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Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea

F. DAVID FROMAN*

Although a right of innocent passage for warships appears in the 1982 Convention on the Law of the Sea, the practices of many coastal States conflict with the Convention's provisions and cloud resolution of central questions. Who decides whether passage is innocent or non-innocent? By what criteria? What sanctions exist? Drawing upon the Convention, coastal State legislation, and recent submarine intrusions of Swedish and Norwegian waters, the author concludes that modern notions of sovereignty, which foster suspicion and rivalry among nations, prompt such intrusions and impede acceptance of internationally formulated rules. Nevertheless, even if the 1982 Convention fails to enter into force, it has inalterably shaped the law governing innocent and non-innocent passage of warships in the territorial sea.

INTRODUCTION

Roll on, thou deep and dark blue ocean — roll!
Then thousand fleets sweep over thee in vain;
Man marks the earth with ruin — his control

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On the night of October 27, 1981, a Soviet “whiskey” class submarine carrying a crew of 56 ran aground inside a restricted security zone nine miles southeast of the Karlskrona Naval Base, deep within Swedish territorial waters. Following an 11-day drama, which included lodging two diplomatic protests, sighting another submarine’s periscope and turning back a Soviet salvage vessel both inside Swedish territorial waters, and discovering uranium 238 emanating from the submarine’s hull, the Swedish government concluded “that the submarine had intentionally violated Swedish territory to gather intelligence.” Swedish Prime Minister Thorbjorn Falldin initially called the episode “the most grave intrusion into Swedish territory since World War II.” He later termed the violation “all the more remarkable since in all probability the submarine has carried nuclear weapons aboard.”

1. CHILDE HAROLD’S PILGRIMAGE, Canto IV, st. 179.
2. “Whiskey” is the international phonetic alphabet equivalent of the letter W. The appellation follows the NATO classification system for Soviet-made submarines.

3. 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. The 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. 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.” Swedish authorities rejected the explanation because of the depth of the submarine’s penetration into territorial waters and the difficulty of the navigating through the Karlskrona archipelago. NEWSWEEK, Nov. 16, 1981, at 48; The Times (London), Nov. 5, 1981, at 28, col. 1; id. Nov. 3, at 1, col. 4.


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 A1, col. 5. For a more complete text of the reply, see 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. 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.

weapons into Swedish territory." Its investigation closed, the Swedish Navy on November 6th escorted the submarine to the 12-mile limit, where it joined a flotilla of 20 Soviet warships waiting just outside.\footnote{70. The Times (London), Nov. 7, at 4, col. 4.}

Subsequent events have emphasized the growing frequency of such incidents.\footnote{10. Id.; Newsweek, Nov. 16, 1981, at 48. A summary of the Supreme Commander's report to the Swedish government concerning the incident lists only 14 Soviet vessels present about 25 miles southwest of Karlskrona. Nine vessels reportedly were present from October 28—two destroyers, three tug-boats, a submarine salvager, a surveying ship, and two communications ships—and five more from November 4—one destroyer, two attack robot corvettes, a frigate and a tanker. Swedish Defense Staff Information Department, Submarine U 137 in Swedish Waters 16 (Dec. 18, 1981) (unofficial English translation by Office of the Naval Attache, Swedish Embassy, Washington, D.C., Oct. 1982) [hereinafter cited as Submarine U 137 Report].}

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

Innocent Passage: Its Importance to 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 Mahan — view maximum naval mobility as essential to their security and economic well-being. Threats to that mobility lie in creeping extensions of coastal

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English, appears in MINISTRY OF DEFENCE, COUNTERING THE SUBMARINE THREAT, REPORT BY THE SUBMARINE DEFENSE COMMISSION, SOV (Swedish Official Reports Series) 1983:13. For an account of more recent submarine incidents in Sweden and Norway, see infra text accompanying notes 246-96.

12. E.g., N.Y. Times, Oct. 8, 1982, at A3, col. 4. At the time of the Haarsfjaerden Bay incident, 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. On April 26, 1983, the Submarine Defence Commission named the Soviet Union as the source of the submarines:

The total amount of evidence is sufficient to form the basis of a judgement by experts, that the submarine intrusion into the Haarsfjaerden area in early October 1982, as well as other submarine violations during 1982 and — at least to an overwhelming degree — the 1980s as a whole, were undertaken by Warsaw Pact submarines. The fact that the Soviet Union has some 45 submarines of conventional size in operation in the Baltic, whereas Poland has only four older submarines and the GDR as far as known has none, is part of the evidence that in this respect the Warsaw Pact is tantamount to the Soviet Union. No observation has been obtained indicating intrusions in Swedish territorial waters of NATO submarines. The Commission, after a careful scrutiny of this issue, associates itself with this judgement.

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14. "I . . . presume that naval mobility remains desirable, and that we should
state sovereignty. Transit rights for modern warships through these sovereign waters, particularly those comprising straits and international sea routes, spring from the customary international law of innocent passage.

Within the last quarter century, this customary law has twice appeared in international conventions — most recently in an expanded and detailed form as part of the United Nations Convention on the Law of the Sea (1982 Convention).\(^\text{15}\) Maritime powers have readily embraced the 1982 Convention's navigational provisions as guaranteeing the desired freedom of passage while protecting coastal state interests.\(^\text{16}\) However, the Convention has yet to become effective. Should the delicate balance of interests achieved in the Convention fail to gain full acceptance — a chance significantly increased by the United States' refusal to sign\(^\text{17}\) — innocent passage, which plays a secondary role to more expanded transit rights in the Convention, is


likely to reemerge as the primary guarantor of naval mobility. The right of innocent passage deserves study from both historical and contemporary perspectives because of its fundamental importance as the residual legal regime for securing transit of ships through sovereign seas. Understanding the scope and nature of the innocent-passage right is a prerequisite to confronting the problem of non-innocent passage.

**Non-Innocent Passage: The Uncharted Waters**

This article focuses on the existing right of innocent passage, and examines how that right can be upheld against its recurring breach and in the face of strong political and military overtones. To accomplish this task, the article charts the legal waters of non-innocent passage by probing questions concerning the characterization and enforcement of innocent passage with the sounding lines of customary and conventional law, by taking bearings from the competing interests involved, and by testing the open channels thus marked against history and contemporary experience. Specifically, the article analyzes the following issues: 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 factors may shape such decisions? The answers to these questions are vitally important to coastal States, such as Sweden, whose territorial waters are being flagrantly violated with increasing frequency, and to major naval powers, whose vessels are most likely to intrude.

**THE CONTROVERSY CONCERNING INNOCENT PASSAGE OF 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. The historical development of these concepts, their embodiment in the Convention on the Territorial Sea and the Contiguous Zone, and the controversy surrounding their specific application in the 1982 Convention all serve as landmarks. Also to be mapped are those portions of international straits and archipelagic waters where the right of innocent passage still prevails.

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18. Whatever the future of the 1982 Convention, the articles defining "prejudicial acts" and the limits of coastal State regulatory authority elaborate controlling provisions of the Convention on the Territorial Sea and the Contiguous Zone, supra note 15. As non-binding expressions of international consensus, these articles will carry significant weight as aids in interpreting the earlier, less precise formulations in the Convention on the Territorial Sea and the Contiguous Zone. Id.
The Historical Development of the Right of Innocent Passage and Its Application to Warships

The origins of the right of innocent passage are clouded in history. The state practice that preceded the right evolved in response to sovereign claims over the seas. The right of passage through these sovereign zones or territorial seas appeared first as a necessity of commerce. The influence of the "jurisdictionalists" who argued


20. We owe the freedom of the high seas to the influence of the writings of Hugo 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. J. BRIERLY, THE LAW OF NATIONS 27-28, 195, 304-305 (6th ed. 1963); H. GROTUIS, 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, 9-10 (1982). State sovereignty over its internal waters—rivers, bays, ports, and estuaries—had long been recognized in international law. J. BRIERLY, supra, at 194-95. Grotius sought to meet the contention that similar sovereignty existed in the expansive claims of waters external to the state. H. GROTUIS, supra, chs. II-VII. Grotius' argument led first to freedom of navigation through the claimed areas, then gradually to the narrowing of claims until, by the beginning of the nineteenth century, freedom of the high seas was firmly established over most ocean spaces. J. BRIERLY, supra, at 305. Simultaneously, the concept arose 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. Id. at 202-04.

Today 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, the traditional regimes are the high seas, international straits, territorial waters, and internal waters. The 1982 Convention adds the regime of archipelagic waters. Three other divisions of the seas recognized under conventional law and State practice preserve high seas navigational freedoms: the contiguous zone, the exclusive economic zone, and portions of the continental shelf. See respectively, Convention on the Territorial Sea and Contiguous Zone, supra note 15, art. 24; Convention on the Continental Shelf, done, Apr. 29, 1958, art. 3; 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311, art. 3; 1982 Convention, supra note 15, arts. 33, 58, 78, 86-87. Conceptually, international straits and archipelagic waters are closely linked to, and often considered merely special instances of, territorial waters. See, e.g., Swayze, Negotiating a Law of the Sea, U.S. NAVAL INST. PROC., July 1980, at 33, 35-37.

21. 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, the right remained subordinate to the possessory extension of coastal State sovereignty measured by cannon fire from the shore. 1 D. O'CONNELL,
that the nature of a state's dominion over the territorial sea was jurisdic- 
tional, not possessory.22 gave further impetus to transforming 
the merchant ships' right of passage into the present law of innocent 
passage.23 This right of innocent passage sets the territorial sea apart 
from internal waters, in which no passage right exists.24 
Warships differ from merchant ships in three particulars. They 
are manned by a crew subject to regular naval discipline, com-
manded by a duly commissioned naval officer, and identifiable as be-
longing to the naval forces of a State.25 Only during the last century 
has the distinction between warships and merchant vessels become 
significant with respect to passage in the territorial sea. Prior to the 
mid-1800s, warships and merchant ships stood on equal footing since 
nations generally conceded to the right of coastal States to exclude 
all foreign ships.26 Since the turn of the century, however, the right 
of passage of warships has come under increasing scrutiny. Indeed, 
the issue has become "[o]ne of the most controversial questions con-
cerning the territorial sea."27 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, passage may be de-
ied at will.28 This debate mirrors the continuing tension between 
the territorialists and the jurisdictionalists.29 
By 1948, the state of the law of innocent passage in the territorial 
sea was observed by one conservative commentator to include: (1) a 
customary right of innocent passage for all merchant vessels, (2) a 

supra note 20, at 260.
22. See, e.g., G. Massé, Le Droit commercial dans ses rapports avec le 
droit de gens (1844). The controversy over this distinction continues. See 1 L. Oppen-
heim, International Law § 185 (7th Lauterpacht ed. 1948).
23. The transformation process also involved a filtering of ideas through commen-
tators, State practice and international conferences. O'Connell, supra note 11, at 409-
45.
24. J. Brierly, supra note 20, at 237; 1 D. O'Connell, supra note 20, at 273; 
Pharand, Innocent Passage in the Arctic, 6 Canadian Y.B. Int'l L. 3, 11-12 (1968).
5200, 450 U.N.T.S. 82 at art. 8, para. 2. Warships initially were thought of as floating 
extensions of the sovereign territory of their flag States, and, thus, remained immune 
from the jurisdiction of other States while acting in the service of the flag State. 1 L. 
Oppenheim, supra note 22, at § 450. Although over time the concept of floating sove-
eignty waned, immunity for warships remains a principle of customary law. See Conven-
tion on the High Sea, supra, art. 8, para. 1.
26. 1 D. O'Connell, supra note 20, at 274-75.
27. Id. at 274. For summaries of the debates and current State practice concerning 
this issue, see infra notes 62-86 and 125-47 and accompanying text.
28. 1 D. O'Connell, supra note 20, at 274. Although the right view had wide 
acceptance among Western seafaring nations, several commentators supported the com-
ity view. See, e.g., Harvard Research in International Law, 23 Am. J. Int'l L. 295 
(Supp. 1929), and P. Jessop, The Law of Territorial Waters and Maritime Juris-
diction 120 (1927).
29. See 1 D. O'Connell, supra note 20, at 274; authorities cited, supra note 22. 
Both sides are presented by O'Connell, supra note 11, at 409-45.
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" that pass through the territorial sea.\textsuperscript{30}

The third-mentioned right of "highway" passage was subsequently elaborated upon by the International Court of Justice in the most significant case dealing with innocent passage of warships, the Corfu Channel case.\textsuperscript{31} The British intention in sending warships through the Corfu Channel in October 1946 — and the theory Britain put forth in argument before the International Court — was to assert the general right of innocent passage of warships in the territorial sea.\textsuperscript{32} The court, however, limited its holding to the exercise of passage "through straits used for international navigation between two parts of the high seas." The court held that such limited passage could occur "without the previous authorization of the coastal State, provided that the passage is innocent," and could not be prohibited in time of peace.\textsuperscript{33} The court, in effect, discovered in customary law a special rule for transit of straits, even though the straits may lie, as those at Corfu, wholly within territorial waters.\textsuperscript{34} Subsequent writers have confused this limited rule with the general principle regarding passage of warships in the territorial sea, concerning which the court was conspicuously silent.\textsuperscript{35} This confounding of the separate, but related, rules appeared in a codified form less than a decade later in the Convention on the Territorial Sea and the Contiguous Zone.\textsuperscript{36}

\textsuperscript{30} 1 L. Oppenheim, supra note 22 § 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." 1 D. O'Connell, supra note 20, 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. Durdenevski & S. Krylov, Meezhdunarodnoe Pravo 257 (1947), quoted in Butler, Soviet Concepts of Innocent Passage, 7 Harv. Int'l L.J. 113, 125-26 (1965).


