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Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers

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Introduction

Once again, tensions are mounting in the Persian Gulf and the Strait of Hormuz. In response to Western powers' import bans on Iranian oil and warnings of other sanctions against Iran because of its nuclear program, Iran has threatened to block the passage of oil tankers through the Strait of Hormuz. The United States in turn has increased its naval presence in the Strait of Hormuz, ostensibly in an exercise of its "transit rights of passage" under the law of the sea.

One-fifth of the world's oil and ninety percent of Persian Gulf oil is transported through the Strait. Iran could blockade it by laying mines across the Strait, which according to experts could be completed within a matter of hours. Closing the Strait of Hormuz would send oil prices skyrocketing and, in this period of serious economic distress in Europe and the United States, could have severe long-term impact on economic recovery. It could also ignite and spread hostilities in the region.

The question this *Insight* will address is whether under international law Iran can block the passage of merchant vessels through the Strait of Hormuz. The regime of passage through international straits was one of the key issues in the negotiations of the 1982 United Nations Convention for the Law of the Sea ("UNCLOS").[1] The Strait of Hormuz presents an interesting legal situation. On the one hand, Iran has signed but not ratified the UNCLOS, but it has ratified the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. On the other hand, Oman, the other coastal state, has ratified UNCLOS. Both Iran and Oman, however, subject the passage of foreign warships to prior notification. The United States has not signed UNCLOS but considers it to reflect customary international law.

The Strait of Hormuz: A Vital Strategic Global Chokepoint

There are several chokepoints in the world that are critical for the global transport of oil.

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According to the U.S. Energy Information Administration ("EIA"), "chokepoints are narrow channels along widely used global sea routes. . . . They are a critical part of global energy security due to the high volume of oil traded through their narrow straits."[2] In terms of the volume of oil being transported, the EIA identified the Strait of Hormuz as the most important oil chokepoint.

Iran and Oman border the Strait of Hormuz, which connects the oil-rich Persian Gulf with the Gulf of Oman and the Arabian Sea. In 2011, nearly seventeen million barrels of oil were transported daily through the Strait, making it somewhat of a "golden horn." The volume of oil transported through the Strait of Hormuz in 2011 amounted to about thirty-five percent of all seaborne traded oil, or almost twenty percent of oil traded worldwide.[3]

Source: U.S. Energy Information Administration 2011

International Law of Straits

a. *Legal Rights of Passage*

As the narrowest point of the Strait of Hormuz is twenty-one nautical miles, all vessels passing through the Strait must traverse the territorial waters of Iran and Oman. The rights of passage for foreign vessels under international law will consequently be subject to either the rules of non-suspendable innocent passage or transit passage depending on the applicable legal regime, as discussed below.

The legal regime of passage through straits was first addressed in the landmark *Corfu Channel* case, which also happened to be the first case brought before the International Court of Justice ("ICJ"). The ICJ confirmed the customary international law rule, used in international navigation, that foreign warships have the right of innocent passage in straits during peacetime.[4] This rule of non-suspendable innocent passage for all vessels was subsequently codified in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone ("1958 Geneva Convention").[5] Essentially, this meant that during peacetime the coastal state could only prohibit the passage of any foreign-flagged vessel if its passage was non-innocent.

Until the Third United Nations Law of the Sea Conference ("UNCLOS III"), the passage regime used in international navigation was "non-suspendable innocent passage" in territorial waters of a coastal state and freedom of passage in the high seas. However, during UNCLOS III, efforts to increase the breadth of the territorial sea from 3 nm to 12 nm

brought strong opposition from the maritime powers, especially the United States. The United States refused to accept the diminution of high seas freedoms in straits—over which coastal states had no legal rights to regulate passage or activities—that would result from a 12-nm territorial sea. If accepted, the 12-nm territorial sea would reduce the area of high seas freedom of passage in several important straits used in international navigation and replace it with the more restrictive innocent passage regime. Ultimately, a compromise was reached with the creation of the new transit passage regime for vessels and aircraft. The compromise preserved open corridors of unimpeded passage for vessels and offered the littoral state more regulatory rights over foreign-flagged vessels than it could exercise over the high seas but less than provided by the customary right of innocent passage in the territorial sea.[6]

However, some questioned the adequacy of the transit passage regime to satisfy U.S. national security needs, a maritime power with strong interests in safeguarding freedom of high seas passage.[7] Concerned over possible restrictions on navigational rights in areas beyond 3 nm, in 1979, the United States established the Freedom of Navigation Program. Since then, the United States has actively defended its navigational rights in zones where it has deemed maritime claims excessive, as well as in important strategic straits such as Hormuz, Malacca, and Gibraltar.

b. Innocent Passage Versus Transit Passage Rights

When signing UNCLOS, Iran declared that it would apply the transit passage regime only to those states that had ratified the convention. As to other states, such as the United States, it would apply the provisions of the 1958 Geneva Convention. Importantly, regardless of the differences between these two rules of passage, both instruments prohibit the unjustified blocking of passage of all vessels.

According to UNCLOS, the transit passage regime applies to “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”[8] Iran, by its own declaration, is obliged to respect the transit passage rights of all vessels flying the flag of states party to UNCLOS, both commercial and military. Likewise, these ships, including foreign-flagged military vessels engaged in transit passage through the Strait of Hormuz, must abide by the applicable provisions of UNCLOS, customary international law, and the United Nations Charter.

