views/2020/01/04/united-states-assassination-iranian-military-leader-violates-international-law>, published on January 04, 2020 by Common Dreams

<sup>8</sup> Saeed Bagheri, Iran’s attitude, p

The previous customary regime based on 1958 Geneva convention of the territorial sea was innocent passage. Under this regime codified in section III of the 1958 Geneva convention, the rule established is that transit is innocent only so long as it is not prejudicial to the peace, good order, or security of the coastal State. The last section of the article also requires that submarines exercising the right of innocent passage navigate on the surface, showing their flag.

In contrast, transit passage, which is regulated by articles 37-44 of United Nations Convention on the Law of the Sea (UNCLOS), cannot be suspended, and not limited to innocent passage. The conditions that may be imposed by sovereign States are limited, and not subject to any real teeth. For Susan Simpson, if a ship is not engaged in any non-transit activities and complying with certain traffic and safety measures, coastal States must permit ships to pass through their territorial seas.<sup>1</sup>

The US, despite its non-ratification of the Convention, has long held that the bulk of UNCLOS's provisions are merely a codification of the International Law Commission (ILC). This includes UNCLOS's provisions regarding transit passage, as US authorities have repeatedly asserted that these norms to be a component of ILC: *...the United States... particularly rejects the assertions that the...right of transit passage through straits used for international navigation, as articulated in the [LOS] Convention, are contractual rights and not codification of existing customs or established usage. The regimes of... transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention*<sup>2</sup>. And, *(...the regime [of transit passage] applies not only in or over the waters overlapped by territorial seas but also throughout the strait and in its approaches, including areas of the territorial sea that are overlapped. The Strait of Hormuz provides a case in point: although the areas of overlap of the territorial seas of Iran and Oman is relatively small, the regime of transit passage applies throughout the strait as well as in its approaches including areas of the Omani and Iranian territorial seas not overlapped by the other)*.<sup>3</sup>

On the other hand, Iran has consistently maintained the opposite view, holding that transit passage only exists among States that have agreed to submit to that regime via ratification of an international agreement. Although Iran has not ratified the UNCLOS, it has signed the Convention, and with its signature it submitted the following declaration<sup>4</sup>:

*(Notwithstanding the intended character of the Convention being one of the general applications and of law-making nature, certain of its provisions are merely product of quid pro quo which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 VCLT, that only States parties to the UNCLOS shall be entitled to benefit from the contractual rights created therein)*.<sup>5</sup>

For Morgan Vasner, the Strait of Hormuz is by no means in international territory from the point of view of international law.<sup>6</sup> But in this respect, each party can rely on its interpretation of the articles of the 1982 UN Convention, to assert its rights, which recognize both the sovereignty of riparian States over their territorial sea even though they are in a strait<sup>7</sup> but also the obligations of these States Parties with regard to cooperation in international navigation, and the prohibition on them to suspend the right of transit passage<sup>8</sup>. However, nothing would prevent foreign vessels from taking new routes in waters of Arab States if Iran decided to close its sea-based shipping space in its portion of the Gulf.

Article 41 of the Convention allows any State Party to redefine new traffic routes in its territorial waters (it is still necessary that the conditions of safety to navigation are met, which is not always obvious in this area). Morgan Vasner thinks that the total closure of the strait of Hormuz at its narrowest point would be illegal under international law. However, in one geographical area where three of the four countries concerned (Iran, United States, United Arab Emirates), aren't signatories of UNCLOS, and thus not bound by any legal text on the question, the argument of law has little weight.<sup>9</sup>

Regarding the US transit passage rights, they are unavailable from Iranian legal opinion because the right is contractual in nature and binds the flag State of a transiting vessel and the coastal State situated along the Strait. For some Iranian officials "Some countries will grant innocent passage without issuing permit. Some

<sup>1</sup> Susan Simpson, 'Is the Strait of Hormuz Governed by Treaty or by Customary International Law?' <https://viewfrom12.com/2012/01/07/is-the-strait-of-hormuz-governed-by-treaty-or-by-customary-international-law/> January 7, 2012

<sup>2</sup> Bing Bing Jia, *The Regime of Straits in International Law*, Oxford University Press 1998. P 195.

