



Policy Forum 08-013: U.S. Hypocrisy in the Strait of Hormuz?



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U.S. Hypocrisy in the Strait of Hormuz?

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By Mark J. Valencia

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I. Introduction

Mark J. Valencia, a Maritime Policy Analyst and Nautilus Institute Associate, writes, "But if the mighty U.S. Navy vessels truly felt threatened by the lightly armed speedboats, then they should have argued they were engaging in self-defense or have even taken the issue to the UN Security Council. But to claim and pursue transit passage in a provocative manner while refusing to ratify the Convention-and then crying 'foul' --smacks of hypocrisy or worse."

The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Nautilus Institute. Readers should note that Nautilus seeks a

diversity of views and opinions on contentious topics in order to identify common ground.

II. Article by Mark J. Valencia

- "U.S. Hypocrisy in the Strait of Hormuz?"

By Mark J. Valencia

The dangerous 6 January 2008 incident involving three United States (US) naval vessels and five Iranian Revolutionary Guard speedboats in the Strait of Hormuz was probably at least partially a result of an ongoing Iranian-US dispute over applicable law of the sea. The US claimed that Iranian speedboats, apparently under the command of the Revolutionary Guard, threatened the US naval vessels while they were engaged in what the US claimed was transit passage.

The Strait of Hormuz is bordered by Iran and Oman. Oman is one of 155 state parties to the 1982 UN Convention on the Law of the Sea (Convention).(1) Iran has signaled its support of the Convention by signing it. However, it has not yet ratified or acceded to it, and is thus is not bound by it.(2) The US remains the only maritime power opposed to the Convention; it did not sign it and is not a party to it. The Convention entered into force on 16 November 1994.

It is important to understand the different interpretations of international law regarding Iran's maritime claims in the Strait. The 1982 Convention allows a coastal State to draw straight baselines along an indented coastline and to claim a 12 nautical mile (nm) territorial sea from these baselines. Iran claims straight baselines along its coast bordering the Strait and from these baselines a 12 nm territorial sea encompassing the northern third of the Strait and the in-bound designated sealane. It also claims three islands just west of the Strait and 12 nm territorial seas around them encompassing much of the navigable waters and both the inbound and outbound designated sealanes. Although the exact location of the incident has not been published, at some point in their passage into and through the Persian Gulf US warships apparently must pass through Iranian-claimed territorial sea.

Iran's publicly declared position is that countries which are not parties to the 1982 Convention, like the US, cannot avail themselves of the transit passage regime in the Strait. Iran claims that the innocent passage regime applies to vessels of such States moving through its territorial sea and that passage of all warships through Iran's territorial sea requires prior authorisation (the latter provision is not consonant with the Convention). Oman recognises only innocent passage through the Strait for all countries. For both the innocent passage and transit passage regimes, a coastal State has the right to adopt laws and regulations to enhance safety of navigation and regulation of maritime traffic (Articles 21, 42).

The US does not recognise some of Iran's straight baselines along the Strait, arguing that Iran's coast is not indented nor fringed with islands in that area as required by the Convention to use straight baselines (Article 7). That means that the US does not recognise the full extent of Iran's claimed territorial sea in the Strait. Moreover, it may not recognise Iran's claim to the disputed islands west of the Strait and thus Iran's territorial waters claimed therefrom.

Although the US has refused to become a party to the Convention, despite pleas from many developing countries as well as US allies, it insists that the Convention's provisions on freedom of navigation, including transit passage through such straits, are customary international law. More specifically, it states that 'it is generally agreed that transit passage is a right of all states under international law'.(3) This is certainly debatable. Many developing countries argue that the Convention was negotiated as a package trading off provisions regarding preferential access and sharing of seabed resources beyond national jurisdiction for freedom of navigation, transit passage

and archipelagic sealane passage for maritime powers. In particular, in the negotiations leading to the Convention, the US agreed to a 12 nm territorial sea in exchange for the transit passage regime. There was no such 'transit passage regime' before it was stipulated and detailed in the Convention. The pre-existing regime was one of innocent passage in territorial seas.(4)

There are significant differences between the two regimes. The transit passage regime provided in the Convention states that 'transit passage means the exercise in accordance with [the Convention] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait' (Article 38(2)). Transit passage cannot be impeded, hampered or suspended (Articles 42, 44).

However, innocent passage is a more restrictive regime. Such passage cannot be prejudicial to the peace, good order and security of the coastal State. If a warship violates the innocent passage regime and, upon notification of the violation, refuses to comply, it can be requested to leave the territorial sea immediately. Of particular relevance here is that a vessel in innocent passage cannot exercise or practice with weapons, launch or land aircraft, or undertake any research or survey activities (Articles 19, 30).