What then are the rights and duties of the coastal state and of vessels in the Strait of Hormuz? Transit passage is defined as the “exercise . . . of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the straits between one of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zones.”[9] Furthermore, all ships and aircraft enjoy the rights of unimpeded transit passage.[10] As for coastal states, UNCLOS Article 44 provides that “States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.” The UNCLOS III compromise gave the coastal states authority to establish sea lanes or traffic separation schemes in straits, subject to the agreement of other states that border the strait and after submission to and adoption of the scheme by the competent international organization, i.e., the International Maritime Organization (“IMO”).[11]

Ships and aircraft also have obligations. According to UNCLOS Article 39 (1), ships engaged in transit passage must proceed without delay; refrain from activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure*; refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of states bordering the strait; and refrain from acting otherwise in violation of the principles of international law embodied in the Charter of the United Nations.[12]

The next question is assessing what implications there might be for Iranian actions as a result of the differences between the UNCLOS transit passage and non-suspendable innocent passage. Both regimes require that passage be "continuous and expeditious." UNCLOS Article 19, which is identical to Article 14(4) of the 1958 Geneva Convention, defines "innocent passage" as passage that is not prejudicial to the peace, good order, or security of the coastal state. The 1958 Geneva Convention provides that the coastal state cannot suspend innocent passage rights in straits. In addition, UNCLOS provides specific examples of non-innocent passage that are not in the 1958 Geneva Convention. These include, *inter alia*: the threat or actual use of force against the sovereignty, territorial integrity, or political independence of the coastal state, or in any other manner in violation of the United Nations Charter; using or even practicing with weapons; intelligence gathering; acts of propaganda; or launching, landing, or taking on board any aircraft or military device.[13] In such cases of *non-innocent* activities, the coastal state can prevent passage.

The status of passage rights during armed conflict is not expressly provided for in either UNCLOS or the 1958 Geneva Convention. The relationship between UNCLOS and the law of naval war remains unclear. However, one can look to past practice, such as in the Persian Gulf operations in 1990 when the U.S. Navy—recognizing the application of the transit passage regime—did not intercept vessels in the Strait of Hormuz.[14] During the extended armed conflict between Iran and Iraq in the 1980s, the Strait of Hormuz was part of the larger zone of combat, and merchant vessels were attacked by both sides. The UN Security Council adopted a resolution condemning the attacks on merchant vessels at the time.[15]

Use of Force and Closure of the Strait of Hormuz

If Iran were to lay mines across the Strait of Hormuz to block the passage of merchant vessels and warships, absent justification this would amount to an unlawful use of force in violation of customary international law and the United Nations Charter.[16]

On the other hand, what if Israel or the United States were to launch an attack against Iranian nuclear facilities without the authorization of a resolution adopted by the UN Security Council? Would this give Iran the legal justification to block the Strait of Hormuz by laying mines or creating a naval blockade? The laws of naval warfare are found principally in customary international law, best reflected in the San Remo Manual.[17] The rights of self-defense are limited by the rules of necessity and proportionality. Minelaying against all merchant vessels would likely not be considered necessary nor proportionate action in this case.[18]

Conclusion

If Iran were to carry out its threat of blocking the passage of oil tankers through the Strait of Hormuz in response to Western economic sanctions, this would amount to a violation of international law by interfering with the rights of transit passage under UNCLOS as well the

rights of non-suspendable innocent passage under the 1958 Geneva Convention. The imposition of economic sanctions bears no relationship to the physical act of passage of vessels through the Strait of Hormuz. The legal right of a coastal state to prevent transit or non-suspendable innocent passage of ships is limited to acts that take place while the ship is in engaged in passage through the strait that constitute a threat or actual use of force against the sovereignty, territorial integrity, or political independence of states bordering the strait, or acting in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.

On the other hand, if any state were to attack Iranian territory without a decision of the UN Security Council, the question would arise whether the provisions for transit passage under UNCLOS would continue to apply or whether Iran could invoke the laws of war and take action against tankers, especially if they are deemed to be assisting the "enemy." However, even if the customary laws of naval warfare were to apply in lieu of the right of unimpeded transit passage, any self-defense claim Iran might assert as a justification to block the passage of oil tankers in the Strait of Hormuz—especially by laying mines—would likely fail to meet the requirements of necessity and proportionality.

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Endnotes:

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[2] U.S. Energy Information Administration, World Oil Transit Chokepoints (Dec. 30, 2011), *available at* http://205.254.135.7/EMEU/cabs/World_Oil_Transit_Chokepoints/pdf.pdf.

[3] *Id*.

[4] Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 244 (Dec. 15).

[5] Geneva Convention on the Territorial Sea and Contiguous Zone art. 16 (4), Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) (providing that "[t]here shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.").

[6] There are several exceptions to the transit passage regime where instead the rule of non-suspendable innocent passage applies. *See* UNCLOS, *supra* note 1, arts. 35(c), 36, 38 (1) & 41(b).

[7] W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 Am. J. Int'l L. 48, 67-71 (1980).

[8] UNCLOS, *supra* note 1, art. 37.

[9] *Id*. art. 38(2).

[10] *Id*. art. 38(1).

[11] *Id*. art. 41.

[12] *Id*. art. 39.

[13] *Id*. art. 19.

[14] Lois F. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World*

Order, 53 La. L. Rev. 1191 (1993).

[15] S.C. Res. 598, U.N. Doc. S/RES/598 (July 20, 1987).

[16] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[17] San Remo Manual on International Law Applicable to Armed Conflict at Sea (Louise Doswald-Beck ed., 1995), *available at* http://www.icrc.org/eng/resources/result/index.jsp?action=w2g_redirect&txtQuery=57JMST.

[18] *See* D.G. Stephens & M.D. Fitzpatrick, *Legal Aspects of the Contemporary Naval Mine Warfare,* 21 Loy. L.A. Int'l & Comp. L. Rev. 553 (1999).