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## BOOK REVIEWS

Charlottesville, Virginia

DEPT OF ARMY PAMPHLET 27-100-135

MILITARY LAW REVIEW

VOLUME 135, 1992

# FREEDOM OF NAVIGATION AND THE BLACK SEA BUMPING INCIDENT: HOW “INNOCENT” MUST INNOCENT PASSAGE BE?

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## I. Introduction

A common theme in discussions concerning freedom of navigation is the inevitable conflict generated by competing interests of coastal states and the international community regarding use of the world's oceans—in particular, territorial waters. Balancing the sensitive considerations of continually expanding coastal state sovereignty claims with the international community's global navigation needs has been a central focus of almost all Law of the Sea negotiations. At the heart of this conflict is the struggle that major naval powers—including the United States—are experiencing in keeping the oceans open so that they may pursue their various strategic and diplomatic interests.<sup>1</sup> Much of the discontent is caused by the increasing “territorialization” of previously unrestricted waters by coastal nations concerned with protecting state security, environmental, and economic interests.<sup>2</sup> This may be the product of some states' tendencies to view their particular interests as somehow separate and distinct from those of other nations.<sup>3</sup>

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<sup>1</sup> Negroponte, *Who Will Protect Freedom of the seas?*, DEP'T ST. BULL., Oct. 1986, at 41.

<sup>2</sup> F. NGANTCHA, *THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA* 1 (1990).

<sup>3</sup> See Negroponte, *supra* note 1, at 42.

The danger . . . is that there is a tendency for each state to see the waters and circumstances off its coast as in some way unique. In this way the coastal state justifies assertions of new or broader forms of jurisdiction to satisfy its coastal appetite. This tendency, which has been dubbed “creeping uniqueness,” is the latest threat to the freedom of the seas.

*Id.*

Whatever the impetus, as littoral states have enlarged their territorial sea jurisdictions and other Law of the Sea claims, maritime powers have witnessed a continuing erosion of, and challenge to, the freedom of navigation.<sup>4</sup> This is especially true in relation to warships.

The regime of innocent passage, as it exists in customary international law, and as negotiated and codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III),<sup>5</sup> represents an attempt by the powers involved to compromise upon, and harmonize, these competing interests. "Simply stated, [the] regime is designed to provide a framework for achieving accommodations of the coastal State's exclusive interests and the [international] community's inclusive interests in the territorial sea."<sup>6</sup> Innocent passage allows coastal states to pursue their various policies of national sovereignty, while at the same time maintaining global freedom of navigation by which other nations may pursue their economic and political objectives.<sup>7</sup> In practice, however, innocent passage—as both an academic and applied concept—has many interpreters, not all of whom agree on exactly how "innocent" the passage must actually be under this regime. The importance of specifically defining the concept was never illustrated more graphically than it was during the Black Sea bumping incident of 1988. World superpowers stood head to head in opposition and confrontation over whether innocent passage is an absolute right in international law, or simply a privilege afforded on coastal states' terms. The incident unequivocally demonstrated the need to clarify the regime further, and to identify who decides when passage is innocent or noninnocent.

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<sup>4</sup> Coll, *International Law and U.S. Foreign Policy: Present Challenges and Opportunities*, 11 WASH. U. L.Q. No. 4, at 104 (1988).

<sup>5</sup> United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), *opened for signature* Dec. 10, 1982, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter UNCLOS III].

<sup>6</sup> Smith, *Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection*, 21 COLUM. J. TRANSNAT'L L. 48, 49 (1982); *see also* de Vries Reilingh, *Warships In Territorial Waters, Their Right of Innocent Passage*, Vol. 2, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 29, 30 (1971).

<sup>7</sup> G. SMITH, RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED 37-38 (1980). The author argues that the term "innocent passage" itself implies that a test of "reasonableness" will be applied when adjudging state standards regarded as excessive impingements on the freedom of navigation. "When conflict arises over the validity of state standards, an attempt is made to strike a balance between promoting international needs for unrestricted and unburdened navigation and protecting the sovereign integrity of coastal states." *Id.*

## 11. The Black Sea Bumping Incident

On February 12, 1988, warships of the United States and the Soviet Union "shadow boxed" over the issue of innocent passage in the Black Sea. The United States, in a direct and open challenge to Soviet legislation that severely curtailed the right of innocent passage in Soviet territorial waters, commissioned a "Freedom of Navigation" exercise in the Black Sea to challenge those restrictions.<sup>8</sup> Specifically, the 1982 Law of the Union of Soviet Socialist Republics on the State Frontier of the U.S.S.R.,<sup>9</sup> and subsequent implementing regulations, purported to limit innocent passage in Soviet territorial waters to the following predesignated "routes ordinarily used for international navigation":

In the Baltic Sea, according to the traffic separation systems in the area of the Kypu Peninsula (Hiiumaa Island) and in the area of the Porkkala Lighthouse;

In the Sea of Okhotsk, according to the traffic separation schemes in the areas of Cape Aniva (Sakhalin Island) and the Fourth Kurile strait (Paramushir and Makanrushi islands); and

In the Sea of Japan, according to the traffic separation system in the region around Cape Kril'on (Sakhalin Island).<sup>10</sup>

Ostensibly, these five traffic separation schemes were the only areas in which the Soviets would allow passage of foreign warships and still consider the passage to be "innocent."<sup>11</sup> Excluded from the legislation was any provision allowing for in-

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<sup>8</sup> The "Freedom of Navigation" program identifies various maritime claims that are inconsistent with international law and which threaten freedom of navigation. Thereafter, diplomatic action and "nonprovocative" operational activity are used to challenge the illegal assertion openly and peacefully. The tenets of the program are outlined in U.S. Dep't of State, Bureau of Pub. Aff., *U.S. Freedom of Navigation Program*, GIST 2 (Dec. 1988) [hereinafter GIST 2].

<sup>9</sup> Law of the Union of Soviet Socialist Republics on the State Frontier of the USSR 24 Nov. 1982, *entered into force* 1 Mar. 1983, *reprinted in* 24 I.L.M. 1716 (1986) [hereinafter the 1982 Law on the State Border]. Pursuant to this law, the Soviet Union promulgated The Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) and Internal Waters and Ports of the U.S.S.R. (1983 Soviet Navigation Rules), which were implemented by decree of the U.S.S.R. Council of Ministers on 28 April 1983. *Id.*

<sup>10</sup> 1983 Soviet Navigation Rules, *supra* note 9, art. 12.

<sup>11</sup> As one Soviet commentator noted, "In short, one may enter [via one of the five separation schemes] 'without knocking' there. In any other place, as not only good manners but also international norms suggest, one should knock first." Gorokhov, What Business Do They Have Off Our Coast?, PRAVDA, Feb. 14, 1988, at 4, *reprinted in* 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 19.

nocent passage through any of the Soviet Union's territorial waters in the Black Sea. The United States found this legislation unacceptable under international law and mounted an independent challenge via the Freedom of Navigation program.<sup>12</sup>

On the morning of February 12, 1988, two United States Navy warships, conducting routine operations in international waters in the Black Sea, altered their courses in a manner that would guide them directly into Soviet territorial waters.<sup>13</sup> The U.S.S. *Caron* and the U.S.S. *Yorktown* were tasked by Pentagon officials to enter Soviet waters off the southwestern tip of the Crimean peninsula and traverse eastward, parallel to the Crimean coastline, until they reentered international waters a few hours later.<sup>14</sup> The goal of the passages—which were to be continuous, expeditious and nonprejudicial to Soviet territorial sovereignty—was to manifest a nonprovocative exercise of the right of innocent passage.<sup>15</sup>

The U.S.S. *Caron* is a heavily armed Spruance class destroyer, with a 7800-ton displacement, configured for sophisticated intelligence gathering. A “modern-day Pueblo” as one author called it,<sup>16</sup> the *Caron's* missions routinely have involved freedom of navigation exercises, as well as intelligence related activities.<sup>17</sup> The U.S.S. *Yorktown*, an Aegis-class guided missile cruiser, with a 9600 ton displacement, is also heavily armed,

<sup>12</sup> See *infra* notes 43-77, and accompanying text.

<sup>13</sup> Wilson, *Soviets Bump U.S. Ships in Black Sea*, WASH. POST, Feb 13, 1988, at A23, col. 1.

<sup>14</sup> Carroll, *Black Day on the Black Sea*, 18 ARMS CONTROL TODAY 14, at 16 (May 1988).

<sup>15</sup> UNCLOS III, *supra* note 5, art. 17: “[s]ubject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”

<sup>16</sup> Arkin, *Spying in the Black Sea*, BULL. OF THE ATOMIC SCIENTISTS, May 1, 1988, at 5.

