

Legal mist stokes US-Iran tensions in Straits of Hormuz

Were US warships really in international waters?

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The recent, and escalating, tension between Iran and the US in the narrow corridor of the Strait of Hormuz has once again drawn attention to the strait's international maritime status, and to the ramifications of this tension as a flashpoint in the Middle East.

In a significant raising of the temperature, US President George W Bush on Sunday accused Iran of threatening security around the world by backing militants and urged his Gulf Arab allies to confront "this danger before it is too late".

Speaking in Abu Dhabi in the United Arab Emirates during his seven-nation tour of the Middle East, Bush said the US is strengthening its "security commitments with our friends in the Gulf" and "rallying friends around the world to confront this danger". He also called Iran "the world's leading state sponsor of terror".

Tension spiked markedly last week when Iranian Revolutionary Guards Corps (IRGC) speedboats were involved in an "incident" with three US Navy vessels, which claimed they were international waters.

Yet there is no "international water" in the Strait of Hormuz, straddled between the territorial waters of Iran and Oman. The US government claimed, through a Pentagon spokesperson, Bryan Whitman, that the three US ships "transiting through the Strait of Hormuz" were provocatively harassed by the speedboats. This was followed by the Pentagon's release of a videotape of the encounter, where in response to Iran's request for ship identification, we hear a dispatch from one of the US ships stating the ship's number and adding that "we are in international waters and we intend no harm".

Thus there is the issue of the exact whereabouts of the US ships at the time of the standoff with the Iranian boats manned by the IRGC patrolling the area. According to Vice Admiral Kevin Cosgiff, the US ships were "five kilometers outside Iranian territorial waters". Yet, this is disputed by another dispatch from the US ships that states, "I am engaged in transit passage in accordance with international law."

Given that the approximately three-kilometer-wide inbound traffic lane in the Strait of Hormuz is within Iran's territorial water, the US Navy's invocation of "transit passage" harking back to the 1982 UN Convention on the Law of the Sea, (UNCLOS) is hardly surprising. [1]

Although the US has yet to ratify the UNCLOS, it has been a strong advocate of its provisions

regarding navigational rights, thus explaining the US officers' availing themselves of "international law". [2]

It is noteworthy that in May 2006, Bush urged the US Congress to "act favorably on US accession to the convention". But, in light of the legal ramifications of the US-Iran standoff in the Persian Gulf, discussed below, opponents of the UNCLOS may have become emboldened. According to them, the convention "prohibits two functions vital to American security: collecting intelligence and submerged transit of territorial waters".

However, irrespective of how Congress acts on the pending legislation on UNCLOS, the fact is that the US cannot have its cake and eat it. That is, rely on it to defend its navigational rights in the Strait of Hormuz and, simultaneously, disregard the various limitations on those rights imposed by the UNCLOS - and favoring Iran. These include the following:

1. Per Article 39 of the UNCLOS, pertaining to "duties of ships during transit passage" US ships passing through the Strait of Hormuz must "proceed without delay" and "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait".

2. Per Article 40, "During transit passage, foreign ships may not carry out any research or survey activity without the prior authorization of the states bordering the straits." And yet, by the US Navy's own admission, it has been conducting sonar activities in the area, to detect submerged vessels. This, in turn, has harmed the Persian Gulf's aquatic mammals. In light of a recent US court ruling limiting the US Navy's sonar activities off the California coast, Iran now has greater political leverage to seek information regarding the activities of US warships transiting through its territorial waters.

3. Given the US's verbal acrobatics, of trying to depict as "international waters" what is essentially Iran's territorial water in the inbound traffic channel of the Strait of Hormuz, it collides with Article 34 of UNCLOS. This regards the "legal status of waters forming the straits used for international navigation", that strictly stipulates that the regime of passage "shall not affect the legal status of the waters forming such straits". Following the UNCLOS, Iran's territorial water extends 12 nautical miles at the Strait of Hormuz.

4. The Pentagon videotape of the incident shows a US helicopter hovering above the US ships, which is in clear contradiction of Article 19 of the UNCLOS, which expressly forbids "the launching, landing or taking on board of any aircraft" during transit passage.

5. Article 19, elaborating on the meaning of "innocent passage", states that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state". And that means a prohibition on "any exercise or practice with weapons of any kind" and or "any act of harmful and serious pollution".

In other words, US warships transiting through Hormuz must, in effect, act as non-war ships, "temporarily depriving themselves of their armed might". And any "warning shots" fired by US ships at Iranian boats, inspecting the US ships under customary international laws, must be considered an infringement on Iran's rights. This technically warrants a legal backlash in the form of the Iranians temporarily suspending the US warships' right of passage. Again, the US could be technically prosecuted by Iran in international forums for conducting questionable activities while in Iranian territorial waters.

6. Under Article 25 of the UNCLOS, a “coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent ... the coastal state may suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its of security, including weapons exercise.”

7. Per Article 30, “If any warship does not comply with the laws and regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal state may require it to leave the territorial sea immediately.”

8. Pursuant to Article 42 of the UNCLOS, “states bordering straits may adopt laws and regulations relating to transit passage” and “foreign ships exercising the right of transit passage shall comply with such laws and regulations.” In this connection, Iran’s 1993 maritime law echoes Article 20 of the UNCLOS: “In the territorial sea, submarines and other underwater vehicles are required to navigate on surface and to show their flag.” Yet, disregarding both international law and Iran’s laws, the US Navy until now has refused to comply with the requirement of surface passage of its submarines through the Strait of Hormuz.

In light of the above, the Strait of Hormuz has now turned into a most fertile source of tension and conflict between Iran and the United States, touching on the larger issue of international law of the sea and the navigational regime through the strait(s).

Iran could conceivably use its privileged geographical position to tap into the complex set of rules pertaining to the navigational regime, as a form of (geo) political leverage to wring concessions from the US Navy, and its regional allies, with respect to security and maritime affairs of the Persian Gulf.

Notes

1. The UN Convention on the Law of the Sea strikes a balance between the sovereign rights of coastal states and the right of passage of foreign ships, requiring concessions from both sides. It prohibits passing ships from “any act aimed at collecting information or use and threat of force”.

2. The Iranian press have complained of the US’s intention to use the man-made, artificial islands by the United Arab Emirates for military purposes, to complement the US’s forward base in Diego Garcia in the Indian Ocean. They wonder if this has been one of the unstated purposes of Bush’s visit to the region, given the brisk operational tempo of the US Navy with regard to Iran. This includes the US’s plan to implement the provisions of its multilateral PSI (Proliferation Security Initiative) , such as ship interdiction, already exercised with regard to North Korea, with respect to Iran. Yet, the PSI initiative collides head-on with the UNCLOS-based limitations on the US Navy’s activities in the semi-landlocked Persian Gulf and, especially in the Strait of Hormuz, discussed in this article.

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