

**TUSSLE BETWEEN THE US AND IRAN IN THE HIGH SEAS: IS IT A SIGN OF AN
UPCOMING WAR?**

Manu Sharma¹

INTRODUCTION

Since 1980's, there has been a constant strain in the diplomatic relations between the two powerful nations of the world, the USA and the Islamic state of Iran. Whether we look at the Iran- Iraq war of 1980's or the recent killing of Iran's superior military commander General Qasem Soleimani, the constant tussle between the two nations have gathered the worldwide attention of the experts who are analyzing the possibility of an "armed conflict" or a "war" in the coming time. This is the recent event which took place in the International water of the Persian Gulf where the Iranian Coast Guard gunboats traversed the American naval ships from an enclosed range. The US claims such perusal as an act of harassment and danger within the limits of high seas.

The legal dimensions of this particular event on one hand includes the legality of perusal by the Iranian coast guards and on other hand the use of armed force in the pretext of self-defense by the US Navy ships. Under the international legal system and principles, the right to defend self has always been a topic of controversy and debate due to its vagueness and over- broadness. However, The US used its mechanisms in consonance to both international as well as its municipal laws. This paper attempts to critically analyze the legal aspect of this Iranian gunboat harassment with special focus on the engagement rules of the US Military laws, humanitarian principles and loopholes in the current settings.

The issue came into headlines on April 15, 2020 when eleven Iranian gunboats repeatedly traversed six US navy vessels, from an extremely close range during its joint integration operation with US army Apache helicopters in the international water of the Persian Gulf. The US Navy claimed this approach of IRCG's gunboats 'intentional, dangerous and harassing.' The matter escalated pretty quickly when the US president Donald Trump instructed the Navy to use an aggressive approach including shoot down and destroy the gunboats harassing them if required. This seems to be the most covert threat of using an armed action against Iran since authorizing the targeted attack at the Baghdad International

¹ Student, Symbiosis Law School, Pune.

airport killing the former IRCG's commander General Soleimani earlier this year. The author of this paper intends to examine whether the actions of both the nations stand on the justifiable grounds under the international legal system. Furthermore, particular reference has been given to the standing rules of US military engagement as they are the result of the national enactment of the principles of international law pertaining to armed conflicts, providing an operational and structural framework for any defensive action by US forces.

RESEARCH QUESTIONS

- a) What are the legal dimensions involved in this tussle between the US and the Republic of Iran in the High seas?
- b) What were the justifications provided by both the countries pertaining to this incident?
- c) What limitations does this incident highlight in pretext to the principles of international law and its customary legal provisions?

RESEARCH METHODOLOGY AND OBJECTIVES

The objective of the research is firstly to analyze, the horizons of international law related to armed conflict at high seas with this particular incident of Iranian gunboat harassment with special emphasis to US's domestic legal and national policy framework to better understand as to how international law is actually practiced in its real application. Secondly, to analyze the consequences of this incident on the relation between both the nations which were already heavily tensed especially after the killing of General Soleimani. Thirdly, to understand the horizons of compliance and limitations of the international law with the help of this incident. Lastly, the challenge that comes in upholding international law with a country like Iran which works against the directives of the US in the region of Middle East and has openly threatened the Americans.

The research methodology is 'doctrinal research'. The author focuses on determining the position of existing international legal order law, its limitations and possible scope of improvement with the help of an incident that happened between two powerful nations of the world, the US and Iran in Persian High seas recently, for which various research papers, reports, articles, policy have been used as a source. The limitations of the research are that it is highly theoretical and formalistic.

CRITICAL ANALYSIS

A. Legality of Iranian gunboats perusal of US naval ships

As the facts of the matter objectively represent that the Iranian gunboats repeatedly crossed the US warships, some from the distance as close as 10 yards, the author believes that the preliminary question which needs to be taken up for consideration is whether this intentional and repeated crossover is violative of the provisions of the international law of sea. The United Nations Convention on the Law of Sea (UNCLOS), talks about the concept of ‘hot pursuit’² which provides that a coastal state can pursue a foreign ship if they have a genuine reason to believe that the ship is violating or has violated the laws and regulations of that particular state within the limits of their territorial waters. Moreover, it also provides this right to the states if any foreign ship is within the range of a contiguous zone and there has been an infringement of certain established exceptional rights for that zone like immigration, fiscal, customs, sanitary laws, and piracy. In the present case there is no denying to the fact that the US ships were in the contiguous zone but only performing their military operations and there is no instance of them violating any law pertaining to the contiguous zone. Hence the legitimacy of the actions of the IRGC’s gunboats pursuing them in this context seems questionable.

