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NAVIES AND THE 'USE OF FORCE'
ANALYSING AN ENCOUNTER BETWEEN THE US NAVY AND SEAGOING FORCES OF THE ISLAMIC REVOLUTIONARY GUARD CORPS
PART 2: ADDRESSING THE LEGAL ISSUES

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The preceding segment of this two-part article had set the context within which three important legal questions needed to be explored: (1) Do IRGCN gunboats classify as warships? (2) Do their harassment-actions constitute a level of 'use of force' that triggers the right of self-defence of US warships? (3) Is the '100-metre rule' valid in terms of international law? The ensuing paragraphs seek to undertake this exploration with the hope that policy-makers and students of international law, both in India and elsewhere, may arrive at a better understanding of the legal nuances that are capable of being extrapolated in other parts of the Indo-Pacific. In any case, with the Indian dependence upon the Persian Gulf — for energy-security (and the 'security of energy', which is quite a different thing), as also for maritime trade — being quite as large as it is, these legal questions are central to the country's legal structures within New Delhi's Ministry of External Affairs (MEA) as well as to the Indian Navy. It is, therefore, primarily to these constituencies that this article seeks to speak. It is reiterated that these legal reverberations of the Persian Gulf have distinct and discernible echoes that travel, unattenuated, some 6,500 nautical miles (12,000 kilometres) across the maritime expanse of the Indo-Pacific, all the way to the South China Sea. Both, India and the USA would do well to recognise the impracticality, even futility, of trying to keep maritime issues (especially legal ones) in separate 'silos' determined by entirely artificial boundaries such as those between the INDOPACOM and the CENTCOM.

The Status of IRGCN Vessels (Warships?)

One of the fundamental questions relating to the IRGCN in this context, is whether their vessels or 'gunboats' classify as warships. The standing definition of a 'warship' in contemporary international law is enshrined in the 1982 United Nations Convention on the Law of the Sea, which states:

> *"For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."*[1]

[1] Article 29 of the United Nations Convention on the Law of the Sea.

At first glance, the history and behaviour of the IRGC Navy, its revolutionary roots and the traditional distinction from the *Artesh* Navy might lead to the view that the IRGCN does not constitute the *"armed forces"* of Iran, but rather a parallel State-sponsored militia. A view that is furthered by the requirement in the definition, for a ship to be manned by a crew under a *"regular"* armed forces discipline. Indeed, the operational perception of the IRGCN, due to its erratic behaviour at sea, has also been one that distinguishes it from the IRIN. This is evident in the observation by US Navy personnel that, amongst other things, unlike the IRIN, the IRGCN *"doesn't speak Navy"*.[2] Additionally, the IRGCN has a more informal and decentralised command structure than does the IRIN, and a less hierarchical rank system. The IRGC is a force immensely grounded in history, drawing its identity from the revolutionary zeal of the early years of the Islamic Republic and giving it new meaning in the present. In its founding years, it shunned a rank structure completely, with only rudimentary distinctions at the command level for operational needs.[3] Moreover, the IRGC had usually stressed on the evils of hierarchical structures in militaries and categorised them as an impeding element for equality within armed forces. This was associated with the identity of the IRGC as a force based on Islamic norms, and on the principles of fraternity and brotherhood. However, by the end of the war with Iraq, the IRGC had been forced to acknowledge the shortcomings arising out of the lack of official ranks, and resorted to a structure that had some semblance to traditional systems of rank.[4] However, the fundamental belief underpinning the original argument against ranks has not been entirely shed (the senior echelons of the IRGCN continue to be staffed by veterans of the 1980-88 war). As has been noted, *"the organization was later forced to adopt ranks after the war, but its commitment to Islamic fraternity has remained a core feature of the organization's culture and identity."*[5] This accounts for the distinctive behaviour of the IRGCN, often leading observers to call it a *"guerrilla force at sea"*.[6]

That having been noted, the lack of adherence of a force to models familiar to other states, cannot be sufficient for one to argue that it does not constitute the "armed forces" of a State. The overt distinction between IRIN and IRGCN notwithstanding, the latter is an integral part of the Iranian state. Its constitutional nature has been stated earlier. Furthermore, the definition of warships in the law of the sea regime itself, has evolved to account for forces other than the navies of States, as has also been noted by other scholars.[7] A parallel reading of the 1958 Convention on the High Seas, with the 1982 UNCLOS, is revealing in this regard. The 1958 Convention states that:

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[2] Michael Connell, *The Artesh Navy: Iran's Strategic Force*, Middle East Research Institute, 31 January 2012, https://www.mei.edu/publications/artesh-navy-irans-strategic-force#_ednref1.