<sup>3</sup> Hugo Caminos & Vincent P. Cogliati Bantz, « The Legal Regime of Straits. Contemporary Challenges and Solutions. Cambridge 2014. P 209.

<sup>4</sup> Susan Simpson, 'Is the Strait of Hormuz .....

<sup>5</sup> Article 34 - General rule regarding third States: "A treaty does not create either obligations or rights for a third state without its consent".

<sup>6</sup> Morgan Vasner, « Le Statut Juridique du détroit d'Ormuz : territoire international ou territoire partagé? », 12 janvier 2012 <https://www.iris-france.org/43622-le-statut-juridique-du-detroit-dormuz-territoire-international-ou-territoire-partage/>

<sup>7</sup> Article 34.

<sup>8</sup> Article 44.

<sup>9</sup> Ibid.

*countries ask warships or military vessels get permission beforehand. These are popular methods, most of countries opt one of these methods. In the Gulf, Iran and other country who is a member of the Convention require military vessels to acquire prior permission before their innocent passage. Therefore, any military vessels enter Iranian waters without permission even if they are passing innocently it has violated Iranian law. In addition, innocent passage has certain conditions and some of these vessels do not meet these conditions. They should not carry any potential threat against the coastal countries.”<sup>1</sup>*

In this regards, one author confirms the vital importance of Hormuz Strait to Iran: “*The holding of ten American sailors by Iran’s Navy in its territorial waters during passage through the Strait of Hormuz in 2016 demonstrated the strategic importance of the Strait in the region and the applicable passage regime to the Strait. In this context, Iran was able to draw the attention of the international community to the significance of its authority in the in its territorial waters one more time.*”<sup>2</sup>

Although article 38 (1) affords all ships and aircraft the right of transit passage, in the view of Iran, this regime does not capture ships and aircrafts of non-parties. For James Kraska, as a matter of treaty law, Teheran view is correct.<sup>3</sup> Article 36 (1) of Vienna Convention on the law of treaties requires that provision of treaty rights to third States arise only in the case in which treaty parties intended the provision to accord those rights.<sup>4</sup> There is no evidence that the drafters of the Third UN Conference that established the UNCLOS, contemplated according such rights to non-parties.<sup>5</sup> Teheran offered article 34 of the Vienna Convention in support of its statement. The provision states that only parties to a treaty are entitled to benefit from the contractual rights created therein. Third parties exercise no rights under a treaty unless those are specifically set forth by the terms of the agreement.

Both Iran and the US think that the law is on their side. For James Kraska, the disagreement between the two States over the application of international law of the sea in the Strait of Hormuz constitutes a legal vortex that can lead to war.<sup>6</sup> Nevertheless, he thinks that the US is not entirely correct in its claim that it enjoys unimpeded freedom of navigation through the Strait as a feature of customary international law. Because the navigational regime of non-suspended innocent passage was in force for passage through national straits long before the adoption of UNCLOS in 1982.<sup>7</sup> That means, the US enjoys only the right of non-suspended innocent passage unless it joins the Convention, and Iran is also limited to enforcement of only three nautical mile territorial sea rather than the current standard of twelve miles.

In our opinion, closing the Strait of Hormuz is a double edge weapon: Oil prices over a hundred dollars will have serious consequences for the world economy, and Iran as an oil exporting country will be in a difficult situation if the export oil is stopped.

From a legal point of view, any action to stop the flow of oil from the Gulf countries by blocking the Strait, not only will be considered a serious violation of international laws, but in practice it would be like a declaration of war.<sup>8</sup>

In conclusion, the Strait of Hormuz does not belong to Iran alone, so if it plans or takes any action aiming to close its entirety, that will necessarily be an act of force prohibited by the UN Charter, and therefore a violation of international law.

### 3.2 Uranium Enrichment

From 2006 to 2010, the UN Security Council had adopted six resolutions regarding Iran’s nuclear program as follows: July 2006 (Resolution 1696), December 2006 (Resolution 1737), March 2007 (Resolution 1747), March 2008 (Resolution 1803), September 2008 (Resolution 1835), and June 2010 (Resolution 1929). However, the Resolution 1803 acknowledges Iran’s right under article IV of the Non-Proliferation Treaty, which provides for ‘the inalienable right... to develop research, production and use of nuclear energy for peaceful purposes’.<sup>9</sup> One of the outcomes of the American withdrawal from the Joint Comprehensive Plan of Action (JCPOA) is that Iran could potentially try to enrich uranium as a possible countermeasure.