\textsuperscript{32} 1 D. O’Connell, supra note 20, at 286.

\textsuperscript{33} 1949 I.C.J. at 28.

\textsuperscript{34} See 1 D. O’Connell, supra note 20, at 314. The Corfu Channel lies within the territorial seas of Greece and Albania.

\textsuperscript{35} 1 D. O’Connell, supra note 20, at 287. For a list of such writers, see O’Connell, supra note 11, at 430.

By 1958, the movement toward a 12-mile territorial sea had gained sufficient support to cast doubt upon the continued viability of the traditional three-mile rule. Absent general agreement among the delegates on either standard, the Convention on the Territorial Sea and the Contiguous Zone remained silent as to the breadth of the territorial sea. The Convention did establish, however, through legislation and codification of custom, detailed procedures for determined baselines from which to measure the territorial sea and a series of rules governing innocent passage within that jurisdictional zone. The Convention affirmed coastal State sovereignty over the territorial sea, including the airspace above and the seabed and subsoil below, but subjected the exercise of sovereignty to the provisions of the Convention and to "other rules of international law." The lively debate concerning innocent passage of warships drew heavily on practical consequences and sparsely on legal precedent. Reflecting the ancient tensions between non-maritime coastal States and seafaring nations, the Convention's ultimate pronouncement regarding passage of warships left something to be desired by nearly everyone. Some commentators argued that the Convention's final innocent passage provisions were inconsistent with the intent of the drafters. Others argued that the provisions' meaning was ambiguous and resort must still be had to customary law to determine the appropriate transit rules for warships. A controversial rule concerning prior notification or authorization of warship passage failed to win sufficient support for inclusion in the treaty. Nevertheless, textual analysis of the provisions support the argument that if a right did not already exist in customary law, the 1958 Convention legislatively established a full right of innocent passage for warships in the

38. Id. arts. 3-13.
39. Id. arts. 14-23.
40. Id. arts. 1-2. Rules of international law presumably would include treaty law, customary law, and "general principles of law recognized by civilized nations." See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 933, 3 Bevans 1153.
42. See 1 D. O'CONNELL, supra note 20, at 288-91; Slonim, supra note 41, at 125-27.
44. 1 D. O'CONNELL, supra note 20, at 291; Slonim, supra note 41, at 118.
45. Anand, supra note 43; Slonim, supra note 41, at 117. For an account of the negotiations on this issue, see Slonim, supra note 41, at 117-21; O'Connell, supra note 44, at 291; Anand, supra note 43.
territorial sea.¹⁶

46. The right of innocent passage provisions appear in Part I, section III, of the Convention on the Territorial Sea and the Contiguous Zone, supra note 15. The section contains 10 articles arranged in four subsections: “A. Rules Applicable to All Ships” (arts. 14-17); “B. Rules Applicable to Merchant Ships” (arts. 118-20); “C. Rules Applicable to Government Ships Other Than Warships” (arts. 21-22); and “D. Rule Applicable to Warships” (art. 23). The four articles of subsection A establish the general rules of innocent passage. Article 14 begins, “Subject to the provisions 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 as “navigation 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, para. 2, and explaining innocence as “not prejudicial to the peace, good order or security of the coastal State,” id. art. 14, para. 4. The maritime nation view was that “the 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.” 1 D. O'CONNELL, supra note 20, at 268-69. Article 14 also places restrictions on foreign fishing vessels, Convention on the Territorial Sea and the Contiguous Zone, supra note 15, at art. 14, para. 5, and requires submarines “to navigate on the surface and to show their flag,” id. art. 14, para. 6. Other pertinent articles restrain the coastal State from hampering innocent passage, id. art. 15, para. 1, but allow it to take “necessary steps in its territorial sea to prevent passage which is not innocent,” id. art. 16, para. 1. 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, id. art. 16, para. 3, but prohibits 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,” id. art. 16, para. 4. Thus, straits are treated as merely another application of the territorial sea. R. BAXTER, supra note 36, at 168. The final article of this subsection requires ships in innocent passage to comply with coastal State laws and regulations, particularly those relating to transport and navigation, Convention on the Territorial Sea and the Contiguous Zone, supra note 15, at art. 17

Rules regarding permissible fees, id. art. 18, and criminal, id. art. 19, and civil, id. art. 20, jurisdiction over merchant ships appear in subsection B. Subsection C distinguishes between government ships operated for commercial purposes, id. art. 21, and those operated for non-commercial purposes, id. art. 22. Subsection C also 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 commercial and non-commercial government ships. Concerning the confusion caused by the specific references contained in articles 21 and 22, see infra, note 51. Subsection D contains the only rule specifically relating to warships, id. art. 23.

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.” Pharand, supra note 24, at 12. Where the drawing of straight baselines, as permitted by article 4, encloses as internal waters areas previously considered part of the territorial sea of or of the high seas, “a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.” Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 5, para. 2 (emphasis added). This provision not only refers to the innocent passage articles as a whole, partaking of a singular "right," but also prevents coastal States using the straight baseline system from denying this right in their newly acquired internal waters by continuing to treat those areas of expansion as territorial, rather than
Article 23 of the 1958 Convention permits the coastal State to require a warship to leave its territorial sea, but only if the warship does not comply with the coastal State’s regulations “concerning passage through the territorial sea,” and further “disregards any request for compliance . . . .” This sanction differs in both nature and degree from that of article 16, which applies to all ships and permits “necessary steps . . . to prevent passage which is not innocent.” The article 23 sanction focuses not upon the innocence of passage, but upon the warship’s compliance with coastal State regulations. This distinction is central to an understanding of the later embodiment of these separate sanctions in the 1982 Convention and the subsequent analysis in this article of instances of non-innocent passage. Despite the elimination from the Convention of a proposed rule requiring prior notice or authorization for the transit of warships, some scholars, nevertheless, read license for such extensive coastal State control in the language of article 23. This interpretation internal, waters. For the difference between territorial and internal waters, see supra text accompanying notes 24 & 25.

47. Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 23. For the definition of passage, see id. art. 14, para. 2.

48. Id. art. 23. 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 36, 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.”).

49. See infra, text accompanying notes 92-94, 159-71, and text following note 176. Article 16 is the Convention’s only sanction for merchant vessels. The distinction between the two warship sanctions becomes paramount in dealing, for example, with the objectively peaceful passage of a warship through the territorial sea of a coastal State whose domestic law requires prior notice or permission for such passage, when neither has been given or obtained. The issue then arises of which sanctions may be employed by the coastal State.

50. The chief Soviet delegate to the 1958 Conference 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 Soviet 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). Pharand concludes that had the Soviet government desired to prohibit innocent passage of warships — which, in effect, its authorization requirement does — the Soviet government should have entered a reservation against article 15 rather than article 23. Pharand,
tion ignores the right of innocent passage which the Convention appears to give to all ships.\textsuperscript{51}

Although the Convention admits to a consistent interpretation on its face, the effect of the Convention is not without question.\textsuperscript{62} The interpretation advanced in this article supports a right of innocent passage for warships that cannot be burdened by requirements of prior notice or authorization. If, however, article 23 may somehow be considered as separate and independent of other innocent passage provisions, then prior notice of or permission for warships seeking to transit the territorial sea could conceivably be required.\textsuperscript{63} The late Professor O'Connell expressed reservations toward both these views. He believed that the Convention effectively "shelved" the question of the degree to which warship transit could be regulated. Consequently, in his view, custom still prevails.\textsuperscript{64} On this point, he found "no evidence of state practice before very recent times other than free and uncontested passage of warships."\textsuperscript{65}

On a much broader scale than ever before, the world community sought again in the 1970s, within the context of a periodic, continuing negotiation, to produce a comprehensive and detailed multina-

\textsuperscript{51} Pharand, supra note 24, at 11. Another commentator suggests 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. Slonim, supra note 41, at 119 (emphasis in original). This argument collapses of its own weight under scrutiny. If the argument is applied to subsection B, which also omits reference to subsection A, merchant vessels would be excluded along with warships, leaving only commercial and non-commercial 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. The specific reference distinguishes the different regulatory regimes for commercial and non-commercial government vessels — a procedure wholly unnecessary to the explanation of rules governing merchant vessels and warships.

\textsuperscript{52} For an account of the continuing controversy and conflicting State practice, see infra text accompanying notes 62-80, 118-45.

\textsuperscript{53} A further extension of this same logic, however, is that the only sanction then available against warships would be that of article 23, a request to comply with coastal State regulations or to leave the territorial sea. "Necessary steps" permitted under article 16 would not, at least under the Convention, apply to warships. Of course, the warships contemplated by this view probably would only have been admitted into the territorial sea after giving prior notice or obtaining prior permission.

\textsuperscript{54} 1 D. O'Connell, supra note 20, at 290-91.

\textsuperscript{55} Id.; cf. Slonim, supra note 41, at 120 (noting that, despite his view that prior notification of warships transit could lawfully be required, "the majority of states do not require authorization for the innocent passage of warships... "). But see infra text accompanying notes 118-34 (examples of recent State practice).

Signed in Jamaica on December 10, 1982, the United Nations Convention on the Law of the Sea 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 sea and answers, at the outset, a question that has eluded consensus for more than 50 years: The breadth of the territorial sea may now extend to 12 miles. The remaining provisions dealing with the jurisdictional limits of the territorial sea are, with minor additions, incorporated verbatim from the 1958 Convention. A major change appears in the 1982 Convention’s expanded navigational provisions, which represent a delicate balance of divergent interests of the coastal States and maritime powers.

57. 1982 Convention, supra note 15, arts. 2-32.
58. Id. art. 3.
59. Id. arts. 4-16.
60. Chief among coastal States’ interests regarding the presence of foreign warships in their territorial waters are sovereignty, security, and avoidance of political or economic pressures. The coastal State’s sovereignty interest involves two dimensions. The lateral dimension — territorial jurisdiction — seeks to encompass available territory and resources which the coastal State may appropriate for the use and benefit of its inhabitants. Running up against political boundaries of surrounding States on land, the coastal State must turn toward the sea for expansion. 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, Latin America’s Influence and Role in the Third Conference on the Law of the Sea, 7 OCEAN DEV. & INT’L L. 65 (1979). For political concerns, see Lacharrière, Politiques Nationales a L’Egard du Droit de la Mer, in DROIT DE LA MER 7 (1977). The vertical dimension of sovereignty is stature — the government’s standing in the eyes of its populace and prestige among nations. A State’s reaction to an unlawful intrusion by a foreign vessel into its territory may tend to raise or to lower the State’s international reputation or credibility.

The security interest is closely related and involves 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 fleet and harbors. For these reasons, coastal States would argue that foreign military operations should be prohibited in the territorial sea. If such operations were allowed, the coastal State would become more vulnerable to intimidation through a show of naval might and would have great difficulty distinguishing routine fleet exercises from an impending attack. 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). Coastal States, in addition, would want specific prohibitions from foreign interference with its communication or defensive systems and permission to designate traffic schemes to channel traffic away from sensitive security areas and facilitate the monitoring of foreign warship movements. For one of the most difficult areas for coastal States is observation and surveillance of maritime activities within their jurisdiction. Many coastal States
The Prior Notification or Authorization Controversy

From the beginning of the Third United Nations Conference on Law of the Sea (UNCLOS III), States put forward proposals to permit coastal States to require prior notice of or authorization for

will have to rely on “international services” to provide satellite monitoring data for enforcement purposes. International Peace Academy, Summary Report, Proceedings of Diplomatic Consultations, Jan. 31, 1977, New York City in Conflict Management on the Oceans 47, 48-51 (June 1977) (International Peace Academy Occasional Paper No. 1).

