

UNCHARTED WATERS: NON-INNOCENT
PASSAGE OF WARSHIPS IN THE TERRITORIAL SEA.

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OF WARSHIPS IN THE TERRITORIAL SEA

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The author is a Lieutenant Commander in the U.S. Navy's Judge Advocate General's Corps. This paper was prepared in conjunction with his participation in the Navy Postgraduate Education Program. The opinions and views expressed herein are solely those of the author and do not necessarily represent the views of the Judge Advocate General, Department of the Navy, or any other agency of the United States Government.

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DEDICATION

to

LIZ

for her patient support, encouragement,
and forbearance during this writing

and

MICHELLE

born during this writing, for the promise
of a peaceful world to grow up in

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Roll on, thou deep and dark blue ocean -- roll!
Ten thousand fleets sweep over thee in vain;
Man marks the earth with ruin -- his control
Stops with the shore; -- upon the watery plain
The wrecks are all thy deed, nor doth remain
A shadow of man's ravage, save his own

Childe Harold's Pilgrimage
Canto IV, st. 179
George Noel Gordon,
Lord Byron

UNCHARTED WATERS: NON-INNOCENT PASSAGE
OF WARSHIPS IN THE TERRITORIAL SEA

On the night of 27 October 1981, a Soviet "whiskey" class¹ submarine carrying a crew of fifty-six ran aground inside a restricted security zone nine miles southeast of the Karlskrona Naval Base, deep within Swedish territorial waters.² Following an eleven-day drama, which included lodging two diplomatic protests,³ sighting another submarine's periscope⁴ and turning back a Soviet salvage vessel both inside Swedish territorial waters,⁵ and discovering uranium 238 emanating from the submarine's hull,⁶ the Swedish government concluded "that the submarine had intentionally violated Swedish territory to gather intelligence."⁷ Having initially called it "the most grave intrusion into Swedish territory since World War II,"⁸ Prime Minister Thorbjorn Falldin termed the violation "all the more remarkable since in all probability the submarine has carried nuclear weapons into Swedish territory."⁹ Its investigation closed, on 6 November the Swedish Navy escorted the submarine to the twelve-mile limit, where it joined a flotilla of twenty Soviet warships waiting just outside.¹⁰

News reports of the incident, which brought to light the frequency of unidentified submarine sightings in Swedish territorial waters,¹¹ included an account of a ten-day pursuit, with depth charges, of two unidentified submarines in the Stockholm Archipelago just thirteen months before.¹² It came as no surprise, then, when the Swedish Navy

in early October of last year sighted a submarine deep inside its territorial waters near the top-secret naval base on Musko Island, some twenty miles south of Stockholm.¹³ After maneuvering for a week and-a-half to contain the submarine and dropping over thirty depth charges to force it to the surface for identification, Swedish naval authorities acknowledged that it had apparently escaped.¹⁴

Whatever their impact on Sweden's defense posture, its traditional neutrality, or its relations with Warsaw Pact countries -- whose submarines many believe these to be¹⁵ -- such obvious violations of territorial waters point to a larger problem. They highlight the inadequacy of the current state of international law effectively to prevent, control, or remedy non-innocent passage of foreign warships within the territorial sea during time of peace.

Innocent Passage: The Foundation of Modern Naval Mobility

The freedom of navies to transit the globe is of utmost strategic importance to the major maritime powers. Whether the mission be defense of merchant shipping, support of allies, projection of political or military influence, or strategic nuclear deterrence, the maritime nations -- under the lingering sway of Mahan¹⁶ -- view maximum naval mobility as essential to their security and economic well being.¹⁷ Threats to that mobility lie in creeping extensions of coastal state sovereignty. Transit rights for modern warships through these sovereign waters, particularly those comprising straits and international sea routes, spring from the custom of innocent passage.

Within the last quarter century, this custom has twice appeared in international treaties -- most recently in an expanded and detailed form

as part of the comprehensive new United Nations Convention on Law of the Sea.¹⁸ Although maritime powers have readily embraced the Convention's transit provisions as guaranteeing the desired freedom of passage while protecting coastal state interests,¹⁹ the treaty has yet to become effective. Should the delicate balance of interests worked out in the decade-long negotiations that produced the Convention fail to gain full acceptance -- a chance significantly increased by the United States' refusal to sign²⁰ -- innocent passage, which plays a secondary role to more expanded transit rights in the Convention, is likely again to emerge as the primary guarantor of naval mobility.²¹ Owing to its fundamental importance as the residual legal regime for securing transit of all ships through sovereign seas, the convention of innocent passage bears study from both historical and contemporary perspectives, for understanding the scope and nature of the innocent passage right is an essential prerequisite to confronting the problem of non-innocent passage.

Non-Innocent Passage: The Uncharted Waters

This article debates neither the proper breadth of the territorial sea, nor the merits of various transit regimes; these issues are taken to have been settled by and among the signatories of the new Convention. Nor does it attempt to replay or analyze the negotiations leading to that agreement. Rather, this study focuses on an existing international convention, innocent passage, and asks how it may be made workable in a specific and recurring instance -- its breach -- in the face of strong political and military overtones. The approach is exploratory, not dogmatic; the goal, a practical solution acceptable to all. To accomplish

this task, the present study seeks to chart the legal waters of non-innocent passage by probing the depths of the following questions with the sounding lines of customary and treaty law, by taking bearings from the competing interests involved, and by testing the open channels thus marked against history and hypothesis: Who decides whether passage of a foreign warship in the territorial sea is innocent? By what criteria? What enforcement and appeal mechanisms, if any, exist? What political factors shape such decisions? The answers to these questions are vitally important to both coastal states, such as Sweden, whose territorial waters are being flagrantly violated with increasing frequency, and major naval powers, whose vessels, statistically, are most likely to intrude.

THE RIGHT OF INNOCENT PASSAGE FOR WARSHIPS IN THE TERRITORIAL SEA

We begin our charting with the concepts of territorial sea, innocent passage, and warships as they have applied to peace-time relations among nations. Three periods of development suggest themselves: 1) The historic regime: customary and treaty law before 1958; 2) The present regime: the 1958 Convention on the Territorial Sea; and 3) the emerging regime: the 1982 Convention on Law of the Sea. The relationship between innocent passage in the territorial sea and its analogue in two closely related maritime regimes, international straits and archipelagic waters, also merits exploration.

The Historic Regime

Division of the Seas

Although all ships enjoy unrestricted operations on the high seas, as they approach land this freedom yields increasingly to coastal state interests, giving rise to separate maritime regimes of increasing stringency. For purposes of navigation, these regimes number five: the high seas, international straits, territorial waters, and internal waters are the traditional divisions; the new Convention on Law of the Sea adds to these the regime of archipelagic waters.²² Conceptually, international straits and archipelagic waters are closely linked to, and often considered merely special instances of, territorial waters.²³

We owe the freedom of the high seas to the influence of the writings of Hugo de Groot, better known as Grotius, who, in 1608, in the face of a proliferation of sweeping claims of sovereignty over the sea, wrote that the sea could not be made the property of any state.²⁴ State sovereignty over its internal waters -- rivers, bays, ports and estuaries -- had long been recognized in international law.²⁵ Grotius sought to meet the contention that like sovereignty existed in the expansive claims of waters external to the State.²⁶ This argument led first to freedom of navigation within the sovereign claims and gradually held sway until, by the beginning of the nineteenth century, freedom of the high seas was firmly established.²⁷ Simultaneously, there arose the concept of a narrow maritime belt running the length of the coastline and separating it from the high seas. Viewed primarily as a protective buffer against naval incursion, this maritime belt was guarded by coastal batteries. Whether its genesis lay in the "cannon shot rule" or in the marine league, the three-mile territorial sea had, with few exceptions,

gained world-wide recognition by the beginning of the twentieth century.²⁸ Although the subsequent movement to extend the territorial sea has prompted much debate and resulted in a variety of specialized regimes,²⁹ no law of the sea issue has raised as much excitement during the last one hundred years as that of innocent passage through the territorial sea.³⁰

Innocent Passage

For international commerce to occur, merchant ships required access to foreign ports. But to enter port, each ship had first to traverse the sovereign zone of waters adjacent to the shore. Although a general right of passage appeared in the public law of the Holy Roman Empire,³¹ Bynkershoek pointed out the inconsistency of such a right with that extension of coastal state sovereignty measured by cannon fire from the shore.³² Thus, until the mid-nineteenth century, innocent passage was considered, where observed, purely a matter of European public law.³³ In 1844, Massé argued that the nature of dominion over the territorial sea was jurisdictional, not possessory.³⁴ In this manner, he sought to resolve the perceived inconsistency of innocent passage with coastal state sovereignty. Such passage had to be in every way inoffensive and without danger.³⁵ This view gained following during the latter part of the nineteenth century, culminating -- through the filter of international codification efforts -- in our present law of innocent passage.³⁶ It is this right which has set the territorial sea apart from internal waters.³⁷

Warships

Warships differ from merchant ships in three particulars: They are manned by a crew subject to regular naval discipline, commanded by a duly commissioned naval officer, and identifiable as belonging to the naval forces of a state.³⁸ Initially thought of as floating extensions of the sovereign territory of their flag states, warships remained immune from the jurisdiction of other states as long as they were acting in the service of the state.³⁹ They were expected voluntarily to comply with the laws of coastal states concerning anchorage, sanitation, quarantine, customs, and order in port; non-compliance was ground for expulsion.⁴⁰ If a warship committed violent acts against other vessels or against officials of a coastal state, only such measures could be taken as were necessary to prevent further acts of violence.⁴¹ Although over time the concept of floating sovereignty waned, the immunity it gained for warships remains a principle of customary law.⁴² Only during the last century has distinction between warships and merchant vessels become of significance with respect to passage in the territorial sea. Prior to the mid-1800's, warships and merchant ships stood on equal footing, because the right to exclude all foreign ships was generally conceded to the coastal states.⁴³ Since the turn of the century, however, the right of passage of warships has come under increasing scrutiny; indeed, it has become "[o]ne of the most controversial questions concerning the territorial sea."⁴⁴ The controversy has centered around whether such passage is a right or a mere comity: if a right, the coastal state cannot act arbitrarily; if comity, it may be withdrawn at will.⁴⁵ This debate mirrors the continuing tension between the territorialists and the jurisdictionalists.⁴⁶

By 1948, the state of the law of transit in the territorial sea included: 1) a customary right of innocent passage for all merchant vessels, 2) a usage of innocent passage for foreign warships and public vessels in time of peace, and 3) a customary right of innocent passage for warships in "highways for international traffic" which pass through the territorial sea.⁴⁷ If we take this latter right to apply to international straits located wholly within the territorial sea, the reasoning of the International Court of Justice in the most significant case dealing with innocent passage of warships becomes clear.

The Corfu Channel Case

Although the British intention in sending warships through the Corfu channel in October of 1946 -- and the theory it put forth in argument before the International Court -- was to assert the general right of innocent passage of warships in the territorial sea, of which it viewed this as but a particular instance,⁴⁸ the Court limited its holding to the exercise of passage "through straits used for international navigation between two parts of the high seas," which it said could take place "without the previous authorization of the coastal State, provided that the passage is innocent," and which could not be prohibited in time of peace.⁴⁹ The Court, in effect, discovered in the customary law a special rule for transit of straits,⁵⁰ even though the straits may lie, as those at Corfu, wholly within the territorial sea of one nation.⁵¹ Subsequent writers have confused this rule with the general principle regarding transit of warships in the territorial sea, concerning which the Court was conspicuously silent.⁵² This confusion resulted in a codified confounding of the two rules less than a decade later.⁵³

The Present Regime: The 1958 Convention on the Territorial Sea

By 1958, the movement toward a twelve-mile territorial sea had gained sufficient support to cast doubt upon the continued viability of the old three-mile rule. Absent general agreement among the delegates on either standard, the Convention on the Territorial Sea and the Contiguous Zone remained silent concerning the former's breadth.⁵⁴ It did establish, however, through legislation and codification of custom, both detailed procedures for determining baselines from which to measure the territorial sea⁵⁵ and a series of rules governing innocent passage within it.⁵⁶ Article 1 affirms coastal state sovereignty over the territorial sea but subjects its exercise to the provisions of the Convention and to "other rules of international law."⁵⁷ Article 2 extends sovereignty to include the airspace above and the seabed and subsoil beneath the territorial sea.

The lively debate concerning innocent passage of warships drew heavily on practical consequences and sparsely on legal precedent.⁵⁸ Reflecting the ancient tensions between non-maritime coastal states on the one hand and seafaring nations on the other, the Convention's ultimate pronouncement regarding passage of warships left something to be desired by nearly everyone.⁵⁹ Among the commentators, the debate over the Convention's innocent passage provisions continues: some argue that the provisions are inconsistent with the intent of the drafters;⁶⁰ others, that their meaning is ambiguous and resort must still be had to customary law to determine the appropriate transit rules for warships.⁶¹ Although a controversial rule concerning prior notification or authorization of warship passage failed to win sufficient support for inclusion in the treaty,⁶² despite confusing the separate straits transit

issue, the remaining articles provide a strong contextual argument for having legislatively established a full right of innocent passage for warships in the territorial sea.

The regime of the territorial sea appears in part I of the Convention, section III of which, entitled "Right of Innocent Passage," contains ten articles arranged in four subsections: "A. Rules Applicable to All Ships,"⁶³ "B. Rules Applicable to Merchant Ships,"⁶⁴ "C. Rules Applicable to Government Ships Other Than Warships,"⁶⁵ and "D. Rule Applicable to Warships."⁶⁶ The four articles of subsection A establish the general rules of innocent passage. Article 14 begins, "Subject to the provision of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea." The article continues, defining and describing passage,⁶⁷ explaining innocence as "not prejudicial to the peace, good order or security of the coastal state,"⁶⁸ placing restrictions on foreign fishing vessels,⁶⁹ and requiring submarines "to navigate on the surface and to show their flag."⁷⁰ Other pertinent articles restrain the coastal state from hampering innocent passage⁷¹ but allow it to take "necessary steps in its territorial sea to prevent passage which is not innocent."⁷² For "protection of . . . security," article 16 permits temporary suspension of innocent passage in specified areas of the territorial sea on a non-discriminatory basis after publication,⁷³ but it prohibits such suspension "through straits . . . 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."⁷⁴ The final article of this section requires ships in innocent passage to comply with coastal state laws and regulations, particularly those relating to transport and navigation.⁷⁵

Rules regarding permissible fees⁷⁶ and criminal⁷⁷ and civil jurisdiction⁷⁸ over merchant ships appear in subsection B. Subsection C distinguishes between government ships operated for commercial purposes⁷⁹ and those operated for non-commercial purposes⁸⁰ and explains, in light of existing concepts of immunity for public vessels, which portions of subsection B, in addition to the rules applicable to all ships, apply to each.⁸¹

The warship rule, article 23, permits the coastal state to require a warship to leave its territorial sea if, first, the warship does not comply with the coastal state's regulations "concerning passage through the territorial sea,"⁸² and further, it "disregards any request for compliance which is made to it."⁸³ Despite the elimination from the final draft of the proposed rule requiring prior notice or authorization for the transit of warships, some scholars, nevertheless, read license for such extensive coast state control in this language.⁸⁴ This ignores that the right of innocent passage is accorded to all ships.⁸⁵ Others suggest that since subsection C incorporates the rules of subsection A by "specific reference," whereas subsection D does not, the Convention grants no general right of transit for warships.⁸⁶ This argument collapses of its own weight under scrutiny: applied to subsection B, which, like subsection D, also omits reference to subsection A, merchant vessels would likewise be excluded, leaving only government ships to enjoy a general right of innocent passage. The fallacy of the specific reference argument springs from a misunderstanding of the necessary function specific reference performs in subsection C; it distinguishes the different regulatory regimes for commercial and non-commercial government

vessels -- a procedure wholly unnecessary in the explanations of rules governing merchant vessels and warships.

One final provision, article 5, places the Convention's innocent passage articles in perspective and underlines "the extent to which the right of innocent passage has become a fundamental principle of the law of the sea and ought not to be interfered with."⁸⁷ Where the drawing of straight baselines, as permitted by article 4, encloses as internal waters areas previously considered part of the territorial sea or of the high seas, "a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters."⁸⁸ This provision not only refers to the innocent passage articles -- including the one for warships -- as a whole, partaking of a singular "right"; it also limits coastal states from denying this right in their newly-acquired internal waters by treating the areas of expansion, in effect, as territorial, rather than internal, waters.⁸⁹

Although the Convention admits to a consistent interpretation on its face, its effect is not without question. The interpretation advanced here yields a right of innocent passage for warships that cannot be burdened by requirements of prior notice or authorization. If, nonetheless, article 23 may somehow be independent of the other innocent passage provisions, then prior permission for warships could conceivably be required. The late Professor O'Connell expressed reservations toward both these views. He believed the Convention effectively "shelved" the question of the degree to which warship transit could be regulated; consequently, in his view custom still prevails.⁹⁰ On this point he found "no evidence of state practice before very recent times other than free and uncontested passage of warships."⁹¹

On a much broader scale than ever before, the world community sought again in the 1970's to face this issue within the context of a periodic, continuing negotiation to produce a comprehensive and detailed multinational treaty which would govern all aspects of international sea law. We turn now to examine the emerging consensus which resulted from those efforts.

The Emerging Regime: The United Nations Convention on the Law of the Sea

Signed in Jamaica on 10 December 1982, the United Nations Convention on the Law of the Sea⁹² attempts to codify and legislate the entire body of law which exists, or should exist, to regulate rights in, transit through, use of and conflicts concerning the marine environment. The Convention begins with the territorial sea⁹³ and answers, at the outset, a question that has eluded consensus for over fifty years: its breadth may now extend to twelve miles.⁹⁴ The remaining provisions dealing with the limits of the territorial sea are, with minor additions, incorporated almost verbatim from the 1958 Convention.⁹⁵

Innocent Passage

The innocent passage provisions⁹⁶ preserve the 1958 subsection format of setting out separately the rules for all ships⁹⁷ first, followed by additional rules for merchant ships⁹⁸ and warships.⁹⁹ While incorporating the remaining 1958 articles virtually intact, the drafters added eight new ones and established separate regimes for international straits and archipelagic waters.¹⁰⁰

All of the new articles apply to warships. Most significant among them is article 19, which sets forth specific objective criteria by which to measure the innocence of passage.¹⁰¹ Article 21 enumerates the areas of permissible coastal state regulation with which "[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply."¹⁰² But article 24 explains that such regulations "shall not hamper the innocent passage of foreign ships through the territorial sea":¹⁰³

In particular, in the application of this Convention, or of any laws or regulations adopted in conformity with this Convention, the coastal state shall not:

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- (b) discriminate in form or in fact against ships of any state or against ships carrying cargoes to, from or on behalf of any state.

