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Legality of Iranian Gunboat Harassment & the Rules of Engagement under International Law

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ABSTRACT

The relations between the two powerful nations of the world, the USA and Iran have been strained since 1980's. Whether it's Iran- Iraq War of 1980, or the recent killing of IRGC's General Soleimani, it has worsened to an extent that experts see a possibility of war between both countries in the coming time. This is the latest event which took place in the International waters of the Persian Gulf, where Iranian gunboats traversed the US Naval ships several times from a very close distance. The US, on the other hand claims such perusal as 'an act of harassment and danger' within the high seas.

The legal dimension of this event includes the legality of the 'hot pursuit' by the Iranian gunboats and right to use of armed

force in self-defense by the UN Navy ships. Though the right to defend one under the perspective of the International law is a highly controversial issue due to the vagueness and over- broadness of the provisions, it in the present situation US used its mechanism in consonance to both international as well as municipal laws. This article focuses on some of the legal aspects of this event, particularly from the viewpoint of US's engagement rules pertaining to its right to self-defense in international waters.

INTRODUCTION

The genesis of the issue starts from April 15, 2020, when eleven Iranian Islamic Revolutionary Guard Corps (IRGC) Navy gunboats repeatedly traversed six US Navy vessel that were in the process of conducting joint integration operation with the US army Apache fighter helicopters in the International waters of the Persian Gulf. It has been claimed by the US Navy that the Iranian gunboat's repeated crossing at an extremely close range, some as close to 10 yards was dangerous and harassing. In the backdrop of the same US president Donald Trump instructed the Navy to use the

approach of ‘shoot down and destroy’ against such IRGC Navy gunboats. This is the most overt threat of ‘armed action’ against Iran since the targeted killing of its Major General Qassem Soleimani, the former military commander of IRGC armed forces, earlier this year. In this article, the author discusses about the legality of Iran’s pursuit of US ships in International waters and whether the US warships have a right under International law to use force in defending their ships against IRGC gunboats for which the main focus will be in examining the US military Standing Rules of Engagement, which provides for the operational structure for any defensive actions by the US forces in sea, including warships too.

CRITICAL ANALYSIS

A. Legality of Iran’s pursuit of US Navy Ships

The preliminary question which needs to be answered here is whether Iran violated the provisions of International law by engaging in ‘Hot Pursuit’ of the US Navy Ships? As per Article 111 of the United Nations

Convention on the Law of Sea (UNCLOS)¹, the hot pursuit of a foreign ship can be undertaken by the competent authorities of the coastal state if they have a good reason to believe that the ship has violated the laws and regulations of that particular state. Moreover, it also states that if any foreign ship is within the zone which is contiguous, the pursuit can only be undertaken if there has been a violation of the rights for the protection of which the zone was established. In the present case, it is not a disputed fact that the US ships were in contiguous zone when they were repeatedly transverse. However, considering the fact the principle of hot pursuit in the contiguous zone can only be done under exceptional circumstances like to prevent the infringement of ‘customs, fiscal, immigration or sanitary law, the legitimacy of the actions of the IRGC’s gunboats in pursuing the US ships in this context is questionable.

B. Use of Armed Force on the pretext of Self-defense: International Perspective

To be lawful, any instance of use of force by the US forces in the pretext of self defence against the Iranian military must comply with the standards of law on the use

¹UN General Assembly, ‘Convention on the Law of the Sea’, 10 December 1982, 1833 U.N.T.S. 397’, art.111. Available at:

<https://www.refworld.org/docid/3dd8fd1b4.html> [accessed June 5, 2020].

of force i.e. jus ad bellum. The UN Charter under Chapter VII authorizes the use of armed actions against another state.² In the present case, engaging IRGC Navy gunboats would have to be based on the law of self-defense enshrined in Article 51 of the Charter³ and its customary international law counterpart. It possesses an inherent right of individual as well as collective self-defense if an armed attack against a member of the UNs, until the Security Council has taken measures necessary to maintain international peace and security. However, an armed attack without the imminent necessity of self-defense otherwise violated the International law leading to penal crime.⁴

C. US's viewpoint on the whole event

The USA has contended two viewpoints in interpretation the application of Article 51 and customary international law pertaining exclusively to the gunboat incident. Firstly, it rejected the prevailing view articulated by ICJ in Nicaragua judgment⁵ that 'the recourse of armed attack in the sovereign land of other state is only and exclusively limited to the gravest forms of use of force'.

²*Id.*, Chapter VII.

³United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art.51. Available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed June 4, 2020].