Applying the same standards to ships of all countries may avoid political or economic pressures. Maintaining an even-handed policy of enforcement of prohibitions and regulations may free coastal States from the influence or intimidation of major maritime powers. See Gaertner, The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea, 19 SAN DIEGO L. REV. 577, 580 n.13, 593-94. Consistency and fairness of administration, as long as they remain domestically desirable goals, enhance a state’s international reputation for integrity and, hence help to increase its stature among nations.

61. Foremost among the interests of maritime nations—those with large merchant and fishing fleets and large navies—is freedom of the seas to insure unrestricted use and navigation for maximum naval mobility. See supra note 14 and accompanying text. Though often, far from home shores, freedom of navigation is exercised in effect, a security interest. Moore, A Foreign Policy for the Oceans, in The Oceans and U.S. Foreign Policy 1, 2 (Ocean Policy Study 1:4, Apr. 1978). Because of the security interest, maritime nations have clung tenaciously to the concept of a narrow territorial sea. When extension of the territorial sea appeared inevitable, these nations insisted upon unrestricted navigation within economic zones outside the territorial sea and free transit through straits and archipelagos within. See, e.g., Richardson, Law of the Sea, supra note 16, 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 MacGuire, supra note 14, particularly 160-63; McConnell, Strategy and Missions of the Soviet Navy in the Year 2000, in Problems of Sea Power, supra note 14, at 39, 43. In part, this insistence grew from the long-held belief that expansion of territorial seas would effectively deny or alter access to scores of international straits. For maritime powers, this would curtail naval mobility and impair security interests to an unacceptable degree. “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). Whether or not this view is correct, clearly 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. Fishing fleets find their traditional fishing grounds increasingly encroached upon by coastal State claims. See, e.g., Comment, The 200-mile Exclusive Economic Zone: Death Knell for the American Tuna Industry, 13 SAN DIEGO L. REV. 707 (1976).

Together with access to resources, the interests of “protection of the environment” and “promotion of ocean knowledge” bear only indirectly on warship transit in the territorial sea. Nevertheless, these interests 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. Moore, supra at 2-4.
transit of foreign warships in the territorial sea.\textsuperscript{62} An early working
draft included such a provision among several alternative wordings
of articles dealing with warships.\textsuperscript{63} The Informal Single Negotiating
Text, however, omitted the provision because of a lack of consensus
for incorporating the requirements.\textsuperscript{64} Repeatedly, throughout the ne-
gotiations, coastal States proffered various amendments reintroduc-
ing specific authority to permit States to impose such requirements.\textsuperscript{65}
Finding these efforts fruitless, more than 30 States placed their dis-
pleasure with the Convention's warship articles on record during the
Resumed Ninth Session's general debate, which was designed to
comprise the travaux preparatoires of the Conference.\textsuperscript{66}

\textsuperscript{62} See, e.g., Malaysia, Morocco, Oman and Yemen: draft articles on navigation
through the territorial sea, including straits used for international navigation, art. 15,
coastal State may require prior notification to or authorization by its competent authori-
ties for the passage of foreign warships through its territorial sea, in conformity with the
regulations in force in such a State." For summaries of earlier discussions concerning this
subject, see Anand, supra note 43; Slonim, supra note 41, at 117; O'Connell, supra note
11 at 440-41.

\textsuperscript{63} U.N. Doc. A/CONF.62/L.8/REV.1, provision 44 (1974). The prior notifica-
tion or authorization formula can be traced through a variety of working documents:
formula C (July 22, 1974); id./REV.2, provision XLI, formula C (Aug. 1, 1974); id.
provision XLIII, formula C (Aug. 26, 1974); and id./C.2/WP.1, provision 44, formula C
(Oct. 15, 1974) reprinted in, respectively, 3 R. PLATZÖDER, THIRD UNITED NATIONS
CONFERENCE ON THE LAW OF THE SEA DOCUMENTS 244, 241-42, 260-61 (1982) and 4
id. at 27 (1983). The latter two drafts are virtually identical to the L.8/REV.1 draft.
The Second Committee's Consolidated Text on Innocent Passage omitted formulas A
and C in favor of formula B2, the predecessor of article 30 of the 1982 Convention. U.N.
R. PLATZÖDER, supra, at 153, 159.

\textsuperscript{64} Chairman Pohl explained the nature of the text:
The Conference at its 55th meeting on 18 April 1975 adopted a proposal by
the President that the chairman of the three main committees should each prepare
a single negotiating text covering the subjects entrusted to his committee,
taking account of all formal and informal discussions and proposals. The Presi-
dent emphasized that the text would be a basis for negotiation, rather than a
negotiated text or accepted compromise, and would not prejudice the position of
any delegation.

\ldots The aim of the Conference in adopting the new method for the future
stage of its work would have been defeated had all trends been retained in this
text. It was possible to amalgamate some of the alternative formulations but in
other cases it was necessary to choose between conflicting proposals. In certain
cases, a middle course was adopted.

\ldots The present text does not necessarily represent the views of my delegation. I
have prepared it in my capacity as an officer of the Conference and not as repre-
sentative of my country.
CONF.62/WP.8/Part II (1975). The document was the first of several single-source
texts developed during the nine-year negotiations.

The most popular such amendment was U.N. Doc. A/CONF.62/C.2/Informal Meet-
ing/38, co-sponsored by Argentina, China and 30 other coastal States.

\textsuperscript{66} The General Debate, which occurred August 25-27, 1980, is found in 4 UN-
The spectrum of States' views on this issue is broad. At the extreme end, denying any ship a right of innocent passage through territorial waters, is the relatively new state of Vanuatu.\(^7\) Albania, China, Iran and the Philippines, while recognizing a right of innocent passage for merchant vessels, all specifically deny the existence of a similar right for warships.\(^6\) Under this view, a foreign warship may enter the territorial sea only with prior permission. Taking a middle-ground stance are several States that tacitly or explicitly acknowledge a right of innocent passage for warships subject to a right of the coastal State to require prior notice or permission.\(^9\) Finally, some States already require prior notification of warship transit and find no incompatibility with this position and the provisions of the Convention.\(^70\)

CLOS III (134th through 140th plen. mtgs.), at 15-81 [hereinafter cited as Resumed 9th Session Debate]. States objecting to the warship articles as they then stood or supporting an amendment permitting prior notice or authorization included: Trinidad and Tobago, Pakistan, Romania, Honduras, Finland, Madagascar, China, Sao Tome and Principe, Egypt, Papua New Guinea, Democratic Kampuchea, Sweden, Argentina, Iran, Malta, Democratic Yemen, Oman, Bangladesh, Somalia, El Salvador, Republic of the Philippines, Cape Verde, United Arab Emirates, Turkey, Uruguay, Guatemala, and Panama. Other States added their displeasure to the record at later sessions. E.g., Vanuatu, North Korea, and Barbados, — UNCLOS III (192d plen. mtg.), at 31, 47-50, and 88, U.N. Doc. A/CONF.62/PV.192 (provisional verbatim record) (1982).

67. Id. at 33-35. Vanuatu, formerly New Hebrides, is an island State in the southwest Pacific of approximately 113,000 inhabitants. The State gained its independence in July 1980.

68. See Resumed Ninth Session Debate, supra note 66, at 23, 41, 58-59, and 69-70. But compare the Islamic Republic of Iran's later apparent shift on this issue, infra note 69.

69. This group appears to comprise the majority of the sponsors and supporters of the Argentine amendment to article 21 of the 1982 Convention. See supra note 65. Despite the failure of that amendment, several supporters at the final session of UNCLOS III purported to find implicit recognition for prior authorization in the Convention. Mr. Mizi, the Maltese delegate, declared: "[W]e feel that we ought to reaffirm our conviction that [the Convention] recognizes the right of coastal States to adopt measures to safeguard their security, including the requirement of prior authorization or notice for the innocent passage of warships through territorial waters." — UNCLOS III (192d plen. mtg.), at 42, U.N. Doc. A/CONF.62/PV.192 (1982). Mr. Mirmehdi of the Islamic Republic of Iran explained in what manner that recognition occurs:

[In the light of customary international law, provisions of article 21, read in conjunction with article 19, on the meaning of innocent passage, and article 25, on the rights of protection of coastal States, recognize, though implicitly, the rights of coastal States to take measures to safeguard their security interests, including the adoption of laws and regulations regarding, inter alia, the requirement of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea.


70. Finland and Sweden are two examples. See Resumed Ninth Session Debate, supra note 66, at 21, 35.
The precise number of States supporting prior notification or authorization is difficult to determine. The rule of consensus was followed on this issue at the request of the conference President; no vote was taken. Nevertheless, approximately 50 States had supported the right of coastal States to require prior notification or authorization or had incorporated prior notice or consent requirements in their domestic laws relating to warship transit before completion of the 1982 Convention.71

Other States either specifically approved the Convention’s warship articles72 or, regardless of their views concerning the merits of the proposals, opposed further amendments to the Convention’s innocent passage provisions.73 The historically seafaring nations of Europe formed the vocal core of this group. Their chief support came, somewhat surprisingly, from several nations within the Soviet Union’s sphere of influence.74 The dispute resulted in a lack of consensus on the issue, retention of the wording already present in the negotiating texts, and failure of the amendments.

Contributing to this result were the rule of consensus, the concept of a “package deal,” and hopes of universal acceptance of the Convention. The “package deal” concept encouraged each State to bargain for provisions in the Convention that were most desirable. Accordingly, developing nations focused on the exclusive economic zone, the continental shelf, and the international seabed mining regime. When they turned their attention more fully toward the navigational articles, the damage — exclusion of the authorization or notice formula from the informal negotiating texts — had already been done.75

Closely related to the “package deal” concept was the practical

71. For a list of States supporting the amendment during the UNCLOS III negotiations, see supra note 66. For a list of States adopting such requirements in domestic legislation, see infra note 118.

72. States approving the provisions were Nigeria, the United Kingdom, Italy, and Portugal. See Resumed 9th Session Debate, supra note 66, at 27, 48-49, 50, 56.

73. States opposing further amendments were Bulgaria, Poland, Byelorussia, Mongolia, Colombia, and Hungary. Id. at 50, 52, 59, 68-69, 73, 77. Colombia’s written statement accompanying its delegate’s remarks echoed the call for compromise:

If certain questions mentioned by some delegations are reopened, the Colombian delegation will have to insist on various points for which, in its view, no entirely satisfactory solution was found. We therefore prefer not to touch on them, and will oppose the reopening of closed topics, in order to preserve the balance achieved, as can be seen from the general debate.


74. See supra note 73. The Mongolian representative stated that “[a]ny attempt to alter [article 21, paragraph 1] would set the Conference back many years and lead to unnecessary dissention.” Resumed 9th Session Debate, supra note 66, at 69.

75. The same process in reverse caused the United States, which was pleased with the innocent passage and transit provisions, to reject the Convention because of the seabed mining provisions.
realization of many States that the effectiveness of any resulting treaty would be severely diminished without universal or nearly universal acceptance, 76 and that the major industrialized seafaring nations would not likely join in any agreement that limited navigational freedoms. 77 Thus, to secure full access to necessary technology for conducting seabed mining operations, developing nations had to attract, or at least not repel, seafaring nations by, in effect, incorporating into the Convention a primarily Western European 78 view of international law regarding innocent passage and creating the new regimes of transit passage and archipelagic sea lanes passage. 79 By failing to achieve a true consensus on this issue the negotiations fostered frustration, alienation, and unilateral action. 80 Resolution of the question ultimately was left to the Convention's dispute settle-

76. Mr. Rattray of Jamaica explained the bargaining process: [A]n assessment of the work of the Conference could not simply be made in terms of national interest. The search for global agreement had been characterized by the sacrifice of a measure of nationalism to internationalism. That had been a painful process particularly for developing countries, but it was impossible to solve all the problems of future generations; the present challenge was to make a good beginning.

Resolved 9th Session Debate, supra note 66 (139th plen. mtg.) at 70, para. 134.

77. The United Kingdom representative, for example, stated: "[T]o empower the coastal State to institute regulations requiring prior notification or authorization of the passage of warships through the territorial sea was inconsistent with existing international law and unacceptable to the United Kingdom." Id. (137th plen. mtg.) at 49, para. 86.

78. Within the terminology of the Convention the geographic grouping of Western Europe includes Canada and the United States of America. See, e.g., 1982 Convention, supra note 15, art. 161, para. 1(e).