[4] The IRGC in its biweekly news organ Payam, in March 1980, "...explains that secular militaries have suffered from four major maladies: ignorance, moral corruption, rigid discipline, and the fostering of a low self-view or inferiority complex among the rank-and-file. These characteristics were the primary factors facilitating the oppressive impulses of militaries and the regimes they served…Beyond those concepts, inequitable relations between commanding officers and subordinates is also highlighted as problematic. The harsh discipline of traditional militaries and abuse of subordinates by officers is singled out as especially damaging to armed forces." See Ostovar, *Vanguard of the Imam,* 122.

[5] Ostovar, *Vanguard of the Imam*, 125.

[6] Dr Michael Connell, "The Artesh Navy: Iran's Strategic Force", Middle East Institute, 31 January 2012, https://www.mei.edu/publications/artesh-navy-irans-strategic-force

[7] Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Virginia Journal of International Law, 809 (1984).

"For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline."[8]

It is to be noted that the words "naval" in the 1958 Convention was changed to "armed" in the 1982 Convention, ostensibly to make the definition more inclusive of other forces that a state may deploy at sea for non-commercial purposes. While it may be argued that such forces necessarily point to coast guards and other border protection forces, the exclusion of a force such as the IRGCN from the 1982 definition, is not supported by the language of the Convention. The United States, although not a party to the UNCLOS, accepts the 1982 definition. Hence, it can be concluded based on the above assertions that IRGCN gunboats qualify as warships under the definition of the 1982 Convention as well as the definition adopted by the United States. This conclusion is valid despite the obvious differences between the nature of IRGCN forces and that of other, more conventional, navies. However, as has been shown, international law itself has evolved and become more inclusive, thereby effectively diminishing this difference.

Whether or not IRGCN vessels are considered to be warships, they undeniably enjoy sovereign immunity. This is due to the clear language of UNCLOS, which states that *"…nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."*[9] The mere fact that a vessel is operated by the government of a State for non-commercial purposes enables it to enjoy the rights of sovereign immunity. While such immunity usually relates to the immunity of warships from the law-enforcement jurisdiction of a State in its Territorial Sea, the argument can be extended in that the same principle prevents any change in the immunity of vessels, despite the organisation to which the vessels are a part, being unilaterally designated a 'terrorist organisation' by another State. Any change to this would need new legal norms and these may well be evolved in the future, but the current norms are what they are and it would be difficult to countenance the cherry-picking of the law by a single country, howsoever powerful it might be. This becomes especially relevant when one considers that the Convention to Suppress Unlawful Acts at Sea (the SUA Convention) is associated with the global legal regime to counter terrorism.[10] The Convention itself declares that its provisions do not apply to warships.[11] Historically, it is the Supreme Court of the United States itself that set a significant precedent highlighting that military vessels in the service of another sovereign state as warships are regarded as military and political instruments of that State.[12] The immunity of warships has much more precedent and years of legal backing, than any practice of designating a State's armed force as a 'terrorist organisation'. It is fair to assume that IRGCN

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[8] Article 8(2) of the Convention of the High Seas, 1958.
[9] Article 32 of the 1982 UNCLOS.
[10] See the third preambulatory clause of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which lays down that the states party to the Convention are "*Deeply concerned* about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings".
[11] Article 2(1)(a) of the SUA Convention.
[12] See *The Schooner Exchange v. McFaddon*, United States Supreme Court, 24 February, 1812

vessels are not divested of their immunity merely due to the 'FTO' designation by the US State Department.

Does 'Harassment' Constitute 'Use of Force', thereby triggering the Right of Self-Defence?