The other general articles include optional rules for establishing sea lane and traffic separation schemes¹⁰⁴ and requirements relating to "nuclear-powered ships and ships carrying other inherently dangerous or noxious substances."¹⁰⁵ Three of the new provisions appear in the section dealing with warships. One incorporates an updated definition of "warship";¹⁰⁶ another establishes liability for loss or damage resulting from non-compliance with coastal state regulations;¹⁰⁷ the third identifies certain exceptions to the immunity of warships and government ships operated for non-commercial purposes.¹⁰⁸

Hence, the right of innocent passage for warships in the territorial sea has been made more definite. Although it cannot be denied or impaired by the coastal state, the manner of its exercise -- the only remaining issue of contention¹⁰⁹ -- is subject to certain coastal state

rights and regulations. Where necessary for safety of navigation, the coastal state may designate sea lanes for nuclear powered ships, but it may not otherwise prevent their innocent passage.¹¹⁰ Submarines must still navigate on the surface and show their flag.¹¹¹ The coastal state, of course, retains its right to take "necessary steps in its territorial sea to prevent passage which is not innocent"¹¹² and to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security."¹¹³ Finally, the coastal state may expel from its territorial waters any warship which fails to comply with its laws and regulations and disregards any request for compliance.¹¹⁴

Article 8 reaffirms the continued right of innocent passage through newly-enclosed internal waters formed by the drawing of straight baselines from "areas which had not previously been considered as such." Its provisions appear to apply equally to innocent passage through the territorial sea and through two closely related new regimes: international straits and archipelagic waters.¹¹⁵

International Straits

Although the regime of transit passage embodied in the Convention's straits provisions grew out of compromise, its roots lay in custom. By the beginning of World War I, warships had gained customary recognition of their right to transit international straits.¹¹⁶ Although frequently described by commentators as "innocent passage,"¹¹⁷ in practice, the straits transit right involved something more.¹¹⁸ The International Court of Justice, in the Corfu Channel Case, identified the additional element: "Unless otherwise prescribed in an international convention,

there is no right for a coastal State to prohibit such passage through straits in time of peace."¹¹⁹ The Court found the decisive characteristic warranting free transit through an international strait to be its geographic connection of two parts of the high seas.¹²⁰ A discrepancy between the authoritative French text,¹²¹ which subordinates use of the strait for international navigation to its geographic situation, and the English translation,¹²² which treats the two as co-equal requirements, undoubtedly contributed to the confusion concerning straits passage apparent in the 1958 Convention.¹²³ Treating straits transit as merely an application of innocent passage through the territorial sea, the drafters adopted the rationale of the English translation, requiring of "international straits" both geographic connection and use for international navigation.¹²⁴ Although properly recognizing a separate regime of transit for straits, the 1982 Convention tipped the balance even further away from geographic considerations. Part III, the Convention's straits section, was entitled, "Straits Used for International Navigation." Clearly, use has become the new critère décisif of international straits.¹²⁵

Within the usage qualification, the geographic criterion does, however, distinguish three separate levels of strait regulation under the Convention. Straits which contain a "route through the high seas or through an exclusive economic zone of similar convenience"¹²⁶ fall outside the straits provisions.¹²⁷ Through straits connecting "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone,"¹²⁸ all ships and aircraft enjoy the right of transit passage, which shall not be impeded.¹²⁹ Those straits which are excluded from transit passage by virtue of the

existence of a seaward route of similar convenience or which connect "a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state," retain the regime of territorial seas innocent passage, with its qualification that there shall be no suspension of innocent passage through such straits.¹³⁰ Regardless of their geographic situation, all other straits within the territorial sea not used for international navigation fall under the suspendable innocent passage provisions of part II.¹³¹

Transit passage conducted in the "normal modes"¹³² must be "continuous and expeditious";¹³³ ships and aircraft exercising this right must "proceed without delay through or over the strait."¹³⁴ Many of the transit passage articles have analogues among those governing innocent passage: a list of duties of ships and aircraft in transit,¹³⁵ a prohibition of marine research or survey,¹³⁶ a sea lanes and traffic separation scheme,¹³⁷ a list of permissible topics of strait state regulation and restrictions concerning their application,¹³⁸ a liability provision for vessels and aircraft with sovereign immunity,¹³⁹ and a duty not to hamper or suspend transit passage.¹⁴⁰ The parallelism of these rules with those governing innocent passage reinforces the view that both rights are intended to operate broadly. Concomitantly, the duties of the transiting vessels are clear; they must avoid the enumerated prohibited activities, comply with lawful coastal state regulations and applicable international regulations, and refrain from other conduct not having a direct bearing on passage.¹⁴¹

Archipelagic Waters

A growing concept in recent years, archipelagic status is officially recognized in the Convention. Archipelagic states¹⁴² are permitted to draw straight baselines to enclose within their perimeters vast expanses of "archipelagic waters,"¹⁴³ up to a ratio of nine parts water to one part land.¹⁴⁴ Archipelagic state sovereignty extends to the waters and their vertically adjacent airspace, land, subsoil, and resources.¹⁴⁵ Within the archipelagic waters, each state may delimit its own internal waters for river mouths, bays, and ports.¹⁴⁶ Encircling the archipelagic waters, measured from their outermost edge, lies the territorial sea.¹⁴⁷ As with straits, two levels of transit rights exist: innocent passage, of the territorial sea-type, for ships through any part of archipelagic waters,¹⁴⁸ and "archipelagic sea lanes passage" for ships and aircraft in designated sea lanes or on designated air routes through or over archipelagic waters and the adjacent territorial sea.¹⁴⁹ The same transit duties, scientific research restrictions, state regulatory authority, and prohibitions concerning hampering or suspending transit passage through international straits apply mutatis mutandis to archipelagic sea lanes passage.¹⁵⁰ Ships in archipelagic sea lanes passage may deviate up to twenty-five miles to either side of the designated sea lane's axis, but they shall respect established and applicable sea lanes and traffic separation schemes.¹⁵¹

Summary of Warship Passage

The foregoing provisions support the following generalizations concerning the Convention's treatment of the passage of warships:

1. Warships enjoy the same rights of transit as do merchant ships in all three regimes, the territorial sea, international straits, and archipelagic waters.
2. A right of innocent passage, subject to temporary suspension, exists through the territorial sea, newly enclosed internal waters,¹⁵² archipelagic waters, and straits within the territorial sea not used for international navigation. Warships exercising this right are subject to the coastal state's dual rights of protection against passage which is not innocent and of expulsion for non-compliance with its laws and regulations.
3. A non-suspendable right of innocent passage exists within the territorial sea and newly-enclosed internal waters through straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state. This right is also exercised subject to the coastal state's rights of protection and expulsion.
4. A non-suspendable right of transit passage applies within the territorial sea and newly-enclosed internal waters to straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another such part.
5. An equivalent right of archipelagic sea lanes passage applies through archipelagic waters and their adjacent territorial seas within

designated archipelagic sea lanes or, if none are designated, through routes normally used for international navigation.

6. Flag states of warships exercising any of the foregoing rights are liable for loss or damage resulting from breaches of coastal state laws and regulations.¹⁵³

7. Submarines must surface and show their flag while exercising the right of innocent passage. During transit and archipelagic sea lanes passage, they may navigate in the "normal mode," that is, submerged.

Application of the Convention

Will the Convention ever come into force? If it does, what will be the respective rights of signatories and non-signatories? Who will be bound, and who not bound, by it? Commentators speculate that since it took four years for the 1958 Convention to garner sufficient acceptance to become operable, and since the new Convention requires substantially more ratifications to activate it than the total number of parties to the 1958 agreement, we may expect a considerable period to elapse prior to its entry into force.¹⁵⁴

In the interim, to the extent that it declares custom, and it has been forcefully argued that its navigational articles do so,¹⁵⁵ the law it embodies is already evident in, and binding upon, state practice. The territorial sea innocent passage provisions ground themselves in both custom and the 1958 Convention; the regime of transit passage through straits "approximates to the situation stabilized in the customary law by the practice of States."¹⁵⁶ Archipelagic sea lanes passage through

newly-legislated archipelagic waters, likewise, recognizes an existing right of passage, conceptually linked to straits transit passage and even more closely akin to high seas "freedom of navigation" due to the vast expanses of these potential archipelagic waters.¹⁵⁷

The Convention's application will be clear among its parties. Less clear will be its force to bind third parties -- most likely under a universal application theory, if it is considered to have legislated, or as a declaration of currently binding customary law.¹⁵⁸ Also unclear is the extent to which a non-party may invoke the benefits of the Convention or suffer the reduction or loss of any rights or benefits it now asserts or exercises contrary to the Convention's terms.¹⁵⁹ These questions are of considerable concern not only to the United States, which, at the eleventh hour, withdrew its support for the Convention, but also to the world community. For without global support, including that of all major riparians and users of the seas, the Convention's purpose of introducing certainty into the affairs of nations and promoting international respect for the rule of law will falter and ultimately fail.¹⁶⁰ A decade's work of delicately balancing widely divergent interests will have left but a hollow shell as its memorial.

NON-INNOCENT PASSAGE

However one may view the varying interpretations of customary and treaty law as either retaining, expanding, or limiting transit rights of warships, there always remains a territorial sea or analogous regime wherein the fundamental convention of innocent passage applies.¹⁶¹ And

wherever this right extends, there also lies the danger of non-innocent passage. For the coastal state, non-innocent passage poses problems of two orders: recognition and response.

Recognizing Non-Innocent Passage

Recognition of non-innocent passage involves physical perception of the observable facts of warship transit against the backdrop of principles or rules that govern such transit. Because the factual question depends heavily on the context of each transit, this section focuses primarily upon the legal standard by which to measure warship actions in the territorial sea and, thereby, to determine the innocence or non-innocence of passage.

The Factual Element

Recognition requires interpreting behavior, the motivation of which may be unclear, first against the objective criteria of innocent passage, then against domestic legislation and regulations related to innocent passage. Interpreting behavior injects a subjective element into the application of objective standards.¹⁶² Unless an express hostile intent has been communicated, it appears more fruitful to focus on the manner in which passage is conducted rather than the often speculative intent motivating the passage.¹⁶³ Judging innocence or non-innocence of passage bears a close resemblance to judging the criminality of individual behavior. Just as there is no crime without law, there is also no crime without a criminal act.¹⁶⁴ The "law" in this case is the list of objective criteria. As with general criminal intent, non-innocent intent may be inferred from the violative act, unless circumstances indicate

otherwise.¹⁶⁵ Thus, a presumption of innocence must exist for each passage undertaken through the territorial sea until, by virtue of some prohibited act, the warship shows its passage to be non-innocent. The burden of proving non-innocence, then, lies with the coastal state.¹⁶⁶

The Legal Criteria

Passage prejudicial to the peace, good order or security of the coastal state would be non-innocent under both Conventions.¹⁶⁷ Inasmuch as the 1958 Convention failed to further elaborate this subjective standard, it left broad latitude for interpretation. Thus, some commentators argued that warships should automatically be excluded, because they always threaten,¹⁶⁸ or that nuclear-powered vessels, or those carrying nuclear substances or weapons were inherently dangerous and could, likewise, never pass innocently.¹⁶⁹ In this regard, the 1982 Convention represents a major step forward, for it spells out in a list of objective criteria what the old subjective standard means. Even if the new Convention were never to enter into force, the list would still be important, because it represents an expression of consensus of the community of nations regarding the nature of innocent passage and the specific acts which render passage non-innocent:¹⁷⁰

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;

- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of willful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

The addition of a broad catch-all provision at the end suggests that the list was meant to be exhaustive, not merely exemplary.¹⁷¹

Within certain bounds, the coastal state may also impose other restrictions not directly affecting the innocence of passage. Again, the new Convention enlarges upon the general language of the 1958 provision¹⁷² by specifying, in article 21, the permissible areas of regulation, and again, the list is important as an expression of international consensus:¹⁷³

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;

- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

. . . .

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Such regulations must not hamper, deny or impair innocent passage.¹⁷⁴

Moreover, violation of these laws or regulations will not necessarily render passage non-innocent.¹⁷⁵ Paragraph four has a cognate among the transit passage articles;¹⁷⁶ taken together with the 1958 provision, the parallel wording of the three articles implies separation of the quality of passage issue from that of compliance with coastal state laws and regulations. Thus, four situations may result:

- 1) innocent passage in compliance with coastal state regulations,
- 2) innocent passage not in compliance with coastal state regulations,
- 3) non-innocent passage in compliance with coastal state regulations, and
- 4) non-innocent passage not in compliance with coastal state regulations.

This is not to say that innocence of passage and compliance with coastal state regulations are mutually exclusive events. Analysis readily shows overlapping subject matter in the areas of customs, fiscal, immigration or sanitation regulations;¹⁷⁷ pollution;¹⁷⁸ fishing;¹⁷⁹ research and survey activities;¹⁸⁰ and systems of communication or "other facilities or installations" of the coastal state.¹⁸¹ These subjects of

prejudicial conduct and coastal state regulation pertain primarily to merchant and fishing vessels. By contrast, the remaining prejudicial acts, those most applicable to warships, have only one possible cognate left among the coastal state's repertoire against which to measure: "the safety of navigation and the regulation of maritime traffic."¹⁸² This provision clearly contemplates not coastal state security, but the "safety" and "regulation" of other vessels passing through the territorial sea. Typical of such regulation might be the adoption of a sea lane or traffic separation scheme.¹⁸³ The warship innocent passage indicia are concerns of a different order. They involve security, not safety, and they clearly prohibit conduct which might jeopardize, in real or imagined terms, the security of the coastal state. Accordingly, they stand independent of further coastal state regulation. Thus, for activities uniquely within the domain of warships, innocence and compliance with coastal state regulations do appear largely mutually exclusive matters.

The effectiveness of coastal state legislative and regulatory standards depend in large part upon the precision with which they are drafted and upon their adherence to the generally accepted scope of regulation. Legislative discretion in determining how broad or narrow these regulations become remains a function of domestic politics. Regulations formulated by those nations having little use for the sea are likely to appear more stringent than those of nations maintaining a significant level of seagoing activities. Whatever its scope, no such rule has force against foreign vessels until the coastal state gives it "due publicity."¹⁸⁴ The analysis regarding whether or not such local laws or regulations have been violated differs somewhat from that of non-innocent passage. In those areas of overlap with the innocent passage

criteria¹⁸⁵ -- primarily of concern to merchant and fishing vessels -- there exists room for legislative fashioning of subjective standards which may have the effect of reversing the presumption of innocence. For warships, this coastal state competence appears primarily limited to safety of navigation and traffic regulation schemes. These would seem to require specific, detailed rules, thus preserving the necessity of an identifiable act by which the warship would violate the regulations.¹⁸⁶

The 1982 Convention also indicates one instance in which vessels exercising the right of transit passage may fall under the rules of innocent passage. Ships and aircraft in transit passage are admonished to "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit," for any such activity "remains subject to the other applicable provisions of this Convention."¹⁸⁷ The two logical points of this reference appear to be the innocent passage and the dispute settlement provisions. This qualification of the transit passage right could be argued to incorporate by indefinite reference the full range of innocent passage prohibitions; indeed, it may even be read more restrictively. Whereas the innocent passage article contains a finite list of prohibitions,¹⁸⁸ the transit passage right has one specific prohibition¹⁸⁹ and one general prohibition which could manifest itself in variety of specific applications. The saving distinction for transit passage is that it shall not be suspended. The question becomes, then, if a transiting vessel is engaged in some other activity, does it cease to be in "transit passage" for the purposes of protection from non-suspension? An affirmative answer hardly seems what the major maritime powers would have envisioned or consented to, not because they were desirous of conducting other activities during

[The text on this page is extremely faint and illegible. It appears to be a list or a series of entries, possibly a table of contents or a catalog, with some items appearing to be numbered or bulleted. The text is too light to transcribe accurately.]

transit passage, but because they wanted to insure against arbitrary or unreasonable application of the Convention's rules to prevent transit altogether.¹⁹⁰ Owing to the fact that innocent passage through international straits is not suspendable, the strait state seeking somehow to apply innocent passage rules to warships it considers in violation of transit passage is left with the futile prospect of requesting a vessel already in "continuous and expeditious transit" immediately to leave the territorial sea.¹⁹¹

Is Submerged Passage Non-Innocent?

In the context of this study, whether submerged passage is per se non-innocent is of some moment.¹⁹² The 1958 Convention places its provision requiring submarines to navigate on the surface at the end of its article that grants the right of innocent passage and defines "passage" and "innocent."¹⁹³ Were it not for the immediately superadjacent provision specifying the conditions under which foreign fishing vessels "shall not be considered innocent,"¹⁹⁴ a contextual argument could be made that failure to surface in the territorial sea renders the submarine's passage non-innocent. Parallel language, however, is missing from the submarine provision, "submarines are required to navigate on the surface and to show their flag."¹⁹⁵ Absence of language saying that a failure to surface "shall not be considered innocent," undercuts any assumption that such behavior is clearly non-innocent and leaves in its wake uncertainty of application.

The uncertainty abates under the 1982 text, but not without close scrutiny. Couched in a separate article, sandwiched between the indicia

of non-innocent passage and the scope of permissible coastal state regulation, lies the submarine provision, largely unchanged: "In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag."¹⁹⁶ Since the drafters could easily have included this provision in the previous list of non-innocent activities, but did not, it appears that they intended operating on the surface not to be a requirement of innocence for submarines. Rather, it is more logically consistent with other terms of the Convention as an independent provision, in pursuance of which the coastal state may adopt laws and regulations concerning "the safety of navigation and the regulation of the marine environment."¹⁹⁷ Submarines, of course, with the sanction of both custom and treaty, do navigate submerged in those portions of the territorial sea that comprise international navigation routes through certain straits and archipelagic waters.¹⁹⁸

The importance of distinguishing the determination of non-innocence from that of violation of coastal state laws and regulations lies in the differing levels of sanction available to meet each breach. Under both Conventions ships in non-innocent passage are treated legally as though they were passing through the coastal state's internal waters. Against such passage, the littoral has a right of protection.¹⁹⁹ The more limited sanction of warning and expulsion applies to warship breaches of coastal state laws and regulations.²⁰⁰ Thus, the characterization of a breach as one rendering passage non-innocent or merely violative of some regulation has important consequences in limiting the coast state's available sanctions. Recognition of a violative act prompts consideration of an appropriate response. Before exploring the decisionmaking process

involved in determining whether a given warship's passage is innocent or not, we turn first to consider what sanctions exist and how they may be applied.

Responding to Non-Innocent Passage

What Measures May Be Taken?

Various immediate and long-range options exist for the coastal state confronted with an apparent breach of innocent passage or its local regulations. Because non-innocent passage is potentially more serious, the scope of the immediate sanction is broader: "The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent."²⁰¹ More limited is the two-tiered sanction immediately available to meet warship violations of coastal state regulations: a request for compliance, which, if disregarded, permits the coastal state to require the warship immediately to leave the territorial sea. To resolve any underlying problem of which the violative passage may be a symptom, the coastal state may consider the political options of no action at all, diplomatic protest,²⁰² negotiation,²⁰³ mediation,²⁰⁴ inquiry, conciliation,²⁰⁵ regional agency settlement, the United Nations Security Council, or other peaceful means;²⁰⁶ the legal options of arbitration or judicial settlement;²⁰⁷ and, in the most serious cases, the military option of force.²⁰⁸ Although instances of non-innocent passage may evoke the full range of these dispute settlement options, breach of coastal state regulations alone does not warrant and cannot justify forceful response, for the coastal state remains under a duty not to hamper, deny, or impair innocent (though non-compliant) passage.²⁰⁹ If the warship in

violation of coastal state regulations fails to heed an initial warning and refuses to leave when requested to do so, its passage at that point may, but does not necessarily, become non-innocent. Provided the relevant coastal state rule falls within the scope of permissible regulation -- a question not without foreseeable controversy -- the warship's failure to leave the territorial sea upon request for an actual, as opposed to a merely technical, violation of coastal state rules will render that passage non-innocent and, hence, subject to the broader sanction. The passage becomes non-innocent not due to the warship's violation of the coastal state's properly drawn rule, but due to its non-compliance with the Convention or other rules of international law,²¹⁰ which, inter alia, require continuous and expeditious passage and prohibit activities not having a direct bearing on that passage.²¹¹ By definition, a vessel exercising the right of innocent passage, except when proceeding to internal waters, is in the continuous and expeditious process of leaving the territorial sea.²¹² A warship is unlikely to refuse to continue its departure when specifically requested to do so; if it does, it removes itself from innocent passage and invites stronger sanction.

The foregoing measures remain subject to the United Nations Charter provisions which require all members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,"²¹³ and prohibit them "from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."²¹⁴ Furthermore, the 1982 Convention requires settlement "by peaceful means" of any dispute concerning its "interpretation or application."²¹⁵ Because they are well

known, the traditional methods of dispute settlement require little additional comment outside the context of the Convention's dispute settlement provisions. After first reviewing the option of no action and before taking up the use of force, we shall consider these settlement provisions and their efficacy in resolving violations of territorial waters.

