With a diplomatic solution, there would be no loser.

An interview with Rüdiger Wolfrum on the situation in the Strait of Hormuz

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The Strait of Hormuz is one of the most important waterways worldwide. Nearly one fifth of the global transport of oil and about one quarter of the production of liquefied natural gas are shipped through the Strait that is only a few kilometers wide. On 19 July 2019, Iran detained the British-flagged tanker *Stena Impero* in this strait. Iran argued that, among other things, the ship had collided with a fishing boat and failed to respond to its subsequent distress calls. According to the Iranian Foreign Minister Mohammad Javad Zarif, this violates maritime regulations and requires a legal investigation. Britain's former Defence Secretary Penny Mordaunt, on the other hand, spoke of a 'hostile act'. While the initial idea of a European-led naval mission in the Persian Gulf seems to have been discarded, a US-led military operation is now discussed.

We spoke with Rüdiger Wolfrum about the incident and asked him about the implications for the law of the sea.

1. According to the United Nations Convention on the Law of the Sea (UNCLOS), the waterway between the Persian Gulf and the Gulf of Oman is a so-called strait. What special rights apply to shipping and coastal states in straits?

There is a separate part on straits in the United Nations Convention on the Law of the Sea (UNCLOS). The purpose of these regulations is to guarantee the freedom of navigation in these waterways to the greatest extent possible. What is special is that straits run through the territorial sea of states, which means that they restrict coastal state competences in this area. The rights of third party states (flag states) remain unaffected, as if they only crossed a territorial sea. At the Third United Nations Conference on the Law of the Sea, this was one of the most important negotiating points. The proponents of the Regime of the Straits – if I may call it that – were, above all, the USA and the USSR at the time. Both states have so-called blue-water navies and are dependent on free passage through straits. Another difference is that straits may be crossed by submarines under water, while they must navigate on the surface in the territorial sea – but this only on a side note.

2. Iran signed UNCLOS in 1982 but has not ratified it yet. What are the implications in this case?

Iran is indeed not a member of UNCLOS and therefore not directly bound by it. However, Iran is a signatory state and, under the Vienna Convention on the Law of Treaties, even a signature – without a ratification – has a certain effect. Article 18 of the Vienna Convention is entitled *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*. According to that article, a signatory state thus may not act in a way that undermines the spirit and purpose of UNCLOS. The strait system is a very important element of UNCLOS and it could therefore be said that Iran must respect this regime, even if Iran is not yet a member. There is another point that needs to be stressed: Iran is a member of the Geneva Conventions on the Law of the Sea and in this respect, it is bound by the Geneva Convention on the Territorial Sea and the Contiguous Zone, which at least guarantees the right of peaceful transit. There are therefore two possible tracks on which it can be argued that Iran has certain obligations under the law of the sea.

3. On 19 July, the U.S. Central Command announced that the country was about to launch the naval mission *Operation Sentinel*. Since then, the U.S. has been seeking the support of other states such as Britain, Israel, Japan and South Korea. Would such a military mission without a mandate from the Security Council be permissible in the Strait of Hormuz and possibly in the territorial sea of another state under UNCLOS?

This is an issue less of the law of the sea but of general international law. Ships under – let us say – the flag of Great Britain have the protection of Great Britain as long as they fly that flag and that protection can also be enforced by military means. In other words, in theory a military mission can be formed to ensure that ships flying the flag of the respective states are not put at risk. However, the powers in such an operation are very limited, states would only be allowed to protect their own ships against illegal attacks. In this case, Iran claims – and we do not really know much more about this – that the tanker has been detained because of a collision with a fishing boat. Provided that the facts are as they are described, Iran is responsible for dealing with this incident and thus also the Iranian Ports and Maritime Organization.

4. UNCLOS offers states comprehensive mechanisms for settling disputes. You yourself were a judge at the International Tribunal for the Law of the Sea in Hamburg. What do you view as the best way for both parties to settle their dispute?

One of the possibilities would be for the flag state of the detained tanker – and this is not easy – to appeal to the International Tribunal for the Law of the Sea under Article 292 of UNCLOS. The problem is that Iran is not a member of the Convention and therefore not bound by this procedure. It would therefore be better, or let us say more promising, if Iran and Great Britain could agree that this dispute should

be settled internationally. That would be either by an agreement of the International Tribunal for the Law of the Sea or, alternatively, by the International Court of Justice in The Hague. The third and most likely alternative would be an arbitral tribunal. I believe that one of these three options should be used. The United Nations Charter states in Article 33 that States are obliged to resolve disputes by peaceful means and refers to these possibilities of settling disputes alongside diplomatic forms of dispute settlement.

Do you think a diplomatic solution is preferable to the resolution of the dispute by an international court or arbitral tribunal?

You know, I have been a judge for 21 years and therefore my answer might surprise you. If the states can agree on a diplomatic solution, this would be the best solution, because then there is no loser. I do not think that a judicial or arbitral settlement is always the most adequate solution. It has advantages, I admit, because it clarifies a legal problem, but if a settlement is reached pragmatically and diplomatically, it also has, to a certain extent, an effect on the interpretation of the relevant legal norms, so that I view a diplomatic solution overall as preferable. I can also give you a legal reason for this: according to the relevant provisions of UNCLOS, a diplomatic solution takes precedence over a judicial or arbitral solution.

5. Incidents in straits are not uncommon, and other issues concerning the law of the sea are increasingly in the focus of international politics too. In which state do you see the normative force of UNCLOS?

The normative force of UNCLOS is relatively strong. The latest decisions of the International Tribunal for the Law of the Sea, the International Court of Justice and the Arbitral Tribunals, have raised and resolved a number of issues concerning UNCLOS. In many of these cases – and most of these cases are politically very sensitive – the judgments and awards have been accepted. The delimitation between Bangladesh and India, or Bangladesh and Myanmar in the Bay of Bengal, for example, was accepted immediately. The delimitation between Ghana and Côte d'Ivoire was also accepted immediately. The problematic cases that were not accepted, but were solved in practice, are the cases with Russia (Arctic Sunrise), but then there are also cases pending between Ukraine and Russia. The big problem is the case of the Philippines vs. China – South China Sea –, where China is not willing to accept the arbitration award. This is where the arbitral tribunal – I myself have been a member of this tribunal – did not manage to convince China. It can be debated for a long time why this was the case, but we will probably have to wait pragmatically until China realizes that this decision also offers great opportunities for China itself. But overall, in order to answer your question globally, the judicial decisions of international courts are much more constructive and influential than many national decisions on national problems.

[The interview has been conducted in German on 19 August 2019.]

Rüdiger Wolfrum has served as a judge on the International Tribunal for the Law of the Sea from 1996 to 2017 and has been its president from 2005 to 2008. He is emeritus director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

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