<sup>17</sup> *Id.* Arkin's article painstakingly traces the *Caron's* missions between 1980 and 1988, including 24 intelligence collection missions in the Atlantic Fleet, 16 separate intelligence missions off the coast of Central America, and three previous surveillance operations in the Black Sea. The following chronology, “compiled by the author from U.S. Navy sources,” is included in Arkin's article:

1980:

March 20: Adm. Thomas Hayward, Chief of Naval Operations, visits the USS CARON (DD-970) at h'orfolk, Virginia, to attend a briefing on the upcoming “Aggressive Knight” surveillance of the Soviet Kiev aircraft carrier battle group in waters above the Arctic Circle.

April 18-28: “Aggressive Knight” operations. September 30 - October 9: CARON conducts surveillance operations in the Baltic Sea, including port visits to Stockholm and Helsinki.

1981:

May 31- June 9: CAROK and the frigate USS MILLER (FF-1091) conduct Baltic Sea surveillance operations.

June 2-7: CAROK and MILLER visit the port of Constanta, Romania.

having the primary mission of serving as a defensive escort for other ships. In tandem, these two very capable American warships entered the twelve nautical mile territorial sea claimed

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July **17**: CARON conducts "Operation Eagle Eye," surveillance of the Soviet aircraft carrier KIEV in the western Mediterranean.

August **18-19**: CARON conducts surveillance operations in the Gulf of Sidra, including the first tracking of Libyan Fitter fighters.

August **27**- September **3**: CARON participates in exercise "Magic Sword" in the Norwegian Sea, part of "Ocean Venture '81," and conducts over-the-horizon surveillance and targeting.

**1982:**

February **16-27**, March **2-7**, March **20**- April **1**: CARON conducts Central American intelligence collection operations.

**1983:**

April **16-22**: CARON conducts southern Caribbean special operations and intelligence collection.

October **21**: CARON is detached from the USS INDEPENDENCE (CV-62) battlegroup while transiting to the Mediterranean and is directed to Grenada. CARON is ordered to proceed at "max speed" to take up station as soon as possible.

October **23**: CARON is the first United States Navy ship to arrive on station for "Operation Urgent Fury," the invasion of Grenada.

October **23** - November **2**: CARON participates in the Grenada invasion, including artillery fire support, surveillance, and search and rescue operations. The ship spends most of its time **1-2** miles off the coast of Grenada.

November **16** - December **12**: CARON conducts surveillance operations in the eastern Mediterranean off the coast of Lebanon.

**1984:**

January **3**: CARON takes up position for **62** days of intelligence collection and artillery fire support off of Beirut. Much of the time, the destroyer is anchored only **1000** yards from the Lebanese coast.

March **30** - April **18**: CARON conducts surveillance operations in the eastern Mediterranean.

November **6** - December **18**: CARON conducts Central American special operations, including transit of the Panama Canal and intelligence collection in the eastern Pacific.

**1986:**

November **20** - December **9**: CARON conducts surveillance operations in the eastern Mediterranean, including a port visit to Haifa, Israel.

December **9-13** the USS YORKTOWN (CG-48) and the CARON enter the Black Sea for the second United States Navy "Black Sea Ops" of the year. This is the first Aegis/Outboard team ever to go into the Black Sea.

**1986:**

January **1**: CARON begins four months of duty in various "Operations in the vicinity of Libya," including Gulf of Sidra operations January **7** - February **1** and February **7-17**.

March **10-17**: CARON takes time out of Libya surveillance to conduct Black Sea operations with the USS YORKTOWN (CG-48), entering on March **10**. On March **16** the ships come within six miles of the Crimean peninsula near Sevastopol. There are three Black Sea deployments in **1986**.

March **18**: The Soviet Union delivers a note to the American embassy in Moscow protesting the incursion of two United States Navy vessels into Soviet territorial waters. A White House spokesman says the vessels were testing the "right of innocent passage," and insists it was not meant to be [a]"provocative or defiant" deployment.

by the Soviet Union<sup>18</sup> and sailed eastward along the Crimean peninsula, coming within seven to ten miles of the Soviet coastline.<sup>19</sup> The *Curon* entered Soviet territorial waters first, followed closely thereafter by the *Yorktown*. Within fifteen minutes after their entry, the *Curon* and the *Yorktown* found themselves being “shadowed” by two Soviet naval vessels: the *Bezzuvetny*, a Krivak I-class frigate with a 3900-ton displacement, and the *SKR-6*, a Mirka 11-class light frigate with a 1100-ton displacement.<sup>20</sup> Both Soviet vessels had been dispatched from Sevastopol, homeport for the Russian navy’s southern fleet, with directions to “intercept” the *Curon* and the *York-*

March 22-29: CAROK serves as flag ship for Destroyer Squadron 20 which leads a three-ship surface-action group to be the first vessel to cross the “line-of-death” in the Gulf of Sidra

April 16: CAROK ends its operations in the vicinity of Libya.

1987:

April 13 • May 20: CAROK conducts surveillance of Central America, including operations in the Caribbean and the eastern Pacific.

October 15-16: CARON conducts operations in the Gulf of Sidra.

December 1-6: CAROS conducts surveillance operations in the eastern Mediterranean and finishes with late December port calls to Alexandria, Egypt, and Haifa, Israel.

1988:

February 12: CARON and USS YORKTOWN are bumped by two Soviet Navy frigates nine miles from the Crimean coast in the Black Sea.

*Id.* at 6.

<sup>18</sup> The breadth of the Soviet territorial sea was not at issue. *Cf.* UNCLOS III, *supra* note 5, art. 3 (“[e]very state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”). Although the United States is not a signatory to the UNCLOS III as a result of its controversial deep seabed mining provisions, it specifically has stated that it recognizes the nonseabed provisions of the Convention as an accurate reflection of customary international law that it is prepared to recognize and uphold, including those provisions relating to the creation of a 12 nautical mile territorial sea. *See* Statement on United States Ocean Policy, 19 Weekly Comp. of Pres. Doc. 383-85 (Mar. 14, 1983), *reprinted in* 22 I.L.M. 464 (1983); *reprinted in* U.S. Navy Dep’t, *Saval Warfare Publication 9, Rev. A (NWP-9), THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS annex AS1-3 (1989) [hereinafter NWP-9]*. For a thorough discussion concerning United States policy on the UNCLOS 111—particularly regarding the deep seabed mining provisions and freedom of navigation—see 136 Cong. Rec. S5547-5550 (Apr. 18, 1990) (statement of James L. Malone).

<sup>19</sup> Cushman, *2 Soviet Warships Reportedly Nudge U.S. Navy Vessels*, N.Y. TIMES, Feb. 12, 1988, at A1, col. 1.

<sup>20</sup> Tisdall, *Senate Probes Black Sea Collision*, MANCHESTER GUARDIAN WEEKLY, Mar. 13, 1988, at 8; *see* SOVIET NAVY VESSELS BUMP U.S. WARSHIPS IN BLACK SEA; BOTH SIDES PROTEST, FACTS ON FILE WORLD NEWS DIGEST (Int’l Aff’s Sec.), Feb. 19, 1988, at 99, col. F3; Levin, *Soviet Protest to USA Over Naval Vessel’s Collision in Black Sea*, British Broadcasting Corporation radio broadcast (Feb. 13, 1988) (transcript available in BBC SUMMARY OF WORLD BROADCASTS, pt. 1, A(1), at 75).

town for their violations of the 1982 Law on the State Boundary and the 1983 Soviet Navigation Rules.<sup>21</sup>

Approximately eight miles off the southern tip of Crimea, between Sevastopol and Yalta, the Soviet vessels assumed a position between the American ships and the Crimean coastline. They then began to parallel the movement of the *Curon* and the *Yorktown*.<sup>22</sup> Apparently acting upon direct orders from Moscow,<sup>23</sup> the Commander of the Soviet Mirka-II class light frigate, the *SKR-6*, maneuvered to within fifty meters of the *Curon*. At the same time, the Krivak-class frigate, the *Bezzavetny*, positioned herself similarly in relation to the *Yorktown*.<sup>24</sup> Upon reaching her position opposite the *Yorktown*, the *Bezzavetny*'s commander radioed the American guided missile cruiser and advised her that she had entered Soviet territorial waters.<sup>25</sup> The *Yorktown* acknowledged the communication, but continued forward on a steady course and speed.<sup>26</sup> The *Curon* did likewise. One more radio warning from the Soviets followed, but it went unacknowledged by the American war-

<sup>21</sup> See *supra* notes, 9, 10; Lodge, *Soviet Union Says Ships Incident Undermines Relations With U.S.*, THE REUTER LIBRARY REP., A.M. cycle, Feb. 13, 1988.