⁴United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art.2, cl. 4. Available

Rather US emphasized the ruling of ICJ in Oil Platform decision,⁶ where the court refused to exclude the possibility that the mining of a single military vessel might be sufficient to bring into action the inherent right to self. In this case, so long as the Iranian actions qualify as a use of force, the US is of the opinion that it gives them a lawful right to respond with its own use of force in defense.

Secondly, although on the face of it, Article 51 is applicable only to an ongoing armed attack, the US has contended the anticipatory application of the same in response to an imminent attack. It is indeed, a universally accepted principle in International law but leaves a grey area as to what exactly counts as imminent. The clearest and most up to date articulation of the US interpretation of imminent is mentioned in the 2016, White House's Legal and Policy framework report. Various factors are considered in determining the question of imminency of an attack such as the nature and immediacy of the attack, probability of an attack, scale of damage, loss likely to occur in absence of such action, whether anticipated attack is just a

at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed 20 May 2020].

⁵*Nicaragua v. United States*, 1986 ICJ 14.

⁶*Islamic Republic of Iran v. USA*, ICGJ 74 (ICJ 2003).

part of a concerted pattern of continuing armed activity.⁷ However here the author believes that such subjective satisfaction is not sufficient enough to deem the use of force in self- defense lawful rather a more suitable test should be whether the defensive action is taking place in the moment of the last possible window of opportunity in the face of an attack that was almost certainly going to occur.

D. The Standing Rules of Engagement: National Perspective

To apply the International law of self-defense, the US has incorporated municipal law by way of promulgating the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement (SROE) was issued in 2005.⁸ They are basically the standing rules in the sense that they remain in force during all military operations as well as contingencies occurring outside the territorial jurisdiction of US, also during air and maritime homeland defense mission

inside its territory, national airspace or territorial waters unless otherwise directed. It classifies an ongoing and imminent threat as 'hostile act'⁹ and 'hostile intent'.¹⁰ While the former represents 'a direct attack or any kind of use of force' against the US states, forces or other designated person or property, the latter is the operational version of anticipatory self- defense.

The determination of imminence is always contextual based on an overall analysis of all facts and circumstances known to US forces at that given point of time. The SROE, 2005 added that imminent does not necessarily mean immediate, in response to the so- called Bush Doctrine Bush doctrine set forth in the 2002 National Security Strategy.¹¹ This addition merely recognizes that the commander –in- charge need not to wait until the attack is on the cusp of execution before defending the unit. SOER as well as the Department of Defense Law of War Manual also incorporate the doctrines of necessity and proportionality into its analysis.¹² With respect to

⁷"REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS", (December 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf

⁸CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, 'STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES', (13 June 2005),

https://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch5.pdf

⁹*Id.*, Part E, rule 2, cl. (c).

¹⁰*Id.*, rule 2, cl. (d).

¹¹'The National Security Strategy of the United States of America', (September 2002). <https://2009-2017.state.gov/documents/organization/63562.pdf>.

¹²Department of Defense, 'Law of War Manual' (June, 2005). <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

proportionality, SOER accurately defines a proportionate use as use of force which is sufficient enough to respond decisively to the hostile act or demonstrations of hostile intent. It might exceed the means, intensity of the hostile act but the nature, time period and the extent should not be overbroad.¹³ The DOD Law Manual takes the similar approach on the same. The SROE can also be supplemented with the tailored 'mission-specific' rules of engagement to facilitate the accomplishment of any particular operations or missions, including during the actual hostilities.¹⁴ They are further classified as they revealed the tactics, techniques and procedures (TTP) to those against whom force might be used.

E. Categorical Classification of Self-Defense in the SROE

The SROE recognize three categories of self-defense which are- national, unit and individual.¹⁵ The difference lies in the level of authority and responsibility at which the self-defense is exercised. National self-defense is that of the nation of US, its forces and in certain situations includes their subjects and property against the hostile acts of hostile intent. It may be exercised by

lawful authorization but it is seen that in contrast, the commandants always have the inherent right which extends to their units, warships, and aircrafts. Despite asserting that unit self-defense has a distinction of legal basic from that of national one the author feels that there is only a quantitative difference and no qualitative difference between responses of a single unit and the entire military in doing so as the legal basis of their responses is the right to self-defense in the wake of an armed attack. Unless otherwise directed by a commander, SROE also permits the individual self-defense and is considered a subset of unit self-defense and hence form the same basis in international law. The author is going to focus particularly on the 'Unit self-defense' as it is contended by the US in the present situation.