79. See 1982 Convention, supra note 15, at arts. 17-32, 37-44, 53-54. A comparison of the United Kingdom’s initial draft articles with the Convention’s final navigational articles reveals that much more protection was won for coastal State interests than was initially proposed by a representative maritime power. For example, the list of prejudicial activities was doubled, and a provision assigning liability to the coastal State for damages caused by the State acting contrary to the Convention was discarded. United Kingdom: draft articles on the territorial sea and straits, 3 UNCLOS III (Docs. of 2d Comm.), at 183, 184, arts. 16, para. 2 & 18, para. 5, U.N. Doc. A/CONF.62/C.2/L.3 (1974). For the coastal States’ statement of dissatisfaction with the concessions, see Statement of the Peruvian Representative, 13 UNCLOS III (9th Session Documents), at 107, 108, paras. 14-16, U.N. Doc. A/CONF.62/WS/6 (1980). But cf. Peru’s former regulations governing visiting foreign warships and military aircraft, enacted by Presidential Decree No. 19, June 25, 1946, art. 2, reprinted in 6 National Legislation and Treaties Relating to the Law of the Sea 404 (U.N. Legislative Series), U.N. Doc. ST/LEG/SER.B/6 (1957) (“Consistent with its interpretation of the principle of freedom of the seas, the Peruvian Government hereby grants to warships, Government vessels, and merchant ships the right of innocent passage though its territorial waters in the broadest terms in time of peace.”).

80. For a summary of unilateral action, see infra notes 118-40 and accompanying text.
ment mechanisms.

During the final negotiating session preceding adoption of the Convention, Mr. Mallet of Saint Lucia aptly described the overall spirit of compromise embodied in the Convention and the specific result reached with regard to passage of warships:

I am empowered by my Government to sign the Final Act and the Convention. We shall sign not because we find all parts of the Convention entirely acceptable, since it is not expected that all the provisions of an international agreement of this scope will be entirely acceptable to all participating countries, but because we believe that, in the spirit of compromise, it is the best that could be achieved at this time. And, just as international law has at times been looked at in a progressive manner, we are hopeful that the dynamic nature of this Convention will prevail over any static interpretation that may be placed upon it.

For example, my government is of the opinion that the vagueness in section 3 of part II of the Convention, with respect to innocent passage in the territorial sea, results from the compromise that was necessary. It can be interpreted to mean that passage in the territorial sea by foreign warships is deemed not innocent unless proven to be so. Of course, the converse also holds. It all depends on who is interpreting. My government regrets the ambiguity inherent in those articles and will from time to time express its concern.81

The Provisions Concerning Innocent Passage of Warships in the Territorial Sea

The innocent passage provisions of the 1982 Convention preserve the 1958 format of setting out separately the rules for all ships first,82 followed by additional rules for merchant ships and warships.83 The 1982 Convention incorporates the 1958 innocent passage articles virtually intact, while adding eight new provisions and establishing separate regimes for international straits and archipelagic waters.84

Most of the new articles apply to both merchant ships and warships.85 Of greatest significance is article 19, which sets forth specific
objective criteria by which the innocence of warship passage is measured. 86 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.” 87 Article 24 explains that coastal State regulations “shall not hamper the innocent passage of foreign ships through the territorial sea”:

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. 88

Hence, the 1982 Convention makes the right of innocent passage for all ships through the territorial sea more definite. 89 The right cannot be denied or impaired by the coastal State. But the manner of exercising that right—the only remaining issue of contention 90—is subject to certain coastal State rights and regulations. For example, where necessary for safety of navigation, the coastal State may designate sea lanes for nuclear powered ships, but may not otherwise prevent the ships’ innocent passage. 91 A coastal State, of course, retains the right to take “necessary steps in its territorial sea to prevent passage which is not innocent” 92 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. A coastal State may also expel from its territorial waters “immediately” any warship which fails to comply with the State’s laws and regulations and disregards any request for compliance.

Article 8 reaffirms the continued right of innocent passage through newly enclosed internal waters formed by the drawing of straight baselines. The article appears to apply equally to innocent passage through waters previously considered as territorial sea and through two closely related new regimes: international straits and archipelagic waters.

Innocent Passage and Transit Passage Through International Straits

Although the regime of transit passage embodied in the 1982 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. Although frequently described by commentators as “innocent passage,” the straits transit right, in practice, involved something more. 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.”

93. 1982 Convention, supra note 15, art. 25, para. 3. The basis for suspension may include “weapons exercises” by the coastal State.

94. Id. art. 30. The new formulation adds the word “immediately” to the 1958 provision. See supra notes 47-48 and accompanying text.

95. 1982 Convention, supra note 15, art. 8, para. 2.

96. “[A] right of innocent passage as provided in this Convention shall exist in those waters.” Id. (emphasis added).


98. See, e.g., Pharand, supra note 24, at 12.

99. R. BAXTER, supra note 36, at 166-68, 185; 1 D. O’CONNELL, supra note 20, at 327.

100. Corfu Channel (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 28. The Montreux Convention, which governs the Turkish straits, was the only existing treaty to restrict warship passage at the time of the decision. R. BAXTER, supra note 36, at 164 n.77; McNees, supra note 97, at 198-99, n.111. For a detailed review of the Montreux Convention’s warship transit provisions, see Comment, Kiev and the Montreux Convention:
found that the decisive characteristic warranting free transit through an international strait was its geographic connection of two parts of the high seas. In the subsequent development of this straits transit right, the focus shifted from the geographic characteristic to the use of straits for international passage. The 1982 Convention, nevertheless, distinguishes three separate levels of straits regulation based on the geographic criterion. Straits that contain a “route through the high seas or through an exclusive economic zone of similar convenience” fall outside the straits provisions. 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,” all

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 Convention, supra note 15, art. 25, and the 1982 Convention, supra note 15, art. 35(c). Other straits governed by individual treaties include the Strait of Gibraltar, the Strait of Magellan, the Danish Straits, and the Straits of Malacca. See 1 D. O’CONNELL, supra note 20, at 317-27. On the straits of Malacca, see KOH, STRAITS IN INTERNATIONAL NAVIGATION: CONTEMPORARY ISSUES 49-95 (1982).


102. Compare the discrepancy between the authoritative French text, which subordinates use of the strait for international navigation to its geographic situation (“le critère décisif paraît plutôt devoir être tiré de la situation géographique du Détroit, en tant que ce dernier met en communication deux parties de haute mer, ainsi que du fait que le Détroit est utilisé aux fins de la navigation internationale.” 1949 I.C.J. at 28) and the English translation which treats the two requirements as co-equal (“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.). This discrepancy undoubtedly contributed to the confusion in the 1958 Convention concerning straits passage. See supra notes 32-36 and accompanying text. Criticisms of Brüel, based upon Judge Azevedo’s dissent in Cortu Channel, apparently encouraged the shift from the Court’s objective geographic criterion to a subjective use criterion. Rangel supra note 101, at 277-78. For a more detailed discussion of the use element, see Pharand, International Straits, 7 Thesaurus AcroAsiun 59, 67-71 (1977). Treating straits transit as merely an application of innocent passage through the territorial sea, drafters of the 1958 Convention adopted the rationale of the English translation, requiring of “international straits” both geographic connection and use for international navigation. Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 16, para. 4. 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. See 1982 Convention, supra note 15, arts. 34, 36-37, and 45.

103. 1982 Convention, supra note 15, art. 36. The route of “similar convenience” envisioned by this provision is similar to a route through the territorial sea, for example. Similarity is measured “with respect of navigational and hydrographical characteristics.” Id. The Straits of Florida are an example of this group of straits. Swayze, supra note 20, at 35.

104. 1982 Convention, supra note 15, art. 37.
ships and aircraft shall “enjoy the right of transit passage, which shall not be impeded.”\textsuperscript{105} 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 the qualification that “there shall be no suspension of innocent passage through such straits.”\textsuperscript{105} Regardless of their geographic situation, all other straits within the territorial sea not used for international navigation fall under the suspenseable innocent passage provisions of part II.\textsuperscript{107}

**Innocent Passage Within Archipelagic Waters**

A growing concept in recent years, archipelagic status is officially recognized in the 1982 Convention. Archipelagic States\textsuperscript{106} may draw

\textsuperscript{105} Id. art. 38, para 1. (emphasis added). This includes the majority of straits used for international maritime communication. Transit passage conducted in the “normal modes,” id. art 39, para. 1(c), must be “continuous and expeditious,” id. art 38, para. 2. Ships and aircraft exercising this right must “proceed without delay through or over the strait,” id. art. 39, para. 1(a). Many of the transit passage articles have analogues among those governing innocent passage: a list of duties of ships and aircraft in transit (id. art. 39; compare id. art. 19, para. 2(a), (h), (l)), a prohibition of marine research or survey (id. art. 40; compare id. art. 19, para. 2(j)), a sea lanes and traffic separation scheme (id. art. 41; compare id. art. 22), a list of permissible topics of strait State regulation and restrictions concerning their application (id. art. 41, paras. 1-4; compare id. art. 21, para. 1(a), (d)-(f), (h); art. 24, para. 1), a liability provision for vessels and aircraft with sovereign immunity (id. art. 42, para. 5; compare id. art. 31), and a duty not to hamper or suspend transit passage (id. art. 44; compare id. art. 24). The parallelism of the transit passage 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. Compare id. art. 19, para. 2(i) (“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, para. 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 note 171 and accompanying text.

\textsuperscript{106} 1982 Convention, supra note 15, art. 45. The former group consists of 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, para. 1. “[T]he Strait of Messina lying between the Italian mainland and Sicily” is such a strait. Swayne, supra note 20, 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 102, at 76.

\textsuperscript{107} This is the status claimed for the Vil’kitskiy Strait in the Northeast passage. See Pharand, supra note 24, at 15-17, 38-41. 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).

\textsuperscript{108} For the purposes of this Convention:
straight baselines to enclose within their perimeters vast expanses of "archipelagic waters,\textsuperscript{109} up to a ratio of nine parts water to one part land.\textsuperscript{110} Archipelagic State sovereignty extends to the waters and vertically adjacent airspace, land, subsoil, and resources.\textsuperscript{111} Within the archipelagic waters, each State may delimit its own internal waters for river mouths, bays, and ports.\textsuperscript{112} Encircling the archipelagic waters, measured from their outermost edge, lies the territorial sea.\textsuperscript{113} As with straits, two levels of transit rights exist: innocent passage, of the territorial sea type, for ships through any part of archipelagic waters\textsuperscript{114} 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.\textsuperscript{115}

Summary of Warship Passage Under the 1982 Convention

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

(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.

1982 Convention, \textit{supra} note 15, art. 46.
109. \textit{Id.} arts. 47 & 49, para. 1.
110. \textit{Id.} art. 47, para. 1.
111. \textit{Id.} art. 49.
112. \textit{Id.} art. 50.
113. \textit{Id.} art. 48.
114. \textit{Id.} art. 52. The right of innocent passage does not, however, apply to those waters delimited under article 50 as internal waters.
115. \textit{Id.} art. 53. This provision allows otherwise impermissible overflight and "normal mode" transit of those portions of the territorial sea within 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." \textit{Id.} art. 53, para. 12. 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. \textit{Id.} art. 54. Ships in archipelagic sea lanes passage may deviate up to 25 nautical miles to either side of the designated sea lane’s axis, but they “shall respect established and applicable sea lanes and traffic separation schemes.” 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.” \textit{Id.} art. 53, paras. 5, 11.
archipelagic waters.

2. A right of innocent passage, subject to temporary suspension, exists through the territorial sea, internal waters newly enclosed by straight baselines, 116 archipelagic waters (other than internal waters delimited under article 50), 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 non-innocent passage 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 through straits 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. 117

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.

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116. As used throughout this article, “internal waters newly enclosed by straight baselines” and “newly enclosed internal waters” signify those waters contemplated by articles 8 and 35(a) of the 1982 Convention and by article 5 of the 1958 Convention. Id. arts. 8, 35(a); Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 5.

117. The scope of potential liability for damage to the coastal State appears to vary directly with the degree of intrusiveness of the passage. Liability is broader under the territorial sea provision than under the straits and archipelagic waters provision. Both provisions 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 violating “other [strait] provisions.” 1982 Convention, supra note 15, art. 42, para. 5. Warships in the territorial sea, however, additionally are subject to liability for non-compliance with any provision of the Convention or other rules of international law. Id. art. 31.
State Practice and Application of the Convention

The foregoing principles express the "consensus" of the participants of UNCLOS III regarding the incorporation of existing customary law, prior treaty law, and entirely new concepts in the law of the sea into a comprehensive navigational scheme. These principles do not completely reflect existing practice, at least with respect to warships. Many States have adopted laws requiring prior notice or authorization for warships to exercise the right of innocent passage in their territorial seas. These laws vary considerably in scope and...
detail. Some cover the entire spectrum of maritime zones; others focus specifically on warships. The various laws can be grouped according to three general attributes: (1) the level of control exercised over warship passage, (2) the characterization of warship passage, and (3) the specified sanction for breach of the conditions of passage.