<sup>22</sup> *Soviet Ships Tried to Oust Americans*, PRAVDA SAYS, THE REUTER LIBRARY REP., A.M. cycle, Feb. 14, 1988.

<sup>23</sup> Sale, *Analysts Believe Soviet Ramming Orders Came From Moscow*, UNITED PRESS INT'L, P.M. cycle, Feb. 29, 1988.

<sup>24</sup> See *Soviet Navy Vessels Bump U.S. Warships in Black Sea; Both Sides Protest*, *supra* note 20.

<sup>25</sup> Commander Vladimir Bogdashin of the *Bezzavetny* was quoted by Pravda as follows regarding his communications with the *Yorktown*:

I went on the 16th radio channel, the international one, and warned them. They answered that they understood. They did not change their course and speed. We took a position between the ships and the coast and tried to signal that their course was dangerous. There was no effect. The decision had already been taken: it was necessary to fulfill the order to force out the intruder, but it was not easy, at the speed of 18 to 20 knots to approach and drive [them] away.

*Soviet Ships Tried to Oust Americans, Pravda Says, supra* note 22. Bogdashin was further quoted by Pravda as follows:

It [the warning] had no effect! I made my decision: the order—[']shoulder out the violator[']—had to be fulfilled, but nonetheless, it wasn't easy: to close with and shoulder out a violator at a speed of 18 to 20 knots. It felt as if we were alongside a tanker . . . . As authorized, I had announced 'emergency quarters' a little earlier. I could hear them do the same. There was no thought of using weapons. It was the same with [the Commander] on board the SKR-6, by the way . . . . To be honest, no one in the command center put on his lifejacket, although the order had been given. The helmsman . . . did his work like a jeweler, executing all commands precisely. In short, we carried out our battle orders.

*U.S., Soviet Naval Ships Collide Off Crimea*, 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 20.

<sup>26</sup> *U.S., Soviet Naval Ships Collide Off Crimea, supra* note 25.



ships.<sup>27</sup> Almost immediately thereafter, and within minutes of one another, both the *Curon* and the *Yorktown* were "bumped"<sup>28</sup> on their port sides by their respective escorts—the *Curon* first by the Mirka-II class light frigate, then the *Yorktown* approximately three minutes later by the Krivak-I class frigate.<sup>29</sup> The Soviet vessels involved in this incident were significantly smaller than the American ships with which they made contact, and overall damage was negligible.<sup>30</sup> Thereafter, both the *Curon* and the *Yorktown* continued on course and completed their transit through Soviet waters. No further incidents took place, but the American ships remained under escort until they reentered international waters.<sup>31</sup>

Both the United States and the Soviet Union exchanged a series of diplomatic protests over the Black Sea bumping incident.<sup>32</sup> Admiral Konstantin Markov, First Deputy Commander

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<sup>27</sup> Gorokhov, *What Business Do They Have Off Our Coast? Impermissible Actions of the U.S. Navy*, PRAVDA, Feb. 14, 1988, at 14 translated and reprinted in 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 19. Captain Jerry Flynn, a spokesman for the Chief of Naval Operations, reported that the warning contained in the radio message was as follows: "Soviet ships have orders to prevent violation of territorial waters. I am authorized to strike your ship with one of our's." The American ships failed to respond in any manner to this second warning. As Captain Flynn put it in statements he made to reporters at the Pentagon, "[w]e made no response . . . our response was to continue on course and speed as any prudent mariner would have." Aldinger, *U.S., Soviet Warships Collide in Black Sea*, *Pentagon Says*, REUTER LIBRARY REP., A.M. cycle, Feb. 12, 1988; see also Wilson, *supra* note 13.

<sup>28</sup> The Soviet action has been described variously in news articles and periodicals as "bumping," "shouldering," "nudging," "grazing," "sideswiping," and "colliding." This article uses the term "bumping" in its literal sense—that is to come, more or less, violently in contact with.

<sup>29</sup> Hitt, *Oceans Law and Superpower Relations; The Bumping of the Yorktown and the Caron in the Black Sea*, 29 VA. J. INT'L L. 713, 714 (1989).

<sup>30</sup> *Soviet Navy Vessels Bump U.S. Warships in Black Sea; Both Sides Protest Incident*, *supra* note 20. It has been speculated that the Soviets intentionally dispatched vessels "a seventh the size of the intruders" to conduct this operation to minimize the potential for actual hostilities and keep the confrontation in check. Tisdall, *supra* note 20. *Russia and America; Things That Go Bump*, THE ECONOMIST (Int'l Ed.) Feb. 20, 1988, at 46.

<sup>31</sup> Levin *supra* note 20.

<sup>32</sup> On Feb. 12, 1988, American officials filed a formal protest over the incident with Yuri Dubinin, then Soviet Ambassador to Washington, alleging that the Soviets deliberately had rammed American vessels that were engaged in innocent passage. The following day, Soviet Foreign Ministry Spokesman Gennadi Gerasimov formally complained on behalf of the Soviet Government that the American ships were at fault. Lee, *Soviets Protest Collision of Warships in Black Sea; Moscow Blames Incident on U.S. Vessels*, WASH. POST, Feb. 14, 1986, at A46, col. 1. The U.S.S.R. Ministry of Foreign Affairs protest stated:

On Feb. 12, 1988, two U.S. naval vessels, the destroyer CARON, at 10:45 a.m. (Moscow time), and the cruiser YORKTOWN, at 11:03 a.m., violated the USSR's state border in the vicinity of the south coast of the Crimea, at a point with the coordinates 44 degrees 15.6 minutes north latitude and 33 degrees 30.0 minutes east longitude. The U.S. ships did not react to warning signals, given in good time by Soviet border craft, that they were nearing the USSR state border, and they did

in Chief of the Soviet Navy, initially denied that Soviet vessels had rammed the American ships deliberately. He alleged that the American vessels caused the "collision" by ignoring warning signals and by maneuvering dangerously after entering Soviet territorial waters.<sup>33</sup> However, because incontrovertible evidence was gathered proving that the Soviet ships had intentionally bumped the *Curon* and the *Yorktown* while they maintained steady courses and speeds,<sup>34</sup> Markov retreated from his position. The Soviets then proffered the argument that the American vessels' passages through Soviet territorial waters in the Black Sea was not innocent because they violated the Soviet Union's 1982 Law on the State Border and the 1983 Soviet Navigation Rules.<sup>35</sup> Marlen Volosvov, Chief Secretary of the Soviet Law of the Sea Association, opined that the passages were illegal because "[m]aritime laws specify that warships while exercising the right of innocent passage should strictly observe the requirements of the littoral state so as to prevent breaches of safety and good order in foreign territorial waters."<sup>36</sup> Because the passages of the *Curon* and the *Yorktown* had not taken place in one of the five routes specified for transit by the 1983 Soviet Navigation Rules, the Soviets viewed them as violations of their sovereignty in contravention of their domestic legislation, customary international law, and the UNCLOS III.<sup>37</sup> Furthermore, the Soviets argued that the passages of the American warships were not innocent because they were navigationally unnecessary—that is, the

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not make suggested changes in their course. After having gone a considerable distance into USSR territorial waters, the U.S. warships did some dangerous maneuvering, which led to a collision with Soviet warships. Despite the collision, the cruiser *Yorktown* and the destroyer *CARON* remained inside the territorial waters and left them only at 12:49 p.m. . . . The responsibility for the provocation that was committed that led to the collision between warships of the two countries, rests wholly and completely with the American side. . . .

*Resolute Protest of the Ministry of Foreign Affairs of the USSR*, PRAVDA, Feb. 14, 1988, at 4, reprinted in 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 19.

<sup>33</sup> See authorities cited *supra* note 32.

<sup>34</sup> The United States Navy produced videotapes taken from the bridge of each vessel that had recorded both bumping episodes, and which clearly demonstrated that neither the *Caron* nor the *Yorktown* were "maneuvering dangerously." Additionally, recordings of the radio transmissions from the Soviet ship Commander indicating that "I am authorized to strike your ship with one of ours" were available to demonstrate that the Soviets had initiated the incident. Lee, *supra* note 31; and see U S Navy videotape (copy on file, International Law Division, The Army JAG School, Charlottesville, Va.).

<sup>35</sup> *supra* notes 9 and 10.

<sup>36</sup> *Soviet Lawyer on the Incident in the Black Sea*, TASS (Feb. 16, 1988).