No Action

Based upon the principle that the passage of every ship through the territorial sea is presumed to be innocent and in compliance with applicable regulations until demonstrated otherwise,²¹⁶ "no action" should be the coastal state's normally expected response to any given transit. The choice of no action may also follow minor breaches or technical infractions which have no direct bearing on the domestic or international affairs of the coastal state. Under other circumstances involving more serious breaches, the coastal state may decide, for political reasons, to take no action. Resort to this alternative may also result from a dearth of navy and air force assets;²¹⁷ many coastal states simply lack the operative capability to recognize and respond to every -- or some, to any -- violation of their territorial waters.

Settlement of Non-Innocent Passage Disputes Under the 1982 Convention

The 1982 Convention requires parties to a dispute to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."²¹⁸ Although it encourages the use of those means specified in the United Nations Charter,²¹⁹ it allows the parties unlimited latitude to settle their dispute "by any peaceful means

of their own choice."²²⁰ The Convention also provides a voluntary conciliation procedure for those parties desiring to utilize this means.²²¹ If the parties fail to resolve their dispute voluntarily through peaceful means, they shall "proceed expeditiously to an exchange of views."²²² Thereafter, subject to certain exceptions, any party to the dispute may initiate a compulsory and binding dispute resolution procedure.²²³ Embodied in a comprehensive agreement designed to regulate human conduct over three-quarters of the earth's surface, this compulsory jurisdiction feature distinguishes the Convention's arbitration and judicial settlement procedures from the ineffectual optional protocol of the 1958 agreements²²⁴ and the largely consensual jurisdiction of existing institutions.²²⁵

Four guiding aspirations shaped the Convention's compulsory dispute settlement provisions: grounding them in law to preserve equality of states and to prevent political and economic pressures, achieving uniformity in the Convention's interpretation, maximizing obligatory settlement by narrowly drafting any exceptions, and integrating the dispute resolution provisions into the body of the Convention.²²⁶ At the core of the compulsory provisions are a newly-created International Tribunal for Law of the Sea and a procedure for constituting arbitration panels to decide disputes arising under the Convention.²²⁷ Parties to the Convention may, within limits, select in advance to submit disputes to the International Tribunal, the International Court of Justice, a general arbitral tribunal or a special, technical arbitral tribunal.²²⁸ Each party may select one or more of the four options; if it selects none, it will be deemed to have accepted general arbitration.²²⁹ Unless the parties agree differently, if they have accepted

the same procedure, it will apply; otherwise general arbitration will apply.²³⁰ The strength of the Convention's compulsory but flexible dispute settlement procedures is substantially eroded, however, by certain limitations and exceptions to compulsory jurisdiction,²³¹ two of which merit comment.

Special limiting provisions make disputes between coastal states and flag states regarding exercise of the coastal state's "sovereign rights or jurisdiction" or infringement or abuses of "the freedoms and rights of navigation" subject to arbitral or judicial settlement.²³² In the nature of a guarantee rather than a limitation of jurisdiction,²³³ these provisions underline the concern with which the maritime powers view the Convention's extensions of coastal state jurisdiction as impinging upon traditional high seas freedoms.²³⁴ They reflect also the coastal state's concern to be free from undesired intrusion by ships of the maritime powers.²³⁵ The compromise, to permit binding resolution of both questions, provides "another example of the dynamics of the dialectics between nationalism and internationalism in making ocean law and mechanisms."²³⁶ While these specific "limitations" apply to activities in the exclusive economic zone, they carry implications for warship transit in the territorial sea. Viewed as a guarantee of jurisdiction for binding dispute resolution amid limitations of that same jurisdiction regarding other subject matters, these provisions imply, both by emphasizing the need for some form of obligatory procedure to resolve disputes in this touchy area and by the absence of any additional limiting language regarding the territorial sea, that the full range of binding and non-binding settlement options applies to disputes arising within the territorial sea.²³⁷ In view of the greater quantum of coastal state dominion

and control over the territorial seas, can this conclusion be correct? With a surface area over fifteen and-a-half times that of the territorial sea²³⁸ in addition to its liberal navigational regime, the economic zone holds high potential for conflict among its users. Not so in the territorial sea, where the coastal state's full sovereignty encounters only the limited and narrowly defined right of innocent passage.²³⁹ Thus, although the coastal state's possessory and regulatory rights are greater in the territorial sea, many developing coastal states have tended to focus instead upon protection of their discretionary rights in the economic zone.²⁴⁰ The result is that the Convention's dispute settlement "limitations" do not apply to warship passage in the territorial sea.

Among the Convention's "optional exceptions,"²⁴¹ however, one -- that for military operations -- raises potentially serious questions concerning the treatment of non-innocent passage disputes. From one or more of the compulsory, binding means of dispute settlement, States Parties may except:²⁴²

- (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

Does this exclusion apply to warships in the territorial sea? Among the dispute settlement literature, two views emerge by implication: that the military exception applies only to "military activities and certain law enforcement measures connected with the exercise of sovereignty within the coastal States' EEZ"²⁴³ and that coastal states could apply it "to naval passage through straits or through territorial seas and economic zones."²⁴⁴ While historical comparison of earlier drafts and grammatical

analysis (which may only reflect the historical grafting process) lend credence to the view that the military exclusion was intended to operate broadly,²⁴⁵ other evidence points convincingly to its application only within the exclusive economic zone. Unquestionably, the second half of the provision deals solely with enforcement activities in the exclusive economic zone.²⁴⁶ The first half specifies military activities, not just military vessels. This implies military maneuvers, exercises, weapons practice and the like. Military activities can be conducted freely on the high seas. High seas freedom of navigation applies in the exclusive economic zone. Innocent passage, by definition, excludes military activities though not military vessels from the territorial sea, and hence from archipelagic waters. Transit passage and archipelagic sea lanes passage allow only those military activities incident to normal navigation²⁴⁷ through portions of the territorial sea and archipelagic waters comprising international straits and archipelagic sea lanes. "Aircraft" mentioned in the first phrase may freely transit the exclusive economic zone but may not overfly the territorial sea except when exercising the rights of transit or archipelagic sea lanes passage. Key words, then, in the first half of the exclusion eliminate the territorial sea's innocent passage regime from its operation. The narrow scope of the transit and archipelagic sea lanes passage restrictions;²⁴⁸ the prohibitions against suspending, denying, impairing or hampering such passage;²⁴⁹ and the overwhelming concern of the developing coastal states to maintain maximum control over activities within their exclusive economic zones²⁵⁰ all point to the additional elimination of the remaining territorial waters comprising straits and archipelagic sea lanes from the scope of this exception. Only the exclusive economic zone remains. Due

to reciprocity of exception,²⁵¹ this conclusion balances and harmonizes the two halves of the exclusion, making them co-equal in scope. Thus, neither the maritime power for its military activities nor the coastal state for its enforcement activities enjoys an advantage over the other in electing this exception. Because the exception, if invoked, relates only to disputes arising in the exclusive economic zone, those disputes precipitated by instances of non-innocent passage of warships in the territorial sea remain amenable to compulsory, binding resolution.²⁵² This is true even if both parties have elected the exception and applied it to all four compulsory procedures.²⁵³ The principle of reciprocity makes the military activities exception a risky option for both coastal states and maritime powers, for it applies to the one ocean regime most likely to generate disputes and, in the absence of binding peaceful resolution machinery, most likely to result in the use of force.²⁵⁴

Use of Defensive Force

The United Nations Charter allows "individual or collective self-defense in the face of "armed attack."²⁵⁵ This instinct of self-preservation²⁵⁶ flows from an overwhelming necessity, "leaving no choice of means and no moment for deliberation."²⁵⁷ The defensive act "must be limited by that necessity and kept clearly within it."²⁵⁸ Although the decision to act in self-defense may be the prerogative of the coastal state in the first instance, it raises the question of response, and it may "afterwards be reviewed by the law in light of all the circumstances."²⁵⁹

Thus, use of force in relation to a warship's passage in the territorial sea should be approached with extreme caution. Even under

suspicious circumstances, until threat of attack becomes imminent, the prudent course dictates following the special procedures applicable to warships breaching coastal state regulations: a warning concerning the improper behavior followed by using the minimal coercion necessary, for example, an escort ship or aircraft, if the behavior persists. Only when these measures fail should the question of armed force under the coastal state's right of protection arise. Wise military strategy counsels against fighting unnecessary battles; thus, force should be applied only when no other alternative exists and only in the minimum degree demanded by the circumstances. For use of force -- even in perceived self-defense -- if excessive or unwarranted, invites self-defense in return. A warship fired upon in the territorial sea may fire back and may be justified in doing so.²⁶⁰

Some commentators view the use of defensive force as encompassing an even broader scope, that of asserting a right unlawfully denied. "[I]f a state has a right which it is entitled to exercise and another state wrongfully and forcibly persists in interfering with its exercise, the first state is not bound to submit to the lawless use of force by the second but may lawfully assert its right by the threat and use of force."²⁶¹ This view is embodied in the Corfu Channel decision.²⁶² This extension of the concept of permissible self-defense is controversial²⁶³ and fraught with danger. Although it describes precisely the way in which the dialectic of claim and counter-claim worked to shape the customary law, it partakes of an era when weapons of limited destructive capability were controlled by a relatively small number of national actors. As today's nuclear weaponry approaches unlimited destructive power asymptotically and the number of national

actors has vastly expanded, the process of ascertaining rights by asserting force or meeting force with opposing force between or among any of those actors risks escalation, intervention, ultimately world conflict. Such risks should, if possible, be kept to a minimum.

The crux of this problem appears in the situation where both sides resort to force to assert a "right" which the other has "unlawfully denied," based upon differing interpretations -- likely, but not necessarily, politically or ideologically motivated -- of factual data or legal standards. Instances of alleged non-innocent passage could easily fit this scenario. Each actor would justify by its subjective belief the application of this extended self-defense rule to vindicate its view of the situation. Where no compulsory and binding means exists to compel decision of the disputed issue, only political means -- the influence of world opinion, outside intervention and the rational calculus of strategic decision theory,²⁶⁴ -- remain to constrain the escalation of hostilities, and these means are far from certain to do so. It is suggested that in the absence of a comprehensive and widely accepted law of the sea treaty, use of force, particularly to ensure free navigation and innocent passage rights, will continue to "be considered a useful and probably effective method of securing [these] objectives."²⁶⁵ Only comprehensive and widely accepted compulsory, peaceful dispute settlement procedures can ensure against forceful handling of foreign warships passing through the territorial sea.²⁶⁶ Identification of breaches and selection of appropriate measures depend upon the respective states' technical capabilities and the individual judgments of their officials. The question at this point being one of rule enforcement, it is important to consider the

decisionmaking process involved in determining whether passage is innocent or not.

Who decides?

Despite objective criteria, due to cultural, linguistic, ideological and political differences, each state will likely develop its own subjective interpretations of innocent passage rules and its own set of regulations, which may, or may not, correspond to those of any other state. When flag state and coastal state interpretations clash, the question arises, who decides?

Initially, the commanding officer of a warship has the capability to decide whether its passage shall be innocent or non-innocent, compliant or non-compliant with coastal state regulations. He may operate under orders in this regard, or he may have the latitude, within limits, to exercise his own discretion. As a matter of national policy, he may, for example, undertake non-innocent passage in portions of the high seas claimed as territorial waters in excess of generally accepted limits.²⁶⁷ Or he may engage in passage calculated to be innocent but non-compliant in order to protest a coastal state regulation or practice which goes beyond those his state views as permissible under the Conventions or other rules of international law.²⁶⁸

Absent a world ocean police force, each littoral State must police and protect its own territorial waters. This involves, in the first instance, as previously noted, recognizing a violation when it occurs, and, in the second instance, deciding whether to take action concerning it. Combining the observed facts of the warship's behavior, then, with his knowledge -- or lack thereof -- concerning the law of innocent

passage and applicable domestic regulations, some official of the coastal state will next decide the question of innocence. As with the warship commander, this official may have either strict orders or discretion within limits concerning how to interpret the warship's behavior and in what manner, if any, to respond.

The initial observer's perception will reflect a natural filtering process in which certain perceived facts will be emphasized and others discarded. The observer's likely communication of the "facts" to higher authority for decision introduces additional opportunity for distortion of the objective data. The accuracy of the information received will be no greater than the product of the observer's perception, his ability to communicate, and the fidelity of the means of communication. This information, in turn, may pass through yet other layers of perception and communication until it rises to the level of decisionmaking. Based upon the communicated "facts," knowledge of the law and a host of institutional considerations including national goals, foreign policy objectives, internal organizational interests, standard operating procedures and domestic political influences,²⁶⁹ the appropriate official or officials will decide whether the warship's passage is innocent or not and what measures, if any, should be taken. A message to this effect will then travel back down through the layers of perception and communication to be acted upon.

In view of the potential seriousness of any perceived act of non-innocent passage, the perception-decisionmaking-execution process introduces an uncomfortable margin for error. At one extreme the decision regarding the character of passage and the appropriateness of sanctions may be made by a lower level official, possibly a military officer in

charge of a coastal defense sector, one step removed from the scene of action, or even directly by a ship or aircraft commander at the scene. At the other extreme, the information must be relayed to a national leader for decision. In the first instance, although the facts may be clearer, knowledge of the fine points of international law is wanting. As the decision level rises to approach the latter case, the reverse occurs: knowledge of the law becomes greater, but the "facts" may have mutated.

Any decision, no matter how arrived at, must be made with an eye toward its likely effects. Unless a great deal is known about the internal decisionmaking processes of the opposing government, the most likely approach in determining the course of action to pursue is to follow the "rational actor" model.²⁷⁰ This theory of dealing with conflict assumes "rational behavior . . . motivated by a conscious calculation of advantages . . . that . . . is based on an explicit and internally consistent value system."²⁷¹ The strategy of dealing with conflict under this model is "concerned with constraining an adversary through his expectation of the consequences of his actions."²⁷² Following this model, a flag state, through its warship commander, then, would undertake non-innocent passage only if it determined that the benefits to be derived would outweigh any harm anticipated in response.²⁷³ For example: 1) the trivial case, the warship completes its mission undetected; or 2) if detected, it was not directly challenged due to the coastal state's: a) operational inability to challenge it, b) concern not to alienate the flag state, or c) belief that the threat of challenge to the warship would be met by fulfillment of an implicit promise to meet force with force -- in which case, the biggest, newest, most efficient warship

(assumed here to be that of the flag state) would likely prevail. Likewise, the coastal state can influence warship behavior at the outset by making a credible threat: warships violating the maritime frontier without permission will be subject to "appropriate measures."²⁷⁴

Whether this threat is consistent with international law or not, state practice shows that the world believes it.²⁷⁵ At the second stage, the coastal state must calculate the warship's or flag state's probable response to the selected measures and, further, the commander's or flag state's estimate of the coastal state's likely reaction to its response. The flag state in responding to the coastal state makes a similar calculation, and so on.

Several lessons flow from this analysis. First, the decisionmaking process in recognizing and responding to instances of non-innocent passage reveals itself as both complex and contingent: complex in that it may involve on both sides (though only one was discussed) a chain of communication, interaction within the governmental structure of competing organizational and personal power relationships, and the need to harmonize contemplated action with standard operating procedures and national objectives; and contingent in that it depends upon the accuracy of perception and communication at each successive level, but most of all upon the behavior of the adversary and the dual prospects of calculating how the rational actor of a particular value system would respond and how to deter an unfavorable response by altering the adversary's expectation of the consequences of its own action. Second, the initial determination of non-innocent passage, whether made actively by the flag state or passively by the coastal state, precipitates a chain of reaction and response decisions which are inexorably interdependent and which,

if based upon inaccurate data or mistaken assumptions, carry significant risks of conflict escalation.

Who then decides the question of non-innocent passage? Both do, for if the rational actor theory provides an accurate description of decisionmaking in the face of conflict, a prerequisite to each calculated "move" is the assessment of the expected "counter-move." In just this way do the interests and expectations of both parties enter into the initial decision of non-innocent passage and into each successive decision until the dispute terminates by voluntary agreement, binding decision, or otherwise. Whether it be an intentional undertaking or a perceived breach, prejudicial passage sets the stage on which the subsequent action must be played out. Not all occurrences of prejudicial passage will evoke response; likewise, some instances of innocent passage may be mistaken. Overreaction, escalation, and intervention may all occur, but behind them all lies the rational calculus of advantage and deterrence. The value systems that undergird this calculus arise from the widely varying interests of individual states. Consideration of those interests will assist in determining how non-innocent passage has been and should be dealt with in concrete cases.

THE POLITICAL DIMENSION: CONFLICTING INTERESTS OF COASTAL STATES AND MARITIME POWERS

Up to this point, the terms "coastal state," "flag state," and "maritime power" have remained undefined. All states that border the sea, of course, are coastal states, just as all states having ocean-going vessels are flag states. These broad meanings apply in the legal context

of differentiating coastal state and flag state rights and duties. In the political context, however, a more restrictive use of these terms emerges, a use defined by predominant national interest. In this manner, "coastal states" focus primarily on national, jurisdictional concerns, while maritime powers seek broader global goals frequently associated with navigational freedoms. There exists a certain fuzziness between the categories and considerable individual variations of specific goals within. Every maritime power is also a coastal state and, as a consequence, at some level must identify with many coastal state interests.²⁷⁶ In such states there exists a complex balance of competing, often conflicting, maritime interests frequently susceptible to political pressures and manipulation. But not every coastal state is a maritime power. Many are industrialized nations; more are not. In the context of the negotiations leading to the 1982 Convention, a group of self-identified "coastal-states" formed.²⁷⁷ The following summary of interests regarding warship passage seeks to reflect a representative view of the general common goals these states hold, while at the same time incorporating within this view all coastal states (in the broad sense) which do not otherwise consider themselves maritime powers.

As with its complement, the listing of nations which are "maritime powers" is not exact. States with large merchant and fishing fleets, major flags of convenience, major naval powers -- these are all candidates for membership. The nature of this study suggests that more weight will be placed on the naval power aspect of maritime power status. Thus follows a brief listing and discussion of the warship-related interests of coastal states that are not maritime powers and those that are.²⁷⁸

Coastal State Interests

The coastal state's interests regarding the presence of foreign warships in its territorial waters include: sovereignty, security, environmental and safety concerns, and avoidance of political or economic pressures.

The coastal state's sovereignty interest involves several dimensions. The lateral -- or quantitative -- dimension, territorial jurisdiction, seeks to encompass all available territory and resources which the coastal state may appropriate to the use and benefit of its inhabitants.²⁷⁹ Running up against political boundaries of other states surrounding it on land, the coastal state must turn toward the sea for expansion. Through a system of zones and boundaries corresponding to its various levels of jurisdictional concern, the coastal state claims exclusive rights to the sea's living and mineral resources and control over activities conducted in it. A significant manifestation of the importance attached to sovereign rights in the exclusive economic zone appears in the jurisdictional limitations on compulsory dispute settlement that coastal states obtained in the 1982 Convention.²⁸⁰ Customs, immigration, and police functions all have to do with this type of sovereignty. The vertical -- or qualitative -- dimension of sovereignty is stature, the government's standing in the eyes of its populace and its prestige among nations. A state's reaction to an unlawful intrusion by a foreign vessel into its territory may tend either to raise or lower that state's international reputation or credibility. Even wholly inoffensive intrusions under color of custom or treaty right, might tend on this axis to be viewed by some states as somehow diminishing a finite store of national pride and dignity. In lieu of trying to prevent such lawful

intrusions altogether, the coastal state concerned by such passage rights would likely seek to minimize the level of intrusion and maximize its exercise of control for the duration of each passage.