<sup>1</sup> Iran TV Discussion on Strait of Hormuz Incident. BBC Worldwide Monitoring Middle-East Political, January 13, 2008 (translating Vision of the Islamic Republic of Iran, Network 2(broadcast January 12, 2008).

<sup>2</sup> Saeed Bagheri, “Iran’s attitude to security in the Strait of Hormuz: An international law perspective. European University Institute – ResearchGate, January 2015, p. 84 [https://www.researchgate.net/publication/317091037\\_Iran%27s\\_Attitude\\_to\\_Security\\_in\\_the\\_Strait\\_of\\_Hormuz\\_An\\_International\\_Law\\_Perspective](https://www.researchgate.net/publication/317091037_Iran%27s_Attitude_to_Security_in_the_Strait_of_Hormuz_An_International_Law_Perspective)

<sup>3</sup> James Kraska, “Legal Vortex...”, p. 361.

<sup>4</sup> Vienna Convention on the law of treaties. supra note 14.

<sup>5</sup> James Kraska, p. 361.

<sup>6</sup> James Kraska, “Legal vortex, p. 326

<sup>7</sup> Id.

<sup>8</sup> Bahman Aghai Diba, Is Iran legally permitted to close the Strait of Hormuz? Yale Center for the Study of Globalization.

12:00 AM, January 07, 2012 / LAST MODIFIED: 12:00 AM, January 07, 2012 <https://www.thedailystar.net/news-detail-217263>

<sup>9</sup> Paul K. Kerry, « Iran Nuclear Program: Teheran’s Compliance with International Obligations» (<http://www.fas.org/sgb/crs/nuke/R40094.pdf>). Congressional Research Service (25 June 2015).

One year after the US withdrew from the nuclear deal and reimposed several unilateral sanctions on Iran, the value of the Iranian currency dropped significantly. The leader of Iran Ayatollah Khamenei declared: “I said from the first day: don’t trust America”.<sup>1</sup> Iran decided to take certain countermeasures. Rouhani said that Iran would resume enrichment of uranium beyond 3.67 percent if other parties could not fulfill their duties to let Iran benefit from the economic advantages of the JCPOA. Iran made this decision after all major European companies abandoned doing business with Iran out of fear of US punishment.<sup>2</sup>

According to a Middle East specialist, Iran’s strategy has changed since the end of May 2019. The country, which had respected the agreement signed in 2015 on nuclear, decided to change its strategy, seeing that the Europeans were passive and that the United States were putting in place a policy of maximum pressure. The Iranians considered them “losers” because they respected the agreement without receiving the economic benefits provided for in the same agreement. They have therefore decided to change the rules of the game by ensuring that the balance of power evolves in their favor. The incidents in the Gulf as well as the three measures put in place by Iran to get out of the agreement (like the announcement, in early September, of the restart of the advanced centrifuges whose production will increase the stock of enriched uranium produced by the country) illustrate this change in strategy.<sup>3</sup>

The 8<sup>th</sup> May 2019, Iran declared that it would suspend the enforcement of some parts of the JCPOA, threatening further action in 60 days unless it received protection from US sanctions.<sup>4</sup>

By measure of retorsion, the Iranian authorities have chosen to gradually relaunch their enrichment program:<sup>5</sup>

On 5 November 2019, Iranian nuclear chief Ali Akbar Salehi announced that Iran will enrich uranium to 5% at the Fordow Fuel Enrichment Plant, adding that it had the capacity to enrich uranium to 20% if needed.<sup>6</sup>

On January 5, 2020, by a legislation voted in the Iranian parliament,<sup>7</sup> Tehran announced the “fifth and final phase” of its plan to reduce its nuclear commitments, in response to the United States’ 2018 exit from the 2015 Vienna Agreement on Iranian Nuclear Deal (JCOPA).

As far as the rate war is concerned, enriched uranium has a rate between 3 and 5% to power nuclear reactors intended to produce energy to make a nuclear bomb. On the other hand, the uranium enrichment rate must be around 80 to 90%. According to the latest statements, Tehran expects to enrich its uranium around 4.5%.