One-third of the laws require only prior notice of transit, from thirty days for operational passage through Brazilian waters to three days for transit of Danish waters. Some State regulations tie warship transit in the territorial sea to visits to internal waters and port calls, requiring prior authorization for both. Others expressly require prior authorization for transit in the territorial sea. Sweden and Denmark have "stepped" requirements, depending upon the route of transit or the number and type of ships involved. For instance, in specified, well-traveled sea lanes, no notice for warships is required. Both States, however, require prior notice for innocent passage of warships through other parts of their territorial seas, and prior au-


119. See, e.g., supra note 118, the laws of Bulgaria, Burma, Guyana, India, Pakistan, Romania, Seychelles, Sri Lanka, and People's Democratic Republic of Yemen.

120. See, e.g., supra note 118, the laws of Brazil, Denmark, Dominican Republic, Sweden, and USSR.

121. E.g., Brazil, Denmark, Dominican Republic, Guyana, India, Seychelles, and Sweden.

122. E.g., Brazil (notice only), Bulgaria, Dominican Republic, German Democratic Republic, Romania, and USSR.

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Authorization for other purposes, including entry into internal waters. If more than three warships from a single State desire to pass through Danish territorial waters simultaneously, the level of supervision increases one step: prior notification to transit the specified sea lanes and prior authorization for passage elsewhere within the territorial sea. Finally, at least three States with laws relating to warship passage expressly recognize the right of innocent passage without prior notice or authorization for all ships, including warships.

Three trends appear in the characterization of passage: States that recognize a right of innocent passage for all ships; States that specifically exclude warships from their definitions of the right of innocent passage; and States that apparently do not address the issue. Several States have qualified their enactments relative to international law. In 1970, the People's Democratic Republic of Yemen decreed sovereignty over its territorial waters and the adjacent airspace, seabed and subsoil, "provided that the provisions of the international law in respect of the peaceful passage of ships of

124. See supra note 118, the laws of Sweden and Denmark. Brazil and the Dominican Republic also have stepped schemes depending upon the formality of the transit or visit. The stepped method of requiring notice or authorization coupled with designating, as have Denmark and Sweden, one or more routes through which all ships, including warships, may pass without giving notice or seeking authorization, may prove an acceptable accommodation of coastal State and maritime power interests and one that will avoid resort to the Convention's dispute settlement mechanisms to settle conflicts over prior notice or authorization requirements.

125. See legislation of Sweden and Denmark, supra note 118. Denmark requires application not less than eight days in advance for permission to enter its internal waters.


127. E.g., Denmark, Norway, Republic of Maldives, Spain, Sri Lanka, Sweden ("through passage"), and Yugoslavia. See supra note 118.

128. E.g., Albania, Burma, Guyana, India, Pakistan, Seychelles, and USSR. See supra note 118.

129. E.g., Brazil, Dominican Republic, Sudan, and People's Democratic Republic of Yemen. See supra note 118.
other States in the territorial sea be respected.” And Spain made its rules “without prejudice to any existing or future provision in international conventions.”

The sanctions embodied in State legislation appear to follow two basic trends. One line corresponds closely to the notice and expulsion provisions of article 30 of the 1982 Convention. The other is an apparent version of the right of protection against non-innocent passage. The Republic of Maldives and Sri Lanka follow neither line of sanctions. Both countries apparently overlooked the sovereign immunity of warships by subjecting violators of State regulations to domestic criminal jurisdiction or confiscation of their vessels.

How do these laws comport with the 1982 Convention? Prior authorization requirements obviously run afoul of the proscription of article 24, which specifically prohibits any coastal State regulation that hampers, denies, or impairs the right of innocent passage in the territorial sea. The right to require authorization implies the right to deny that authorization. The right of authorization is perfectly acceptable and in full accord with customary international law when exercised with respect to passage within internal waters, as when a port visit is involved. But application of the right to passage within the territorial sea is prohibited under the 1982 Convention. A similar argument, but of reduced force, applies to prior notice requirements. Conceivably, the procedures required in rendering prior notice could be so burdensome as to effectively impair or deny passage. Such notice provisions would conflict with article 24. Less restrictive procedures, such as Denmark’s three-day notice requirement, while more consistent with article 24, may still be incompatible with article 21. Coastal States well understood that the article 21 list of permissible regulatory areas was inclusive and applicable to all ships. An additional regulatory area permitting the imposition of special requirements for warships was not added to article 21. Without an explicit basis in the Convention for such regulation, coastal States’

131. Order on Visits by Foreign Warships to Spanish Ports and Transit Through Waters under Spanish Jurisdiction, supra note 126, at 158.
132. E.g., Brazil, Burma, Dominican Republic, and USSR. See supra note 118; 1982 Convention, supra note 15, art. 30.
133. E.g., Sudan and People's Democratic Republic of Yemen. See supra note 118.
134. See supra note 118, laws of Republic of Maldives and Sri Lanka.
135. See supra text accompanying notes 23 & 24.
136. For example, differing requirements concerning timing, content, and means of communication of the notice, and to whom it must be communicated, could make the effort simple or extremely complicated.
137. See supra notes 62-81 and accompanying text.
representatives sought to locate regulatory authority among "the generally recognized principles of international law."\(^{138}\)

Another State regulation that clashes with the Convention is the exclusion of warships from the innocent passage regime. The Convention clearly states that the right of innocent passage in the territorial sea belongs to all ships.\(^{139}\) Such laws must be reworded to pass muster under article 21.

Additionally, States that sanction the violation of their rules regarding innocent passage of foreign warships by resort to the right of protection will transgress article 30. The distinction between non-innocent passage and non-compliance with coastal State regulations becomes critical in the area of sanctions.\(^{140}\)

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 the provisions? Commentators speculate that the 1982 Convention will not take effect for some time since four years passed before the 1958 Convention came into force and the new Convention requires substantially more ratifications.\(^{141}\)

138. Statement of the delegate of China, 14 UNCLOS III (135th plen. mtg.), at 23, para. 49 (Aug. 25, 1980). Cf. written statements of Honduras, id. at 151, 152, U.N. Doc. A/CONF.62/WS/13 (1980) ("a security requirement of the coastal States whose fulfillment amply justifies . . . prior authorization") and Argentina, 13 UNCLOS III at 104, 105, para. 8, U.N. Doc. A/CONF.62/WS/5 (1980) ("[W]e believe that the failure to include . . . a specific mention of the right of the coastal State to require prior notification or authorization for the innocent passage of warships through the territorial sea is a serious omission. Everyone knows that this right is recognized in existing international law and that many countries have adopted relevant legislation on that basis."); and statements in the General Debate of the representatives of Papua New Guinea, 14 UNCLOS III (135th plen. mtg.), at 30 ("[P]rior authorization or notification, in the absence of bilateral commitments, was a right of the coastal State which must be respected before warships could navigate in the territorial sea."); Finland, id. at 21 (Prior notification requirement is in accordance with "well-established international practice."); and Cape Verde, id. at 64 (139th plen. mtg.) (Aug. 27, 1980) (Prior authorization requirement accords with "existing international practice.").

139. See supra text accompanying notes 82-89.

140. See supra note 49 and accompanying text, supra text accompanying notes 92-94, infra text accompanying notes 159-71 and following note 176.

141. 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; cf. Lacharriére, supra note 60, at 55 ("[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.").

In the interim, to the extent that the Convention declares customary law (and commentators forcefully have argued that the navigational articles do so), the provisions already are binding upon all States. The territorial sea innocent passage provisions ground themselves in both custom and the 1958 Convention, while the regime of transit passage through straits “approximates to the situation stabilized in the customary law by the practice of States.” 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” because of the vast expanses of these potential archipelagic waters.

What will be the effect of the Convention upon conflicting State legislation? Will signatory States amend their legislation to conform to the Convention? Will additional States seek to demonstrate their displeasure with the Convention’s navigational provisions by adopting their own notice or authorization laws? Have we come full circle in developing the law of the sea? Despite the contention that customary law of the sea and later efforts at its codification were products of industrialized and seafaring nations and nonresponsive to the needs of developing nations, a comprehensive and universal effort was made to codify and legislate the entire body of sea law. Nations initially unhappy with the former state of customary law and now displeased with particular provisions of the new Convention must acquiesce in the universal effort or set aside the Convention and embark again on an era of State practice to shape the law of the sea into their vision of what it is or should be. Divergent State practice will encourage international conflict and confrontation and will foster warship incidents perceived (whether intended so or not) as non-innocent passage.

The Convention’s application will be clear among its parties. Less

States in Force on January 1, 1982, at 255.

142. See, e.g., Harlow, supra note 141, 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 16, at 576 ("The . . . Convention as it relates to navigation and overflight and related uses of the seas is a considerable improvement over existing law.").


144. Convention on the High Seas, supra note 25, art. 2; see supra note 20. The status of unilateral territorial claims to these waters is subject to dispute by maritime powers that refuse to recognize such expansive claims in the absence of a treaty.
clear will be its force to bind third parties. 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. These questions are of considerable concern not only to the United States, which, at the eleventh hour, withdrew support for the Convention, but also to the world community. 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.\textsuperscript{145}

**Non-innocent Passage**

Whether customary and treaty law are viewed as retaining, expanding, or limiting transit rights of warships, the territorial sea or an analogous regime endures wherein the fundamental convention of innocent passage applies.\textsuperscript{146} Wherever the right of innocent passage extends, the danger of non-innocent passage exists. For the coastal State, non-innocent passage poses two problems: recognition and response.

*Recognizing Non-Innocent Passage*

Recognition of non-innocent passage involves the physical perception of observable facts of warship transit against the backdrop of principles or rules governing 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.

\textsuperscript{145} Lacharrère, supra note 60, at 55; Richardson, *Power, Mobility*, supra note 16, at 919. For an alternative view of the real purpose of UNCLOS III and, hence, the 1982 Convention, see Pardo, *The Law of the Sea: U.S. Interests and Alternatives* 161-62 (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 Knight, *Alternatives to a Law of the Sea Treaty*, in *The Law of the Sea: U.S. Interests and Alternatives* 133 (1976).

\textsuperscript{146} See supra text following note 115. Expansion of the territorial sea by a factor of up to four times only highlights the importance of innocent passage for continued maritime mobility.
The Factual Element

Recognition requires interpreting behavior, the motivation of which may be unclear, first against the objective criteria of innocent passage, and then against domestic legislation and regulations. Interpreting behavior injects a subjective element into the application of objective standards.147 Focusing on the manner in which passage is conducted appears more fruitful than trying to interpret the often speculative intent of passage, unless an express hostile intent is communicated.148 Judging innocence or non-innocence of passage closely resembles judging the innocence or criminality of individual behavior. A universal maxim in criminal law is that no crime exists without law, nor without a criminal act.149 The "law" in this case is the list of objective criteria embodied in the 1982 Convention and the laws of the coastal State. As with general criminal intent, non-innocent intent may be inferred from a violative act, unless circumstances indicate otherwise.150 If, as with individual criminal behavior, the law can only be violated by an identifiable and previously proscribed wrongful act, then a presumption of innocence must exist for passage of each ship through the territorial sea until the ship commits a prohibited act which indicates its passage to be non-innocent. The burden of identifying and proving the non-innocent act, then, appears to lie with the enforcement authority, the coastal State.151

The Legal Criteria

Passage prejudicial to the peace, good order, or security of the coastal State would be non-innocent under both the 1958 and 1982 Conventions.152 The 1958 Convention, by failing to elaborate this subjective standard, left broad latitude for interpretation. Thus, some commentators argued that warships automatically should be

147. See 1 D. O'Connell, supra note 20, at 272.
148. See Corfu Channel (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 30. The Court emphasized 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 that the warships' objective behavior did not threaten.
150. For instance, circumstances could indicate force majeure or distress. See Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 14, para.3; 1982 Convention, supra note 15, art. 18, para. 2.
152. Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 14, para. 4; 1982 Convention, supra note 15, art. 19, para. 1. For the meaning of "security," see supra note 46.
excluded since they always threaten.\textsuperscript{153} Others claimed that nuclear-powered vessels or those carrying nuclear substances or weapons were inherently dangerous and, thus, could never pass innocently.\textsuperscript{154} The 1982 Convention represents a major step forward by spelling out in a list of objective criteria what the old subjective standard means. Even if the new Convention never entered into force, the list still would be important as a consensus of nations regarding the nature of innocent passage and the specific acts which render passage non-innocent. The 1982 Convention states that:

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.\textsuperscript{155}

The addition of a broad, catch-all provision suggests that the list was meant to be exhaustive, not merely exemplary.\textsuperscript{156}

\textsuperscript{153} 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 Corfu Channel (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 74.