The US deliberately and repeatedly challenges Iran's claims through 'operational assertions' of the freedom of navigation. In this latest incident, the lead vessel, the US Hopper, made a broadcast stating 'I am engaged in transit passage in accordance with international law'. Thus it initially claimed transit passage - over the standing objections of Iran and Oman.

If the innocent passage regime applies, the US has probably violated it, perhaps frequently. Video of the incident shows a US helicopter hovering above the US ships. This apparently contradicts the prohibition on the launching or landing of aircraft (Article 19(2)(e)). In an earlier incident, the US Whidbey Island reportedly fired warning shots at an approaching small Iranian boat. If true, this would also violate the Convention's innocent passage prohibition on 'any exercise or practice with weapons of any kind'. Iran also alleges that US Navy vessels frequently conduct survey activities of submerged wrecks during passage through the Strait. Yet this is prohibited by both the innocent and transit passage regimes.

In the 6 January incident, the US alleged that the Iranian 'high speed boats charged at and threatened to blow-up the Navy convoy'. The US war ships nearly opened fire on the speedboats. Subsequently, the US admitted that the audio threat may not have come from the speedboats or even the Revolutionary Guard. Iran's Defence Minister Mohammed Najjar said that 'the identification of vessels passing through the Strait of Hormuz by Iranian Navy Units is a natural occurrence. Islamic Republic of Iran Navy units always put questions to passing vessels and warships at the Strait of Hormuz and they need to identify themselves. This is in accordance with normal procedures. Navy units asked them to identify themselves. They responded accordingly and continued their path'.(5)

The reality is that there is not much Iran can do about what it perceives as the illegal and provocative behavior of US naval vessels. If the US was a party to the Convention, it could seek to have the dispute adjudicated, most likely by the International Tribunal for the Law of the Sea. But of course, if the US had ratified the Convention it would also be entitled to the more liberal transit passage regime. It would be helpful if the Tribunal, in a relevant case, expressed its view as to whether non-State parties have the right to transit passage. Meanwhile, not wanting to have a violent confrontation by actually denying passage to US naval vessels and requiring them to leave its territorial sea, Iran has apparently chosen to simply identify such vessels as part of its regulations enacted under its innocent passage regime. But the US Navy vessels consider this harassment or even perhaps 'hampering' of its claimed transit passage through the Strait. So far, superior 'might

makes right'.

But if the US believes that its naval vessels were truly 'innocent' and that they were threatened or even attacked by the lightly armed speedboats, then they should have taken the issue to the UN Security Council for its guidance and support regarding Iran's actions. But to claim and pursue transit passage for its warships in open defiance of Iran's maritime claims while refusing to become a party to the Convention-and then to cry 'foul'-appears hypocritical or worse, i.e. a purposeful provocation.

Given these starkly different positions, the increasingly provocative actions by both sides and the accompanying shrill rhetoric enhance the danger of an incident escalating into open conflict. The establishment of a hotline between Washington and Tehran or their respective relevant military commands might help avoid unintended incidents or their escalation. Even better would be an 'incidents at sea agreement' or at least a mutual understanding of each other's rules of engagement that could minimise the number of incidents or avoid their unintended escalation into broader conflict.

III. Works Cited

1. Upon signing the Convention in 1983, Oman made the following declaration under Article 310: 'It is the understanding of the Government of the Sultanate of Oman that the application of the provisions of articles 19, 25, 34, 38 and 45 of the Convention does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interest of peace and security.' Upon its ratification of the Convention in 1989, Oman made a number of declarations, including the following: 'Innocent passage is guaranteed to warships through Omani territorial waters, subject to prior permission.' See <http://www.un.org/Depts/los/index.htm> .
2. Upon signing the convention in 1983, Iran made an 'interpretative declaration on the subject of straits'. This included the statement that it considers 'that only states parties to the ... Convention shall be entitled to benefit from the contractual rights created therein', including the right of transit passage. It also viewed international law as implicitly recognising 'the rights of the Coastal States to take measures to safeguard their security interests including the adoption of laws and regulations regarding, inter alia, the requirements of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea.' See <http://www.un.org/Depts/los/index.htm> .
3. See US Department of State, 'Iran's Maritime Claims', Limits in the Seas, No. 14 (1994), p 24. Available at: <http://www.law.fsu.edu/library/collection/LimitsinSeas/ls114.pdf>
4. See, eg, Churchill, R.R. and Lowe, A.V. 1999. The Law of the Sea (3rd ed). (Manchester University Press).
5. Associated Press, 'Bush warns Iran after naval incident', 10 January 2008.

IV. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: napsnet-reply@nautilus.org . Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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Nautilus Institute
608 San Miguel Ave., Berkeley, CA 94707-1535 | Phone: (510) 423-0372 | Email:
nautilus@nautilus.org