The security interest is closely related.²⁸¹ It consists of a desire to avoid intimidation or coercion by displays of force, to prevent surprise attack from the sea, and to protect the coastal state's own fleet²⁸² and harbors. For this reason, the coastal state would argue, foreign military operations should be prohibited in the territorial sea, for if they were allowed, the coastal state not only would become more vulnerable to intimidation through a show of naval might, but it would also have great difficulty distinguishing routine fleet exercises from an impending attack.²⁸³ The coastal state would want, in addition, specific prohibitions from interference with its communication or defensive systems and the ability to designate traffic schemes in order to channel traffic away from any sensitive security areas and to facilitate the monitoring of its movement.²⁸⁴

Environmental and safety concerns include insuring adherence to applicable health and safety laws to prevent disease, injury or property damage; navigation routes and procedures designed to prevent collisions; and anti-pollution practices to avoid oil spills or other marine disasters.

Avoidance of political or economic pressure results from applying the same standards to the ships of all countries, without distinction. The political benefits of maintaining an even-handed policy concerning enforcement of prohibitions and regulations lies in freeing the coastal state from the influence or intimidation of the major maritime powers.²⁸⁵ Consistency and fairness of administration, as long as these remain

domestically desirable goals, enhance a state's international reputation for integrity and, hence, help to increase its stature among nations.

Of these four, sovereignty and security have remained the dominant themes of coastal states, particularly among the newer nations of the world.²⁸⁶

Maritime Power Interests

Foremost among the interests of the maritime nations -- those with large merchant and fishing fleets, but particularly those with large navies -- is freedom of the seas to insure unrestricted use and navigation for maximum naval mobility.²⁸⁷ Though often exercised far from home shores, this is, in effect, a security interest.²⁸⁸ This is why these nations have clung so tenaciously to the concept of a narrow territorial sea, and why, when it appeared that extension of the territorial sea was inevitable, they insisted upon unrestricted navigation within economic zones outside the territorial sea and free transit through straits and archipelagos within.²⁸⁹ In part this insistence grew from the long-held belief that expansion of territorial seas would have the effect of denying or altering access to scores of international straits around the world.²⁹⁰ For the maritime powers, this would have curtailed naval mobility and impaired security interests to an unacceptable degree.²⁹¹ Whether or not this view was correct, clearly the maritime nations have a strong interest in preserving freedom of unrestricted navigation throughout the world's oceans and unrestricted access to the world's ports for their shipping, fishing fleets, and navies. Like concerns exist for navigation of commercial and military aircraft over the world's oceans.

Access to the resources of the sea and seabed also ranks high among the interests of the maritime powers. The fishing fleets of the world find their traditional fishing grounds increasingly encroached upon by coastal state claims.²⁹² Deep sea mining companies have developed technology to extract magnesium nodules from the ocean floor.²⁹³ The United States government's decision to decline to sign the 1982 Convention due to an unacceptable seabed mining regime²⁵⁴ highlights the grave concern with which some states dependent upon imports for these critical materials view this interest. Together with access to resources, the additional interests of "protection of the environment" and "promotion of ocean knowledge"²⁹⁵ bear only indirectly on warship transit in the territorial sea; nevertheless, they derive from the same motivating force -- freedom of the seas -- which drives the navigational interest. A stable and fair mechanism of conflict management and "maintenance of a favorable legal order" round out general interests which bear on warship transit.²⁹⁶

The four major naval powers share certain naval missions to effectuate these interests,²⁹⁷ among which strategic deterrence figures prominently in each state's naval posture. Incidents of non-innocent passage in the territorial sea, however, may threaten to impair the future conduct of this mission by submarine forces.

Strategic Interests

Strategic and political interests include preserving the nuclear balance and avoiding technological or tactical surprise. A major factor in preserving the nuclear balance is the ballistic missile submarine.²⁹⁸ Because nuclear deterrence depends so heavily upon the undetectability of

these submarines, the major naval powers have particularly pressed for submerged transit through straits and archipelagos.²⁹⁹ As long as no side can locate and threaten with destruction any substantial portion of the others' ballistic missile carrying submarines, any aggressor runs the risk of unacceptable retaliation in the event of a nuclear first strike.³⁰⁰ Though one may question the sanity of a world organized around the doctrine of strategic deterrence, policed by a hundred mobile, submerged nuclear arsenals, it remains a fact of the nuclear age. Until trust and cooperation in relations among nations replace suspicion and deviousness, everyone's best interests lie in keeping the strategic missile submarines submerged as they transit the globe. Though they may pass under straits and archipelagic waters, few, if any, will ever venture into territorial waters, for their domain is the high seas, where they can patrol undetected.

Other submarines pose different problems. Their missions vary from tracking down missile submarines to gathering intelligence.³⁰¹ Avoiding technological and tactical surprises may involve this latter function. It is likely that all naval powers which engage in gathering intelligence by means of submerged submarines will have to consider carefully whether the expected benefits to be derived from such activity outweigh the serious risks to international peace and stability involved in the face of the universal recognition of the validity of a twelve-mile territorial sea.

If incidents of warship non-innocent passage occur frequently, coastal states are likely to perceive them as abuses by the maritime powers of their innocent passage rights. This perception may lead to two undesirable results. First, it may make the coastal state more ready

to defend forcibly against perceived threats to its sovereignty. Second, it will prompt the coastal state to take measures to resist transit near its shores, including through straits which lie within its territorial sea. Coastal state reaction is likely to be manifested against submarines, the principal vehicles of covert operation, which are the most likely -- because the least obvious -- violators. Such a reaction probably would not distinguish between the deep-water fleet ballistic-missile submarines and those employed in coastal intelligence gathering and surveillance; instead, all would be seen as tools of superpower aggression and domination. Such a stance on the part of coastal states would make it more difficult for the naval powers to preserve free transit rights in any future law of the sea negotiation or renegotiation. Especially at risk would be continued submerged straits transit rights for strategic submarine forces.

Examples of Non-Innocent Passage

Drawn from historic incidents but treated hypothetically, the following four examples serve briefly to illustrate some of the problems and questions likely to arise during various alleged cases of non-innocent passage: submerged submarines, electronic intelligence activities, denial of straits transit, and excessive maritime claims.

Submerged Submarines in the Territorial Sea: The Swedish Experience

The submerged submarines off the Swedish coast are most likely sent to gather intelligence. Can we doubt that their commanders know where they are and what rules apply? If it were only a case of inadvertence, of straying into the territorial sea, the submarine would surface

when warned by a depth grenade. Such signal procedures are well known to all submarine officers.³⁰² But these submarines dove or evaded each time they were detected. Due to the volume of incidents and the proximity of two large Soviet submarine fleets,³⁰³ there is reason to believe that most, if not all, of these "unidentified contacts" belonged to the flag state of the grounded one.³⁰⁴ Queried concerning the presence of weapons aboard the grounded submarine, the Soviets replied in a manner which neither confirmed nor denied their presence.³⁰⁵ When the Swedish press speculated that the more recent submarines belonged to the Soviet Union, again, although both West Germany and the United States denied ownership, no denial came from the East; rather, Tass issued a statement of diversion, speculating that Sweden had invented the incident to strain relations. Had they not been Soviet submarines one might well imagine that the denial would have been immediate and uncategorical. Suppose the identity of the 1982 submarine had been discovered. And suppose further, despite the rhetoric of Tass, it proved to be Soviet. With two-thirds of its submarine fleet having access to the North Atlantic,³⁰⁶ this would not be a totally unwarranted assumption.³⁰⁷ Such a revelation, had it occurred, would undoubtedly have proved a substantial embarrassment to a state that has long claimed a twelve-mile territorial sea,³⁰⁸ required thirty days prior permission for warships to transit it,³⁰⁹ and officially adopted a policy of attacking any submerged submarines it detects in its territorial waters.³¹⁰ How could its leader avoid responsibility for and humiliation by the intrusion? How much would it diminish his own and his government's credibility in the eyes of the world? Such an incident could only increase world tensions. And it would certainly undercut the

pretense that the Soviet reservation to article 23 of the 1958 Convention³¹¹ could have any further vitality: by its own action the Soviet Union would have derogated its policy of prior permission.³¹²

Swedish action concerning the submarines has showed both restraint and grave concern. Depth charging to force the submarines to surface rather than to sink them, the Swedish Navy has taken care to fire its explosives at a prudent distance from the submarines' hulls. Likewise, it detained the grounded submarine and its crew only long enough to finish its investigation of the matter. Both of these, the latter coupled with diplomatic protest, go beyond the warning and expulsion measure into the realm of necessary steps to prevent non-innocent passage.

While a submarine may transit submerged without impairing its innocence, the presumption dictates against innocence in the case of one found lurking in the territorial sea.³¹³ If in addition to the Conventions' requirement, flag state law provides that foreign submarines must surface in its territorial sea, the warship should, at the risk of making its government appear hypocritical or heavy-handed, strictly observe the same practice in the waters of another sovereign state.³¹⁴

To summarize in view of our criteria of analysis, the decision for submerged intrusion in these cases came first from the flag state, through the submarines' commanders. Swedish authorities appear to have regarded the instances at the outset as breaches of the international rule requiring submarines to navigate on the surface; they, therefore, utilized internationally recognized naval procedures to warn the submarines that they were in territorial waters and should surface. This failing, they attempted with depth charges to expel the intruders. Only in those instances involving direct threats to their secret naval

bases did they take the further measures allowed by the right of protection in cases of non-innocent passage.³¹⁵ This right, as embodied in the Conventions, equates to the customary right of self-defense. Having found by objective analysis the submarine's continued submerged presence near a top-secret naval base not to be an exercise of innocent passage through the territorial sea, Sweden was justified in applying the minimal force necessary to protect its security.³¹⁶ Owing to the difficulty of identifying with certainty the state of origin of a submerged contact, there is little else Sweden can do at this point save protest informally through the media and apply necessary measures of self-defense in an effort to ward off or to identify the intruders. For the major naval powers, the submerged submarine inside territorial waters is a time bomb: sooner or later one will be trapped or, worse, sunk, and the undeniable truth of its identity will become known to all.

Electronic Intelligence Gathering Ships: Pueblo, et al.

Within the last two decades three United States warships suffered attack while on intelligence gathering missions: the U.S.S. Maddox, by torpedo boats off the coast of North Vietnam,³¹⁷ the U.S.S. Liberty, strafed by Israeli aircraft and attacked by torpedo boats during the seven-day war,³¹⁸ and the U.S.S. Pueblo, seized by the North Koreans.³¹⁹ Although all were reportedly in international waters at the time of attack,³²⁰ and thus, exercising a permissible use of the high seas,³²¹ in a world governed by the new Convention, had they been stationed inside the territorial sea, their intelligence-gathering conduct would have been non-innocent, thereby enabling the coastal state to take "necessary steps" to prevent such conduct.³²² In such case, since they

were warships, the prudent course suggests that the first step in each instance should have been a warning to cease the activity or to leave the territorial sea. Expulsion could then follow if the behavior persisted, but armed attack in the first instance unless responding to prior attack would appear to violate international law.³²³ Possibly attack could be justified in defense of a right forcibly (by a warship) infringed, but in this event, the minimal force necessary was exceeded. A further explanation of the actual result in these cases present itself, however. All three confrontations share a common element: In each case there existed a de facto state of war between the attacker and another state, and in two of the instances the United States had thrown its support behind the attacker's opponent. The attackers, therefore, may not have viewed these as strictly peacetime incidents. In contrast to the excessive force illustrated here, request to leave or escort out of the territorial sea coupled with diplomatic protest in the more serious cases should suffice in most instances of intelligence-gathering by surface vessels.

These cases are instructive in several respects. First they highlight how differing territorial sea claims can lead to conflict. The United States recognized only a three-mile territorial sea at the time, while the attackers recognized twelve-mile³²⁴ and six-mile³²⁵ claims. The recent declaration of a twelve-mile claim for North Vietnam may have figured in the warship's presence -- and the United States acknowledgment of it -- within eleven miles of the coast shortly before it was fired on.³²⁶ The second lesson is that although intelligence gathering by means of seaborne, airborne and satellite platforms is a permissible and accepted -- even desirable -- use; nevertheless, its

practice is likely to appear threatening and hostile to the coastal state.³²⁸ Although the 1982 Convention purports to retain high seas freedoms in the exclusive economic zone, it remains to be seen if under a regime governed by the Convention coastal states will attempt to restrict intelligence activities conducted by surface ships or submerged submarines from outside the territorial sea but inside the adjacent economic zone.³²⁹ A dispute over this question may prove difficult to resolve, because of the military and law enforcement activities exception.³³⁰ If the maritime power has invoked the exception for all compulsory procedures and the coastal state interferes with the military activity, the flag state cannot bring the dispute to a compulsory process without the coastal state's consent. However, it appears that under the same facts, but with the coastal state having filed the blanket exception, the flag state could, indeed, initiate a compulsory procedure. Whereas the military half of the exclusion is not subject to qualification, the law enforcement half appears to apply only to enforcement activities regarding marine scientific research and fishing, but not to those relating to high seas freedoms.³³² Thus, it appears that unless the flag state files a blanket military activities exception, it may initiate a compulsory and binding settlement procedure whenever its high seas freedoms are unreasonably challenged or denied by the coastal state within the exclusive economic zone. Likewise, unless the flag state has excepted all compulsory methods, the coastal state can compel compulsory settlement to decide questions of flag state violation of the Convention and coastal state rules.

Denial of Straits Transit: Icebreakers in the Northeast Passage

Soviet denial of passage in 1965 to the United States Coast Guard icebreaker Northwind and in 1967 to the icebreakers Eastwind and Edisto during their attempted transits of the Northeast Passage³³³ was illegal under customary law, the Corfu Channel Case, and both Conventions.³³⁴ The Vil'kitskiy Strait connects two parts of the high seas, or, at a minimum, a part of the high seas with a territorial sea,³³⁵ but the Soviet Union claims that the strait lies inside its maritime frontier.³³⁶ At the time of the passage attempts, the 1958 Convention, expanding upon the Corfu Channel Case, which held that innocent passage through international straits does not require prior permission,³³⁷ had established a non-suspendable right of transit through those straits described as Vil'kitskiy, above. The differing Soviet interpretation of the coastal state regulatory provision of this Convention has already been mentioned.³³⁸ Because they technically fit the definition of warships, the icebreakers were denied passage based upon a 1960 law protecting state borders.³³⁹ The Soviets protested the attempted passage in 1965, and the United States protested the denial of passage in 1967, due to the Soviet requirement of thirty days prior authorization for passage of warships.³⁴⁰

The 1982 Convention vindicated the Western interpretation of its predecessor that any coastal state requirement of prior authorization or notice was contrary to its terms. Under both Conventions' standards, innocent passage through Vil'kitskiy Strait should not have been denied. In view of the light the 1982 Convention sheds on interpreting the 1958 document, the Soviet Union will find it increasingly difficult to defend its strident position on the inviolability of national maritime frontiers,

particularly since it participated in drafting the new Convention. Even moreso, should the Soviet Union become a party to the new Convention, it will find that current interpretation of the prior authorization requirements of its Statute on the Protection of the State Border fly in the face of the clear prohibitions against infringing or denying innocent passage in the territorial sea or transit passage through international straits.

The icebreaker incidents illustrate the protest of a coastal state regulation, perceived to be unlawful, through passage calculated to be innocent but not in compliance with the regulation. The Soviets decided passage in each case would violate Soviet frontiers and would be met by "appropriate measures."³⁴¹ Their passage refused under threat of force, the icebreakers would have been justified in forcefully asserting the right unlawfully denied.³⁴² Instead, political considerations prevailed: a diplomatic protest was lodged, and the icebreakers turned back. Several features of this exchange stand out. First, though operated under the U.S. Department of Transportation, the Coast Guard icebreakers were, nevertheless, considered warships because they fit the technical description and carried armament. Second, the law applied to deny passage dealt with "previous authorization" to "pass through territorial and enter internal sea waters";³⁴³ no provision explicitly addressed transiting the territorial sea without entering internal waters or passing through straits located within the territorial sea. Third, desiring to avoid confrontation, the rival powers communicated their positions diplomatically rather than testing each other's resolve by forcing the issue. Finally, with the Soviet Navy's new global emphasis, the principle of reciprocity will likely encourage the harmonization of

Soviet territorial sea practice regarding warships with the prevailing rules of other nations and of international law.³⁴⁴ If for some unforeseen reason this does not occur, the question of freedom of transit through the Northeast Passage appears well suited for international arbitration or adjudication, particularly under the new law of the sea dispute settlement procedures, should the Convention enter into force and the disputants become parties to it.³⁴⁵ Because the application of the military activities exception to international straits is doubtful, it appears that either party could initiate a compulsory procedure, any extant military activities exception notwithstanding.

Excessive Maritime Claims: The Gulf of Sidra

On August 19, 1981, two F-14 fighter aircraft, from the U.S.S. Nimitz (CVN-68), conducting range clearance for the second day of a two-day missile exercise, were fired upon by two Lybian SU-22 interceptors approximately 60 nautical miles from land over the Gulf of Sidra, a 300-mile wide pocket of the Mediterranean Sea adjacent to the Lybian coast.³⁴⁶ In the ensuing battle, both Lybian planes were shot down.³⁴⁷ Stung by the defeat, Lybia strongly protested encroachment of its sovereign territory, for it considers the Gulf of Sidra to be an historic bay and, therefore, part of its internal waters.³⁴⁸ Since Colonel Khadaffi announced this policy in October 1973, the United States Sixth Fleet has resisted this encroachment upon the freedom of navigation in the Mediterranean Sea by conducting periodic naval exercises in the Gulf.³⁴⁹

This scenario presents an instance of resistance to a perceived unlawful territorial claim by conduct that would, if the claim were valid,

constitute non-innocent passage -- incursion by naval aircraft launched from a nearby aircraft carrier.³⁵⁰ Judging from its reaction, Lybia interpreted the fighters' presence as non-innocent, but used excessive force in attempting to assert its claim of sovereignty to the Gulf and the airspace above it. Given the long-time United States naval presence in the Mediterranean and the tempo of its training operations there, it can hardly be imagined that Lybian leaders could seriously have believed that two fighter aircraft performing range clearance for the second day of a publicized missile shoot -- miles off the coast -- posed any threat whatsoever to the territorial integrity of the Lybian mainland. The prudent approach of the Lybians to the American fighters, then, would have been to intercept them, warn them by radio or visual means to leave the area and escort them to the limit of claimed jurisdiction.³⁵¹ Given the initial use of force by the Lybian aircraft, the U.S. fighter crews were justified, both under the Corfu Channel rationale and by the doctrine of self-defense, in resisting the forceful and unlawful denial of their right to free navigation and operation over the high seas. It is an altogether different question whether, being justified, they should have, nevertheless, attempted to avoid confrontation.³⁵² Had they first been warned but resisted any escort attempt, the Lybian aircraft could have used this same rationale forcefully to repel the American planes, with the caution that if the "right" they were enforcing proved later to be unlawful they would bear international responsibility for the incident. The same qualification, of course, applies to the actions of the American fighters. The result is that both sides believed they were justified politically, if not legally, in using force to assert a right being derogated by the other. The decisions to attack and to counter-attack

when fired upon must have derived ultimately from the rational calculus of each side. In hindsight, we may observe that the rational actor parameters employed by Lybia in deciding to initiate the attack were either lacking or grossly mistaken. Either they miscalculated U.S. resolve to resist encroachments of the seas,³⁵³ or they overestimated their own fighters' capabilities. Although the American pilots may have been able successfully to evade further salvos, they were faced with a dilemma. To retreat would have weakened U.S. resistance to the Lybian claim. To remain risked their lives and aircraft. In the high-speed world of negotiation by air-to-air missiles, the only viable alternative for the American fighters was self-defense.