<sup>37</sup> *Id.*

*Caron* and the *Yorktown* could have transited the Black Sea in international waters instead of through Soviet territorial sea.<sup>38</sup>

The position of the United States was clear and unambiguous—the transits of the *Caron* and the *Yorktown* were valid exercises of the right of innocent passage.<sup>39</sup> Richard L. Armitage, then Assistant Secretary of Defense for International Security Affairs, acknowledged that, from an operational standpoint, the transits were not necessary.<sup>40</sup> He asserted that, despite the absence of necessity, as long as a passage is continuous, expeditious, and conducted in a manner not prejudicial to the peace, good order, or security of the littoral state, it is innocent.<sup>41</sup> The United States went on to acknowledge that the Black Sea transits specifically had been commissioned as part of its ongoing Freedom of Navigation program.<sup>42</sup>

### 111. The Freedom of Navigation Program

The United States' commitment to preserving and protecting maritime rights and freedoms is no better exemplified than in its Freedom of Navigation (FON) program.<sup>39</sup> Recognizing that the many navigational rights it currently enjoys may be lost over time if not used, this program charts a steady course for actively asserting these freedoms globally to ensure their continued viability.<sup>43</sup> Because the United States did not sign or ratify the UNCLOS III, but nevertheless accepts its navigational principles as customary international law, a continuing obligation exists to exercise these rights to preserve them.<sup>44</sup> At the heart of customary international law is assertion and activism. In other words, "[t]o protect our navigational rights and freedoms we must exercise them."<sup>45</sup> The Freedom of Navigation program accomplishes this by targeting and operationally challenging maritime claims that are in contravention of

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<sup>38</sup> Carroll, *supra* note 14, at 15; Rubin, *Innocent Passage in the Black Sea?* CHRISTIAN SCI. MONITOR, Mar. 1, 1988, at 14, col. 1; see Schachte, *The Black Sea Challenge*, 114 U.S. NAVAL INSTITUTE PROCEEDINGS 62 (June 1988).

<sup>39</sup> Armitage, *Asserting U.S. Rights On the Black Sea*, 18 ARMS CONTROL TODAY, May 1988, at 17.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Campbell, *USS Caron's Black Sea Scrape Furthered International Law, National Interest*, THE VIRGINIAS-PILOT AND THE LEDGER STAR, June 12, 1988, at C3, col. 1.

<sup>43</sup> Negroponce, *supra* note 1, at 42.

<sup>44</sup> Leich, *U.S. Practice (Law of the Sea)*, 84 AM. J. INT'L L. 237, 240-241 (Jan. 1990). Negroponce, *Current Developments in the U.S. Oceans Policy*, Dep't St. Bull. Sept. 1986, at 84; see also Negroponce, *supra*, note 1.

<sup>45</sup> Schachte, *supra* note 38, at 62.

international law. The 1982 Soviet Border Rules and the 1983 Soviet Navigation Rules, which attempted to thwart innocent passage in the Black Sea, are exactly the type of maritime claim that the program was designed to challenge.<sup>46</sup>

The program was created in 1979 during the final year of the Carter Administration.<sup>47</sup> The feeling at the time was that “even with a widely ratified Law of the Sea Treaty to which the United States was a party, it still would be necessary to exercise the rights set forth in the convention in order not to lose them.”<sup>48</sup> President Carter himself made this point clear in announcing the new program. “Due to its preeminent position [in world affairs], the United States feels compelled actively to protect its rights from unlawful encroachment by coastal states.”<sup>49</sup> The 1983 presidential ocean policy statement by President Reagan further committed the United States to this concept:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 Law of the Sea] Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related uses of the high seas.<sup>50</sup>

The Bush Administration has continued this course, essentially adopting the 1983 ocean policy statement as its own fundamental platform.<sup>51</sup>

The exercise of navigational rights by the United States is not intended to be provocative or threatening, nor does it seek to challenge lawful exercises of coastal state sovereignty over its territorial waters.<sup>52</sup> “Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more.”<sup>53</sup> Noteworthy also is the fact

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<sup>46</sup> Rose, *Naval Activity in the EEZ—Troubled Waters Ahead*, 39 NAVAL L. REV. 67, 86-86 (1990); see GIST 2, *supra* note 8.

<sup>47</sup> Rose, *supra* note 46, at 85.

<sup>48</sup> Negroponte, *supra* note 1, at 42.

<sup>49</sup> Dep't of St. Bureau of Pub. Aff., U.S. Freedom of Navigation Program, GIST 1 (Dec. 1988)[hereinafter GIST 1].

<sup>50</sup> Statement on United States Ocean Policy, *supra* note 18, at 384.

<sup>51</sup> Malone, *Law of the Sea—Again, Statement to Congress*, 136 CONG. REC. S5547-6650, at 5648 (Apr. 18, 1990).

<sup>52</sup> GIST 2, *supra* note 8.

<sup>53</sup> Negroponte, *supra* note 1, at 42.

that, in theory, no state is immune. The program purports to reject impartially the excessive maritime claims of "allied, friendly, neutral, and unfriendly states alike."<sup>54</sup>

The goals of the Freedom of Navigation program are accomplished by the following three-step approach:

#### *A. Informal Diplomatic Assertion*

The United States endeavors to resolve alleged unlawful maritime claims at the lowest level possible. This is done in two ways. First it will make a diplomatic attempt to guide state practice toward general acceptance of the UNCLOS III provisions through bilateral negotiations.<sup>55</sup> Influencing state legislation prospectively is much easier than attempting to change it retrospectively, and American representatives involve themselves with other countries to encourage conformance with the Law of the Sea.<sup>56</sup> Second, the State Department will select an unlawful maritime claim and seek, through informal diplomatic channels, to convince the state involved to conform its claim to international law. Most often this action is taken through informal protests and negotiations.<sup>57</sup>

#### *B. Formal Diplomatic Assertion*

When appropriate, the State Department will file a formal, written diplomatic protest that addresses specific objectionable maritime claims of other states.<sup>58</sup> More than seventy of these protests have been filed since 1948, and more than fifty since the inception of the Freedom of Navigation program in 1979.<sup>59</sup>

#### *C. Operational Assertion of Rights*

When diplomatic efforts prove to be inadequate, components of both the Navy and the Air Force may be called upon to assert freedom of navigation rights. "Operational assertions

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<sup>54</sup> GIST 2, *supra* note 8

<sup>55</sup> Negroponte, *supra* note 44, at 84

<sup>56</sup> A good example of how this process takes place is the negotiations that took place with Fiji to convince that state to conform its archipelagic legislation to the archipelagic articles in the UNCLOS III *Id.* at 85

<sup>57</sup> GIST 2, *supra* note 8

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

tangibly manifest US. determination not to acquiesce in excessive claims to maritime jurisdiction by other countries.”<sup>60</sup> Carried out against friend and foe alike, Freedom of Navigation exercises are the most controversial prong of the three-step approach. Generally speaking, this assertion-of-rights program has been used to challenge:

- (1) Inflated historic waters claims;<sup>61</sup>
- (2) Improperly drawn baselines for measuring maritime claims;<sup>62</sup>
- (3) Territorial sea claims greater than twelve nautical miles;<sup>63</sup>
- (4) Territorial sea claims that impose impermissible restrictions on the right of innocent passage for any type of vessel, such as requiring prior notification or authorization for passage;<sup>64</sup>
- (6) Excessive jurisdictional claims in areas beyond the territorial sea of a nation that have the effect of restricting high seas freedoms, such as in the exclusive economic zone (EEZ), or in so called “security zones.”<sup>65</sup>

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<sup>60</sup> Since World War II, more than 75 coastal nations have asserted various maritime claims that the United States believes are inconsistent with the Law of the Sea and threaten the freedom of navigation. *Id.*; see Leich, *supra* note 44, at 241.

<sup>61</sup> Perhaps the most notorious of these was Libya’s claim that the Gulf of Sidra is an “historic bay” permitting closure across its mouth—a closure line of approximately 300 miles—and qualifies for treatment as “internal waters.” This claim, first advanced in 1979, has not been accepted by the international community and is frequently challenged. See UNCLOS III, *supra* note 6, art. 10(6); see NWP-9, *supra* note 18, at 1-10, n.10.

<sup>62</sup> Articles 6 through 14 of UNCLOS III, *supra* note 6, provide details on the various types of baselines and how they are drawn. Maritime boundaries, as determined by the proper or improper drawing of the various baselines, are frequently a source of contention among nations. See NWP-9, *supra* note 18, 1-3, n.9.