Use of armed forces in the pretext of self-defense: International Perspective

Any instance of use of force between two or more states in the pretext of defending self needs to fulfill the standards of the law on the use of force i.e. jus ad bellum to be lawful. The United Nations (UN) Charter under its chapter VII³ enshrines Article 51 that authorizes a state to initiate an armed action against the belligerent state as a matter of its inherent right to defend itself individually as well as collectively, until the Security Council (UNSC) takes requisite measures to maintain international peace and security. Hence, self-defense is a ‘circumstance precluding wrongfulness’ of a state’s use of force that would otherwise be violative of the prohibition stated in Article 2 (4) of the Charter⁴ and its customary international law counterpart. Now in this case, there has been no resolution passed by the

² Stanly Johny, *Analysis: What is next in Iran- US Conflict?*, The Hindu, (January 8, 2020).

<https://www.thehindu.com/news/international/analysis-what-is-next-in-iran-us-conflict/article30510865.ece>

³ UN 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 October 14, 2020].

⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art.51. Available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed October 14, 2020]

UNSC and hence US government must base its future actions of engaging IRCG's gunboats on Article 51.

B. Interpretation of the Event: USA's viewpoint

Pertaining to this particular incident, the US government has put forward two contentions in expounding the application of Article 51 and other customary laws. The authorities in their first contention rejected the current prevailing and accepted view propounded by the International Court of Justice (ICJ) in its Nicaragua judgment where it opined that an armed attack must only be resorted exclusively in situations of the gravest form of use of force.⁵ Rather, the US backs for the automatic implication of the right of self-defense against any illegal use of force, for which it relied on the ICJ's judgment in Oil Platforms case¹¹ wherein the court upheld that the mining of a military vessel sufficiently enough to bring into play the inherent right of self-defense. This indicates that the US views it lawfully justifiable to use armed force if the actions of Iranian gunboats subjectively satisfy their parameters of the use of force. However, the author disagrees with this contention and believes that the right to use self-defense must be used in exceptional circumstances where all other possible measures are exhausted. Secondly, the US has Islamic Republic of Iran v. USA, ICGJ 74 (ICJ 2003), contended the anticipatory application of Article 51 in the response to an imminent attack, an accepted viewpoint under international setting also leaves a grey area as to what exactly counts as 'imminent'. The latest articulated interpretation of 'imminent' has been provided in the White House's 2016 and Policy Frameworks report.⁶

There are a variety of factors that the US military authorities take into consideration on a national level in determining the imminency of an armed attack including nature, immediacy, probability of an attack, injury damage/loss likely to be caused, whether the anticipated attack is part of a concerted pattern of an ongoing armed attack, alternative measures of self-defense etc. However, the author believes that it is important to look into it from the perspective of a military commander who is actually executing it at the unit level when time is of the essence, and hence a more manageable test should be whether the defensive measure is opted during the last possible window of opportunity in the fact of an attack that

⁵ International Court of Justice (ICJ) in its Nicaragua judgment.

⁶ *Report on the Legal and Policy Frameworks Guiding the United States' Use Of Military Force and Related National Security Operations*,
https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf

was almost certainly going to occur. Furthermore, finding out that whether an armed attack is ongoing or imminent is just not sufficient enough to deem the justifiable use of force in self-defense.⁷