The Iranian tactic is part of a will to pressure Europe to save the agreement, after the United States has withdrawn from it and reimposed the sanctions [against Iran], including on the oil sector. But, despite the efforts of the Europeans, Washington seems far from being in dialogue with Tehran.<sup>8</sup>

The question to be raised is whether imposing economic sanctions on a country inexorably can impede its nuclear program? The answer can be negative, North Korea had succeeded in building nuclear weapons despite series of sanctions and UN Security Council resolutions.

In fact, it will not be easy to dissuade a State if it is planning to acquire the nuclear bomb from doing so.

Kenneth Waltz thinks that, if Iran determines that its security depends on possessing nuclear weapons, sanctions are unlikely to change its mind. In fact, adding still more sanctions now could make Iran feel even more vulnerable, giving it still more reason to seek the protection of the ultimate deterrent.<sup>9</sup> He went even further when he said “*If Iran can get the nuclear bomb, that will restore stability in the Middle East*”.<sup>10</sup>

The same author had published in 1981 an essay titled, ‘The Spread of Nuclear Weapons: more May Be Better’. His argument was that nuclear weapons are revolutionary in allowing weaker nations to protect themselves from powerful ones.<sup>11</sup> He explained that: International relations is ‘a realm of anarchy as opposed to

<sup>1</sup> “Iran Warns Trump: ‘You’ve made a mistake’” (<http://www.bbc.com/news/world-us-canada-44057306>). BBC NEWS. 9 May 2018.

<sup>2</sup> Sharafedin, Bozorgmer (8 May 2019). “Iran rolls back pledges under nuclear pact abandoned by Washington” (<http://www.reuters.com/article/us-usa-iran-rouhani-idUSKCN1SE015>). Reuters.

<sup>3</sup> Thierry Coville, « L’Iran veut changer les règles du jeu avec les Etats-Unis » in Les Clés du Moyen-Orient », Interview du 3 octobre 2019. <https://www.iris-france.org/140909-liran-veut-changer-les-regles-du-jeu-avec-les-etats-unis/>

<sup>4</sup> “Iran news: Iranian President Hassan Rouhani announces partial withdrawal from 2015 nuclear deal” (<http://cbsnews.com/news/nuclear-deal-iran-announces-partial-withdrawal-2015-pact>). [www.cbsnews.com](http://www.cbsnews.com)

<sup>5</sup> Michel Fortmann, L’Iran, une puissance nucléaire : une réalité incontournable, <https://www.lapresse.ca/contexte/2021-12-19/international/l-iran-puissance-nucleaire-une-realite-incontournable.php#:~:text=International%20L%27Iran%27enrichissement%20d%27uranium.&text=La%20question%20nucl%C3%A9aire%20iranienne%20est%20de%20retour%20dans%20l%27actualit%C3%A9>

<sup>6</sup> Iran will enrich uranium to 5% at Fordow nuclear site -official (<http://www.jpost.com/Breaking-News/Iran-will-enrich-uranium-to-5-percent-at-Fordow-nuclear-site-official-606964>).

<sup>7</sup> Michel Fortmann, Id.

<sup>8</sup> Courrier International N0. 1497 11-17 July 2019 p.34

<sup>9</sup> Kenneth Waltz, “Why Iran should get the bomb”. Foreign Affairs, July August 2012, P. 1.

<sup>10</sup> Kenneth Waltz, “Why Iran should get the bomb”.

<sup>11</sup> Michael Shellenberger, « Who Are We to Deny Weak Nations The Nuclear Weapons They Need For Self-Defense? » Forbes of 6 August 2018, <https://www.forbes.com/sites/michaelshellenberger/2018/08/06/who-are-we-to-deny-weak-nations-the-nuclear-weapons-they-need-for-self-defense/#6e5ae0d0522f>,

hierarchy...of self-help...you are on your own'.<sup>1</sup>

In fact, in the Middle East region exist a fundamental geostrategic imbalance. The very existence of this nuclear power, which has lost nothing of its clandestinely, has created a fundamental geostrategic imbalance in the region, which explains Israel's impunity in its wars of conquest and occupation, even when it violates the most solemn resolutions of the United Nations. Iraq, in 1975, with the help of France, Jacques Chirac being Prime Minister, built a reactor, called Osirak, intended in principle for civilian research. It was destroyed by an Israeli air raid on June 7, 1981.<sup>2</sup>

In the same way, on September 6, 2007, Israel bombed a site in Syria where a heavy-water reactor was installed to be used to produce military plutonium, killing 10 North Korean engineers. This is an undeclared nuclear power that claims the right to maintain its monopoly on the supreme weapon in its region, without the said international community being moved.