<sup>63</sup> Article 3 of UNCLOS III, *supra* note 5, proclaims that “[e]very state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this convention.” Currently, there are 20 nations that claim territorial seas in excess of 12 nautical miles. The following nations claim a 200 nautical mile territorial sea: Argentina, Benin, Brazil, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia, and Uruguay. NWP-9, *supra* note 18, table ST1-5.

<sup>64</sup> See NWP-9, *supra* note 18, annex AS2-17B.

<sup>65</sup> *Id.* at 2-44, n.91. Freedom of navigation and overflight may not be unduly restricted or impeded in the EEZ. UNCLOS III, *supra* note 6, arts. 66, 58, 60; see also Rose, *supra* note 46, at 73-76. Similar rules apply in regard to declared security and defense zones in time of peace. NWP-9, *supra* note 18, at 2-44.

(6) Archipelagic claims not in conformance with UNCLOS III;<sup>66</sup>

(7) Territorial sea claims that overlap international straits, but prohibit or inhibit the right of innocent or transit passage.<sup>67</sup>

To reduce the inevitable political friction that results from the conduct of Freedom of Navigation exercises, they are almost always highly classified in nature.<sup>68</sup> This approach, however, conflicts with the notion that these challenges should be open and notorious to clearly communicate that the United States does not recognize the particular claim involved.<sup>69</sup> The impact of "stealth" Freedom of Navigation exercises on customary international law formulation is, no doubt, a matter subject to much debate.<sup>70</sup>

The United States recognizes that there will be times when the political costs of asserting Freedom of Navigation rights will be high.<sup>71</sup> However, if the major maritime powers do not jointly take action to regularly assert their international rights in the face of claims by others that do not conform to the law, "they will be said to acquiesce in those claims to their disadvantage."<sup>72</sup> The world community may not allow itself to be "coerced into lethargy" in the protection of the freedom of the seas.<sup>73</sup>

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<sup>66</sup> Frequently, these claims involve improper drawing of archipelagic baselines, or conduct that inhibits archipelagic sealane passage, such as submerged transit by submarines or overflight by aircraft. *See* NWP-9 *supra* note 18, at 2-44, n.91; UNCLOS III, *supra* note 5, arts. 52, 53, 54.

<sup>67</sup> These claims would include requirements for advance notification or authorization prior to exercising transit passage rights, or the application of requirements in a discriminatory manner. NWP-9, *supra* note 18, at § 2.3.3.1.

<sup>68</sup> Coll, *supra* note 4, at 112-13.

<sup>69</sup> *Id.*

<sup>70</sup> One author commented on this problem as it relates to excessive EEZ claims:

So long as challenges to objectionable EEZ's go undetected or are left unpublished, they have little impact on reducing coastal nation expectations or influencing any rollback of excessive claims . . . . To keep the public thrust of our FON program in balance . . . the United States needs to increase the tempo of its visible FON operations within such EEZ's, and also to make public those challenges actually conducted.

Rose, *supra* note 46, at 86-87.

<sup>71</sup> The political notoriety of the 1986 U.S. Freedom of Navigation challenge to Libya's closing of the Gulf of Sidra as an "historic bay" and the drawing of a so-called "line-of-death" across the Gulf's mouth, is a good example of what is at stake in this program. *See* Parks, *Crossing the Line*, U.S. NAVAL INST. PROC., 41-43 (Nov. 1986); Blum, *The Gulf of Sidra Incident*, 80 AM. J. INT'L L. 668 (1986).

<sup>72</sup> Kegroponte, *supra* note 1, at 44-45.

<sup>73</sup> *Id.*

There was nothing at all lethargic about the American challenges to disputed Soviet maritime claims in the Black Sea. The 1988 bumping incident was the culmination of at least two prior Freedom of Navigation exercises by the United States in those waters.<sup>74</sup> Ironically, on each of the three known occasions when Black Sea challenges were conducted, the *Caron* and the *Yorktown* were involved.<sup>75</sup> From 1984 on, their biennial presence in the Soviet territorial sea steadfastly demonstrated American resolve in asserting global freedom of navigation and the right of innocent passage, despite the potential for political friction. The use of United States naval warships in the exercise of disputed navigational rights carries the very real risk of conflict:

Within DOD, there is also a sober appreciation that the literal testing of the waters required by a FON strategy involves risk of confrontation and escalation . . . . The FON program serves as a barometer of American willingness to run risks to preserve maritime freedoms . . . . As long as American policy makers choose to reject the 1982 Convention and rely instead on customary law, there is no viable alternative to the FON strategy. The essence of customary international law is activism—the will to act in situations where law is made, and unmade, by acquiescence.<sup>76</sup>

The right of innocent passage through the territorial waters of coastal states is integral to American interests, which span the world's oceans—both politically and economically.<sup>77</sup> The “activism” required to maintain this fundamental customary law regime will continue to place maritime nations potentially in harm's way unless consensus can be reached. The UNCLOS III purported to provide the world community with an exhaustive and objective list of criteria that would define passage as innocent or noninnocent. Nevertheless, state practice since 1982

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<sup>74</sup> The March 13, 1986, Freedom of Navigation exercise was virtually identical to the 1988 exercise. The 1984 exercise resulted in no official Soviet protest. The 1986 exercise, on the other hand, created a storm of controversy and resulted in the U.S.S.R. filing formal diplomatic protests with the United States. See Wilson, *Soviet Ships Shadowed U.S. Vessels' Transit; Black Sea Maneuver Similar to One in 1984*, WASH. POST, Mar. 20, 1986, A33, col.1; Hanson, *U.S. Says Its Ships Entered Soviet Waters Legally*, REUTERS NORTH EUROPEAN SERV., A.M. cycle, Mar. 18, 1986; *U.S. Denies Charges of Violating Soviet Territorial Waters*, THE XINHUA GENERAL OVERSEAS NEWS SERV., Mar. 19, 1986; Halloran, *Two U.S. Ships Enter Soviet Waters OFF Crimea To Gather Intelligence*, N.Y. TIMES, Mar. 19, 1986, at A1, col. 4.

<sup>75</sup> See Arkin, *supra* note 17.

<sup>76</sup> *Id.* at 87.

<sup>77</sup> GIST 2, *supra* note 8.



has demonstrated that the regime is still very unclear and yet unsettled. Reaching a consensus on the fundamental concept of "innocence" has proven to be virtually impossible, and the resulting uncertainty threatens to incapacitate this most essential navigational principle.

#### IV. How "Innocent" Must Passage Be?

##### A. *Innocent Passage Under the UNCLOS III*

The UNCLOS III, which opened for signature in Jamaica on December 10, 1982, addressed innocent passage in a manner thought to represent the definitive and conclusive statement on the navigation of foreign vessels in a coastal state's territorial sea.<sup>78</sup> Article 17 of the UNCLOS III guarantees to ships of all states, coastal or landlocked, the "right of innocent passage through the territorial sea."<sup>79</sup> Article 18 examines the meaning of the term "passage" in some detail, and mandates that it be conducted in a "continuous and expeditious" manner.<sup>80</sup> The "heart" of the innocent passage provisions is contained in article 19, which seeks to define the right objectively by specifying noninnocent activity as follows:

(1) Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

(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 viola-

<sup>78</sup> Ngantcha, *supra* note 2, at 43

<sup>79</sup> UNCLOS III, *supra* note 5.

<sup>80</sup> 1. Passage means navigation through the territorial sea for the purpose of

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

*Id.* art. 18.

tion 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 [sic] or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence [sic] or security of the coastal State;

(e) the launching, landing or taking onboard of any aircraft;

(f) the launching, landing or taking onboard 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 wilful 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 which does not have a direct bearing on **passage**.<sup>81</sup>

Article 20 mandates that a submarine navigate on the surface and show its flag for its passage to be innocent. Article 21 allows coastal states the right to adopt laws and regulations relating to innocent passage that have in mind 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;

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<sup>81</sup> *Id.* art. 19

- (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 States.<sup>82</sup>

When safety of navigation is a concern, article 22 allows coastal States to require foreign ships exercising the right of innocent passage to use specifically designated sea lanes and traffic separation schemes.<sup>83</sup> Article 24 cautions coastal states not to “hamper the innocent passage of foreign ships through the territorial sea”, and specifically not to

- (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 the ships of any State or against ships carrying cargoes to, from or on behalf of any State.<sup>84</sup>

Article 25 provides coastal states with an enforcement mechanism for handling noninnocent passage. All “necessary steps” may be taken within a state’s territorial sea to prevent passage that is not innocent, including any breach of a condition of admission to internal waters or for a port call.<sup>85</sup> This article also allows the temporary suspension of the right of innocent passage if essential for the protection of coastal state security.<sup>86</sup> Articles 29 and 30 purport to tailor the innocent passage provisions to warships. Article 29 defines a warship as “a ship belonging to the armed forces of a State . . . under the command of an officer duly commissioned by the government of [that] State . . . and manned by a crew which is under regu-

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<sup>82</sup> *Id.* art. 21.