\textsuperscript{154} 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 107, at 336-42.

\textsuperscript{155} 1982 Convention, supra note 15, art. 19, para. 2.

\textsuperscript{156} Grammig, supra note 107, at 340; but see 1 D. O'Connell, supra note 20, at 270 (omission of "only" before list of prejudicial actions indicates "catalogue might
Within certain bounds, the coastal State may also impose other restrictions not directly affecting the innocence of passage. Again, the 1982 Convention enlarges upon the general language of the 1958 provision by specifying, in article 21, the permissible areas of regulation. This list also is important as an expression of international consensus:

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. Coastal State laws and regulations may not hamper, deny, or impair innocent passage. Thus, violation of these laws or regulations will not necessarily render passage non-innocent. Paragraph four of article 21 has a cognate among the transit passage articles. Taken together with the 1958 coastal State regulation provision, the parallel wording of the three related articles points to separation of the innocent passage issue from that of compliance with coastal State laws and regulations. Within each of the three articles, innocent pas-
sage is assumed as a pre-existing condition. Compliance with coastal State laws and regulations is merely exhorted. Treating the two as independent factors governed by different criteria and remedied by separate sanctions, the possible combinations in which they may appear yield four situations:

1. innocent passage in compliance with coastal State regulations (the situation normally thought of as innocent passage);
2. innocent passage not in compliance with coastal State regulations (passage which, while not transgressing any of the prohibitions of article 19, nevertheless, violates a coastal State regulation, such as a rule regarding safety of navigation);
3. non-innocent passage in compliance with coastal State regulations (passage which, while in compliance with regulations enacted under article 21, violates one of the provisions of article 19, such as collecting information to the prejudice of the security of the coastal State);

and

4. non-innocent passage not in compliance with coastal State regulations (for example, carrying out any fishing or marine research or survey activities, where these activities are prohibited also by the laws of the coastal State).

Despite the four possible situations, innocence of passage and compliance with coastal State regulations are not always mutually exclusive events. On the contrary, for merchant, fishing, and research ships the two factors almost totally merge. Articles 19 and 21 both require compliance with customs, fiscal, immigration, and sanitation regulations.\textsuperscript{163} Overlap also occurs in the areas of pollution,\textsuperscript{164} fishing,\textsuperscript{165} and research and survey activities,\textsuperscript{166} and in the regulation of communication systems or "other facilities or installations" of the coastal State.\textsuperscript{167} These areas of prejudicial conduct and coastal State regulation pertain primarily to merchant, fishing, and research ves-

\textsuperscript{163} Compare 1982 Convention, supra note 15, art. 19, para. 2(g) with id. art 21, para. 1(h). This is the only innocent passage qualification which specifically incorporates violation of a coastal State regulation.

\textsuperscript{164} Compare id. art. 19, para. 2(k) ("willful and serious pollution") with id. art. 21, para. 1(f) (environmental preservation and pollution control).

\textsuperscript{165} Compare id. art. 19, para. 2(i) ("any fishing activities") with id. art 21, para. 1(d) ("conservation of the living resources of the sea") and id. art 21, para. 1(e) ("prevention of infringement of . . . fisheries laws").

\textsuperscript{166} Compare id. art 19, para. 2(j) ("the carrying out of research or survey activities") with id. art 21, para. 1(g) ("marine scientific research and hydrographic surveys").

\textsuperscript{167} Compare id. art 19, para. 2(k) ("Act aimed at interfering with") with id. art. 21, para. 1(b) ("protection of navigational aids. . . and other facilities") and id. art. 21, para. 1(e) ("protection of cables and pipelines"). "Other facilities or installations" would cover submarine monitoring devices emplaced on the seabed.
sels. By contrast, the remaining acts prohibited under article 19 — those most applicable to warships — do not overlap any permissible coastal State regulatory area. An overlap arguably exists with the coastal State's right to adopt laws or regulations concerning "the safety of navigation and the regulation of maritime traffic." This regulatory right, however, clearly does not contemplate coastal State security, but the "safety" and "regulation" of foreign and domestic vessels passing through the territorial sea. Such regulation may involve the adoption of a sea lane or traffic separation scheme. The innocent passage warship prohibitions are concerns of a different order. They involve security, not safety, and they clearly prohibit conduct that might jeopardize, in real or imagined terms, the security of the coastal State. Accordingly, the innocent passage prohibitions stand independent of further coastal State regulation. Attempts by coastal States to impose security-related requirements on transit of foreign warships fall outside the scope of article 21 and likely contravene the article 24 provision prohibiting coastal States from hampering, denying, or impairing innocent passage.

The effectiveness of coastal State regulations depends 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 the scope of regulations remains a function of domestic politics. Regulations formulated by coastal nations with little use for the sea likely will appear more stringent than those of nations with significant seagoing activities.

The analysis of whether coastal State laws or regulations have been violated differs somewhat from the analysis of innocent passage violations. In the areas of overlap with innocent passage criteria — primarily of concern to merchant and fishing vessels — coastal State regulation may involve subjective standards that effectively reverse the presumption of innocence. But for warships, coastal State competence to fashion subjective criteria appears primarily limited to safety of navigation and traffic regulation schemes. These schemes seem to require specific, detailed rules, which can be violated only by an identifiable, overt act by a warship.

168. Id. art. 21, para. 1(a).
169. Id. art. 22.
170. See the variety of State laws already enacted, supra notes 118-40 and accompanying text. Whatever its scope, no regulation has force against foreign vessels without "due publicity." 1982 Convention, supra note 15, art. 21, para. 3.
171. However, by imposing a requirement not necessarily dependent on an overt act, one provision of the 1982 Convention reverses the presumption of innocence for nuclear-powered ships and those carrying nuclear, inherently dangerous, or noxious substances. The provision 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 1 D. O'Connell, supra note 20, at 273.

The 1982 Convention also indicates one instance in which vessels exercising the right
Is Submerged Passage Non-Innocent?

The 1958 Convention places the provision requiring submarines to navigate on the surface at the end of the article granting the right of innocent passage and defining "passage" and "innocent."\(^{172}\) If not for the superadjacent provision specifying the conditions under which foreign fishing vessels "shall not be considered innocent,"\(^{179}\) 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, which states that "submarines are required to navigate on the surface and to show their flag."\(^{174}\) The absence of specific language that 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 Convention, 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."\(^{175}\) The drafters could easily have included this provision in the previous list of non-innocent activities. The failure to do so indicates the drafters' intentions not to make surface operation a requirement of innocence for submarines. Rather, viewing the surface requirement as an independent provision is more logically consistent with other terms of the Convention. Pursuant to the surface requirement, of course, coastal States may adopt laws and regulations concerning "the safety of navigation and the regulation of the marine

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\(^{172}\) Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 14.

\(^{173}\) Id. art. 14, para. 5.

\(^{174}\) Id. art. 14, para. 6.

\(^{175}\) 1982 Convention, supra note 15, art. 20.
environment."

The importance of distinguishing between non-innocent passage and violation of coastal State laws and regulations lies in the different sanctions available to meet each breach. Under the 1958 and 1982 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 State has a right of protection. By contrast, the more limited sanction of warning and expulsion applies only to warship breaches of coastal State laws and regulations. Thus, the characterization of a breach as one rendering passage non-innocent or merely violative of a 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 non-innocent, this article will 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 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.” More limited is the two-tiered sanction immediately available to meet warship violations of coastal State regulations. First, a request for compliance must be made. If the request is disregarded, the coastal State may require the warship immediately to leave the territorial sea. Once a breach has appa-

176. Id. art. 21, para. 1(a). Submarines, of course, navigate submerged in portions of the territorial sea that comprise international navigation routes through certain straits and archipelagic waters under customary and treaty law. 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)

177. Convention on the Territorial Sea and the Contiguous Zone, supra note 15, art. 15, para. 1; 1982 Convention, supra note 15, art. 25, para. 1. See also 1 D. O’CONNELL, supra note 20, at 273.


179. See supra, note 177. Due to the traditional immunity of warships, such steps against warships would likely involve less intrusive measures than those taken against non-innocent passage of merchant vessels. But cf. id. art. 32 (subjecting the immunities of warships to the exceptions contained in the Rules Applicable to All Ships); see supra note 85.

180. See supra note 178.
ently occurred, the coastal State may consider the political options of no action, diplomatic protest, negotiation, mediation, inquiry, conciliation, regional agency settlement, the United Nations Security Council, or other peaceful means; the legal options of arbitration or judicial settlement; and, in the most serious cases, the military option of force. \(^1\text{81}\) 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. The coastal State remains under a duty not to hamper, deny, or impair innocent (though non-compliant) passage. \(^1\text{82}\)

If a warship in violation of coastal State regulations fails to heed an initial warning and refuses to leave upon request, its passage at that point may, but does not necessarily, become non-innocent. If the relevant coastal State rule falls within the scope of permissible regulation — a question not without foreseeable controversy \(^1\text{83}\) — the warship’s refusal to leave the territorial sea upon request for failing to comply with local 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 \(^1\text{84}\) or other rules of international law \(^1\text{85}\) that require continuous and expeditious passage through the territorial sea and prohibit activities not having a direct bearing on that passage. \(^1\text{86}\) 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. \(^1\text{87}\) A warship commander is unlikely to refuse to continue the ship’s departure from the territorial sea when specifically requested to do so; if he does, he removes the ship from innocent passage and invites stronger sanctions.

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181. Except for this last option, the list is virtually identical to that contained in article 33 of the United Nations Charter.

182. 1982 Convention, supra note 15, art. 24, para. 1. For example, failure to accord prior notice of, or to obtain prior authorization for, exercise of the right of innocent passage through another State’s territorial sea may be a violation of coastal State regulations, but does not of itself render passage non-innocent. The appropriate sanction would be under article 30, not under article 25, paragraph 1, of the 1982 Convention. For a fuller discussion of this issue, see supra notes 159-69 and accompanying text.

183. The controversy centers around the permissibility of prior notice or authorization requirements. See supra notes 62-80, 118-40 and accompanying text.

184. See 1982 Convention, supra note 15, art. 30.

185. Id. art. 19, paras. 1, 2(a) (focusing on the second half of the latter provision); see supra text accompanying note 155.

186. See 1982 Convention, supra note 15, arts. 18, para. 2 & 19, para. 2(l).

187. Id. art. 18.
The foregoing measures remain subject to the United Nations Charter provisions which require members to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,” and prohibit members “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.” Furthermore, the 1982 Convention requires settlement “by peaceful means” of any dispute concerning the Convention’s “interpretation or application.”

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 discussing the use of force, this article will consider the 1982 Convention’s dispute settlement provisions and their efficacy in resolving violations of innocent passage rules.

No Action

Based upon the previously expressed conclusion that the passage of every ship through the territorial sea should be presumed innocent and in compliance with applicable regulations until its actions demonstrate otherwise, “no action” should be a coastal State’s normal response to any given transit. The choice of no action may also follow minor breaches or technical infractions having 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 result from a dearth of navy and air force assets. Many coastal States simply lack the operative capability to recognize and respond to every, or possibly any, violation of rules relating to passage through their territorial waters.

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188. U.N. CHARTER art. 2, para. 3.
189. Id. art. 2, para. 4.
190. 1982 Convention, supra note 15, art. 279.
191. See supra text accompanying notes 149-51.

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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.” The Convention encourages the use of settlement means specified in the United Nations Charter, but allows the parties unlimited latitude to settle their dispute “by any peaceful means of their own choice.” If the parties fail to resolve their dispute voluntarily through peaceful means, they must “proceed expeditiously to an exchange of views.” Thereafter, subject to certain exceptions, any party to the dispute may initiate a compulsory and binding dispute resolution procedure. This compulsory jurisdiction feature distinguishes the 1982 Convention’s arbitration and judicial settlement procedures from the ineffectual optional protocol of the 1958 agreements and the largely consensual jurisdiction of existing institutions.