It is worth mentioned that when India acquired the atomic weapon (first test in 1974), Pakistan decided to follow it (first test in 1998). And no one has challenged this Muslim State's right to reshape the strategic balance of the Indian continent.

Then, in a gesture of conciliation and goodwill, Iran, in 2015, agreed to give up this weapon in exchange for lifting the economic sanctions that hit it. The United States, Russia, Great Britain, China, France, and Germany have publicly signed the Joint Comprehensive Plan of Action with Iran. Israel opposed this agreement with all its strength and eloquence, because for it this agreement is bad in that it strengthens the Iranian economy and would not really prevent Iran from pursuing nuclear ambitions.

From a strictly legal reasoning, relying on the principle of sovereign equality set forth in article 2 (1), on which the UN Organization is based, Iran can claim the possession of its own nuclear arm to ensure the defense of its territory as a sovereign right in a region in turmoil.

The 1968 Non-Proliferation Treaty, as the global pact, created a system of "atomic apartheid." Five nations were permitted to have nukes—the U.S., Britain, France, China, and Russia, and the rest were not.<sup>3</sup>

These countries have pledged not to help other countries acquire it but have not renounced possession of it. They are in a way closed the door of the nuclear club behind them, which is perhaps seen as a way of ensuring their domination while hiding it behind pompous speeches on the preservation of the security of peoples.

There has never been a major war between nuclear powers. Deterrence has created a "balance of terror" that has not been broken. The United States invaded Iraq to prevent it from making the nuclear weapon, but spared North Korea, which possesses it. In 2014, Russia was able to take Crimea away from Ukraine, which renounced nuclear power after the fall of the USSR.

Although article IV of the NPT establishes the 'inalienable right' of all States Parties to develop, research and produce nuclear energy for peaceful purposes, the NPT also requires each non-nuclear weapon State Party to accept safeguards as set forth in a safeguards agreement with the IAEA.<sup>4</sup>

On the eve of the Iranian nuclear deal, jurists and scholars were wondering about Iran's right to enrich uranium domestically. Iran thinks it has an inherent right to enrichment as a signatory State to the Non-Proliferation Treaty (NPT). The P5+1 disagrees, referring to the UN Security Council resolutions against its nuclear program. Their argument is based on that the NPT does not grant non-nuclear weapon States a right to enrich uranium on their own soil.

Thus, Iran insists that the Treaty gives it the right to pursue peaceful nuclear activities, some of which require enriched uranium. The Obama administration accepts that but deny that the NPT gives them the right to enrich uranium themselves, rather than purchase it abroad US administrations predating the current one has made this argument based on the fact that the Treaty doesn't explicitly gives non-nuclear countries the right to enrich on their own soil<sup>5</sup>

Iran has the better argument here: the NPT does not contain a clause in which non-nuclear countries renounce domestic enrichment, in contrast to the article in which they renounce their right to pursue nuclear weapons. If States had a right to pursue nuclear weapons before becoming signatories to the NPT as non-nuclear States, then it is hard to argue that they did not similarly possess a right to enrich uranium.<sup>6</sup>

<sup>1</sup> Kenneth Waltz, "The Spread of Nuclear Weapons: More May Better," *Adelphi Papers*, Number 171 (London: International Institute for Strategic Studies, 1981)

<sup>2</sup> Philippe Simonnot, L'Iran a-t-il droit à l'arme nucléaire ? <https://www.lenouveleconomiste.fr/liran-a-t-il-droit-a-larme-nucleaire-75542/> Posted on 05/02/2020.

<sup>3</sup> Gordon G. Chang, "Should More Nations Have Nukes?," <https://www.hoover.org/research/should-more-nations-have-nukes>.