Operationalizing Law of Self- Defense: US's Standing Rules of Engagement

The Standing Rules of Engagement (SROE) promulgated in 2005, are the most recent version of directives providing an operational framework to use the right of self-defense by the US armed forces. They are issued by a competent military authority that outlines the circumstances as well as the limitations which the US forces will initiate or proceed with combat engagement with other encountered forces. These standing rules remain in force and must be abided by the armed personnel during both territorial and extra- territorial military operations and eventualities unless directed otherwise. The terms used under SROE for describing an ongoing and imminent attack are 'hostile act'⁸ and 'hostile intent'⁹. "A hostile act" refers to 'an attack (direct/ indirect) or use of force' against the state of the USA, its armed forces, subjects or its property. On other hand 'hostile intent' signifies the SROE's operational version of anticipatory self- defense. It can be defined as a situation carrying an impression of 'threat of imminent use of force' against the US, its citizens, property or forces. To define what actually constitutes imminent for a state is a difficult question and hence it is always contextual which means based on a subjective assessment of all circumstantial facts known at that particular point of time, even for the US forces. Importantly, the SROE in an attempt to bring some clarity in this regard added that 'imminent' does not necessarily mean immediate or on- the spot'. This was done to counter the so called 'Bush doctrine' set forth under the National Security Strategy, 2002,¹⁰ which is a general description of an aspect of the US foreign policy post 9/11 attack dealing exclusively with the strategic horizons of preemptive attack as a means of self-defense. By addition, it now simply acknowledges that the commanding officer need not to wait for an actual attack to happen, though in no way it suggests the authorization of so called

⁷ *Chairman 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,*

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

⁸ *Id.*, Part E, rule 2, cl. (c).

⁹ *Id.*, rule 2, cl. (d).

¹⁰ *The National Security Strategy of the United States of America*, (September 2002). <https://2009-2017state.gov/documents/organization/63562.pdf>.

preventive self-defense.

The principle of proportionality and necessity are also incorporated in SROE. The military personnel are trained 'to not take the first hit' before defending. The author believes that if we read this statement in a broader sense that, the SROE caution the use of self-defense only while the belligerent state exhibits hostile intent or continue to commit hostile acts. Moreover the 'Law of War Manual'¹¹, states the non-availability of any reasonable alternative than using force if there is a demonstration of hostile intent. This is a pure reflection of the classic understanding of principle of necessity. With respect to proportionality, SROE contains precise description of what proportionate response shall be¹²; which is use of force that is sufficient enough to conclusively counter to hostile acts or demonstrations of hostile intent. It acknowledges within its justiciable domain the excessive use of means and intensity but not the nature, duration and scope of the force from what is actually needed. Even the Law Manual takes a very similar approach where it says that a response to an armed attack is proportionate to an extent of repelling the belligerent forces and restoring the peace and security of the disturbed area. Looking at both these principles the U.S's national policies with regards to armed attacks fulfills the obligations of International humanitarian law as it disallows the use of force when other alternatives are available, attack is non-imminent and non-continuous.

The current mission specific rules in SROE must be formulated in a more tailored fashion to facilitate the accomplishment of a particular operation including during actual hostilities,¹³ which currently are largely classified because they might reveal US's forced tactics, techniques etc. to the belligerent state, giving an example declaring a particular organization as 'hostile' will permit the forces to engage with its members on the basis of their status of being the member of that designated group. But, since this is only allowed during an armed conflict, an ~~an~~ ~~an~~ to this effect by US forces on IRCG Navy gunboat in high seas or any other Iranian forces ~~will~~ be unlawful unless there starts an armed conflict.

¹¹ <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20->

¹² Supra note 13, Enclosure A, Part 4, cl. (3).

¹³ 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_Rules_of_Engagements/120_Roe_Guidelines.pdf

SROE's Categories of Self- Defense

There are three categories of self-defense recognized by SROE which are- individual, unit and national.¹⁴ The very difference in this hierarchy lies in the level of authority and responsibilities in which the right to self-defense is exercised. As already mentioned above the defending of the US, its forces and under certain circumstances its persons and property constitutes the requirements of national self-defense. It has to be noted here that the commanders of the unit are also authorized to exercise national self-defense. The category of Unit self-defense by contrast provides an inherent right to self-defense and also put certain obligations in return upon the commanding officers of the unit based on any warship or aircraft or any other place of their operation.

Though, the SROE specifically creates a legal distinction between the category of national and unit self-defense, there is no real or qualitative difference between a unit responding or the entire military structure because the legal basis is the same for both under the international law i.e. self-defense in face of an armed attack. Apart from responding in group, the SROE also authorizes the members to exercise self-defense in their individual capacity if required. When acting as part of the unit, such individual self-defense is treated as sub- set of unit defense and hence stands valid on the legal basis of international principles. In the present case the author is going to specifically deal with the unit self-defense because only a unit of the US's air force was operating in the Persian high seas at the time they were pursued by the IRCG's gunboats.