Dispute settlement under the 1982 Convention involves a different exception in this instance, that for historic bays. It provides an intermediate step, compulsory conciliation in the event the parties cannot voluntarily agree to a settlement within a reasonable time.³⁵⁴ The parties must then negotiate an agreement based upon the conciliation commission report.³⁵⁵ If conciliation fails, "the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree."³⁵⁶ In dealing with a militaristic, saber-rattling government such as Lybia's, one that supports the cause of international terrorism and has massed its forces to invade neighboring Sudan, respect for international legality is likely to carry little persuasive force. By the same measure, the United States may be reluctant to risk the adverse decision of this issue by an arbitral panel or by the Law of the Sea Tribunal, which will be dominated by third-world countries, of which Lybia is one.³⁵⁷ Thus, prospects for an early solution to this problem are low. For the present, the process

of claim and counterclaim shaping the practice of states to build international custom holds the most promise -- but also the the most danger -- for settling Lybia's disputed "historic" claim to the Gulf of Sidra.

TOWARD THE FUTURE

The foregoing examples represent only a preview of non-innocent passage incidents likely to occur in the future. The 1982 Convention goes far in resolving previous uncertainties of interpretation and in providing a helpful framework for judging innocence or its opposite. Even if the new Convention never enters into force, its innocent passage rules carry the weight of international consensus as standards for interpreting the 1958 Convention. But more is needed. That "more" involves a transformation of understanding, of will, and of action.

First, we need to purge from our understanding of the concept of sovereignty its historically recent overlay of absolute and unlimited power inherent in each state. By displacing the legal underpinnings of sovereign authority with might, Hobbes, in effect, removed sovereignty "from the sphere of jurisprudence, where it had its origin and where it properly belongs, and . . . import[ed] it into political science, where it has ever since been a source of confusion."³⁵⁸ The shift toward locating sovereignty in the state as a juridic person rather than in the person of an individual ruler (or in "the people" of a democracy) has added to the confusion.³⁵⁹ "For if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time

be subject to law. . . . [I]f the premises are correct there is no escape from the conclusion that international law is nothing but a delusion."³⁶⁰ Instead, we need to recognize that the power to make laws, the essential manifestation of sovereignty, must be subordinate to some higher laws, including the fundamental laws of the state that define the sovereign power, the law of reason, and the law that is common to all nations.³⁶¹

The law of reason or of nature signified "the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being."³⁶² Borrowing this jus naturale concept from the Greek Stoics, the Romans eventually amalgamated it with their practical and progressive jus gentium, a body of rules observed to be common to all nations, which were "regarded as so simple and reasonable that they must be recognized everywhere and by everyone."³⁶³ The two concepts became synonymous as two sides of the same coin. This "law of nations," comprising the law of reason and the law that is common to all nations, forms the core of our modern international law.³⁶⁴

The concept of absolute state sovereignty based on might is outmoded. Although still readily apparent in relations among nations, the "might-makes-right" theory of international relations has decreased in importance and legitimacy. It partakes of a bygone era where war after war redefined political boundaries and alliances and where claim and counterclaim shaped expectations in the relations among states. But with the demise of colonial empires, the growth of global institutions and the advent of nuclear weapons, war has diminished in its centrality as a normal instrument of foreign policy. Increasingly, positive international law results from reason, argument and accommodation rather than from

force and assertion of right. While the more immediate and certain method of consensus in the shaping of international obligations has moved to the fore, custom and the general principles of law recognized by civilized nations still play important roles in international law.³⁶⁵

For the "ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far [sic] as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live."³⁶⁶ Clearly, then, our thinking about sovereignty must include both the independence and the interdependence of nations.³⁶⁷

The second transformation -- that of national will -- follows closely on the heels of the first; it would require acceptance of the international rule of law as the governing standard in all relations among nations. Respect for international legality can only strengthen certainty in those relations and ease international tensions. Merely understanding this principle is not enough; it must become the conscious motivating force behind the foreign policy of all states. Subordination of national sovereignty to the international rule of law embodies a paradox: one must give in order to gain. By joining with all other nations in giving up the "rights" to make war, to threaten its neighbors, to hold others as nuclear hostages, or to disobey rules it finds inconvenient, each national government gains for itself and its people a stability, predictability, and peace in its international relations which it could never guarantee by itself.

In the context of this study, respect for national sovereignty and international order, in short, for the rule of law, should mean the

elimination of willful violations of territorial waters. But it likewise means a willingness to resist those unlawful violations and encroachments which do occur. When compliance fails, the offended party must take those measures -- in accordance with law -- which are best calculated to result in an acceptable solution, one which will repair the harm done and restore the integrity of the international legal order. At the same time, it must be realized that there will be some insoluble conflicts in international law, because they are political, not legal.

Finally, transformed understanding and will mean nothing without action to implement them. It is particularly incumbent upon the major powers in each sphere of influence to assume a leadership role in promoting respect for international law. For maritime nations, this includes both setting an example of compliance by the exercise of restraint and strict observance of rules in order to foster coastal state trust and cooperation, and maintaining the will to continue to enforce rights against illegitimate claims while at the same time working to negotiate or otherwise peacefully to establish uniform and universal standards. For coastal states, such leadership involves even-handed enforcement of reasonable regulations. Leadership does not mean bossing; it means direct, active and concerned participation -- together with all other nations so inclined -- to shape the policies and institutions of the future.

CONCLUSION

The foreign warship's right of innocent passage through territorial waters forms the cornerstone of modern naval mobility. This right developed historically as the practical response to ocean commerce among nations in an era when merchant vessels remained undifferentiated from warships. It enabled them to pass between the high seas and their ports of trade through the sovereign, marginal sea protected by cannon fire from the shore. Over the centuries, despite competing national claims to various degrees of control over the seas, this usage solidified into a rule of customary law, which, within the last century and amid much controversy, began to assimilate passage of warships under the general right. Judicial decision and early codification attempts sought to define the quality and limits of warship transit within the territorial sea as partaking either of a right or of mere comity. The fruits of these codification efforts reveal themselves finally in the comprehensive navigational rules of the 1982 United Nations Convention on Law of the Sea.

Building upon the customary innocent passage right, the Convention establishes between a state's internal waters and its economic zone, where high seas navigational freedoms prevail, separate transit regimes for the territorial sea and broader, more flexible ones for international straits, and newly-recognized archipelagic waters. But these transit rights are contingent to a greater or lesser degree upon the behavior of the vessels exercising them. In the territorial sea, passage which is not innocent invites sanction. Who decides the question of innocence and the level of any resulting sanction is the crux of the problem of non-

innocent passage. Herein lie the uncharted waters. These waters may now appear more familiar, but they are no less fraught with danger.

Judging the quality of warship passage involves recognizing non-innocent passage when it occurs and determining an appropriate response. Recognition, in turn, requires combining accurate factual data with the appropriate legal standards to facilitate the decisionmaking process. Such decisions -- partly legal, partly factual, nearly always heavily political -- result in large measure from a rational calculus which includes simultaneous, unilateral consideration of the interests and values of both actors. Those values, in turn, are likely to reflect the government's identification as a developing or developed nation, a coastal state or a maritime power. Coupled with internally-generated institutional biases and political pressures, these values and goals shape a decision-making process that is both complex and contingent.

Broad options exist for sanction and peaceful resolution of disputes. The new Convention steps beyond traditional means by requiring the parties to attempt to resolve disputes peacefully, through means of their own choosing, and that failing, it provides a flexible but compulsory framework for achieving binding decisions. Insofar as these compulsory procedures remove dispute resolution from the realm of force, they protect less powerful nations from the political and economic pressures of more powerful nations and they strengthen certainty and trust in international dealings and confidence in and respect for the international legal order. To the extent that they do not, they foster inde^{te}terminacy of right, hostility and disintegration of international legality.

Innocent passage is a vestige of a bygone era. It grew from the dialectic of claim and counterclaim in a world of few powerful actors and

infinite resources. That world has vastly changed. Modern "cannons" span continents, not leagues. World resources are, after all, limited. And modern notions of sovereignty threaten to re-divide the seas into a checkerboard of national domains. In such a world with vastly more actors pursuing a broader diversity of interests, the slow dialectic of custom has given way to the speedier dialectic of consensus. The ink is hardly dry on the new Convention, but even if it never enters into force, the very process of reaching agreement has inalterably shaped the law beyond the bounds of the 1958 Convention. For such a world, the uncharted waters of non-innocent passage stand as a warning.

The problem of non-innocent passage in the territorial sea ripples far beyond the twelve-mile bound. Its concentric circles spread outward through seas and oceans to wash all the shores of the planet. The reasons for non-innocent passage lie not in the breadth of the territorial sea nor even in its juridical character; rather, they lie in the relentless competition of national sovereignties sparked by suspicion and alarm over other states' political institutions or social values which differ from one's own. Until the leaders of all nations order their actions from the understanding that humankind is huddled closely together on a tiny life-raft adrift in the vast ocean of galaxies, the problem of submarines lurking in the uncharted waters beneath the territorial sea will persist.

FOOTNOTES

1. "Whiskey" is the international phonetic alphabet equivalent of the letter W; the appellation follows the NATO classification system for Soviet-made submarines.
2. The Times (London), Nov. 6, 1981, at 1, col. 2; id. Nov. 4, at 1, col. 6; Le Monde, Oct. 30, 1981, at 4, col. 5. Captain of the 1,000-ton diesel submarine No. 137, Lieutenant Commander (Captain of Third Rank) Anatoly M. Gushin, told Swedish authorities he ran aground "after problems with his rudder and radar in bad weather." The Times (London), Nov. 6, 1981, at 1, col. 2; id. Nov. 5, at 28, col. 1; id. Oct. 29, at 1, col. 7. Compare N.Y. Times, Nov. 7, 1981, at 3, col. 4 (identifying the captain as Lieutenant Commander Pyotr Gushin) with id. Nov. 3, at 1, col. 5 (correcting the captain's name). Questioned by Swedish investigators, Captain Gushin later implicated a faulty gyrocompass. The official version from Tass maintained that the submarine strayed off course "in poor visibility and with malfunctioning navigation equipment." Due to the depth of the submarine's penetration into territorial waters and the difficulty of navigating through the Karlskrona archipelago, Swedish authorities rejected this explanation. Newsweek, Nov. 16, 1981, at 48; The Times (London), Nov. 5, 1981, at 28, col. 1; id. Nov. 3, at 1, col. 4.
3. The Times (London), Nov. 7, 1981, at 4, col. 4; id. Oct. 29, at 1, col. 7; Le Monde, Nov. 7, 1981, at 4, col. 3; id. Oct. 31, at 3, col. 4.
4. The Times (London), Oct. 30, 1981, at 1, col. 4.
5. N.Y. Times, Oct. 30, 1981, at A3, col. 1.
6. Weapons experts believe that the uranium 238 isotope, itself unsuitable for nuclear weapons, is used to shield nuclear tipped torpedoes or possibly SSN3 "Shaddock" cruise missiles. Newsweek, Nov. 16, 1981, at 48; The Times (London), Nov. 6, at 1, col. 2. Queried about the presence of nuclear weapons aboard the submarine, the Soviet Government replied, "[T]he submarine carries, as do all naval vessels at sea, the necessary weapons and ammunition However, . . . this has nothing to do with the circumstances surrounding the unintentional intrusion by the submarine into Sweden's territorial waters." N.Y. Times, Nov. 6, 1981, at 1, col. 5. A more complete text of the reply appears in Le Monde, Nov. 7, 1981, at 4, col. 3.
7. The Times (London), Nov. 7, 1981, at 4, col. 4. The newspaper accounts reveal two possible targets for intelligence gathering. The restricted area where the submarine ran aground is "rumored to be one of the West's most powerful and advanced posts for spying on Soviet communications systems." N.Y. Times, Nov. 3, 1981, at 1, col. 5. And the Swedish Navy was conducting secret tests of a new anti-submarine torpedo on the same day the submarine ran

- aground only six miles away. The Times (London), Nov. 5, 1981, at 28, col. 1.
8. Newsweek, Nov. 16, 1981, at 48.
 9. The Times (London), Nov. 7, at 4, col. 4.
 10. Id. Newsweek, Nov. 16, 1981, at 48.
 11. "The Swedish Navy makes regular sightings of unidentified submarines" The Times (London), Oct. 30, 1981, at 1, col. 4. Swedish territorial waters were reportedly violated thirteen times in 1980 by vessels of NATO and Warsaw Pact nations. Le Monde, Oct. 30, 1981, at 4, col. 5.
 12. Le Monde, Oct. 30, 1981, at 4, col. 5; The Times (London), Oct. 30, 1981, at 1, col. 4. Professor O'Connell recounts four earlier encounters with foreign submarines in Swedish territorial waters occurring in October 1966. O'Connell, Innocent Passage of Warships, 7 Thesaurus Acroasium 405, 450 (1977).
 13. N.Y. Times, Oct. 6, 1982, at A3, col. 1; The Times (London), Oct. 5, 1982, at 6, col. 5.
 14. The Times (London), Oct. 12, 1982, at 7, col. 7; id. Oct. 7, at 1, col. 6; N.Y. Times, Oct. 9, 1982, at 5, col. 1; id. Oct. 8, at A3, col. 4; id. Oct. 7, at A3, col. 4. As with the earlier incident, the Swedish Navy detected a second submarine well inside its territorial waters and near the northern exit of Haarsfjaerden Bay, where the first submarine was trapped. Id. Oct. 9, at 5, col. 1; id. Oct. 8, at A3, col. 4; The Times (London), Oct. 9, 1982, at 5, col. 1.
 15. E.g., N.Y. Times, Oct. 8, 1982, at A3, col. 4. Soviet, Polish and West German submarines were known to be operating in the Baltic. Both West Germany and the United States denied ownership of the trapped submarine. Id. Oct. 6, at A3, col. 1. The Soviet press agency Tass speculated that the incident may be "a deliberate invention seeking to shatter trust and traditionally normal relations between the U.S.S.R. and the Scandinavian countries." Id. Oct. 7, at A3, col. 4. Reported sightings of unidentified submarines in Swedish territorial waters during 1982 totaled over fifty at the time of this incident. Id. Oct. 9, at 5, col. 1; The Times (London), Oct. 5, 1982, at 6, col. 5.
 16. A. Mahan, The Influence of Seapower upon History (1890). Concerning Mahan's continuing influence, see Etzold, Is Mahan Still Valid?, U.S. Naval Inst. Proc., Aug. 1980, at 38 and Pandolfe, Soviet Seapower in Light of Mahan's Principles, Id. at 44.
 17. "I . . . presume that naval mobility remains desirable, and that we should continue to pursue policies that would lead to its maximization." Clingan, The Next Twenty Years of Naval Mobility U.S. Naval Inst. Proc., May 1980, at 82. For a listing of these policies and the naval missions developed to accomplish them, see

Problems of Sea Power As We Approach the Twenty-First Century (J. George, ed., 1978); M. Janis, Sea Power and the Law of the Sea (1976); U.S. Library of Congress, Congressional Research Service, Soviet Oceans Development (1976); Eberle, The Royal Navy, U.S. Naval Inst. Proc., Aug. 1980, at 26; McGuire, The Rationale for the Development of Soviet Seapower, id. May 1980, at 155; Polmar, Their Missions and Tactics, id. Oct. 1982, at 34; West, A Fleet for the Year 2000: Future Force Structure, id. May 1980, at 66; West, Planning for the Navy's Future, id. Oct. 1979, at 26. For a comparison of major power naval missions and interests in various theatres, see also Baker, Sixth Fleet Update, id. Sept. 1980, at 52; Swarztrauber, The Potential Battle of the Atlantic, id. May 1979, at 108; Tarpey, A Strategic Analysis of Northwest Asia and the Northwest Pacific, id. May 1980, at 106. Concerning rivalry to control the seas, see Edward, Soviet Expansion and Control of the Sea-Lanes, id. Sept. 1980, at 46.

18. United Nations Convention on Law of the Sea, opened for signature, Dec. 10, 1982, _____ U.N.T.S. _____, U.N. Doc. A/CONF.62/122 (7 Oct. 1982) reprinted in 21 Int'l Legal Materials 1261 (1982) [hereinafter cited as 1982 Convention].
19. See, e.g., Richardson, Power, Mobility and the Law of the Sea, 58 Foreign Aff. 902, 914-15 (1980) and Law of the Sea: Navigation and Other Traditional National Security Considerations, 19 San Diego L. Rev. 553, 555, 576 (1982).
20. See Remarks of Ambassador James L. Malone, U.N. Law of the Sea Conference (April 30, 1982), Press Release USUN 25 (82); Statement of Thomas A. Clingan, Jr., U.N. Law of the Sea Conference (Dec. 9, 1982) at 2, U.N. DOC A/CONF.62/PR.192 (1982). For a summary of the concerns which rendered the Convention unacceptable to the United States, see the statements of President Regan (Jan. 24, 1982) and Ambassador Malone (Feb. 23, 1982) reprinted in U.S. Dep't of State, Law of the Sea, Current Policy No. 371 (Jan.-Feb. 1982).
21. Whatever the future of the 1982 Convention, its articles defining "prejudicial acts" and the limits of coastal state regulatory authority elaborate controlling provisions of the 1958 Convention, infra note 22. As non-binding expressions of international consensus, these articles will carry significant weight as aids in interpreting what the earlier, less precise formulations mean.
22. Three other divisions of the seas recognized under conventional law and state practice preserve traditional high sea freedoms: the contiguous zone, the continental shelf, and the exclusive economic zone. See, respectively, Convention on the Territorial Sea and Contiguous Zone, done at Geneva, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as 1958 Convention]; Convention on the Continental Shelf, done at Geneva, Apr. 29, 1958, art. 3, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; 1982 Convention, supra note 18, art. 58.

23. See, e.g., Swayze, Negotiating a Law of the Sea, U.S. Naval Inst. Proc., July 1980, at 33, 35-37.
24. J. Brierly, The Law of Nations 195, 27-28, 304-05 (6th ed. 1963); H. Grotius, Mare liberum (1608) (Magoffin translation of 1633 ed. 1916). Grotius founded his arguments upon "a primary rule . . . the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it." Id. at 7. 1 D. O'Connell, The International Law of the Sea 2, 9-18 (1982). For a detailed history of the territorial sea, see Fenn, Origins of the Theory of Territorial Waters, 20 Am. J. Int'l L. 465 (1926); Florsheim, Territorial Sea, 3000 Year Old Questions, 36 J. Air L. Com. 73 (1970); and O'Connell, The Judicial Nature of the Territorial Sea, 45 Brit. Y.B. Int'l L. 303 (1971).
25. J. Brierly, supra note 24, at 194-95.
26. H. Grotius, supra note 24, chaps II-VII.
27. J. Brierly, supra note 24, at 305.
28. Id. at 202-04.
29. See supra note 22 and accompanying text.
30. D. O'Connell, supra note 24, at 271.
31. Id. at 260.
32. C. van Bynkershoek, De Dominio Maris Dissertatio 44 (2d. ed. 1744) (Magoffin translation 1964): "Wherefore on the whole it seems a better rule that the control of the land [over the seas] extends as far as a cannon will carry; for that is as far as we seem to have both command and possession."
33. D. O'Connell, supra note 24, at 261.
34. G. Maseé, Le Droit commercial dans ses rapports avec le droit de gens (1844); The controversy over this distinction continues. Shortly after the end of World War II, a respected authority wrote that the practice of states still appeared to agree with the possessory view. 1 L. Oppenheim, International Law § 185 (7th Lauterpacht ed. 1948).
35. 1 L. Oppenheim, supra note 34, § 188.
36. For an account of this filtering process through the commentators, state practice and international conferences, see O'Connell, supra note 12, at 409-445 (1977).
37. J. Brierly, supra note 24, at 237; D. O'Connell, supra note 24, at 273; Pharand, Innocent Passage in the Arctic, 6 Canadian Y.B. Int'l L. 3, 11-12 (1968).