Four guiding aspirations shaped the Convention’s compulsory dispute settlement provisions. The drafters desired to (1) ground the provisions in law to preserve equality of States and to prevent political and economic pressures; (2) achieve uniformity in the Convention’s interpretation; (3) maximize obligatory settlement by narrowly drafting any exceptions; and (4) integrate the dispute resolution pro-

194. Id. art. 279, citing U.N. CHARTER art. 2, para. 3 & art. 33; id. art. 280.
195. Id. art. 283, para. 2.
196. Id. art. 286.
198. See, e.g., Statute of the International Court of Justice, supra note 40, art. 36.
visions into the body of the Convention. At the core of the compulsory provisions are a newly created International Tribunal for Law of the Sea and a procedure for forming arbitration panels to decide disputes arising under the Convention. Parties to the Convention may, within limits, agree in advance to submit disputes to the international tribunal, the International Court of Justice, a general arbitral tribunal or a special, technical arbitral tribunal. Each party may select one or more of the four forums. If none is selected, the party will be deemed to have accepted general arbitration. If the parties to a dispute have accepted the same procedure, that procedure will apply, unless the parties agree otherwise. If the parties' choices vary, general arbitration will apply. The strength of the Convention's compulsory, but flexible, dispute settlement procedures is substantially eroded, however, by certain limitations and exceptions to compulsory jurisdiction, two of which merit comment.

Provisions limiting the compulsory use of dispute settlement procedures apply principally to the exclusive economic zone. Disputes that

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199. 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 No. 1); see Sohn, supra note 197.
200. 1982 Convention, supra note 15, art. 287.
201. Id. The structure and procedures of the tribunal and panels 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, art. 2, para. 1 & art. 1, para. 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. General 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 is composed not only of legal, but also of scientific or technical experts. Each 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 the party's national, and, together appoint a fifth member, who shall be president of the special tribunal. Id. Annex VIII, art. 3. Both binding and non-binding fact finding options are also available. Id. Annex VIII, art. 5.

202. Id. art. 287, paras. 1-3.
203. Id. art. 287, paras. 4, 5.
204. Id. arts. 297, 298.
remain subject to arbitral or judicial settlement include those regarding a coastal State's exercise of "sovereign rights or jurisdiction" and those concerning a foreign ship's abuse of "the freedoms and rights of navigation." The requirement of settlement procedures for these disputes represents a compromise between the maritime power's concern with the Convention's extension of coastal State jurisdiction and the coastal States' concern to be free from undesired intrusion by ships of maritime powers. This compromise provides "another example of the dynamics of the dialectics between nationalism and internationalism in making ocean law and mechanisms."

Specific "limitations" of binding settlement procedures applicable to the exclusive economic zone carry implications for warship transit in the territorial sea. Article 297 of the Convention guarantees binding dispute resolution for disputes between coastal States and flag States concerning sovereign rights and navigational freedoms, while

205. Id. art. 297, para. 1(a), (b). The provisions read:

Article 297

Limitations on applicability of section 2

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:

(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;

(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention.

The terms "sovereign rights or jurisdiction" identify the exclusive economic zone and the continental shelf as the subjects of these limitations and serve to distinguish them from straits (involving "sovereignty or jurisdiction"), and the territorial sea and archipelagic waters (involving "sovereignty"). Compare id. arts. 2, 34, 49 (dealing with the territorial sea, straits, and archipelagic waters, respectively) with id. art. 56, para. 1 (dealing with the exclusive economic zone) and id. art. 77 (dealing with the continental shelf). The Convention specifically uses the terms "sovereign rights" and "jurisdiction" to connote something less than full sovereignty within the exclusive economic zone and continental shelf. If the coastal State had full sovereignty over the continental shelf and exclusive economic zone, few disputes would arise concerning respective rights therein.

206. See Carreño, supra note 197, at 323.

207. See Gaertner, supra note 60, at 586.

limiting binding resolution for other disputes. This guarantee, by emphasizing the need for compulsory settlement procedures in this touchy area and by the absence of any additional limiting language regarding the territorial sea, implies that the full range of non-binding and binding settlement options applies without limitation to disputes arising within the territorial sea.\(^{209}\)

Among the Convention’s “optional exceptions,”\(^{210}\) the provision 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:

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209. An argument may also be made that the limitations do not apply to the territorial sea because of the greater quantum of coastal State dominion and control there. 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 15.5, considering some allowance for variations in actual square area due to coast-line contour. With a surface area over fifteen times that of the territorial sea in addition to its liberal navigational regime, on a statistical basis alone, the exclusive economic zone holds a much higher potential for conflict among its users. In the territorial sea, the coastal State’s full sovereignty encounters only the limited and narrowly defined right of innocent passage, from which the greater freedoms of transit passage and archipelagic sea lanes passage differ only in degree. Finally, because the coastal State’s possessory and regulatory rights are already absolute in the territorial sea (subject to the right of innocent passage), many developing coastal States have tended to focus instead upon extension and protection of their discretionary rights in the exclusive economic zone. See Gaertner, supra note 60, at 584-86. To balance these rights with the need to resolve disputes concerning freedom of navigation and its infringement or abuse, a compulsory provision—co-extensive in scope with limiting provisions following it—was included. Ambassador Constantin Stavropoulos, recounts the restructuring of this article (then numbered 296): “With regard to the restructuring of article 296 . . . it was agreed . . . that the provisions regarding the application of compulsory adjudication procedures should appear first, to be followed by the compromise text . . . dealing with compulsory recourse to conciliation” (emphasis added). Results of the Work of the Negotiation Group on Item (5) of U.N. Doc. A/CONF.62/62, Report to the Plenary by the Chairman, Ambassador Constantin Stavropoulos, 10 UNCLOS III 13, 118, U.N. Doc. A/CONF.62/RCNG/1 (1978). These provisions do not apply to the territorial sea simply because there are no analogous limiting provisions that apply to the territorial sea. The only “gaps” in binding dispute settlement coverage, save for the optional exclusions, are the limitations of article 297(2) & (3). From this reasoning, one may conclude that the Convention’s dispute settlement “limitations,” both the guarantee of 297(1) and the limitations of 297(2) & (3), do not apply to warship passage in the territorial sea. Rather, the Convention’s binding dispute resolution procedures continue to apply to disputes arising there, irrespective of article 297. Ultimately, the scope of applicability of this provision will have to be decided in individual cases.

As a practical matter, disputes in which compulsory jurisdiction is limited, concerning marine scientific research and fisheries, would not occur in the territorial sea anyway because they are not permitted innocent uses. 1982 Convention, supra note 15, art. 297, paras. 2, 3. Compare, e.g., id. art. 245, which recognizes the coastal State’s sovereignty over the territorial sea and, therefore, its exclusive right to regulate marine research therein, with id. art. 246, which recognizes the coastal State’s jurisdiction over marine research in the exclusive economic zone and sets forth the conditions of the exercise of jurisdiction.

210. 1982 Convention, supra note 15, art. 298.
(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. 211

Does this exclusion apply to warships in the territorial sea? From the dispute settlement literature, two views emerge: (1) that the military exception applies only to “military activities and certain law enforcement measures connected with the exercise of sovereignty within the coastal States’ [exclusive economic zone],” 212 or (2) that coastal States could apply the exception “to naval passage through straits or through territorial seas and economic zones.” 213 Comparison of earlier versions of this provision and grammatical analysis (which may only reflect the historical grafting process) suggest that the military exclusion was intended to operate broadly. 214 Other evidence, however, points convincingly to applying the exception only to disputes concerning the continental shelf and the exclusive economic zone. 215

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211. Id. art. 298, para. 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. art. 298.
212. Gaertner, supra note 60, at 586.
214. The provision’s evolution may be traced from its first proposal in 1974, see Sohn, supra note 197, at 515 (“(d) Disputes concerning military activities [unless the State conducting such activities gives its express consent]”), through the May 1, 1975 draft appended to the Informal Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/SD.Gp./2nd Session/No.1, Annex 1, art. 17, para. 3(c) (“(e) 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, 1982 Convention, supra note 15, art. 298, para. 1(b).
215. The military exclusion was the product of negotiations relating to the settlement of disputes in the exclusive economic zone. See Results of the Work of the Negotiating Group on Item (5), supra note 209, at 117-19; see also Report of the President on the Work of the Informal Plenary Meeting of the Conference on Settlement of Disputes, 13 UNCLOS III 86, U.N. Doc. A/CONF.62/L.52 (1980) (The report states, regarding article 298(1)(b): “The President pointed out that the intention was to align the law enforcement activities that may be excluded by declaration with the exercise of the sovereign rights and jurisdiction which were excluded from the compulsory jurisdiction of a court or tribunal [under article 296].” Article 296 was entitled “Limitations on applicability of this section” in the Informal Composite Negotiating Text (ICNT), U.N. Doc. A/CONF.62/WP.10/Add.1 (1977); it later became article 297.); the contemporaneous written statements of Peru, 13 UNCLOS III 106, 107, para. 7, U.N. Doc. A/CONF.62/WS/6 (1980) (finding reasonable the provision under which the coastal State is not obliged to accept the submission to international courts or tribunals of any dispute relat-
Unquestionably, the reference to article 297 limits application of the second half of the provision to enforcement activities relating to the continental shelf and the exclusive economic zone. The first half specifies military activities, not just military vessels. This implies such activities as military maneuvers, exercises, and weapons practice. While these military activities may be conducted freely on the high seas and within the exclusive economic zone, innocent passage, by definition, excludes military activities from the territorial sea and hence from archipelagic waters. A narrowly defined exception, for transit and archipelagic sea lanes passage, allows only such military activities as are incident to normal navigation through specific portions of territorial seas and archipelagic waters that comprise international straits and archipelagic sea lanes. Aircraft mentioned in the first phrase of the exception may freely transit the exclusive economic zone but may not overfly any part of the territorial sea except when following designated air routes in the exercise 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, the prohibitions against suspending, denying, impairing, or hampering such passage, and the overwhelming concern of the developing coastal States to maintain maximum control over economic activities within their exclusive economic zones point to the elimination of territorial waters comprising international straits and archipelagic sea lanes from the scope of the exception. If the exception applies at all to the territorial sea, its application is limited to cases in which the right of innocent passage has been breached by

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216. The provision refers to “sovereign rights or jurisdiction.” See supra note 205.

217. 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 buoys 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 141, at 20.


219. Id. arts. 42, para. 2, 44.

220. See Gaertner, supra note 60, 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.
military activities. A coastal State has a right of protection against such a breach under the 1982 Convention and other rules of international law for, subject to the right of innocent passage, the coastal State exercises full sovereignty over its territorial sea. Thus, only the exclusive economic zone and the continental shelf, the two areas where coastal States exercise only “sovereign rights or jurisdiction,” remain as the loci for this exception.

Because the exception relates only to disputes within the exclusive economic zone and the continental shelf, disputes precipitated by non-innocent passage of warships in the territorial sea would remain amenable to compulsory, binding resolution.\(^{221}\) This is true even if both parties have elected the exception and applied it to all four compulsory procedures.\(^{222}\) To conclude otherwise would subject the less powerful coastal States to the whims of their more powerful neighbors, who could, by exercising the exception, gain license to conduct military activities in the territorial seas of other States in violation of the right of innocent passage with virtual impunity.

The principle of reciprocity\(^{223}\) 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. Reciprocity, however, makes the military activities exception a risky option for both coastal States and maritime powers. The exception applies to the ocean regime most likely to generate disputes — the exclusive economic zone — and, in the absence of binding peaceful resolution machinery, most likely to precipitate the use of force.\(^{224}\)

**Use of Defensive Force**

The United Nations Charter allows “individual or collective self-defense in the face of armed attack.”\(^{225}\) This instinct of self-preser-
vation flows from an overwhelming necessity that leaves "no choice of means and no moment for deliberation." The defensive act "must be limited by that necessity and kept clearly within it." 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 may "afterwards be reviewed by the law in light of all the circumstances."

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 in breach of coastal State regulations: communicating a warning to the offending vessel concerning the improper behavior and requesting the vessel to leave if the behavior persists. Only when these measures fail and the warship's passage has become non-innocent, should the question of use 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. 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.

Some commentators believe that defensive force may be used to assert any right unlawfully denied.

[If 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.]

This extension of the concept of permissible self-defense is controversial and fraught with danger. Although describing precisely the way in which the dialectic of claim and counter-claim traditionally

226. J. Brierly, supra note 20, at 405.
227. Statement of Secretary of State Webster in The Caroline, noted in 2 J. Moore, A Digest of International Law 412 (1906).
228. Id.
229. J. Brierly, supra note 20, at 407, citing the Nuremberg Tribunal.
230. An example of minimal force would be the use of an escort ship or aircraft.
231. "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 11, at 451.
232. J. Brierly, supra note 20, at 429 (emphasis in original). This view is embodied in the Corfu Channel decision. See supra note 148.
233. Professors Knight and McDougal find no inconsistency with the United Nations Charter in using force to preserve an existing right. See Knight, supra note 145, at 133, 141-42 (1976); McDougal, Commentary, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES at 156-57. Contra Pardo, Commentary, id. at 163-64; Sohn, Discussion, id. at 169.
has worked to shape customary law, the extended self-defense rule 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 risks escalation, intervention, and ultimately world conflict. Such risks must, if possible, be kept to a minimum.