<sup>4</sup> N. Jansen Calamita, Sanctions, Countermeasures, and the Iranian Nuclear Issue, *Vanderbilt Journal of International Law*, vol 42, NO. 5 November 2009, p. 1399.

<sup>5</sup> Zachary Keck, "Solving Iran's right to enrich dilemma: The Taiwan Precedent". November 2013. <https://thedi diplomat.com/2013/11/solving-irans-right-to-enrich-dilemma-the-taiwan-precedent/>

<sup>6</sup> Article IV of the NPT provides that: "1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment,



### 3.3 Iran's Potential Countermeasures and International Law

Iranian current president, Ebrahim Raisi again vowed to take vengeance against the former US president Trump, against then – Secretary of State Mike Pompeo.<sup>1</sup> As well, Iranian former Foreign Minister Javad Zarif has claimed that ‘Iran does not have a timeframe for this revenge, that is an open-ended threat to the US.’<sup>2</sup>

On April 30, 2019, the Iranian Parliament voted a countermeasure law to designate American forces in West Asia – known as the United States Central Command (CENTCOM) – as a terrorist organization in a countermeasure against the US labelling Iran’s Islamic Revolution Guards Corps (IRGC) as a terrorist organization.<sup>3</sup>

The American measure is intended to allow US to impose further sanctions affecting business sector, given the IRGC in Iran’s economy. Measures from both undermine peace and are contrary to international law.

A State which uses countermeasures to penalize the other shall do so in order to avoid withdrawing, for example, from the convention binding on them, a withdrawal which "would have the effect of releasing the other party from its own obligations towards it". These measures will allow the State to protect itself from the imbalance resulting from the unlawful behavior of the other party. It could be said that it considers the State to be failing and obliges it to enforce its judgment when it exerts pressure to reach a satisfactory settlement.<sup>4</sup> To question the legality of Iranian countermeasures, we will refer to the practice of international tribunals as well as the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

1. International tribunals had recognized the legality of countermeasures in public international law. Two famous decisions are known as precursors to the recognition of countermeasures in international law. The first decision was that rendered by the arbitral tribunal of 9 December 1978 on the case the Air Service Agreement of 27 March 1946 between the United States of America and France.

In this case, the International Arbitral Tribunal decided that each State “*has the right, subject to compliance with the general rules of international law relating to armed constraints, to enforce its right by means of countermeasures*”<sup>5</sup>. It affirmed the legality of countermeasures in the framework of general international law and thus confirmed the practice of States and international organizations in this matter.

The second decision is the one issued by the International Court of Justice in the case between the United States of America and Iran, regarding the hostage taking of American diplomatic and consular staff in Tehran. The judge recognized the right of States to take countermeasures when they consider themselves wronged by another State or when they deem that a State does not respect, in general, international law.

Apart from reaffirming the legality and legitimacy of the countermeasures in that decision, the Court also demonstrated their binding nature by deciding that the United States has adopted such measures against Iran with the aim of requiring it to “*immediately cease the unlawful detention of the chargé affairs, other members of the diplomatic and consular staff of the United States*”<sup>6</sup>

2. The recognition of countermeasures in international law is controversial but they are common practices in international relations, and are prevailingly regarded as an instrument of self-help aimed at inflicting a social cost for the wrongdoing.<sup>7</sup> In the international law Commission (ILC) debates leading to the adoption of the Articles on State Responsibility in 2001, there was disagreement to whether the use of countermeasures should be recognized in any form.<sup>8</sup>

Article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) in 2001 provides that: “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter 2 of Part 3”. That means, in certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness.

Articles 49-54 enumerate the conditions of legitimate countermeasure, which consists of: a) act against an

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materials and scientific and technological information for the peaceful uses of nuclear energy.”

<sup>1</sup> 2 years after the US killed Iran’s Qasem Soleimani, tensions remain. <https://www.npr.org/2022/01/03/1069983221/2-years-after-the-u-s-killed-irans-qasem-soleimani-tensions-remain>

<sup>2</sup> Id.

<sup>3</sup> <http://www.iran-daily.com/News/251813.html>

<sup>4</sup> Hassani Mohammed Hassani, *Les contre-mesures en droit international public*. Mémoire de Maitrise, Université Cheikh Anta DIOP de Dakar - Maitrise de Droit Public 2006.

