

Clarifying Freedom of Navigation in the Gulf

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Brief Analysis

Legal ambiguities have led to disagreements over how vessels can use the Strait of Hormuz and Persian Gulf, so Washington should highlight them in any future talks with Iran.

When Secretary of State Mike Pompeo laid out his twelve “basic requirements” for Iran during a policy speech last year, he made only passing reference to ending the regime’s “threats to international shipping.” Yet the seizure of two foreign oil tankers and other recent events have shown that these threats are very real and need to be addressed frankly in any future negotiations, right alongside Tehran’s nuclear program, missile arsenal, and destabilizing regional activities. Otherwise, diverging interpretations of the applicable laws of the sea will leave room for more misuse and potential military flare-ups.

DIFFERING LEGAL FRAMEWORKS IN PLAY

One major area of disagreement is passage through the Strait of Hormuz. Historically, foreign vessels transiting territorial seas and international straits have been bound by two sets of rules: the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and the succeeding 1982 [UN Convention on the Law of the Sea \(https://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm\)](https://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm). UNCLOS took precedence over the 1958 convention when it came into force in 1994.

The United States is party to the old convention but has not signed UNCLOS. Washington considers UNCLOS to reflect customary international law and abides by most of the requirements therein, but it objects to certain provisions, and the convention does not allow selective ratification.

Iran is a signatory to the 1958 convention but never ratified it. Tehran also conditionally signed but did not ratify UNCLOS; like the United States, it does not accept certain provisions. Meanwhile, Iran ratified its own national

maritime law in 1993, which allows “innocent passage” under certain conditions but does not make any reference to “transit passage” through Hormuz or recognize it as an international strait (see next section for a fuller discussion of these terms).

One key change in UNCLOS was to increase the extent of a country’s coastal seas from three nautical miles to twelve. The United States strongly opposed this provision at first but has since accepted it in most contexts—except when dealing with straits and other international passages. In practical terms, this means Washington does not recognize the right of coastal states to regulate passage or limit activities in such waterways. Rather than viewing unhindered transit as a new right under UNCLOS or as a contractual right in general, U.S. officials regard it as a longstanding, well-established international practice for all states seeking to sail through or overfly international straits.

Oman, the state whose coast lies on the other side of the Strait of Hormuz, has ratified UNCLOS. Like Iran, however, it requires foreign warships to give prior notification before transiting the strait—a requirement the United States does not recognize.

INNOCENT PASSAGE VS. TRANSIT PASSAGE

To determine how their vessels pass through territorial waters or international straits, states rely on two concepts: innocent passage (codified by both conventions) and transit passage (introduced by UNCLOS). Some states apply them differently than others depending on their interpretations of international and domestic law.

Innocent passage applies to navigation through a country’s territorial seas, or through an international strait that connects “a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state.” Passage is considered innocent as long as foreign vessels (including warships) respect all of the coastal state’s safety regulations that conform to UNCLOS, and refrain from posing a threat to the state. To clarify the latter requirement, UNCLOS introduced a list of activities that would be considered “prejudicial to the peace, good order, or security of the coastal state” if conducted inside territorial waters during innocent passage (Article 19). A state can temporarily suspend innocent passage in specific areas of its territorial seas for security reasons (Article 25), but this provision cannot be applied in a discriminatory fashion that singles out individual countries. More important, it does not apply to international straits (Article 45).

Transit passage refers to continuous, expeditious navigation through straits that connect two areas of the high seas and/or the exclusive economic zones of two or more countries. The United States categorizes the Strait of Hormuz and its approaches as such. Accordingly, U.S. vessels exercise the rules of transit passage when entering the Persian Gulf—though as mentioned previously, Washington regards this as well-established international practice rather than a contractual right granted under UNCLOS.

Transit passage offers significantly greater navigation rights than innocent passage. Article 39 describes how transiting ships are expected to avoid any threatening activity against “the sovereignty, territorial integrity, or political independence” of the coastal state as determined by the UN Charter. Yet UNCLOS also explicitly declares that transit passage through an international strait “shall not be impeded” (Article 38), and that coastal states cannot suspend it for any purpose, including military exercises (Article 44).

When signing UNCLOS, Iran declared it would apply the new requirements only to those states that were party to the 1982 convention; for other countries like the United States, it would apply the 1958 convention. This approach can be interpreted as discriminatory, which is prohibited by UNCLOS.

To ensure the safety and security of navigation through international waterways like the Strait of Hormuz, the UN’s International Maritime Organization divides them using a system of transit corridors and traffic separation schemes. Such a system gives coastal states more regulatory rights over foreign-flagged vessels than they can exercise on the high seas (e.g., regarding pollution risks), but less than that provided by the right of innocent passage in territorial

seas. In the Strait of Hormuz, these corridors lie entirely in Omani waters; in the Persian Gulf, they mostly run through Iranian waters.