<sup>83</sup> *Id.* art. 22(1). “In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.” *Id.* art. 22(2).

<sup>84</sup> *Id.* art. 24(1) (emphasis added).

<sup>85</sup> *Id.* art. 25(1); (2).

<sup>86</sup> *Id.* art. 25(3).

lar armed forces discipline."<sup>87</sup> Article 30 makes it abundantly clear that if a warship fails to comply with a coastal state's rules adopted pursuant to articles 21 and 22, it may be required to leave state territorial waters immediately.<sup>88</sup>

In considering these provisions against the backdrop of the Black Sea bumping incident of 1988, it is important to note what specifically was *not* mentioned in the UNCLOS III. First, there is no provision stating that a warship must request authorization for, or give prior notification of, its exercise of the right of innocent passage through another state's territorial waters. Second, there is no requirement that passage through a state's territorial waters be necessary for it to be innocent. Finally, no provision states that, to be innocent, the passage must be via the shortest, most direct means available.<sup>89</sup>

Those who view the UNCLOS III as a codification of customary international law principles frequently claim that the exclusion of these matters indicates that they have no continuing efficacy in international law. That, however, may be too simple an explanation. A persuasive counter-argument cites the language in the preamble to the UNCLOS III, which states, ". . . matters not regulated by this Convention continue to be governed by the rules and principles of general international law."<sup>90</sup> The proposition that the preamble makes is that the UNCLOS III clarified many existing principles of the Law of the Sea, but was not intended to exclude matters that had gained general acceptance as customary law.<sup>91</sup> Support for this interpretation also is found in article 19(1), which not only defines innocent passage, but also states that "[s]uch passage shall take place in conformity with this Convention *and with other rules of international law.*" The United States has taken the position that article 19 contains an "all-inclusive" listing of

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<sup>87</sup> *Id.* art. 29.

<sup>88</sup> *Id.* art. 30.

<sup>89</sup> Article 18 does define "passage" as "continuous and expeditious" navigation through the territorial sea. *Id.* art. 18(2). Some have read into this provision a collateral obligation that the route taken during innocent passage must be the shortest and most direct for it to be truly "expeditious." See R. SOROKIN, INNOCENT PASSAGE OF WARSHIPS THROUGH TERRITORIAL WATERS, MORSKOISBORNIK, no. 3 (1986); Neubauer, *The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union*, 41 NAVAL WAR COLLEGE REV., 52 (Spring 1988); see also Tarhanov, *The International Law Aspects of the Activities of the Naval Fleet of USSR in the World Ocean*, quoted in Jin, *The Question of Innocent Passage for Warships After UNCLOS III*, 13 MARINE POLICY 56, 64-65 (Jan. 1989).

<sup>90</sup> UNCLOS III, *supra* note 5, preamble.

<sup>91</sup> *Id.* (emphasis added); see F. NGASTCHA, *supra* note 2, at 147.

activities incompatible with innocent passage.<sup>92</sup> To be noninnocent, the activity must be expressly proscribed by article 19.<sup>93</sup>

### B. *The Soviet Union's Position on Innocence of Passage*

With the above discussion in mind, it is important to clarify the specific objections that the Soviet Union voiced to the 1988 transits by the *Curon* and the *Yorktown* through its territorial waters in the Black Sea. The objections were twofold. First, passage of warships through Soviet territorial waters is not innocent when it fails to comply strictly with coastal state domestic laws—in this case, the 1982 Law on the State Border and the 1983 Soviet Navigation Rules.<sup>94</sup> Secondly, because the transits through the Soviet territorial sea were not necessary, and were undertaken solely to challenge Soviet domestic law, they were not innocent.

Notably absent was any allegation by the Soviet Union that the *Curon* and the *Yorktown* were engaged in intelligence collection activity. This is somewhat surprising considering the *Curon's* configuration for sophisticated intelligence collection and her history of assignments.<sup>95</sup> Numerous non-Soviet pundits were quick to leap to the conclusion that this passage was tainted because of the intelligence gathering past of the *Caron*.<sup>96</sup> The Soviets ostensibly "knew better."<sup>97</sup> Had intelligence gathering actually been involved, there is little doubt that the transit would have been in violation of the innocent passage regime.<sup>98</sup> In determining innocence, a distinction must

<sup>92</sup> See NWP-9, *supra* note 18, at 2-9, n.26; h'eubauer, *supra* note 89, at 54.

<sup>93</sup> *Id.*

<sup>94</sup> See 1983 Soviet Navigation Rules, *supra* note 9.

<sup>95</sup> See Arkin, *supra* note 16; *supra* note 17 (chronology of the *Caron's* alleged intelligence gathering activity).

<sup>96</sup> See Carroll, *supra* note 14; Arkin, *supra* notes 16, 17; Rubin, *supra* note 38.

<sup>97</sup> See Campbell, *supra* note 42.

It is noteworthy that . . . accusations of intelligence collection in the Soviet territorial sea were not made by the Soviet government. Neither in bridge-to-bridge communications during the incident, nor in their protests thereafter did Soviet authorities assert that the ships were illegally gathering intelligence. The Soviets knew better. On the contrary, they confined their complaints to the bald proposition that the ships were purportedly violating Soviet borders.

*Id.*

<sup>98</sup> Article 19(2)(c), UNCLOS III, *supra* note 5, specifically states that ". . . any act aimed at collecting information to the prejudice of the defence (sic) or security of the coastal State . . ." will render passage not innocent. This Article, frequently referred to as the "PUEBLO clause," envisions that a voyage undertaken in whole or in part to test coastal state defenses, or for passive listening and sensory activities, will not be

be drawn between the actual activity of the vessel during its passage as opposed to simply its capabilities.<sup>99</sup> Prohibited activity in the territorial sea is the only way passage may be rendered improper. Mere possession of passive characteristics, such as combat or intelligence gathering capabilities, does not disqualify passage from being innocent.<sup>100</sup> No evidence exists that would suggest that the *Caron* or the *Yorktown* were engaged in intelligence gathering, and the fact that they were clearly capable of this activity is irrelevant in determining the innocent nature of their passages.<sup>101</sup>

Soviet policy on innocent passage as reflected in its 1982 Soviet Border Rules and the 1983 Soviet Navigation Rules<sup>102</sup> represented a complete reversal of Soviet doctrine on this matter as it had existed since World War II. The claim that coastal states were entitled to limit the passage of warships to specific or traditional routes, thereby excluding them from other areas, was a new Soviet assertion.<sup>103</sup> Prior to the adoption of its 1983 Navigation Rules, "Soviet legislation and practice . . . was fully consistent with the prevailing customary rules of international law governing the right of innocent passage in the territorial waters of a coastal state."<sup>104</sup> As one of the predominant maritime powers, the Soviet Union was at the forefront of the coalition striving for liberal interpretation for innocent passage during the negotiations leading up to the UNCLOS III.<sup>105</sup> This is perhaps best evidenced by the fact that the Soviets specifically had opposed the notion that innocent passage could be conditioned upon prior approval from, or notification of, the coastal state.<sup>106</sup> Accordingly, the United States was surprised when the Soviets objected to the transit of American

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considered innocent. See Butler, *Innocent Passage and the 1982 Convention: the Influence of Soviet Law and Policy*, 81 *AH. J. INT'L L.* 331, 345 (1987).

<sup>99</sup> de Vries Reilingh, *supra* note 6, at 36.

<sup>100</sup> Burnett, *Mediterranean Mare Clausum in the Year 2000?: An International Law Analysis of Peacetime Military Navigation in the Mediterranean*, 34 *NAVAL L. REV.* 75, 107 (1985).

<sup>101</sup> Campbell, *supra* note 42. UNCLOS III, *supra* note 5, art. 19 protects warships' rights in that "it states an objective rule under which a ship's actual conduct, rather than its capabilities or the coastal State's subjective fears, determine the innocence of passage." Hitt, *supra* note 29, at 721; see also Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 *VA. J. INT'L L.* 809, 853.

<sup>102</sup> See *supra* note 9.

<sup>103</sup> Neubauer, *supra* note 89, at 50; see Jin, *supra* note 89, at 63-65.

<sup>104</sup> Butler, *supra* note 98, at 332.