At its widest point, the Persian Gulf, which falls under the area of responsibility of the IRGCN, is 210 miles (336 kms). This effectively implies that most of the Gulf is covered by the Exclusive Economic Zone of the bordering States. However, this fact in no manner limits the freedom of ships to navigate these waters, as all vessels enjoy the same freedoms in the EEZ of States, as they would on the High Seas, without prejudice to the rights of the Coastal State with respect to its EEZ. Therefore, both US Navy vessels as well as IRGCN vessels do enjoy the same navigation rights on these waters. While IRGCN's provocative behaviour is in no way novel and has manifested in several forms across the past two decades, the April 2020 incident cited earlier which also involved IRGCN vessels crossing the bows and sterns of US ships including the guided missile destroyer USS Paul Hamilton, is the most recent. It must be noted that none of the IRGCN vessels fired against any US vessel or made physical contact. It fits the traditional practice of the IRGC, which has categorically been termed as 'harassment' by US Navy officials and the President of the United States. The Notice to Mariners in the Persian Gulf by the US Navy that any vessel approaching within 100 metres of US warships would be perceived as a threat and be subjected to *"lawful defensive measures"*, is a result of such perception. If one considers the tweet by the former President, Mr Donald Trump, that such harassment would cause the US Navy to *"shoot down and destroy any and all Iranian gunboats"*, then it would appear that the use of armed force is a part of the *"lawful defensive measures"* earlier indicated. However, as has become the unofficial norm, most observers have found it prudent to take such tweets with a pinch of salt. Moreover, the US Navy itself has stated that its rules of engagement remain unchanged. The ambiguity about the character of potential US responses to further IRGCN actions notwithstanding, it is worthwhile to explore if such 'harassment' constitutes a valid threat of force, or the actual use of force, and if US warships have the right to use armed force in self-defence.

Drawing from years of jurisprudence on the subject of the use of force, it can be asserted that the meaning of the 'use of force' is not restricted to those acts which aim to seize territory from another sovereign state or overthrow a regime. The ICJ has for long rejected a narrow interpretation of the prohibition on the 'use of force' as stipulated in Article 2(4) of the UN Charter.[13] In the *Nicaragua* case, the Court split the meaning of the use of force into grave forms and less grave forms. It noted that only an 'armed attack' against a State would qualify as a grave breach of the prohibition on the use of force. Consequently, it is such an armed attack against a State which would trigger the inherent right of self-defence of a State.[14] The Court reaffirmed

[13] Despite several cases having been submitted to the Court that directly or indirectly involve the use of force, the Court thus far has been able to pronounce on the merits of only four such cases, which are- *Corfu Channel (United Kingdom v. Albania), Military and Paramilitary Activities (Nicaragua v. USA), Oil Platforms (Iran v. USA) and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. See also Christine Gray, *The ICJ and the Use of Force*, Tams and Sloan (eds), 2013, The Development of International Law by the International Court of Justice.
[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* International Court of Justice, 27 June 1986, see paragraphs 191 and 195 of the judgment. Albeit in a land-based incident, the Court had

this interpretation in the *Oil Platforms* case which involved the United States and Iran, in its 1998 judgment.[15]

It is true that the meaning of "armed attack" is itself not included in Article 51 of the Charter. In fact, the Court has acknowledged this in the *Nicaragua* case and pointed toward customary international law for a solution.[16] However, from a strictly legal perspective (as distinct from an operational one) it would be difficult to conflate the mere act of an IRGCN vessel coming close and engaging in provocative manoeuvres but without firing at US warships, with an "armed attack", irrespective of whether or not it falls within the ambit of the 'use of force'. It would be even more difficult to equate, the act of any vessel at all, whether armed or not, entering the 100-metre radius announced by the US Navy, with an 'armed attack'. Therefore, any reaction by the warships of the United States would, from the legal perspective at least, have to necessarily be restricted to internationally accepted measures short of the use of armed force. A few such measures were delineated by the International Tribunal for the Law of the Sea in the *MV Saiga* case:

> *"The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force."*[17]

The fact that a radius of one hundred metres is far too small for these sequential measures to be taken is an undeniable one and operational commanders cannot really be faulted for being exasperated if not outraged by the lack of realistic appreciation of the part of the law. However, the law is what it is and the correct course of action would be to endeavour to consensually amend the law, if that is what is required to meet operational needs of safety and security. Although the *MV Saiga* case involved the use of force during law enforcement operations, as did most other cases involving the use of force submitted to the Tribunal for its consideration, and the circumstances of the case were quite different from the situations that arise between the US Navy and the IRGC Navy in areas of the Persian Gulf that lie outside of any State's Territorial Sea, the jurisprudence of the Tribunal is nonetheless valuable. At most, the ITLOS has noted that actions which prevent by force a warship from discharging its mission and duties, could be a

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ruled in the same case that the conduct of military manoeuvres by a State, itself cannot be termed as the "threat of use of force" (See paragraph 227).