Unit Self Defense

At the unit level, the SROE's *de- escalation principle* is designed in a way to satisfy the principles of necessity¹⁵ and proportionality.¹⁶ It states that the belligerent actor must be warned and provided with an opportunity to withdraw and cease its threatening actions. Here the author believes that it is a classic situation of 'easier said than done', which seems to be a challenging decision for a commander to determine whether there is a demonstration of hostile intent and whether de- escalation should be attempted or not. For example, during the Iran- Iraq War, 1987, Iraq Air Force attacked the US's Stark ship in high seas

¹⁴ Supra note 13, Part E, rule 2.

¹⁵ Supra note 13, Enclosure A, Part 4, cl. (2)

¹⁶ Supra note 20.

causing the death of 37 US Navy personnel. The Iraqi jets were identified from a distance and warnings were given to it, however it still launched an armed attack on US ships. Afterwards, an investigation led by the House of Representatives Armed Services Committee¹⁷ found out that the pre required condition of de- escalation principles prior to self- defense in factored into the commander's inaction to defend the ship.

While on the other hand, in 1988, a US cruiser was shot down by an Iranian passenger aircraft Air Flight 655, killing off around 297 on board, that took off from Bandar Abbas International Airport which was mistakenly identified as combat aircraft operating in an attacking zone¹⁸. In present year, Iran also mistakenly took down a Ukrainian International Airlines killing approximately 176 people¹⁹ during a tussle between the US and Iran after the targeted killing of General Soleimani earlier this year. The aim of the author in giving these two contrasting examples is just to underscore the complex nature of these decisions, especially in the presence of little moments of deliberation.

Margin of Appreciation

Doctrine of Margin of appreciation is an invention of the European Court of Human rights²⁰ wherein, they defer to the will of member states, in specific circumstances. For ex- in case of disturbance to public tranquility or a threat to national security, the courts may justify State's restriction on freedom of speech or assembly etc. If such restrictions are in accordance with the law and necessary considering the facts and circumstances of that particular situation. The author aims to analyze whether this doctrine can be applicable in such scenario, particularly in this case. As stated already that under its requirement of proportionality principle, SROE allows a fair margin of appreciation in the use of means and intensity of force but not with respect to its nature, duration and scope. There is no debate to

¹⁷ *Report 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>

¹⁸ Brad Lendon, In 1988, A US Navy warship shot down an Iranian passenger plane in the heat of battle,' CNN World, (January 20, 2020) <https://edition.cnn.com/2020/01/10/middleeast/iran-air-flight-655-us-military-intl-hnk/index.html>

¹⁹ Matthew S. Schwartz. *Iranian Report Details Chain of Mistakes In Shooting Down Ukrainian Passenger Plane*, NPR, (July 20, 2020). <https://www.npr.org/2020/07/12/890194877/iranian-report-details-chain-of-mistakes-in-shooting-down-ukrainian-passenger-pl>

²⁰ Council of Europe, *The Margin of Appreciation*, https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

the fact how peculiar is to measure the precise degree of force necessary to do so and therefore the author believes that a fair margin appreciation must be given to the states in this regard. With respect to this particular case, considering the facts of the situation that the distance between the IRCG's navy boats repeatedly traversed the US warships from as close to a distance of 10 yards, if the US warships have had attacked IRCG's gunboats, then, the author feels it could have been defended under the doctrine of margin of appreciation if it was under a recognized doctrine under the principles of international law. On the other side, under no circumstances the states indulging in armed attack should use excessive means and intensity of force from what is actually required. Hence a balanced approach is what a State must strive for in such situations.

The Actual Response

The US warships did not use any kind of force on the IRCG's gunboats even after their repeated crossing, which shows that their actions were in complete consonance with the provisions of Standing Rules of Engagement and as well as international legal norms. On the other side, the gunboats were neither attacking the US warship nor the helicopters which shows that they were not demonstrating any kind of 'hostile intent'. However the author feels that their actions are questionable under 'Hot pursuit'²¹ mentioned under UNCLOS. To appreciate the calculated and sound decision taken by the US unit commander and to characterize the demonstration of hostile intent by Iranian gunboats, it is to be considered that the navy boats were armed and the relations between both the countries are highly strained and tensed.