<sup>5</sup> Tribunal arbitral, sentence du 9 décembre 1978, *R.S.A.*, vol. II, 2<sup>ème</sup> partie, p. 131.

<sup>6</sup> CII, *Rec.* 1980, p. 44.

<sup>7</sup> Enzo Cannizaro, Beatrice I. Bonafé, *Countermeasures in International Law*, 2015. Oxford Bibliographies Online. International Relations. P.1.

<sup>8</sup> With respect to the debates, James Crawford, the special rapporteur for the final stage of the ILC’s efforts, observed: “Concerns regarding the provisions on countermeasures] were expressed at various levels. The most fundamental related to the very principle of including countermeasures in the text either at all or in the context of the implementation of State responsibility.” James Crawford, *The International Law Commission Articles on State responsibility: Introduction, Text, and Commentaries* 48 (2002).

international obligation; b) reversibility of the obligation; c) temporality of the measure; d) respect for peremptory norms of international law ‘*jus cogens*’ (e.g. human rights, humanitarian law, diplomatic immunities); e) proportionality f) notification and offer of negotiation.

In our humble opinion, countermeasures are a better tool for regulating international relations. Well governed by public international law, they also contribute to its development and its purpose, the balance of the international legal order, for a better world with stable and peaceful international relations.

But if we know that the resolutions of the International Law Commission (ILC) have only an incentive value, and as until then, the conclusion of an international treaty on the responsibility of States for an international unlawful act has not been reached, can we say that this legal system is effective enough?

The use of countermeasures in response to violations, far from undermining the international order, may serve to promote respect for international rule of law. As Giorgio Gaja has noted: “*Were States not even allowed to adopt countermeasures.... one would probably conclude that law rather protects the infringements of those [community] interests*”.<sup>1</sup>

#### 4. Conclusion

On August 14 2020, The UN rejected US resolution to extend arms embargo in Iran. The United States hoped to appear less alone in its strategy to combat Iran’s nuclear power. But not surprisingly, the UN Security Council rejected a US resolution to extend the arms embargo on Iran, which expires in October, angering the United States to denounce an “*inexcusable*” vote.<sup>2</sup>

In international law, the peaceful means to settle disputes set forth in article 33 of the UN Charter, is the mandatory standard in almost all bilateral, multilateral, and global instruments dealing with various political, cultural, social, economic, scientific and technical matters. Therefore, any State must exhaust all available dispute settlement procedures before taking a unilateral action or countermeasures.

As for their so-called belligerent purpose, we have seen that the purpose of countermeasures is to put an end to international illegality, to seek redress for the harm that may have resulted from this violation of international law. Countermeasures are therefore a response to an internationally illicit act. Because rather than imposing punitive sanctions, it is a matter of exerting pressure to put an end to the violation of human rights, for example, and to restore legality and compliance with international obligation. Certainly, the risk of overflow is not to be ignored. It is real but diminished by the regulation of countermeasures.

The killing of Qassim Soleimani which followed the US retreat of the JCPOA pushed Iran to proceed to some countermeasures, while it can recourse to others potentially since the confrontation with Trump administration does not seem to come to an end. With a suffocated economy because due to US sanctions, Iran was trying to stand firm. The election of Joe Biden as President of the United States brought great expectations in difficult times, so Iran thought that Washington might change its policy and officially announce a lifting of sanctions and returning to the Vienna agreement. Iran even considered these American elections an internal affair. But again, after the assassination of the country’s top nuclear scientist Mohsen Fakhrazadeh, which Iranian leader blamed on Israel, the Iranian Parliament reacted by passing a new law requiring the production and the storage of at least 120kg of 20% - enriched uranium annually. The process of enrichment has started on Monday January 4, 2021, at the underground Fordo plant.<sup>3</sup>

Beyond international law, the question remains how long the US and Iran can continue with what the other side interprets as a provocation, while keeping the economic impact low and deterrence high.<sup>4</sup>

Time is short, but it is not yet too late for both parties and other JCPOA signatories to reach a renewed agreement based on mutual compliance. That will require the US and Europe to make credible proposals on how to translate the lifting of nuclear related US sanctions into economic relief for Iran, and Iran to make a firm commitment to verifiable decline in its nuclear program.<sup>5</sup>

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