[15] *Oil Platforms (Islamic Republic of Iran v. United States of America),* International Court of Justice, 6 November 2003. In that case too, shipping in the Persian Gulf was affected and endangered due to belligerent action in the region between Iran and Iraq, largely due to the laying of mines by both parties. The United States in that case too focused on providing escort to reflagged tankers to protect them from armed attacks. One cannot but help notice the similarity with the USA initiating the IMSC in 2019 as a response to the mine attacks on shipping in the Gulf. The Court had held then that even the super tanker *Bridgeton* striking a mine laid by Iran, did not constitute an armed attack by Iran against USA as the mine was not intended for the US vessel. This was also followed by the mining of the *USS Samuel B. Roberts.* Though the Court did not exclude the possibility that the mining of a single military vessel might be sufficient to bring the "inherent right of self-defence" of the United States into play, it adjudged that the armed attack by the USA against offshore Iranian oil platforms under the justification of self-defence, was violative of international law. See paragraph 72 of the judgment.

[16] *Military and Paramilitary Activities,* see paragraph 176.

[17] *The M/V "Saiga"* (No. 2) *Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, 1 July 1999, see paragraph 156.

source of conflict between States.[18] Notably, *prima facie*, the use of force in any form remains illegal. 'Self-defence' serves to create an exception to this act which would otherwise have been wrongful. Moreover, only a grave breach of this prohibition would invite the victim State to use force as an act of self-defence. Any restriction on the use of force by US warships stated above is obviously removed, with the principles of proportionality and necessity accounted for, if the US warship perceives itself to be under armed attack or the imminent threat of an armed attack. It must be remembered that in practice, no warship will stand by and wait to be attacked, if it determines that a hostile vessel is initiating an armed attack.

While international law has evolved to accommodate, to some extent, the extraterritorial use of force against terrorists, the broad prohibition on the use of force still reigns.[19] As noted, the US designation does not strip IRGC vessels of their status as State actors and they remain sovereign instruments of the Iranian State.

Although the US Navy notice was ostensibly directed at Iranian vessels in the Gulf and although IRGCN vessels are usually armed, the notice was addressed generally to all ships in the Persian Gulf. It remains unclear as to how the US Navy is to determine if a vessel coming within 100 m of its ship(s), is armed or unarmed. If the US Navy uses force against an unarmed vessel but one that the former perceives to be armed, for breaching the radius, it will open itself to the charge of being derelict in the discharge of international legal responsibilities to which it has committed itself.

The Validity of the 100-metre Zone in International Law

While any engagement due to a potential breach of the 100-metre zone set by the US Navy, is an operational matter, it is the delimiting of such a zone itself that merits examination. It is evident that above all else, this is a measure undertaken as a response to specific provocation, and not one borne out of the United States' traditional policy at sea during peacetime. The right of a warship to defend itself under threat, is universally recognised and hardly needs restating. The United States Navy recognises this right, as well as that of a US warship to defend US flagged vessels, in its Commanders' Handbook of 2017.[20]

The creation of zones at sea has been a prominent feature of the law of the sea, with the UNCLOS itself being divided into topics based on zones, beginning with the territorial sea. While the UNCLOS, in Article 25(3), accords the coastal State the right to suspend the passage of ships through specified areas of its territorial sea for weapon-firing exercises, the US Navy in its Handbook elucidates that:

> *"The Charter of the United Nations and general principles of international law recognize that a State may exercise measures of individual and collective self-defense against an armed attack or imminent threat of*

[18] *The "ARA Libertad" case (Argentina v. Ghana), Provisional Measures,* Order of 15 December 2012, see paragraph 97.
[19] Christian J. Tams, *The Use of Force against Terrorists*, The European Journal of International Law, Vol. 20, No. 2 (2009) 359 – 397. The period between 1989 and 2009 serves to show well how the international approach to the use of force against 'terrorism' has evolved. The paper is a good summary and analysis of those events which contributed to such evolution.
[20] The Commander's Handbook on the Law of Naval Operations, August 2017, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A. See section 3.10.1.

armed attack. Those measures may include the establishment of "defensive sea areas" or "maritime control areas" in which the threatened State seeks to enforce some degree of control over foreign entry into those areas. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. The geographical scope of such areas and the degree of control that a coastal State may lawfully exercise over them must be reasonable in relation to the needs of national security and defense."[21]

The United States and Iran are not at war, as stated earlier, and the Handbook itself establishes the inapplicability of the application of this right to create the above zones at sea in peacetime. Interestingly, the document precedes this by acknowledging in the same section that this right is limited to the Territorial Sea of a Coastal State and that the creation of any zones (in times of peace) that impede the movement of warships beyond the territorial seas, is not permissible. It states:

"As a general rule, international law does not recognize the peacetime right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal States have asserted claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law in time of peace, and are not recognized by the United States."