Turning to what the US's president directed to US warships to shoot and destroy the IRCG's navy boats,²² the author believes that if this happens, the justifiability will totally depend upon the ~~circumstances~~ circumstances of that time. It must be concluded on the precise facts that firstly a hostile act has occurred, or demonstration of hostile intent has been done. Secondly, there is no other alternative left than to employ force against the gun boats to defeat or disable the imminent attack and lastly the quantum of force used is within the limits of what was actually needed. Short of any reasons mentioned in SROE for a unit self- defense, the only

²¹ supra note 7

²² *Trump says US will destroy Iranian gunboats harassing US ships*, Alja Zeera, (April 22, 2020).
'<https://www.aljazeera.com/news/2020/4/22/trump-says-us-will-destroy-iranian-gunboats-harassing-us-ships>

reason left for the US to engage them would be national self-defense which can only be brought into play when there is an armed attack by from Iran's side. Even in that, it has to be determined that though the Iranian gunboats were not participating momentarily but there is a possibility that they would be used in future ongoing armed attack against the US and that it is not the situation in the Persian Gulf today.

Lastly, talking about the claims of the U.S. Navy, and the approach that the Iranian gunboats were dangerous and harassing²³ could become the sole reason for using armed force. Here the author would like to remind that the provisions of SROE are contextual in application, but the author believes that in most situations practically such activities would not rise to the level of an imminent armed attack and would not qualify as demonstration of hostile intent without an indication that gunboats were about to actually use of their weapon.

CONCLUSION AND SUGGESTIONS

From the above discussion it can be concluded that sabre - rattling is acceptable to an extent where it is not leading to an unlawful threat of use of force because of their unlawful nature under the provisions of U.N Charter. It is clear from looking at the domestic legal order of the US for dealing with the dimensions of armed attack that they are clearly defined in the Standing rules of engagement with other instruments like the War Manual which is in consonance with the norms of international law. The President's comment on the whole issue can be considered a warning to the Iranian government that the US navy units will avail their right to self-defense which can be considered lawful. The author is of the opinion that such comments are not appreciable as they might constitute a threat of armed attack and hence unlawful. Moreover, harassment which does not give an impression of imminent risk to life or property does not open the gateways to right of self-defense. The actions of IRCG's gunboats of repeatedly traversing the US warship in the high seas can be questioned under the provision of United Nations Convention on Law of Seas. Lastly, looking at the history of relations between the US and Iran it can be said that lack of sound and reasoned decisions in situations of harassment can lead to an armed conflict and hence it is important that these

²³ Tucker Higgins & Amanda Macias, 'Trump says US will 'destroy' Iranian gunboats that harass American ships, CNBC, (April 22, 2020) <https://www.cnbc.com/2020/04/22/trump-says-us-will-destroy-iranian-gunboats-that-harass-american-ships.html>

countries should engage in peace talks or mediation can be initiated by other international organizations as it is historically evident that small events of prolonged tussle can turn into full-fledged situation of armed conflict, the recent example of which is Armenia- Azerbaijan conflict. The author is of the opinion that the present norms of international laws are outdated and seem to fail in achieving their object as the provisions are very vague and overbroad which gives opportunity to the powerful states to abuse these loopholes. For example, the definition of self- defense which is too overbroad that even an unlawful use of force can be justified under it in the pretext of anticipatory self-defense. Even the principle of necessity and proportionality are too outdated and undefined thus prone to be misused. There is an urgent need to change the present structure and form more precise definitions. Secondly, every member nation must formulate a domestic law which enshrines a more accurate scope and definition of international principles for e.g. - like the US have their own. Thirdly, the role of the international organizations like the U.N, which has now turned completely redundant, must be brought to an urgent institutional change to ensure the effective implementation of the Charter. Fourthly, some real powers to impose strict penal provisions against individuals as well as the States violating the provisions of international law must be there. Lastly, the most important of all is to mend the relations between the nations who are at tussle with each other, as friendly and co-operative relation between the States is the key to a peaceful world.