<sup>105</sup> Neubauer, *supra* note 89, at 53-54.

<sup>106</sup> *Id.* at 54.

warships through its Black Sea territorial waters—not because of their behavior, but simply because of their presence.<sup>107</sup>

The Soviet's legal argument for objecting was pedestrian, at best—because there were “no traditional seaways” in the Black Sea, entry by American vessels was per se improper.<sup>108</sup> Admiral Markov and Soviet Foreign Ministry spokesman, Genady Gerasimov, attempted to clarify this position in a briefing held for foreign correspondents on February 13, 1988.<sup>109</sup>

[T]here exists a [1982] law on the protection of the state borders of the Soviet Union. This law does not provide for the right, as you put it, of peaceful passage of naval vessels of any country through Soviet territorial waters in the area of the Black Sea. I think that the strict observance and respect, mutual respect, of the inviolability of the state borders of the sides (sic) is in the interests of the entire world community . . . .<sup>110</sup>

Professor Marlen Volosov, Chief Secretary of the Soviet Law of the Sea Association, reasoned that “[m]aritime laws specify that warships, while exercising the right of innocent passage, should strictly observe the requirements of the littoral state so as to prevent breaches of safety and good order in foreign territorial waters.”<sup>111</sup> He went on to allege that

[American] allusions to the so-called “right of innocent passage” won't hold water. . . . Under the legislation existing in the USSR foreign warships may not exercise this right in the given area of the Black Sea, because there are no designated routes for international shipping. The U.S. navy men (sic) knew that well enough. Nevertheless they resorted to an unlawful action.<sup>112</sup>

In a nutshell, the position of the Soviets was that innocent passage in its territorial waters could occur only where it de-

<sup>107</sup> Butler, *supra* note 98, at 345.

<sup>108</sup> Walker, *Moscow Claims U.S. Ships Were Spying*, THE TIMES (London), Mar. 21, 1986, at 7, col. 1.

<sup>109</sup> See Levin, *supra* note 20, at A(1).

<sup>110</sup> *Id.* (comments of Admiral Markov). Mr. Gerasimov added,

As regards the legal side of the issue, there is a handbook of international law which says precisely that during passage through territorial waters naval vessels must conform to the instructions which they may receive from the local naval or border command. There were such instructions, and [the U.S.] ignored them.

*Id.*

<sup>111</sup> *Soviet Lawyer on the Incident in the Black Sea*, *supra* note 36.

<sup>112</sup> *Id.*

creed that the right existed. This was a position that the United States was unwilling to recognize or accept—a position that obviously was ripe for challenge via the Freedom of Navigation program.

*C. The United States' Position: The Presumption of Innocence*

The United States was quick to respond to what it viewed as an unreasonable assertion by the Soviet Union. Applying a strict interpretation of the international law rules as codified by the UNCLOS III, it argued that a presumption of innocence applied to passage of warships through foreign territorial waters until such time as noninnocence clearly could be demonstrated within the context of article 19.<sup>113</sup> The burden of rebutting this presumption of innocence falls upon the coastal state, which is relegated to using the objective and specific criteria contained in article 19.<sup>114</sup> Ostensibly, the article 19 list is finite, and “makes certain” noninnocent activities.<sup>115</sup> Nowhere in the article 19 criteria, or anywhere else within the UNCLOS III, is authority expressly or implicitly given to coastal states to preclude innocent passage by an act of omission. In other words, “the right of innocent passage is not a ‘gift’ of the coastal state to passing vessels but a limitation of its sovereignty in the interests of international intercourse.”<sup>116</sup> The Soviets could not preclude the right of innocent passage simply by failing to designate a “traditional sea lane” for that passage. Article 24 specifically cautions against any state action aimed at hampering innocent passage of any vessel, or having the “practical effect of denying or impairing the right. . . .”<sup>117</sup> Furthermore, no logical argument could be made that the preclusion of passage in the Black Sea was required for reasons of “safety of navigation” so as to allow the operative provisions of article 22 to come into effect.<sup>118</sup>

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<sup>113</sup> See UNCLOS III, *supra* note 5, art. 19.

<sup>114</sup> Neubauer, *supra* note 89, at 55.

<sup>115</sup> *Id.*; see Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 659 (1984); Ghosh, *The Legal Regime of Innocent Passage Through the Territorial Sea*, 20 INDIAN J. INT'L L. 216, 238 (1980). For a contrary view arguing that the list of activities contained in art. 19 is not intended to be exhaustive, see Burnett, *supra* note 98, at 108.

<sup>116</sup> Butler, *supra* note 98, at 346.

<sup>117</sup> UNCLOS III, *supra* note 5, art. 24.

<sup>118</sup> *Id.* art. 22:

The coastal States may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.



The United States was similarly acrimonious over the Soviet claims that, for passage to be innocent, it must be necessary, and that Freedom of Navigation exercises are, by definition, not "necessary" passage.<sup>119</sup> Professor Richard Grunawalt of the Naval War College addressed the "necessity" argument this way:

[The implication is] that if the passage is undertaken for the purpose of demonstrating that the international community may lawfully engage in navigational freedoms articulated in the 1982 LOS Convention, it is somehow prejudicial to the peace, good order, or security of the coastal state. That notion stands the concept of innocent passage on its head.<sup>120</sup>

Grunawalt correctly reiterated a long-recognized principle in international law that "passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal state."<sup>121</sup> The fact that alternate routes outside territorial waters are available does not disqualify passage from being innocent, nor does the fact

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*Id.* In the designation of sea lanes pursuant to this Article, the coastal state must take into account:

- (a) the recommendations of the competent international organization;
- (b) any channels customarily used for international navigation;
- (c) the special characteristics of particular ships and channels; and
- (d) the density of traffic.

*Id.*

<sup>119</sup> See Carroll, *supra* note 14, at 14; Rubin *supra* note 38, cf. Armitage, *supra* note 39. Rubin states the Soviet position when he says, "[i]t appears to have been conceded . . . that the rules permitting 'innocent passage' apply only when there is reason for the passage other than naval exercises or display of the flag. In the Black Sea incident there was no such reason. Thus there is serious question as to whether a military passage, not in a normal sea lane, qualifies as 'innocent' under general law before the 1982 Convention." Rubin, *supra* note 38.

<sup>120</sup> Grunawalt, *Innocent Passage Rights*, THE CHRISTIAN SCI. MONITOR, Mar. 12, 1983, letters to editor.

<sup>121</sup> Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 27 BRITISH Y.B. INT'L L. 28 (1960). The Special Working Committee on Maritime Claims of the American Society of International Law had a practical suggestion in this regard:

[P]rograms for the routine exercise of rights should be just that, "routine" rather than unnecessarily provocative. The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of and underlying legal position. Those responsible relations with particular coastal States should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at latter (sic) time.

AM. SOC. INT'L NEWSLETTER, Mar.-May 1988, at 6 quoted in NWP-9, *supra* note 18, at 2-43, n.91.

that shorter routes may exist through that territorial sea.<sup>122</sup> Pentagon officials easily could have mandated that the *Curon* and the *Yorktown* skirt the Crimean peninsula by more than twelve nautical miles to avoid controversy. Instead, they deliberately passed where they did to manifest the United States' determination to maintain access within waters that are not recognized as "sacred."<sup>123</sup> This action was intended to communicate to the Soviets that the right of innocent passage cannot be denied by any coastal state law or regulation.<sup>124</sup> The Soviet legislation was attempting to impose security-related, instead of safety-related, requirements upon foreign warship transit in Black Sea territorial waters. This action fell clearly outside the areas of permissible state regulation under article 21, and violated the fundamental principle underlying article 24.<sup>125</sup>

#### *D. The Illegality of the "Soviet Remedy"*

A state's "bumping" a foreign vessel out of its territorial sea, or any similar use of force, for an alleged violation of that state's sovereignty is not a dispute settlement technique contemplated by the drafters of the UNCLOS III. Any resort to the use of force to compel compliance with one nation's view of the "rules" actually violates the fundamental tenets of all international instruments regulating the conduct of international interaction. Inspired by the provisions of the United Nations Charter that prohibit "the threat or use of force" in the settlement of international disputes,<sup>126</sup> the drafters of the UNCLOS III mandated the settlement "by peaceful means" of any dispute over the interpretation or application of its provisions.<sup>127</sup> The UNCLOS III reproduces verbatim the United Nations Charter provisions on the nonuse of force.<sup>128</sup> Additionally, it pro-

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<sup>122</sup> See *supra* note 89 (discussion regarding this contention).

<sup>123</sup> Jin, *supra* note 89, at 67.