While the creation of a mobile zone of 100-metre radius around warships is obviously different from the creation of a static zone stretching over a larger expanse of water, the fundamentals of the creation can be argued to be similar. Both zones, if sought to be created, restrict the movement of ships through them. In this case, while it means that Iran cannot claim to create any such zone beyond its Territorial Sea in the Gulf and attempt to hinder the movement of US ships, it also means the United States cannot create any such zones either. In this case, to justify the creation of such a radius around its warships, the United States can only make an argument based on operational and practical considerations due to the provocative acts of the IRGCN, but not a legal one based on the regime of the law of the sea.

Assessing Reality

"It is natural that we always conduct training, drills, and exercises for confrontation with the operational goals we have, and the Americans and the entire world knows that one of the IRGC Navy's operational goals is to destroy America's Navy."[22]

The above quote, with which a 2017 report of the Office of Naval Intelligence of the United States begins, is attributed to Rear Admiral Ali Fadavi of the IRGC Navy.[23] It offers a lucid understanding of how the United States perceives the IRGCN. While the recent escalation of tensions is resultant of the "maximum pressure" campaign against Iran by the United States, which itself came on the heels of US actions vis-à-vis the JCPOA (which elicited little

[21] Commander's Handbook, see section 2.6.4.
[22] *Iranian Naval Forces* (US Navy ONI), see note 8.
[23] Rear Admiral Ali Fadavi has now been promoted to Deputy Chief of the IRGC and the IRGCN is currently commanded by Rear Admiral Alireza Tangsiri.

international support), the IRGCN does not have an enviable record in terms of dealing with other forces in the region, either. Both, actions that have been confirmed as having been executed by the IRGCN (such as the frequent encounters with the US Navy in the region), and those purported to have been executed by the IRGC, such as the mining of oil tankers in 2016, can hardly be deemed to be anything but deeply destabilising ones. To this list must also be added the IRGC's maritime manifestations of friction with neighbours across the Gulf, as also its encounters with British vessels, military and non-military. The legality of at least a few of these actions remains extremely doubtful, particularly the constant denial by Iran of the right of innocent passage of warships through its Territorial Sea, without prior authorisation.[24] The vitriolic polemics that characterises the engagement between Iran and the United States is well known but nevertheless deeply disturbing. While this animosity was sparked by the coup of Mohammed Mossadegh in 1953 and fuelled into a blaze post 1979, the IRGC today serves as more than just a vestige of the anti-US feeling generated in the last century. It is a force that constantly revisits its historical past to seek legitimacy for its present existence. However, its evolution from merely a militia raised to protect the Iranian regime into a multi-dimensional force that spreads its reach across Iranian society, cannot be ignored. During this metamorphosis, an integral phase was when the IRGC sought to protect Iran from what it considered to be a cultural 'velvet revolution' by the United States.[25] Supplemented by Iran's designation as part of the 'axis of evil' following 9/11,[26] this animosity was only given more oxygen. Therefore, it ought to come as no great surprise that the Navy of the IRGC, which is evidently the primary Iranian force operating in the waters of the Gulf, chooses to remain in character while dealing with the US Navy, which the Iranians know is a much larger force. Hence, any analysis of the manner in which either force in the region adheres to the law of the sea cannot and should not be seen independent of this context. Ideally, the responsibility of one State to uphold international legal norms is not predicated on the reciprocal adherence to the same norms by an adversary, the degree of hostility notwithstanding. However, the large measure of political friction that exists between Iran and the United States, makes the Persian Gulf a powder keg. It is one that requires careful consideration to be given to political factors, more than legal ones. On the other hand, the strategic importance of the Gulf and the need to ensure stability in its waters makes the upholding of the law to be in the interest of all States. Perhaps, it is an awareness of this common interest that accounts for the absence of any further escalation of the confrontation between the naval forces of the United States and the Islamic Revolutionary Guards Corps of Iran. All arguments considered, respect for and adherence to international law in general and the law of the sea in particular, which has witnessed years of State practice — one of the lynchpins of which is an acknowledgment of the sovereign rights of States — must be upheld, encouraged and advocated.

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[24] 20 April 1993 Iranian law of maritime territories which lays down that the innocent passage of warships requires prior authorization.

[25] Martin Beck Matuštík, "Velvet Revolution in Iran?", The International Journal of Not-for-Profit Law, Volume 9, Issue 1, December 2006, https://www.icnl.org/resources/research/ijnl/velvet-revolution-in-iran

[26] Alex Wagner, "Bush Labels North Korea, Iran, Iraq an 'Axis of Evil'", Arms Control Association, https://www.armscontrol.org/act/2002-03/press-releases/bush-labels-north-korea-iran-iraq-axis-evil

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