F. Requisites of Unit Self-defense

At the unit level, the SROE's '*de-escalation principle*' is designed to satisfy the necessity¹⁶ and proportionate¹⁷ criterion. It provides that when time and situation permits, the hostile state should be warned and given the opportunity to step back. Of course, it cannot be denied that

¹³ Supra note 8, Enclosure A, Part 4, cl. (3).

¹⁴ Department of Peacekeeping Operations Military Division, 'Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations', MD/FGS/0220.0001 (May 2002).

https://www.aaptc.asia/images/resourcess/9_RULE_S_OF_ENGAGEMENTS/120_ROE_Guidelines.pdf

¹⁵ Supra note 8, Part E, rule 2.

¹⁶ Supra note 8, Enclosure A, Part 4, cl. (2)

¹⁷ Supra note 13.

whether forces are demonstrating hostile intent and whether de-escalation should be attempted can be an extraordinarily arduous. Consider this example of 1987 Iran-Iraq war, which involves a commander's subjective discretion to employ force in unit self-defense. US Navy lost around 37 of its personnel due to air strike launched against USS Stark. The ship had identified the Iraqi jet for 70 miles out and issued warning as it approached closer. The investigation by the House of Representative Armed Committee¹⁸ in this matter revealed that the de-escalatory measure prior to the exercise of self-defense likely played a major role into the commander's hesitancy to defend his/her ship. On the contrary, in 1988 near the end of this war, the US air force shot down Iran Air Flight 655, a civilian passenger aircraft, mistakenly identifying it as a combat aircraft operating in an attack profile leading to the death of 290 people on board.¹⁹

SROE equally emphasis on the principle of proportionality, even when the use of force becomes necessary, the nature duration and extent of force should not be excessive. Any overbroad use of force would amount to an unlawful use of force. However, it is

difficult to compute the exact degree of necessary to do so and hence author thinks that a margin of appreciation should be given. The point author wants to bring out is simply the intricate nature of the 'subjective satisfaction' in such kind of decision pertaining to use of force in self-defense.

G. Response to Iranian Harassment

There was no event of firing on the ICRG gunboats considering the fact that they came within 10 yards of a warship. This was in pursuance to the directives of SROE and principles of international law. Even the Iranian gunboats did not attack the navy ships or the helicopter and hence there was no 'hostile act' as that term is understood in SROE. On the same line the calculated decision of the commander in characterizing their operation as a demonstration of hostile intent and thereby preparing for an anticipatory response in self-defense in pursuant to SROE considering the fact that the Iranian gunboats were armed and the tension between US and Iran is quite acute.

Coming to the US president Donald Trump's directive to shoot down and destroy ICRG Navy gunboats, whether US

¹⁸Report of The Staff Investigation into the Iraqi Attack on the USS Stark of the Committee on Armed Services House of Representatives', One-Hundredth Congress, 1st Session (June 1987).

<https://babel.hathitrust.org/cgi/pt?id=uc1.31210014708372&view=1up&seq=8>

¹⁹<https://www.nytimes.com/2020/01/11/world/middleeast/iran-air-flight-655-history.html>

forces will be justified if they do so depend on circumstances leading to the same. The Commander must conclude that a hostile act has been committed and use of force is the only way left to disable the attack once it is imminent and that the degree of force is proportionate to achieve that legitimate aim.

Finally, coming to the claims that Iranian gunboats activities involved 'dangerous and harassing approaches' whether that endangerment alone can constitute a use of force? All determinations pertaining to hostile intent and acts are contextual in applying the SROE, but generally it would not give rise to an imminent armed attack and would not be categorized as a demonstration of hostile intent without a clear indication that the gunboats were about to use their weapons against US warships.

CONCLUSION

From the above discussion it can be concluded that the act of ICRG gunboats in pursuing the US ships in International water can be considered a violation of law of seas which in return gives lawful right to the US Navy, both in international law as well under SROE in employing force against ICRG gunboats. Clearly harassment that does not clearly risk imminent harm to life or property does not open the channel of

self-defense under law. If the president would have threatened to engage in armed attack at any threshold below the requirements of imminency and necessity, the threat to use force itself would be violative of the UN Charter and its customary international law counterparts. The author believes that there is a burning need to change the provisions pertaining to use of force in pretext of self-defense as firstly, the binding value of international law is practically nil especially when a powerful nations are involved and hence it is more likely to be abused and secondly, it leaves a scope of numerous interpretations due to its overbroad language which in turn can also be used in one's favour and therefore needs to be amended soon considering the rapid change in the dimensions of international relations in today's era and near future.