<sup>124</sup> See Froman, *supra* note 115, at 660 (citing D. O'Connell, 1 *THE INT'L LAW OF THE SEA* 2, 273-274 (1982)).

<sup>125</sup> Article 21 essentially allows coastal state to adopt laws or regulations concerning "the safety of navigation and the regulation of maritime traffic", a scheme that does not contemplate coastal security measures. See UNCLOS III, *supra*, art. 21(a)-(h), note 5. Article 24 prohibits state action that "hampers the innocent passage of foreign ships through the territorial sea." *Id.* art. 24; see also Froman, *supra* note 115, at 662.

<sup>126</sup> U.N. Charter, arts. 2(3), 2(4).

<sup>127</sup> UNCLOS 111, *supra* note 5, art. 279, reads as follows:

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

<sup>128</sup> *Id.* art 301 cautions,

vides for compulsory arbitration or adjudication of disputes between states when its provisions are in contest.<sup>129</sup> Third-party settlement is contemplated for resolving conflicts over the exercise of the freedoms and rights of navigation when it is alleged that a state, in exercising these rights, acted in contravention of the UNCLOS III.<sup>130</sup> The Soviet Union therefore was obligated to act in accordance with the provisions of the UNCLOS III in any dispute it claimed to have had over the *Caron's* and the *Yorktown's* exercises of the right of innocent passage.<sup>131</sup> The appropriate response of the Soviet Union to what it perceived as an infraction of the UNCLOS III by the United States was "to direct the offending ship[s] to leave those waters forthwith."<sup>132</sup> If compliance was not obtained, then resort to the arbitration and adjudication provisions should have occurred. The use of force under the circumstances present on February 12, 1988, was illegal in every sense of the word.<sup>133</sup> This crude version of "high seas justice" demonstrated that the rule of law still has a long way to go in the Soviet Union.

### E. A Move Towards "Minimum World Order" at Sea

An encouraging step forward toward resolving the impasse between the United States and the Soviet Union over the right of innocent passage occurred on September 23, 1989. On that date, the two superpowers, after significant and meaningful discourse, signed an agreement entitled Uniform Interpretation

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In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

<sup>129</sup> *Id.* arts. 281-286. All disputes between states that cannot be settled by alternate means, and are not subject to binding third-party arbitration or adjudication pursuant to some other treaty, are subject to binding arbitration or adjudication under the convention. *Id.*; see Oxman, *supra* note 101, at 823.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* art. 297(1)(a).

<sup>132</sup> Grunawalt, *supra* note 120; see UNCLOS III, *supra* note 5, art. 30.

<sup>133</sup> The utilization of force under the provisions of UNCLOS III appears to be governed by the same principles allowing the use of force under the U.N. Charter. First and foremost is the proposition that force, or the threat thereof, should never be employed against another nation. The only possible justification for the use of force being that which may be taken in individual or collective self-defense in the event of an armed attack or enforcement measures authorized by the United Nations. U.N. Charter. art. 51; see UNCLOS III, *supra* note 5, art. 301.

of Rules of International Law Governing Innocent Passage.<sup>134</sup> This document was signed shortly after a separate agreement dealing with the Prevention of Dangerous Military Activities (DMAA),<sup>135</sup> and both were intended to supplement the existing 1972 agreement on the Prevention of Incidents On and Over the High Seas (INCSEA).<sup>136</sup> In combination, these bilateral accords seek to “diffuse the tension associated with provocative naval incidents between the two parties which had been occurring . . . with increasing frequency.”<sup>137</sup> Most significant is the fact that the Soviet Union, in the Joint Interpretation on Innocent Passage, acceded to the position earlier espoused by the United States. Specifically, it was acknowledged that article 19(2) of the UNCLOS III contains an exhaustive listing of activities that will be considered noninnocent in judging innocence of passage.<sup>138</sup> The Soviets also conceded that “[i]n areas where no [traditional sea lanes exist, or where no traffic separation schemes] have been prescribed (i.e., in the Black Sea), ships nevertheless enjoy the right of innocent passage through Soviet territorial waters.”<sup>139</sup> This capitulation evidences the successes of both the Freedom of Navigation program and the 1988 Black Sea exercise in helping to guarantee free passage rights and establish a “minimum world order” for use of the oceans. The nations agreed upon procedures that would be followed when the coastal state seeks to question the innocence of a vessel’s passage.<sup>140</sup> Furthermore, when a warship engages in noninnocent conduct and does not take corrective action upon request, the coastal state may demand that it immediately depart the territorial sea.<sup>141</sup> It also was decreed that differences over the exercise of innocent passage shall be settled

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<sup>134</sup> Union of Soviet Socialist Republics—United States: Joint Statement With Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, entered into Jackson Hole, Wyoming, Sept. 23, 1989), reprinted in 28 I.L.M. 1444 (1989) [hereinafter Joint Interpretation on Innocent Passage].

<sup>135</sup> Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, Sept. 23, 1989, reprinted in 28 I.L.M. 877 (1989).

<sup>136</sup> Agreement Between the Government of the United States of America and the Union of Soviet Socialist Republics on the Prevention of Incidents on and Over the High Seas, May 25, 1972, reprinted in 11 I.L.M. 778 (1972).

<sup>137</sup> Nagle, *The Dangerous Military Activities Agreement: Minimum Order and Superpower Relations on the World’s Oceans*, 31 VA. J. INT’L L. 124, 124-25 (Fall 1990).

<sup>138</sup> Joint Interpretation on Innocent Passage, *supra* note 134, at para. 2.

<sup>139</sup> *Id.* at para. 6.

<sup>140</sup> *Id.* para. 4, states, “[a] coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.”

<sup>141</sup> *Id.* para. 7.

through diplomatic or other agreed means, not by resort to force—that is, no “bumping.”<sup>142</sup>

Although the Joint Interpretation on Innocent Passage is only a bilateral agreement, it significantly contributes to the clarification of the regime of innocent passage for the entire world community. Customary international law on the subject, as expressed in the UNCLOS III, is made even more certain as a result of this concurring interpretation by the world’s predominant maritime powers.<sup>143</sup>

## V. Conclusion.

The only plausible compromise in balancing a coastal state’s sovereignty over its own territorial waters, with the navigational needs of the international maritime community, is a healthy, viable regime of innocent passage. A symbiotic relationship between the two competing interests can be achieved only through uniform application of rules that acknowledge fundamental freedoms of navigation. Continuous, expeditious and unimpeded passage of a truly innocent nature through the territorial sea of all coastal states appears to be one of the fundamental freedoms contemplated by the UNCLOS III. A foreign vessel claiming this valuable right must be willing to accede to reasonable restrictions upon its passage in deference to its host state’s legitimate security, economic and environmental needs. Coastal state’s necessarily will have to be reasonable regarding conditions that they impose upon the right of innocent passage.

For this concept to work in actual practice, “innocence” of passage must be capable of unambiguous and objective definition. An “eye of the beholder” approach injects subjective elements into the formula that cannot and will not satisfy the international need for uniformity. The criteria established in article 19(2) of the UNCLOS III was thought to be a clear and comprehensive delineation of rules that would provide the criteria for defining the right of innocent passage. Unfortunately, the Black Sea bumping incident demonstrated that the definition of “innocence” is not as clear and discernable as the drafters of the UNCLOS III may have intended. While Freedom of Navigation exercises help to sharpen the definition by forcing issues to a head, they carry very real risks of precipitating

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<sup>142</sup> *Id.* para. 8.

<sup>143</sup> Hitt, *supra* note 29, at 742

violent interaction between nations or, at a minimum, generating political ill-will,

It appears clear, however, that we are moving in the right direction toward uniformly defining innocent passage. The Joint Interpretation of Innocent Passage between the United States and the Soviet Union is significant for two reasons. First, It helps to clarify the "exhaustive list" contained in article 19(2) of the UNCLOS III, from which all nations will benefit. Second, it demonstrates that freedom of navigation disputes can be resolved peacefully through negotiation and accord within the context of the UNCLOS III. The world community certainly will not miss the significance of two world superpowers coming together at the bargaining table to resolve their international disputes through words and not deeds. Future generations should view the Black Sea bumping incident as a very temporary "blackout" for the otherwise strong rule of law in the new world order.

Today, maritime nations enjoy a right of innocent passage that is stronger and more firmly entrenched than at any previous time in history. It will be important for nations to understand and apply the intricate art of compromise to keep the world's oceans open and free. A clear, concise right of innocent passage is the mechanism by which competing interests in this area will be harmonized. Each nation must be ever watchful and vigilant in ensuring that this critical concept receives its full, deliberate, and faithful compliance.