38. Convention on the High Seas, done at Geneva, Apr. 29, 1958, art. 8(2), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; cf. 1 L. Oppenheim, supra note 34, § 450.
39. 1 L. Oppenheim, supra note 34, § 450. Certain other state owned and operated ships also enjoy this immunity. Id. § 447. But shipwrecked and abandoned warships, those in revolt against the state, and those sailing for private purposes are no longer "state organs." Id.
40. Id. § 450.
41. Id. Certain other state operated and owned ships also enjoyed this immunity. Id.
42. See Convention on the High Seas, supra note 38, art. 8(1). Concerning this evolution, see 2 G. Hackworth, Digest of International Law 408-23 (1947); 2 J. Moore, A Digest of International Law 571-90 (1906); 4 M. Whiteman, Digest of International Law 633-40 (1965).
43. D. O'Connell, supra note 24, at 274-75.
44. Id. at 274.
45. Id. Although the right view had wide acceptance among Western seafaring nations, supporters of the comity view included Harvard Research in International Law, 23 Am. J. Int'l L. 295 (Supp. 1929), and P. Jessop, The Law of Territorial Waters and Maritime Jurisdiction 120 (1927).
46. See D. O'Connell, supra note 24, at 274; authorities cited, supra note 34. Both sides are presented by O'Connell, supra note 12, at 409-45.
47. This latter right "cannot be denied to foreign men-of-war." 1 L. Oppenheim, supra note 34, § 188. In practice the "coastal state will not forbid the innocent passage of warships through its territorial sea. . . . [A]s a general rule no previous authorisation or notification will be required." D. O'Connell, supra note 24, at 283. Two prominent Soviet legal scholars expressed the pre-1960 view of warship transit in the following terms: "Foreign warships . . . may pass in territorial waters without receiving previous authorization for this and without a previous notification about the passage. . . . The practice of states shows that in peacetime states generally do not hinder the passage of foreign warships in their territorial waters." V. Durdenevskii & S. Krylov, Mezhdunarodno pravo 257 (1949), quoted in Butler, Soviet Concepts of Innocent Passage, 7 Harv. Int'l L.J. 113, 125-26 (1965).
48. D. O'Connell, supra note 24, at 286.
49. The Corfu Channel Case, (Merits) [1949] I.C.J. 4, 28.

50. See D. O'Connell, supra note 24, at 314.
51. See supra text accompanying note 47.
52. D. O'Connell, supra note 24, at 287; he provides the list in O'Connell, supra note 12, at 430.
53. R. Baxter, The Law of International Waterways 166-67 (1964); D. O'Connell, supra note 24, at 314-17; Cundick, International Straits: The Right of Access, 5 GA. J. Int'l & Comp. L. 107, 123 (1975).
54. 1958 Convention, supra note 22, arts. 1-13.
55. Id. arts. 3-13.
56. Id. arts. 14-23.
57. Such rules would presumably include treaty law, customary law, and "general principles of law recognized by civilized nations." Cf. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 933, 3 Bevans 1153.
58. Slonim, Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea, 5 Colum. J. Trans. Nat'l L. 96, 126-27 (1966).
59. See D. O'Connell, supra note 24, at 288-91; Slonim, supra note 58, at 125-27.
60. Anand, Freedom of Navigation Through Territorial Waters, Indian J. Int'l L. 169, 176 (1974); Sorensen, Law of the Sea, 1958-59, Int'l Conciliation 195, 235.
61. D. O'Connell, supra note 24, at 291; Slonim, supra, note 58, at 118.
62. Anand, supra note 60; Slonim, supra note 58, at 117. For an account of the negotiations on this issue, see id. at 117-21 and O'Connell, supra note 12, at 440-41.
63. 1958 Convention, supra note 22, arts. 14-17.
64. Id. arts. 18-20.
65. Id. arts. 21-22.
66. Id. art. 23.
67. "[N]avigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." Id. art 14(2).

68. Id. art. 14(4). "[T]he word 'security' had no exact or precise meaning, but . . . it implied that there should be no military or other threats to the sovereignty of the coastal State: it did not relate to economic or ideological security, and so threats of that order would not warrant suspension of innocent passage." D. O'Connell, supra note 24, at 268-69.
69. 1958 Convention, supra note 22, art. 14(5).
70. Id. art. 14(6).
71. 1958 Convention, supra note 22, art. 15(1).
72. Id. art. 16(1).
73. Id. art. 16(3).
74. Id. art. 16(4). Thus, straits are treated as merely another application of the territorial sea. R. Baxter, supra note 53, at 168.
75. 1958 Convention, supra note 22, art. 17.
76. Id. art. 18.
77. Id. art. 19.
78. Id. art. 20.
79. Id. art. 21.
80. Id. art. 22.
81. Concerning the confusion occasioned by the specific references contained in articles 21 and 22, see infra, text accompanying note 86.
82. 1958 Convention, supra note 22, art. 23. For the definition of passage, see supra note 67.
83. Id. The conjunctive language suggests that both non-compliance and disregard of any request for compliance must occur before the warship may be requested to leave. Accord, R. Baxter, supra note 53, at 168: "[A] consistent reading of the articles would point to a right of free navigation by warships which cannot be suspended but which is qualified by a requirement of compliance with the navigational laws of the coastal state."
84. The chief Soviet delegate concluded:
[The Western powers] succeeded in securing the deletion from the draft convention of the clause giving coastal states the right to grant or deny foreign warships the right of passage through their territorial waters. However, the clause requiring that foreign warships observe

the rules governing passage through territorial waters laid down by the coastal state remained. Such rules can, of course, include a requirement that prior permission be obtained or prior notification of passage given.

Tunkin, The Geneva Conference on the Law of the Sea, 1958 Int'l Aff. (Moscow), No. 7, at 47, 49.

The view that article 23 permitted such latitude could not have been strongly held because the Soviet and Bulgarian delegations attempted to amend article 15, which prohibits coastal states from hampering innocent passage, to deprive warships of the right of innocent passage. Failing this, the Soviet Government filed a reservation to article 23: "The Government of the USSR considers that a coastal state has the right to establish an authorization procedure for the passage of foreign warships through its territorial waters." 3 Soviet Statutes and Decisions, No. 4, at 45 (Summer 1967). Reviewing these matters, Pharand concludes that had the Soviet Government desired to prohibit innocent passage of warships -- which, in effect, its authorization requirement does -- it should have entered a reservation against article 15 rather than article 23. Pharand, note, 27, at 31-33. Other authorities on Soviet law agree that "Soviet legislation operates in effect to deny the right of innocent passage to warships rather than to restrict that right." Butler, supra note 47, at 129; One writer even asserts that owing to Soviet restrictions on warship passage, "no foreign warship or submarine ever passed through the Soviet territorial waters." Balupuri, Territorial Waters in Soviet Law and Practice, 14 Indian J. Int'l L. 217, 229 (1974).

85. Pharand, supra note 37, at 11.
86. Slonim, supra note 58, at 119 (emphasis in original). Similar reasoning must be followed to conclude that only "commercial" submarines enjoy innocent passage under subsection A. See id. n.116.
87. Pharand, supra note 37, at 12.
88. 1958 Convention, supra note 22, art. 5(2) (emphasis added).
89. Concerning the difference between territorial and internal waters, see supra text accompanying notes 36 & 37.
90. D.O'Connell, supra note 24, at 290-91.
91. Id.; cf. Slonim, supra note 58, at 120, who notes, despite his view that prior notification of warships transit could lawfully be required, "[T]he majority of states do not require authorization for the innocent passage of warships"
92. N.Y. Times, Dec. 11, 1982, at 1, col. 2; 1982 Convention, supra note 18.
93. Id. pt. II, arts. 2-32.

94. Id. art. 3.
95. Id. arts. 4-16.
96. Id. pt. II, sec. 3, arts. 17-32.
97. Id. subsec. A, arts. 17-26. It is clear that these are intended to apply to warships as well.
98. Id. subsec. B, arts. 27-28.
99. Id. subsec. C, arts. 29-32. The drafters grouped commercial government vessels with merchant ships, and noncommercial government vessels with warships, thereby eliminating one subsection and two articles. Thus, the entire discussion of transit rights for warships applies with equal force to non-commercial government ships.
100. Id. pts. III & IV, discussed infra. The only 1958 provision not included in part II, article 16(4), dealing with straits, has been moved to part III.
101. See infra text accompanying note 170.
102. See infra text accompanying note 173.
103. Id. art. 24(1). The drafters replaced the 1958 text, "must not hamper" with "shall not hamper." This appears to have been done solely for the sake of linguistic uniformity and not to connote any qualitative change in the level or obligation. Compare id. art 44 ("States bordering straits shall not hamper transit passage There shall be no suspension of transit passage.").
104. Id. art. 22.
105. They "shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements." Id. art. 23.
106. Id. art. 29. See supra text accompanying note 38. This article comes from the Convention on the High Seas, supra note 38; specific references to "naval forces" and "naval discipline" have been replaced by the more general "armed forces" and "armed forces discipline."
107. The flag State shall bear international responsibility for any loss or damage to the control State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.
1982 Convention, supra note 18, art. 31.

108. Id. art 32. This provision is also borrowed from The Convention on the High Seas, supra note 38, art. 8(1). Its "complete immunity" "on the high seas" language becomes subject in the territorial sea to the provisions of subsection A and articles 30 and 31.
109. See D. O'Connell, supra note 24, at 293.
110. See supra note 105.
111. 1982 Convention, supra note 18, art. 20.
112. Id. art. 25(1) (emphasis added). See infra text accompanying notes 199-201 for a discussion of permissible "steps" in relation to warships. The Soviet Government has adopted a policy of "hot pursuit" for violations of their maritime frontiers. Salupuri, supra note 84, at 226. This implies that "necessary steps" to prevent innocent passage into Soviet waters may occur outside the territorial sea.
113. 1982 Convention, supra note 18, art. 25(3). The basis for suspension may include "weapons exercise."
114. Id. art. 30. The new formulation adds the word "immediately" to the 1958 provision. See supra notes 82-83 and accompanying text.
115. "[A] right of innocent passage as provided in this Convention shall exist in those waters." 1982 Convention, supra note 18, art. 8(2) (emphasis added).
116. 1 E. Bruel, International Straits: A Treatise on International Law 202 (1947). On the right of passage through international straits, see Cundick, supra note 53, at 107; Deddish, The Right of Passage by Warships Through International Straits, 24 JAG J. 79 (1970); Grandison & Meyer, International Straits, Global Communications, and the Evolving Law of the Sea, 8 Vand. J. Transnt'l L. 393 (1975); McNees, Freedom of Transit Through International Straits, 6 J. Maritime L. 175 (1975); Smith, Politics of Lawmaking: Problems in International Maritime Regulation -- Innocent Passage v. Free Transit, 37 U. Pitt. L. Rev. 487 (1976); Note, Peacetime Passage by Warships Through Territorial Straits, 50 Colum. L. Rev. 220 (1950); Comment, Free Transit in Territorial Straits: Jurisdiction on an Even Keel?, 3 Cal. W. Int'l L.J. 375 (1973); Nolta, Passage Through International Straits: Free or Innocent? The Interests at Stake, 11 San Diego L. Rev. 815 (1974).
117. See, e.g., Pharand, supra note 37, at 12.
118. R. Baxter, supra note 53, at 166-68, 185; D. O'Connell, supra note 24, at 327.
119. [1949] I.C.J. 28. The exception to this right of free passage pointed to the Turkish Straits. The Montreux Convention, which governs the Straits, was the only existing treaty to restrict

warship passage at the time of the decision. R. Baxter supra note 53, at 164 n.77; NcNees, supra note 116, at 198-99, n.111. For a detailed review of the Montreux Convention's warship transit provisions, see Froman, Kiev and the Montreux Convention: The Aircraft Carrier That Became a Cruiser to Squeeze Through the Turkish Straits, 14 San Diego L. Rev. 681 (1977).

Exceptions for individual straits regimes appear in both the 1958 and 1982 Conventions, supra note 22, art. 25, and supra note 18, art. 35(c), respectively. Other straits governed by individual treaties include the Strait of Gibraltar, the Strait of Magellan, the Danish Straits, and the Straits of Malacca. See, D. O'Connell, supra note 24, at 317-27. On the Straits of Malacca, see Koh, Straits in International Navigation: Contemporary Issues 49-95 (1982).

120. Pharand, supra note 37, at 13; Rangel, Le Droit de la Mer dans la Jurisprudence de la Cour Internationale de Justice, 7 Thesaurus Acroasium 259, 276 (1977).
121. "Le critère décisif paraît plutôt devoir être tiré de la situation géographique du Déroit, en tant que ce dernier met en communication deux parties de haute mer, ainsi que du fait que le Déroit est utilisé aux fins de la navigation internationale." [1949] I.C.J. 28.
122. "But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." Id.
123. See supra note 53. The shift away from the Court's objective geographic criterion toward a subjective use criterion appears to have received impetus from the criticisms of Bruel based upon arguments of dissenting Judge Azevedo. Rangel, supra note 120, at 277-78. For a more detailed discussion of the use element, see Pharand, International Straits, 7 Thesaurus Acroasium 59, 67-71 (1977).
124. 1958 Convention, supra note 22, art. 16(4).
125. See 1982 Convention, supra note 18, arts. 34, 36, 37, & 45.
126. As, e.g., one through the territorial sea.
127. Similarity is measured "with respect to navigational and hydrographical characteristics." Id. art. 36. The Straits of Florida exemplify this group of straits. Swayze, supra note 23, at 35.
128. 1982 Convention, supra note 18, art. 37.
129. Id. art. 38(1) (emphasis added). This includes the vast majority of straits used for international maritime communication.
130. Id. art. 45. The former group consists of those straits formed by an island and the mainland of the same state where "there exists

seaward . . . a route through the high seas or through an exclusive economic zone of similar convenience." Id. art. 38(1). "[T]he Strait of Messina lying between the Italian mainland and Sicily" is such a strait. Swayze, supra note 23, at 35. The latter group comprises only about twenty straits including those of Tiran (id.) and Juan de Fuca, the Lema Channel, the Jacques Cartier Pass, and the Jubal Strait. Pharand, supra note 123, at 76.

131. This is the status claimed for the Vil'kitskiy Strait in the Northeast Passage. See Pharand, supra note 37, at 15-17, 38-41; and infra text accompanying notes 333-45. For an account of the controversial transit of another such strait, see Grammig, The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea, 22 Harv. Int'l L.J. 331 (1981).
132. 1982 Convention, supra note 18, art. 39(1)(c).
133. Id. art. 38(2).
134. Id. art. 39(1)(a).
135. Id. art. 39. Compare id. arts. 19(2)(a) (threat), 19(2)(h) (pollution), & 19(2)(l) (other activities).
136. Id. art. 40. Compare id. art. 19(2)(j).
137. Id. art. 41. Compare id. art. 22.
138. Id. art. 41(1)-(4). Compare id. arts. 21(1)(a) (navigation and safety), 21(1)(d) & (e) (fishing), 21(1)(f) (pollution), 21(1)(h) (customs), & 24(1) (duty not to hamper, impair, deny or discriminate).
139. Id. art. 42(5). Compare id. art. 31.
140. Id. art. 44. Compare id. art. 24.
141. Compare id. art. 19(2)(l) ("Passage of a foreign ship shall be considered to be prejudicial . . . if in the territorial sea it engages in . . . any other activity not having a direct bearing on passage.") with id. art. 38(3) ("Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention."). In the case of transit passage, this latter provision injects some uncertainty as to which "other applicable provisions" might apply, who might apply them, and how they might be applied. For a discussion of this point, see infra text accompanying notes 187-91.
142. For the purposes of this convention:
 - (a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

(b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Id. art. 46.

143. Id. arts. 47 & 49(1).

144. Id. art. 47(1).

145. Id. art. 49.

146. Id. art. 50.

147. Id. art. 48.

148. Id. art. 52.

149. Id. art. 53. This provision allows otherwise impermissible overflight and "normal mode" transit of those portions of the territorial sea adjacent to archipelagic sea lanes and air routes. "If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the route normally used for international navigation." Id. para. 12.

150. Id. art. 54.

151. While deviating from the sea lane axis, "ships and aircraft shall not navigate closer to the coasts than 10 percent of the distance between the nearest points on islands bordering the sea lane." Id. art. 53(5) & (11).

152. As used throughout this study, "newly enclosed internal waters" signifies those waters contemplated by id. arts. 8 & 35(a) and by the 1958 Convention, supra note 22, art. 5.

153. The scope of potential liability for damage to the coastal state appears to vary directly with the degree of intrusiveness of the passage. It is broader under the territorial sea provision than under the straits and archipelagic waters provision. Both recognize liabilities for loss or damage to coastal states for violation of coastal state laws and regulations. Beyond this, warships in transit and archipelagic sea lanes passage may incur liability only by violation of "other [straits] provisions." 1982 Convention, supra note 18, art. 42(5). Those in the territorial sea, however, are additionally subject to liability for non-compliance with any provision of the Convention or other rules of international law. Id. art. 31.

154. See, e.g., Comments by Rear Admiral B.A. Harlow, JAG Corps, U.S. Navy, Duke University College of Law Symposium on Law of the Sea (Oct. 29-30, 1982) at 3; Knight, Alternatives to a Law of

the Sea Treaty, in *The Law of the Sea: U.S. Interests and Alternatives* 133 (1976); cf. Lacharrière, *Politiques Nationales à l'Égard du Droit de la Mer*, in *Droit de la Mer* 7, 55 (1977) ("[I]l reste qu'il n'est nullement certain qu'une telle convention entre en vigueur, c'est-à-dire soit adoptée signée et ratifiée par un nombre suffisant d'États."); Oxman, *The New Law of the Sea*, 69 A.B.A. J. 156 (1983) ("There is a substantial possibility that more than the necessary 60 states will ratify the convention and bring it into force in the 1980s.").

The Convention comes into force twelve months after deposit of the sixtieth instrument of ratification. *Id.* art. 308(1). Only forty-five states are parties to the 1958 Convention on the Territorial Sea and Contiguous Zone. U.S. Dep't of State, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 1982*, at 255.

155. See e.g. Harlow, *supra* note 154, at 15: "[G]iven the right of submerged transit and overflight through straits under Part III of the treaty, one must address the follow-on question; whether this part of the treaty is law declaratory, that is, reflective of the current state of customary international law. I am convinced that it is." But cf. Richardson, *Law of the Sea*, *supra* note 19, at 576 ("The . . . Convention as it relates to navigation and overflight and related uses of the seas is a considerable improvement over existing law.").
156. D. O'Connell, *supra* note 24, at 331. *Accord*, Clingan, *supra* note 20, at 2 ("[T]hose parts of the Convention dealing with navigation and overflight . . . reflect prevailing international practice."); Neutze, *Whose Law of Whose Sea?*, U.S. Naval Inst. Proc., Jan. 1983, at 43, 48 ("The most important characteristic of the regime of navigation and overflight laid down in the treaty is its consistency with current practice.").
157. Convention on the High Seas, *supra* note 38, art. 2; see *supra* note 22. The status of unilateral territorial claims to these waters is subject to dispute by those maritime powers which refuse to recognize such expansive claims in the absence of a treaty.
158. See Harlow, *supra* note 154, at 7-8.
159. *Id.* at 1-6, 9; Richardson, *Power, Mobility*, *supra* note 19, at 918.
160. Lacharrière, *supra* note 154, at 55; Richardson, *Power, Mobility*, *supra* note 19, at 919. For an alternative view of the Law of the Sea Conference's, hence the Convention's, real purpose, see Pardo, *Commentary*, in *The Law of the Sea: U.S. Interests and Alternatives* 161, 162 (1976):

It may be useful . . . to bear in mind the true purpose of the law of the sea conference as distinguished from its stated purpose. I believe that, at least for the majority of the conference, that is, for coastal states, the true purpose of the conference is to achieve international recognition of perceived national interests in the seas

without much regard either to international equity, to the maintenance of international order, or to the long-term viability of the treaty.

For possible options in the absence of a treaty, see generally Knight, supra note 154.