The vulnerabilities of the existing system were highlighted just last week, when Iranian forces seized a British-flagged tanker in retaliation for the Royal Navy's previous capture of a ship **suspected of transporting Iranian oil** (<https://www.washingtoninstitute.org/policy-analysis/view/irans-response-to-britains-tanker-seizure>) to Syria in defiance of European sanctions. According to a recording obtained by CNN, a British frigate near the scene told the tanker's crew, "As you are conducting transit passage in a recognized international strait, under international law your passage must not be impaired, impeded, obstructed, or hampered." In response, Iranian forces claimed they did not intend to challenge the tanker, but merely to inspect it for "security reasons."

MILITARY IMPLICATIONS

Views diverge on whether UNCLOS allows foreign military vessels to launch and recover aircraft during a transit passage. This is a major point of contention when carriers or warships with helicopters on board sail through the Strait of Hormuz. According to the principle of transit passage, U.S. military aircraft may overfly the strait in combat formation and with normal equipment operating, while warships may transit in a manner consistent with sound navigational and force-protection practices.

Submarines add a further layer of complexity. Under UNCLOS, they are required to surface when conducting innocent passage through territorial seas (Article 20), but views are divided on whether they can be submerged during transit passage. American submarines often remain submerged while passing through the Strait of Hormuz and the shipping corridors to its west as a way of exercising their right of transit passage.

UNCLOS does not explicitly require countries to give prior notice for the passage of their warships through foreign waters. Thus while U.S. military vessels abide by the provisions of innocent passage when moving through foreign territorial seas (as opposed to waterways covered by transit passage), they generally do not give notice of their passage.

For its part, Iran's Islamic Revolutionary Guard Corps Navy maintains a strong asymmetric presence in the Strait of Hormuz and Persian Gulf, claiming that it interrogates every ship entering the Gulf via radio and monitors traffic closely using aerial drones or small boats. Such "monitoring" sometimes takes an aggressive form. Iranian officials frequently refer to this imposition of will on foreign warships as a "victory." Now that the **IRGC is a U.S.-designated terrorist entity** (<https://www.washingtoninstitute.org/policy-analysis/view/what-will-irgc-designation-actually-do>), however, its legal right to engage in such activities is unclear. UNCLOS allows ships and aircraft conducting transit passage to deviate from their "normal mode of activity" if they encounter *force majeure* or distress (Article 39, paragraph 1c). A threatening approach by armed speedboats or drones in the narrow Strait of Hormuz would seem to fall under this definition, allowing for defensive action.

CONCLUSION

Tehran does not recognize transit passage through any part of its territorial waters or the Strait of Hormuz, and has placed restrictions on innocent passage there as well, partly to challenge the United States. Article 23 of Iran's 1993 maritime law states that the legislation supersedes all previous laws and regulations, and while some experts contend that this language refers only to domestic laws, the document makes no reference to how it should be interpreted in light of UNCLOS or any other international law. This needs to be clarified. The only way to avert future tensions is through a regional agreement that includes global maritime powers such as the United States while clarifying the maritime laws presiding in the Strait of Hormuz and its approaches.

In the meantime, the United States should continue its customary practice since the Islamic Republic was

established in 1979: exercising freedom of navigation in “maritime claims-excessive” zones like Hormuz, meaning waterways where it believes coastal states are exercising too many claims. Yet maintaining current arrangements indefinitely runs the risk of future escalation given the U.S. commitment to freedom of navigation and Iran’s principal policy of forcing America out of the Middle East. At best, any favorable change in Iran’s behavior will be short-lived without a comprehensive, transparent agreement; at worst, the lack of such an accord could lead to wider military confrontation.

Farzin Nadimi is an associate fellow with The Washington Institute. He wishes to thank Ashley Roach, a former attorney advisor in the State Department’s Office of Oceans, International Environmental and Scientific Affairs, for reviewing this PolicyWatch at the draft stage and offering his expert opinions. ❖

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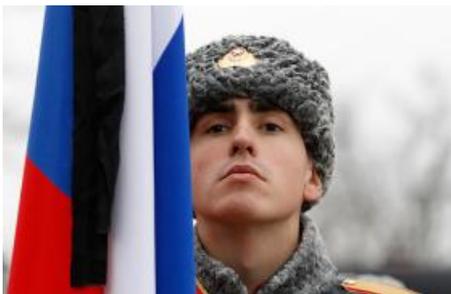
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