161. See supra pp. 18-20. Expansion of the territorial sea by a factor of up to four times only highlights the importance of innocent passage for continued maritime mobility.
162. See D. O'Connell, supra note 24, at 272.
163. See The Corfu Channel Case (Merits), [1949] I.C.J. 4, 30, wherein the Court emphasized its view that the manner of the British warships' passage was innocent despite their crews being at battle stations and prepared to respond to attack. With main batteries stowed in the fore and aft position and anti-aircraft guns at full elevation, the ships entered the channel single-file and not in battle formation. Although British intent was to intimidate Albania, the Court found persuasive the fact that the warships' objective behavior did not threaten.
164. 1 H. Silving, Criminal Justice 172-73 (1971).
165. E.g., force majeure or distress. See 1958 Convention, supra note 22, art. 14(3); 1982 Convention, supra note 18, art. 18(2).
166. See D. O'Connell, supra note 24, at 273. Pharand appears to concur, supra note 37, at 7, 15.
167. 1958 Convention, supra note 22, art. 14(4); 1982 Convention, supra note 18, art. 19(1). For the meaning of "security," see supra note 68.
168. The famous observation of the United States Agent, Elihu Root, in 1910 in the North Atlantic Coast Fisheries Arbitration, made at a time when the United States opposed innocent passage in the territorial sea, has been seized on by many modern commentators and governmental representatives to deny the right of innocent passage for warships: "Warships may not pass without consent into this zone because they threaten. Merchant ships may pass because they do not threaten." 11 Proceedings, North Atlantic Court Fisheries 2007 (1912). Judge Krylov repeated this formula in his dissent in the Corfu Channel Case. [1949] I.C.J. 74.
169. For a discussion of the Japanese position and the attempt in 1958 of Yugoslavia to amend the draft 1958 Convention to deny innocent passage to vessels carrying nuclear weapons, see Grammig, supra note 131, at 336-42.
170. 1982 Convention, supra note 18, art. 19(2).
171. Cf. Grammig, supra note 131, at 340 (rejection of "broadly-worded provision" in favor of one "enumerating non-innocent activities

suggests that the latter provision was meant to be exhaustive."). But see D. O'Connell, supra note 24, at 270 (omission of "only" before list of prejudicial actions indicates "catalogue might not be closed.").

172. "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation." 1958 Convention, supra note 22, art. 17 (emphasis added).
173. 1982 Convention, supra note 18, art. 21 (emphasis added).
174. Or "discriminate in form or in fact" against ships on the basis of flag or destination state. Id. art. 24.
175. See D. O'Connell, supra note 24, at 273-74.
176. "Foreign ships exercising the right of transit passage shall comply with such laws and regulations [of States bordering straits relating to transit passage]." 1982 Convention, supra note 18, art. 42(4) (emphasis added).
177. See supra text accompanying notes 170 & 173. Compare id. art. 19(2)(g) with id. art. 21(1)(h). This is the only innocent passage qualification which specifically incorporates violation of a coastal state regulation.
178. Compare id. art. 19(2)(k) ("willful and serious pollution") with id. art. 21(1)(f) (environmental preservation and pollution control).
179. Compare id. art. 19(2)(i) ("any fishing activities") with id. art. 21(1)(d) ("Conservation of the living resources of the sea") and id. art. 21(1)(e) ("prevention of infringement of . . . fisheries laws").
180. Compare id. art. 19(2)(j) ("the carrying out of research or survey activities") with id. art. 21(1)(g) ("marine scientific research and hydrographic surveys").
181. Compare id. art. 19(2)(k) ("Act aimed at interfering with") with id. art. 21(1)(b) ("protection of navigational aids . . . and other facilities") and id. art. 21(1)(c) ("protection of cables and pipelines"). "Other facilities or installations" would cover submarine monitoring devices emplaced on the seabed.
182. Id. art. 21(1)(a).
183. Id. art. 22.
184. Id. art. 21(3).
185. See supra text accompanying notes 177-81.

186. However, by imposing a requirement not necessarily dependent on an overt act, one provision of the 1982 Convention, in effect, reverses the presumption of innocence for nuclear-powered ships and those carrying nuclear, inherently dangerous, or noxious substances. It requires all such vessels exercising the right of innocent passage to "carry documents and observe special precautionary measures established . . . by international agreements." Id. art. 23. See D. O'Connell, supra note 24, at 273. A public announcement of government policy that henceforward all nuclear powered and nuclear armed warships will retain proper documents on board at all times and will observe all special precautionary measures may, by providing both assurance and a face saving measure, avoid potential confrontations of such warships with coastal state enforcement authorities.
187. 1982 Convention, supra note 18, arts. 39(1)(c) & 38(3). The former restriction also applies to archipelagic sea lanes passage; the latter does not. See id. art. 54.
188. Id. art. 19(2)(l). While innocent passage also has a general prohibition, it is hard to conceive of prejudicial activity that would fall within it but outside all the other prohibited activities. See supra text accompanying note 170.
189. Threat of use of force. Id. art. 39(1)(b).
190. The better view would be that transit passage remains transit passage, even if violated. The violation, then, can be dealt with through the Convention's dispute settlement machinery. See Harlow, supra note 154 at 13-15: "The regime is one of freedoms with specific limitations, not one of innocent passage with specific additions."
191. Although conceptually an analysis of "non-transit passage" might follow the same reasoning process as that of non-innocent passage, because the innocent passage rules are more restrictive than transit passage rules, such an analysis would prove of little value: a violation of transit passage would most likely also constitute a violation of innocent passage. It becomes apparent through this process that the two regimes were not intended to overlap.
192. See generally D. O'Connell, supra note 24, at 294-97.
193. 1958 Convention, supra note 22, art. 14.
194. Id. para. 5.
195. Id. para. 6.
196. 1982 Convention supra note 18, art. 20.
197. Id. art. 21(1) & (1)(a). See supra text accompanying note 173.

198. For a discussion of straits and archipelagic waters submerged transit of which is vital to the U.S. ballistic missile submarine fleet, see Osgood, U.S. Security Interests and the Law of the Sea, in the Law of the Sea: U.S. Interests and Alternatives 11, 13-24 (1976).
199. 1958 Convention, supra note 22, art. 16(1); 1982 Convention, supra note 18, art. 25(1). See also D. O'Connell, supra note 24, at 273.
200. 1958 Convention, supra note 22, art. 23; 1982 Convention, supra note 18, art. 30. "Immediately" was added to the 1958 provision in the new Convention.
201. See supra, note 199. Due to the immunity of warships, such steps would necessarily involve less intrusive measures than those taken against non-innocent passage of merchant vessels.
202. A diplomatic protest demonstrates the coastal state's grave concern over a serious breach, either a clear case of non-innocent passage of the threatening type or a flagrant violation of state regulations resulting in damage or portending serious harm. This action may accompany other action, such as warning to and expulsion of a warship, or it may stand alone. If further redress is desired, the protest can serve to open a dialogue leading to negotiation.
203. See generally, R. Fisher & W. Ury, Getting to Yes (1981). If the parties can communicate with each other, directly or through intermediaries, they can negotiate. Establishing formal or informal lines of communication is the first step. Many negotiations fail because parties begin with unreasonable or unacceptable demands and thereafter find themselves unable to move away from them without losing credibility or face. Id. at 5. By focusing, instead, on their respective interests, rather than locking themselves into hard negotiating stances, the parties have a better chance of working together to solve their mutual problem. Id. at 41-57. Trust is helpful, if it exists, but it is not a necessary ingredient. Negotiation can proceed independently of trust as long as each side is committed to finding a solution based upon mutually agreed standards. Id. at 13, 85-98. In the context of an incident of non-innocent passage in the territorial sea, negotiation might seek to establish public acknowledgement of and apology for the violation, payment of damages, if any, and assurances of freedom from future incidents on the one hand or to effect revision of unduly restrictive regulations or withdrawal of excessive territorial claims on the other. Most "day-to-day differences" among nations are likely to find their resolutions through negotiation. W. Bishop, Jr., International Law Cases and Materials 63 (1962).
204. Should negotiation prove unable to resolve a dispute because of the hostility or rigidity of the parties, mediation, or good offices, may succeed. An independent, disinterested third party who can talk to the parties separately and candidly in private may often convince them through the institution of good offices to enter direct negotiations with each other or, through mediation, facilitate a mutually

acceptable solution between them when it would have been impossible for them to achieve one on their own. The mediator in the non-innocent passage case might, among other things, help each side to view the matter from the other's perspective, discuss with the parties their understandings of the applicable principles of law and their perceptions of the facts, try to get them thinking about their long-term relationship and how this incident and its solution will fit into it, or attempt to formulate a working plan which meshes both parties' needs and interests and which they may then criticize and revise in an attempt to find an acceptable solution. Mediation merely suggests an answer; it is for the parties to decide. Both procedures figure prominently in the Convention on Pacific Settlement of International Disputes (Hague I), Oct. 18, 1907, arts. 2-8, 36 Stat. 2197, T.S. No. 536, 1 Bevans 577.

205. Enquiry involves "elucidating the facts by means of an impartial and conscientious investigation." Id. art. 9. It applies solely to disputes of fact. J. Brierly, supra note 24, at 374. Conciliation has a broader scope. While it makes factual findings, it may also refer to applicable rules of international law or to "considerations of international policy." W. Bishop, Jr., supra note 203, at 64. Selected in whole or in part by the parties, ad hoc commissions characteristically perform both procedures. Neither binds the parties.
206. The United Nations Charter allows resort to any "peaceful means" chosen by the parties in resolving a dispute, including settlement under regional or other agreements. U.N. Charter, art. 33(1). The Security Council may refer disputes to appropriate regional agencies. Id. art. 52(3). In the event that all of the foregoing measures fail to resolve the dispute, the parties "shall refer it to the Security Council," (art. 37(1)) which is empowered to make recommendations to the parties or, if it finds a threat to the peace, (art. 39) to sanction the offending party or parties by economic or other measures, (art. 41) or by the use of force (art. 42). The likelihood of such action in the case of an alleged violation by the warship of a major maritime power is extremely remote because the nations with the world's four largest navies, as permanent members of the Security Council, retain the power to veto any substantive Security Council resolution. Id. arts. 23, 27(3). The coastal state is likely to find little solace here.
207. Arbitration differs from judicial settlement chiefly in that the arbitration panel consists of ad hoc judges chosen by the parties rather than, for example, the permanent judges of the International Court of Justice. W. Bishop, Jr., supra note 203, at 64; J. Brierly, supra note 24, at 347. Because the parties have more control over the composition of the panel and the scope of its inquiry, arbitration has in this century become a popular means for settling disputes which elude informal resolution. See id. at 347-48; W. Bishop, Jr., supra note 203, at 65-66. Many arbitral tribunals exist throughout the world, the best known of which is the Permanent Court of Arbitration at the Hague. Sharing the same building at the Hague is the International Court of Justice. All United

Nations members are automatically parties to the Court. U.N. Charter, art. 93. States parties may submit disputes to the Court, which shall decide them on the basis of "international conventions . . . ; international custom . . . ; the general principles of law recognized by civilized nations;" and "rules of law" evidenced by "judicial decisions and the teachings of the most highly qualified publicists." Statute of the International Court of Justice, supra note 57, arts. 35 & 38. The decisions of both tribunals are final and binding upon the parties to the dispute.

208. Except for this last option, the list is virtually identical to that contained in article 33 of the U.N. Charter.
209. 1982 Convention, supra note 18, art. 24(1).
210. Id. arts. 19(1) & (2)(a) (focusing on the second half of the latter provision); see supra text accompanying note 170.
211. See id. arts. 18(2) & 19(2)(l).
212. Id. art. 18.
213. U.N. Charter art. 2, para. 3.
214. Id. para. 4.
215. 1982 Convention, supra note 18, art. 279.
216. See supra text accompanying note 166.
217. For a discussion of the sizes and classification of coastal navies see infra note 282. Concerning suggestions for improving efficiency and enforcement capabilities of coastal navies, see Hoon, A Model for Small Navies, U.S. Naval Inst. Proc. Oct. 1980, at 136. At the time of his writing, Lieutenant Colonel Lim Kwong Hoon was Fleet Commander of the Republic of Singapore Fleet.
218. 1982 Convention, supra note 18, art. 283(1).
219. Id. art. 279, citing U.N. Charter art. 2(3) & art. 33. For a list of means corresponding to that of Article 33, see supra notes 203-07 and accompanying text.
220. 1982 Convention, supra note 18, art. 280. Unless the parties agree otherwise, the Convention's voluntary settlement provisions will apply only if means of their own choice fail to produce settlement within the time-limit agreed by the parties. Id. art. 281. Binding dispute settlement procedures to which the parties "have agreed, through a general, regional, or bilateral agreement or otherwise," apply in lieu of the Convention's voluntary procedures, unless the parties agree to the contrary. Id. art. 282.

These voluntary means of peaceful settlement, "which can be described as political means or diplomatic devices do not necessarily consist of the application of International Law. When using these

means, norms of International Law are mostly set aside. . . .
[T]he most important and far-reaching fact in connection with these means is that the emphasis is on the obligation to use them."
Ibler, The Settlement of Disputes arising [sic] from the Interpretation and Application of the Sea Law Convention with Special Consideration of the Spring 1976 New York Session of the Law of the Sea Conference, 7 Thesaurus Acroasium 453, 458-59 (1977).

221. Id. art. 284 & annex V.
222. Id. art. 283(2).
223. Id. art. 286.
224. See Carreño, La Solución a los Controversias en el Derecho del Mar, in Derecho Del Mar 311, 327-28 (1976); Sohn, Settlement of Disputes Arising Out of the Law of the Sea Convention, 12 San Diego L. Rev. 495, 516-17 (1975).
225. See, e.g., Statute of the International Court of Justice, supra note 57, art. 36.
226. Sohn, Conflict Management under the Law of the Sea Convention, in Conflict Management on the Oceans 1, 8 (June 1977) (International Peace Academy Occasional Paper #1); see Sohn, Settlement of Disputes, supra note 224.
227. 1982 Convention, supra note 18, art. 287. Their structure and procedures reflect the influence of the Hague counterparts. Id. annexes VI-VIII. The Tribunal, composed of 21 members and based in Hamburg, may organize itself into special chambers of three or more members to deal with particular categories of disputes. Id. annex VI, arts. 2(1), 1(2), & 15. Except for the Sea-Bed Disputes Chamber, the Tribunal is accessible only by "States Parties." Id. art. 291 & annex VI, art. 20. Applying the "Convention and other rules of international law not incompatible with [it]," or principles of equity at the request of the parties, the Tribunal has the power to prescribe provisional measures to dismiss unfounded claims, and to award default judgments when it is satisfied "that it has jurisdiction" and "that the claim is well-founded in fact and law." Id. arts. 293, 290, 294, & annex VI, arts. 25 & 28. Decisions are final and binding upon all parties to the dispute and any intervenors. Id. art. 296 & annex VI arts. 31-33.
- Two types of arbitration are provided for: general and functional. Genral arbitration is accomplished by a five-member panel selected from a pool comprised of four nominees by each State Party. Each party to a dispute appoints one arbitrator, and they mutually agree on the other three. Id. annex VII, arts. 2 & 3. The tribunal determines its own procedure, affording "each party a full opportunity to be heard and to present its case." Id. art. 5. Decision is by majority vote, default judgments may be entered, and the award is "final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure." Id. arts. 8, 9, & 11.

The functional or "special" arbitral tribunal differs in that it is composed of legal, scientific or technical experts. Every State may nominate two experts in "each of the fields of (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation." Id. annex VIII, art. 2. Parties having disputes concerning any of the foregoing fields may separately appoint two arbitrators from the appropriate list, only one of whom may be its national, and, together appoint a fifth member, who shall be president of the special tribunal. Id. art. 3. Both binding and non-binding fact finding options are also available. Id. annex VIII, art. 5.

228. Id. art. 287.

229. Id. paras. 1-3.

230. Id. paras. 4 & 5.

231. Id. arts. 297 & 298.

232. Id. art. 297(1)(a)-(b). The terms "sovereign rights or jurisdiction" identify the exclusive economic zone as the subject of these limitations and serve to distinguish it from straits ("sovereignty or jurisdiction") and the territorial sea and archipelagic waters ("sovereignty"). Compare id. arts. 1, 34, & 49, with id. art. 56(1):

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this convention. (Emphasis added.)

233. The provision appears to guarantee international and limit national jurisdiction.

234. See Carreño, supra note 224, at 323.

235. See Gaertner, The Dispute Settlement Provisions of the Convention or the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea, 19 San Diego L. Rev. 577, 586 (1982).

236. International Peace Academy, Summary Report, Proceedings of Diplomatic Consultation, June 31, 1977, New York City, in Conflict Management on the Oceans, supra note 226, at 48.
237. As a practical matter, those disputes in which compulsory jurisdiction is limited would not occur in the territorial sea anyway because they are not permitted innocent uses: "Marine scientific research" and "fisheries." 1982 Convention, supra note 18, art. 297(2) & (3).
238. The exclusive economic zone extends 200 miles from the baseline of the territorial sea, but it begins where the territorial sea ends. Thus, with a 12-mile territorial sea, the exclusive economic zone measures 188 miles in breadth. Dividing the breadth of the economic zone by that of the territorial sea yields a ratio of about one to $15\frac{1}{2}$, considering some allowance for variations in actual square area due to coast-line contour.
239. Transit passage and archipelagic sea lanes passage differ only in degree.
240. See Gaertner, supra note 235, at 584-86.
241. 1982 Convention, supra note 18, art. 298.
242. Id. art. 298(1)(b). A state may "declare in writing that it does not accept any one or more of the [compulsory] procedures provided for in section 2 with respect to one or more of the following categories of disputes": sea boundary delimitations or historic bays, military and law enforcement activities, and those in which the Security Council is acting. Id. For a discussion of the historic bays exception, see infra text accompanying notes 354-57.
243. Gaertner, supra note 235, at 586.
244. M. Janis, supra note 17, at 62.
245. Its evolution may be traced from its first proposal in 1974, listed in Sohn, supra note 224, at 515:

(d) Disputes concerning military activities [unless the State conducting such activities gives its express consent.]

through the 1 May 1975 draft appended to the Informal Single Negotiating Text, U.N. Doc. A/Conf.62/WP.8/SD.Gp./2nd Session/No.1 annex I, art. 17(3)(c):

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

to the final version, supra text accompanying note 242.

246. Note again the term "sovereign rights or jurisdiction." See supra note 232. Concerning the reference to paragraphs 2 and 3 of article 297, see supra note 237.
247. Examples of "normal mode" transit include submerged passage for submarines and "normal and necessary defensive measures integral to perimeter security" for surface vessels. For an aircraft carrier this "would include defensive deployment of acoustical bouys and a protective helo net, both activities being normal to the vessel, purely defensive in nature, and in no way directed at, or posing of a threat to, the resource rights or security interests of the coastal state." Harlow, supra note 154, at 20.
248. 1982 Convention, supra note 18, arts. 39 & 54.
249. Id. arts. 42(2) & 44.
250. See Gaertner, supra note 235, at 586:
The limitations and exceptions to the compulsory dispute settlement provisions show the influence of the G-77 [Group of 77]. Through the use of these provisions, the coastal State members of the G-77 can exercise a great deal of discretionary power concerning the uses of EEZs without having to submit any dispute to a procedure which would entail a binding decision.
251. "A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party." 1982 Convention, supra note 18, art. 298(3).
252. This analysis would also include disputes arising in straits and archipelagic waters.
253. In this case, resort would be made to original declarations. See supra text accompanying notes 228-30. "In the event of a dispute as to whether a court or a tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal." Id. art. 288(4).
254. See Gaertner, supra note 235, at 580 n.13, 593-94.
255. U.N. Charter, art. 51.
256. J. Brierly, supra note 24, at 405.
257. Statement of Secretary of State Webster in The Caroline, noted in 2J. Moore, supra note 42, at 412.
258. Id.

259. J. Brierly, supra note 24, at 407, citing the Nuremberg Tribunal.
260. "A submarine which is attacked in the territorial sea may be justified in responding to the attack by torpedoing the surface vessel" O'Connell, supra note 12, at 451.
261. J. Brierly, supra note 24, at 429 (emphasis in original).
262. See supra note 163.
263. Professors Knight and McDougal find no inconsistency with the U.N. Charter in using force to preserve an existing right. See Knight, supra note 154, at 141-2; McDougal, Commentary, id. at 156-57. Contra Pardo, Commentary, id. at 163-64; Sohn, Discussion, id., at 169.
264. See infra text accompanying notes 270-73.
265. Knight, supra note 154, at 142.
266. Cf. Gaertner, supra note 235, at 593-94.
267. For commentary on the U.S. Navy's policy of challenging excessive maritime claims, see Richardson, Power, Mobility, supra note 19, at 902. For an example of this type of passage see infra text accompanying notes 346-57.
268. This is similar to the Corfu Channel Case. See supra note 163.
269. See G. Allison, Essence of Decision 32-35, 78-96, 162-81 (1971).
270. Id. at 24.
271. T. Schelling, The Strategy of Conflict 4 (1960). This corresponds with Allison's Model I decisionmaking paradigm, supra note 269, at 10.
272. T. Schelling, supra note 271, at 15-16. Schelling lists various strategic moves, id. ch. 5, at 119-61.
273. This formulation assumes within "harm anticipated" the deterrent effect of its anticipatable response to coastal state action.
274. Cf. R. Petrow, Across the Top of Russia, 352-53 (1967).
275. See Balupuri's observation supra note 84.
276. One example of a maritime power acting as a coastal state is President Truman's 1945 declaration of jurisdiction over the continental shelf, which "produced a chain reaction in the [Latin American] region." Pohl, Latin America's Influence and Role in the Third Conference on the Law of the Sea, 7 Ocean Dev. & Int'l L. 65, 73-74.

277. Various other overlapping groupings occurred during the negotiations. Those which predated the Third Law of the Sea Conference included geographic groupings tied to the United Nations; independent regional organizations such as the European Economic Community, the Arab League, the Organization of African Unity, and the Organization of American States; and the Group of 77, all members of which were developing countries. A second category of groups formed during the conference. The first of these grew out of common geographic features. Membership of these groups cut across both economic and ideological lines: the coastal states, numbering approximately twenty-five and including countries such as Canada, Norway, Australia, Chile, Mexico, India, and Great Britain -- those for which extension of rights seaward would be most advantageous; the geographically disadvantaged and landlocked states, numbering approximately fifty; five archipelagic states; and a group of Latin American and African states claiming 200-mile territorial seas. The other major division centered around similarity of economic or technical development related to the oceans. This included the maritime nations and the researchers. Lacharrière, supra note 154, at 15-18.
278. For a broader comparison of the contrasting positions and interests of developing and industrialized nations during the law of the sea negotiations, a division which corresponds roughly to the coastal state-maritime power distinction made here, see id. at 7-56.
279. See comments of Arvid Pardo, supra note 160.
280. See supra notes ²³²⁻⁵⁴. For a more detailed discussion of specific regional sovereignty and economic concerns, see Ferreira, The Role of African States in the Development of the Law of the Sea at the Third UN Conference, 7 *Ocean Dev. & Int'l L.* 89(1979); Pohl, supra note 276, at 65.
281. See M. Janis, supra note 17, at 63, 68-70.
282. Janis classifies coastal navies into three categories following the first class (U.S. and Soviet) and second class (British and French) "blue water, SSBN navies":

Some 21 third-class navies have more than 10 major surface combatants (cruisers, destroyers, and frigates), usually some submarines, and occasionally an aircraft carrier. These third class navies typically have between 80 and 250 vessels in all. . . .

Another 29 fourth-class navies have at least one, but no more than 10, major surface combatants. Fourth-class navies have no aircraft carriers, rarely a cruiser, and number about 50 vessels in all. . . .

Finally, the remaining 72 minor maritime forces can be termed fifth-class navies. A fifth-class navy has no major surface combatants and rarely more than a dozen vessels in all.

Id. at 63-64. Updated information concerning these classifications appears in U.S. Naval Inst. Proc., Mar. 1983 (containing regional reviews of Latin American, Western European, East European, Middle Eastern, North African, South Asian, African south of the Sahara, and Far Eastern Navies).

283. In this regard, however, one commentator does not see a significant difference from the naval power point of view in a show of naval strength at three miles or at twelve: "The presence of naval forces at 12 miles can still be used to display resolve or determination to a government looking through high-powered binoculars or radar." Neutze, Bluejacket Diplomacy: A Juridical Examination of the Use of Naval Forces in Support of United States Foreign Policy, 32 JAG J. 81, 155 (1982).
284. One of the most difficult areas for coastal states is observation and surveillance of maritime activities within their jurisdiction. Many coastal states will have to rely on "international services" to provide satellite monitoring data for enforcement purposes. International Peace Academy, Summary Report, Proceedings of Diplomatic Consultations, in New York City (Jan. 31, 1977) in Conflict Management on the Oceans, supra note 226, at 47, 48-51.
285. See Gaertner, supra note 235, at 580 n.13, 593-4.
286. Slonium identified a "security group" at the law of the sea negotiations which "placed primary emphasis on the sovereignty of the coastal state and considered the right of innocent passage as a mere courtesy" supra note 58, at 125.
287. See supra note 17 and accompanying text.
288. Moore, A Foreign Policy for the Oceans, in the Oceans and U.S. Foreign Policy 1, 2 (Ocean Policy Study 1:4, Apr. 1978).
289. See, e.g., Richardson, Law of the Sea, supra note 19, at 553-55. This, of course, has not been true of the Soviet Navy, which has only within the last two decades shifted its attention from defense of homeland to global presence. See MccGuire, supra note 17, particularly 160-63; McConnell, Strategy and Missions of the Soviet Navy in the Year 2000, in Problems of Sea Power, supra note 17, at 39, 43.
290. Estimates on the exact number of such straits vary, perhaps based on differing points of view concerning use for international navigation. See, e.g., Osgood, supra note 198, at 11, 14 (1976) (setting the number at 121); Neutze, supra note 156, at 43, 45-47 (noting 116 such straits and providing a chart of 63 of them along the Pacific Rim); Major Issues of Law of the Sea 133-135 (1976) (listing 106 such straits together with widths and littoral states in tabular form condensed from 2 S. Lay, R. Churchill, & M. Nordquist, New Directions in the Law of the Sea 885-91 (1973)).

291. "The question of straits remains the most vital legal issue of sea power, because it is in confined waters that naval coups can best be effected under the pretext of self-defense and there that intolerable obstructions can be effectively raised to strategic and tactical deployment." D.O'Connell, *The Influence of Law on Sea Power* 103 (1975).
292. See, e.g., Froman, The 200-mile exclusive Economic Zone: Death Knell for the American Tuna Industry, 13 *San Diego L. Rev.* 707 (1976).
293. Geddes, The Future of United States Deep Seabed Mining: Still in the Hands of Congress, 19 *San Diego L. Rev.* 613, 614-16 (1982). An illustration of two deep-sea mining methods appears in Oxman, supra note 154, at 156, 161.
294. See supra note 20.
295. Moore, supra note 288, at 2-3; see Knight, supra note 154, at 138.
296. Moore, supra note 288, at 3-4.
297. United States: "control of the sea, projection of power ashore, strategic deterrence, and naval presence"; USSR: "defense of the homeland"(including strategic deterrence and conventional defense), "sea denial," and "naval presence"; Great Britain: "strategic deterrence," "regional defense," and "protecting distant water interests"; France: "territorial security" (including strategic deterrence), "security of Europe and the Mediterranean," and "fulfillment of France's overseas commitments." Neutze, supra note 283, at 83 (U.S.); Janis, supra note 17, at 23-24 (USSR), 39-41 (Great Britain), & 53-55 (France).
298. See, e.g., ^{M.}Janis, supra note 17, at 1-2. The least vulnerable leg of the U.S. strategic triad, nuclear submarines carrying ballistic missiles are capable of performing assured destruction and soft counterforce missions. See Panel on U.S. Security and the Future of Arms Control, Carnegie Endowment of International Peace, *Challenges for U.S. National Security* 38-39, 42-43 (1982).
299. See, e.g., Harlow, supra note 154, at 7-20. But only three straits strategically important to submerged transit of ballistic missile submarines would be overlapped by twelve mile territorial seas: Gibraltar, Ombai-Wetar and Lombok, the latter two of which also lie within the Indonesian Archipelago. Osgood, supra note 198, at 14-15.
300. See also Panel on U.S. Security, supra note 298, at 42-43, 61; Katner, Commentary, in *Problems of Sea Power*, supra note 17, at 73, 75-76; Osgood, supra note 290, at 13-20. Cf. Secretary Weinberger: "The United States will maintain a strategic nuclear force posture such that, in a crisis, the Soviets will have no incentive to initiate a nuclear attack on the United States or our

allies." Policy, Strategy & the Budget, Defense 82, May 1982, at 13.

301. "The submarine's objectives will range from reconnaissance, mining, delivery of saboteurs or agents, and survivor evacuation, to attacks on military or mercantile shipping." Taylor, Surface Warships Against Submarines, U.S. Naval Inst. Proc., May 1979, at 168, 173. "Submarines provide excellent covert capability . . ." Id. at 181.
302. See O'Connell, supra note 12, at 451. "United States and NATO submarines identify themselves pursuant to these procedures, but Soviet ones do not." D. O'Connell, supra note 291, at 144.
303. Half of the entire Soviet submarine force is based with the Northern Fleet at Murmansk, on the Kola Peninsula; the Baltic Fleet has a somewhat smaller submarine force, Swarztrauber, supra note 17, at 110.
304. Recall the periscope sighted near the grounded submarine well inside Swedish waters, supra text accompanying notes 4-5.
305. For a similar response to a similar inquiry, see Grammig, supra note 131, at 331-32.
306. Swarztrauber, supra note 17, at 110.
307. See infra note 312.
308. A 1909 Russian Law on the Extension of the Maritime Customs Zone is "cited by the USSR as having established the breadth of its territorial waters at 12 miles." Pharand, supra note 37, at 28.
309. See discussion of the 1960 Statute on the Protection of the State Border of the USSR and its prior authorization rule in id. at 30-33 and Butler, supra note 47, at 118, 127-30.
310. Instruction of the Soviet Ministry of Defense, reported in Pravda, August 29, 1961, noted in 1 V. Sebek, The Eastern European States and the Development of the Law of the Sea 308 (1979). Bulgaria and Roumania have the same rule. Id.
311. See supra note 84.
312. The great majority of submarines which have been detected in territorial waters in recent years are believed to have been Soviet, and they are rendered vulnerable by the Soviet view of the right of warships to traverse the territorial sea. Faced with extended territorial sea claims, the Soviet navy can complete oceanographical investigations, upon which its strategic doctrine is being erected, only by submarine invasion of the marginal waters of other nations. In this respect, too, the transition of the Soviet navy from a coastal defense force into a

instrument of global sea power has distorted to the point of contradiction Soviet doctrine on the law of the sea. D. O'Connell, supra note 291, at 141. Professor O'Connell believed that in view of this shift to a global mission, "the Soviet navy has gone cold on the notion that warships may not transit the territorial sea without previous permission." Id.

313. See id. at 142-44; cf. Restatement (Second) of Foreign Rel. §45 comment g ("In order to have a right of innocent passage, a foreign submarine must navigate on the surface and show its flag."); 1 V. Sebek supra note 310 and accompanying text. The four factors most useful for judging innocence of submarine transit are "the reasonableness of the use of the territorial sea for transit purposes, which may be in ratio with its extent, the weather conditions at the time, the political climate, and most important, the track taken by the submarine." D. O'Connell, supra note 291, at 143.
314. Since the Soviet Union seems to have been at the receiving end of most of the attacks which have been made on unidentified submerged submarines; it may have been hoist by its own petard. For if warships have no right of innocent passage the submarine should not have been in the territorial sea at all. It is an invader, to be dealt with like any other invader. Some countries of the Soviet bloc have declared that unidentified submarines will be attacked and destroyed. The victim can, therefore, hardly complain.
Id. at 142.
315. 1958 Convention, supra note 22, art. 16(1); cf. 1982 Convention, supra note 18, art. 25(1).
316. Cf. D. O'Connell, supra note 29, at 143-44:
While the use of force against a submerged submarine in the territorial sea is not ruled out, on the argument that entry of a warship for purposes other than that of innocent passage is an intrusion upon the national territory and may be repelled just as a military intrusion on land may be, every measure should be taken short of force to require the submarine to leave. . . ."
317. 2 August 1964. E. Potter, Illustrated History of the United States Navy 278 (1971).
318. At the time of the attack on 8 June 1967, the Liberty was 15 miles north of the Sinai peninsula. The attack killed 34 crew members and injured 75. Id. 278-79.
319. One was killed and three wounded in the 22 July 1968 attack on the Pueblo. The ship was boarded and seized and the surviving crew of 82 imprisoned for eleven months. Id. 279.

320. For a possible exception concerning the Maddox, see infra note 326 and accompanying text. The Pueblo was seized "15.3 nautical miles from the nearest land . . . and 16.3 nautical miles from the mainland of North Korea." Dean, The Pueblo Seizure: Facts, Law, Policy, 63 Am. Society of International L. Proc. 1(1969). Opinion is divided on whether at some point in its mission the Pueblo may have strayed inside the North Korean's tacitly claimed twelve-mile territorial sea. Compare Aldrich, Questions of International Law Raised by the Seizure of the U.S.S. Pueblo, id. at 2, 3 ("[W]e are satisfied that the ship did not at any time intrude into territorial waters claimed by North Korea.") with Butler, The Pueblo Crisis: Some Critical Reflections, id. at 7, 10 ("[T]here is no absolute assurance that at some point the vessel did not violate the North Korean boundary.")
321. [T]he activities of the Pueblo were lawful and could not legitimately be termed espionage. There is no precedent for a suggestion that visual or electronic observation on the high seas can be treated as espionage by any state. Such observation is a common practice in the world today; virtually all warships of all navies carry out visual and electronic observation as a normal part of their activities.
- Aldrich, supra note 320, at 5.
322. 1982 Convention, supra note 18, art. 19(2)(c).
323. See Dean, supra note 320, at 2; Aldrich, supra note 320, at 3-4.
324. North Vietnam (1964), North Korea (date unavailable). Major Issues in Law of the Sea, supra note 290, at 30.
325. Israel (1956). Id.
326. Osgood, supra note 198, at 29-30. Concerning the U.S. Navy policy of challenging such claims, see supra note 267 and infra note 343 and accompanying text.
327. The advent of sophisticated high-altitude photography -- first from the U-2, and since 1961 by reconnaissance satellite - has added enormously to the volume and reliability of information about opposing deployments and developments that can be obtained by national means. Satellite reconnaissance has been tacitly accepted as a legitimate intelligence activity, at least by the United States and the USSR. Neither seems to regard it as violating the rights of the observed state at international law.
- Chayes, An Inquiry into the Workings of Arms Control Agreements, 85 Harv. L. Rev. 905, 951-52(1972). "[T]he phrase 'national technical means' in SALT I further legitimized the use of such techniques without specifying what they entailed." Lowenthal, Salt Verification, Congressional Research Service Library of Congress (78-142F July 10, 1978), at 9.

Near the end of the American Society of International Law discussion of the Pueblo seizure, the following exchange occurred:

Professor Alberto J. Gabrielli. Is the policy of sending electronic equipment to explore the defense of other countries compatible with bona fide principles of international law?

Mr. Aldrich. If by bona fide principles you mean international fair play, yes, it is in the interests of a stable world order to have as open societies as possible. The great risks today come from threats that are maintained in secrecy.

63 Am. Society International Law 27(1969). See also supra note 321.

328. "A surprise armed attack of this character is clearly a disproportionate response to the threat posed by an electronics intelligence vessel, but it nevertheless is illustrative of the magnitude of concern felt by the coastal state." Butler, supra note 320, at 9.
329. Cf. D. O'Connell, supra note 291, at 142: "[C]oastal States will increasingly resent intrusion into areas where they wish to claim exclusive economic rights, and where damage can be done to their interests. Inevitably they will want to regulate shipping in the area, and the lurking submarine is unlikely to escape their legal nets."
330. 1982 Convention, supra note 18, art. 298(1)(b). See supra notes 241-54 and accompanying text.
331. Id. art. 297(2) & (3).
332. Id. art. 297(1)(a) & (b).
333. More commonly known today as the "Northern Sea Route." Pharand, supra note 37, at 15.
334. Cf. id. at 41.
335. Pharand seems to conclude that the Kara, Laptev, East Siberian and Chukchi Seas are Soviet territorial waters. Id. at 35-38. But he notes that between 1962 and 1965 U.S. Coast Guard icebreakers carried out oceanographic surveys in each of these seas as well. Id. at 38. But if these seas were considered territorial waters by the Soviet Government, would not these icebreakers have encountered the same denial of access for lack of prior authorization? The evidence Pharand relies on to distinguish these "territorial" seas from internal waters appears to support equally their classification as high seas.
336. Id. at 16.

337. See supra note 49 and accompanying text.
338. See supra note 84 and accompanying text.
339. Statute on the Protection of the State Border of the USSR, (1960), 3 Soviet Statutes and Decisions, No. 4 (Summer 1967), at 10-24, summarized in Bulter, supra note 47, at 118-20.
340. Id. art. 16.
341. See R. Petrov, supra note 274.
342. See supra note 261 and accompanying text. Notwithstanding its serious implications for U.S. - Soviet relations, such an assertion might likely have been suicidal for two modestly armed icebreakers in the home waters of the Soviet's Northern Fleet.
343. Statute on the State Border, supra note 339, art. 16.
344. See supra note 312.
345. The U.S. position has already been noted, supra notes 20 & 194 and accompanying text. Although the Soviet bloc abstained from voting to adopt the treaty in April 1982, its members signed the Convention on 10 December 1982 in Jamaica. Bureau of Public Affairs, Department of State, GIST, Law of the Sea 1 (Nov. 1982); Oxman, supra note 154, at 156.
346. Neutze, The Gulf of Sidra Incident: A Legal Perspective, U.S. Naval Inst. Proc., Jan. 1982, at 26, 27-29.
347. Id. at 27.
348. Id. at 27-28. The United States also filed a protest with the United Nations Security Council. Id. at 27.
349. Id. at 28-29. Within four months of the claim, the U.S. State Department denounced the Lybian claim, and between 1977 and 1981 the U.S. Navy conducted eight large-scale exercises . . . in the disputed area without significant incident." Id. at 29.
350. Actually, if Lybia's claims were valid, it would constitute an analogous but possibly more serious violation because Lybia claims the Gulf as historic "internal" waters; nevertheless, for analytical purposes we shall treat it as a question of territorial waters.
351. Nearly the opposite occurred. The U.S. fighters intercepted the Lybian fighters to warn them of the missile exercise in the area -- as U.S. aircraft had warned more than 60 Lybian military aircraft the previous day, without incident. Before the warning could be given, "one of the Lybian aircraft suddenly launched an Atoll missile at the lead F-14." Id. at 27.
352. Compare supra text accompanying and following note 342.

353. Cf. Osgood supra note 198, at 29: "Where military security . . . is involved, the maritime states have been bolder in backing their interests."
354. 1982 Convention, supra note 18, art. 298(1)(a)(i).
355. Id. subpara., ii.
356. Id. Although the parties remain free to agree to other procedures this provision appears to require them to agree upon a mutually acceptable binding procedure to resolve the dispute. To interpret it otherwise relegates the ultimate decision of these matters to the realm of force.
357. See Gaertner, supra note 235, at 86-88.
358. J. Brierly, supra note 24, at 13.
359. Id. at 15-16.
360. Id. at 16. "To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support." Id. at 47.
361. Id. at 9.
362. Id. at 17.
363. Id.
364. For its place among other modern sources of international law, see supra note 57.
365. See J. Brierly, supra note 24, at 49-56.
366. Id. at 56.
367. See id. at 40.

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