The crux of this problem appears when both sides resort to force to assert a "right" which the other allegedly has "unlawfully denied." The decision of both sides to use defensive force is 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 the application of force by its subjective interpretation of the situation. Where no compulsory and binding means exist to compel resolution of the disputed issue, only political means — the influence of world opinion, outside intervention, and the rational calculus of strategic decision theory — remain to constrain the escalation of hostilities. These means are far from certain to succeed. Commentators have 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." Only comprehensive and widely accepted compulsory, peaceful dispute settlement procedures can ensure against forceful handling of foreign warships passing through the territorial sea. Identification of breaches and selection of appropriate measures depend upon the respective States' technical capabilities and the individual judgments of their officials.

Who Decides?

Despite objective criteria, 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

234. See infra text accompanying notes 243-45.
235. Knight, supra note 145, at 142.
236. Cf. Gaertner, supra note 60, at 593-94.
237. For examples of existing State rules concerning warships, see supra notes 118-40 and accompanying text.
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 and compliant or non-compliant with coastal State regulations. The officer may operate under orders in this regard or may have the latitude to exercise limited discretion. As a matter of national policy, the officer may, for example, undertake non-innocent passage in portions of the high seas claimed as territorial waters in excess of generally accepted limits.\textsuperscript{238} Or the officer may engage in passage calculated to be innocent but non-compliant to protest a coastal State regulation or practice which the flag State views as impermissible under the 1982 Convention or other rules of international law.\textsuperscript{239}

Absent a world ocean police force, each littoral State must police and protect its own territorial waters. This involves, in the first instance, recognizing a violation and, in the second instance, deciding whether to take action. Thus, a coastal State official will decide the question of innocence based upon the observed facts of the warship's behavior and the official's knowledge, or lack thereof, concerning the law of innocent passage and applicable domestic regulations. As with the warship commander, this official may have either strict orders or limited discretion as to interpreting the warship's behavior and determining in what manner 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, the observer's ability to communicate, and the fidelity of the means of communication. The information may pass through other layers of perception and communication before reaching the decisionmaking level. 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 influ-


\textsuperscript{239} This is similar to the \textit{Corfu Channel} case. See supra note 31.
ences)\(^{240}\) the appropriate official or officials will decide whether the warship's passage is innocent and what measures, if any, should be taken. A message must then travel down through the layers of perception and communication before action is taken.

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 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, the reverse occurs. Knowledge of the law becomes greater, but the “facts” may have mutated.

Any decision must be made with an eye toward its likely effects. Unless much is known about the internal decisionmaking processes of the opposing government to predict its likely reaction, the best approach in determining a course of action would be to follow the “rational actor” model.\(^{241}\) This theory assumes that a State will follow “rational behavior . . . motivated by a conscious calculation of advantages . . . that . . . is based on an explicit and internally consistent value system.”\(^{242}\) The strategy of this model is “concerned with constraining an adversary through his expectation of the consequences of his actions.”\(^{243}\) Under the rational actor theory, a flag State would undertake non-innocent passage only if the benefits outweigh any harm anticipated in response.\(^{244}\) For example, non-innocent passage may occur if the flag State believes that the warship will complete its mission undetected or, if detected, will not be directly challenged due to the coastal State’s operational inability to challenge it, concern not to alienate the flag State, or belief that challenge of the warship would be met by superior force.


\(^{241}\) Id. at 24.


\(^{243}\) T. SCHELLING, supra note 242, at 15-16. Schelling lists various strategic moves. Id. at 119-61.

\(^{244}\) This formulation assumes within “harm anticipated” the deterrent effect of its anticipatable response to coastal State action. This appears to describe the calculus behind the sending of submarines into Swedish and Norwegian waters. See infra text accompanying notes 248-96.
The coastal State can influence warship behavior at the outset by making a credible threat. For instance, the coastal State may announce that warships violating the maritime frontier without permission will be subject to "appropriate measures."245 If a breach occurs, the coastal State must calculate the flag State's probable response to selected measures and, further, the commander's or flag State's selected measures, and further predict the flag State's estimate of the coastal State's likely reaction to a response. The flag State, in responding to the coastal State, makes a similar calculation.

Several lessons flow from this analysis. First, the decisionmaking process in recognizing and responding to instances of non-innocent passage is complex and contingent. Complexity results from the possible existence on both sides of a chain of communication, interaction of competing organizational and personal power relationships within the government, and the need to harmonize contemplated action with standard operating procedures and national objectives. Contingency results from dependence upon the accuracy of perceptions and communication, but primarily upon the adversary's behavior 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 the flag State and coastal State do. 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." Thus, 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. Behind the actions and reactions 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.

245. See R. Petrow, Across the Top of Russia, 352-53 (1967). State practice indicates that nations believe such a threat, even though it may be inconsistent with international law. See Balupuri, supra note 92, at 229.
Non-innocent Passage of Warships
SAN DIEGO LAW REVIEW

COASTAL STATE REACTION TO NON-INNOCENT PASSAGE: THE CASES OF SWEDEN AND NORWAY

Few foreign warship incidents in territorial waters have provoked as much concern in the littoral State or as much media interest in recent times as the increasingly frequent sightings of unidentified submarines in Swedish and Norwegian waters. Although these incidents highlight the use of submarines as vehicles of non-innocent passage, the manner in which the States have recognized, evaluated, and responded to the submarine intrusions provides a useful model for other coastal States in dealing with any type of non-innocent passage. The recent intrusions into Swedish and Norwegian waters are the most serious type of non-innocent passage, involving penetration by a covert vehicle often completely through territorial waters and deep into internal waters. Accordingly, the level of sanction employed in the cases that follow should be reserved for the most serious instances of non-innocent passage.

246. See supra note 11 and accompanying text.
247. A major factor in preserving the nuclear balance in today's world is the ballistic missile submarine. See, e.g. M. JANIS, supra note 14, at 1-2. Because nuclear deterrence depends so heavily upon the non-detectability of these submarines, major naval powers have pressed particularly for submerged transit through straits and archipelagos. See, e.g., Harlow, supra note 141, at 7-20. Although these submarines may pass under straits and archipelagic waters, few, if any, will ever venture into territorial waters. Their domain is the high seas where they can patrol undetected.

Other submarines have varying missions, from tracking down missile submarines to gathering intelligence. "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.

Coastal States probably would perceive frequent incidents of non-innocent passage by warships as abuses of innocent passage rights. This perception may lead to two potentially undesirable results. First, the coastal State may be more prepared to defend forcibly against perceived threats to its sovereignty. Second, the coastal State may take measures to resist warship transit near its shores, including transit through straits which lie within its territorial sea. Indeed, the latter result already is manifested in the prior notice or authorization debates, supra text accompanying notes 62-81, and in more stringent coastal State measures, infra text accompanying notes 267-68, 281-85.

Coastal State reaction probably would be manifested against submarines, which are the most likely innocent passage violators due to their capabilities of covert operation. Such reaction probably would not distinguish between large, deep-water, fleet ballistic missile submarines and the smaller vessels employed in coastal intelligence-gathering and surveillance. Rather, all submarines would be seen as tools of super power aggression and domination. Such a stance by coastal States would make the preservation of free transit rights by naval powers more difficult in any future law of the sea negotiations. Especially at risk would be continued submerged strait transit rights.
Soviet Submarines in Swedish Waters

Since the 1981 grounding of U 137 and forty reported violations of its waters by foreign submarines in 1982,248 Sweden has experienced at least three major submarine hunts: at Haarsfjärd in October 1982;249 at Sundsvall Bay in May 1983;250 and at Tore Bay, near the Finnish border, in July 1983.251 The submarines’ missions appear to have been both operational and intelligence-related.252 One plausible assessment of the motive behind these intrusions is that they are part of a larger plan by which the Soviet Union is trying to “Finlandize” Sweden to remove the political and military ambiguity this neutral State injects into the increasingly strategically important Baltic Sea.253

The submerged submarines off the Swedish coast most likely were sent to gather intelligence.254 Can one doubt that their commanders knew where they were and what rules applied?255 If the submarines

248. SUBMARINE DEFENCE COMMISSION REPORT, supra note 11.
249. See supra note 11.
252. See SUBMARINE DEFENCE COMMISSION REPORT, supra note 11, at 7; SUBMARINE U 137 REPORT, supra note 10, at 12.
253. Zumwalt & Bagley, Why Soviet Subs Continue to Probe Swedish Waters, Navy Times, July 11, 1983, at 21, col. 1 (“Soviet Finlandization of Sweden would clarify security in the Baltic Sea, offer ways to seed doubts in Norway about the adequacy of its defenses in the south, and introduce political uncertainties among the Scandinavian leaders who prevail politically, in part, through common values and coordinated national policies.”). It appears that this is part of a step-by-step process. For a detailed account of another long-term Soviet step-by-step erosion of international law, see Comment, supra note 100, at 711-14.
254. The information given applying to the submarine is partly contradictory, partly preposterous. During the hearings no believable information was given about the mission of the submarine in the area. It is very probably that the submarine violated Swedish territory to engage in unlawful activities. The most probable motive for the submarine's actions is intelligence activities.

SUBMARINE U 137 REPORT, supra note 10, at 12.

255. From documents on board and from the crew’s report, it can be concluded that there is no acceptable explanation as to why the submarine went off course by 130 kilometers during the approx. ten hours it takes to cover this distance. . . .

The submarine's Commander, LCDR Gusjitin, explained the grounding with technical malfunctions and human error. The proportions which he indicates go beyond all accepted principles of how to—in a way worthy of seamanship—in a safe manner command a submarine above the water line as well as below. The grounding must have taken place due to errors in navigation and maneuvering within the restricted zone.

Id. at 10. “According to the log it could be concluded that several bearings of the gyro compass had been altered.” Id. “[A]fter what has taken place in recent years the foreign
inadvertently strayed into the territorial sea, they would have surfaced when warned by a depth grenade. Such signal procedures are well known to all submarine officers. But the submarines in Swedish waters dove or evaded each time they were detected. Due to the number of incidents and the proximity of two large Soviet submarine fleets, most, if not all, of the submerged submarines probably belonged to the flag State of the grounded submarine, the Soviet Union. When the Swedish press speculated that the more recent submarines also belonged to the Soviet Union, no denial came from the East. Rather, Tass issued a statement of diversion, speculating that Sweden had invented the Haarsfjaerden incident to strain relations. Not surprisingly, the commission studying the October 1982 incident concluded that the six submarines involved were Soviet and on a military operational mission. This conclusion reflected poorly on the Soviet government since the Soviets have long claimed a twelve-mile territorial sea required thirty days prior permission for warships to transit the territorial sea and officially adopted a policy of attacking any submerged submarines detected in territorial waters.

To date, Swedish actions concerning the submarines demonstrate restraint and grave concern. In depth charging to force the submarines to surface, the Royal Swedish Navy has fired explosives at a submarine operations in Swedish waters cannot possibly be carried out by military authorities only, without prior knowledge and consent on the part of their political leadership. 

256. See O'Connell, supra note 11, at 451. “United States and NATO submarines identify themselves pursuant to these procedures, but Soviet ones do not.” D. O'Connell, supra note 61, at 144.

257. 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 source, giving two-thirds of the Soviet submarine fleet access to the North Atlantic. Swartztrauber, supra note 14, at 110.

258. See supra note 12.

259. See supra note 11. For a summary of the conclusion that the submarines belonged to the Soviet Union, see supra note 12.

260. 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 24, at 28.


263. See supra note 11.
prudent distance to avoid sinking the submarines. Likewise, Sweden
detained the grounded Soviet submarine and its crew only long
enough to complete an investigation of the matter. Both actions, cou-
pled with registering a diplomatic protest against the Soviet Union,
go beyond the measure of warning and expulsion, and into the realm
of necessary steps to prevent non-innocent passage.

The extensive effort in Haarsfjaerden and the actions taken
against the submarines in the two more recent instances — from the
detonation of sea-bottom mines to the dumping of 10,000 logs to
augment steel nets in sealing a shallow bay — emphasize the new
resolve with which the Swedish government is facing the submarine
menace. \(^{264}\) Further measures proposed to counter the threat include
increasing Sweden’s long-term budget for submarine defense, divert-
ifying funds and efforts in the short term from other sectors of defense
to quickly improve existing submarine defense capability, increasing
the number of personnel assigned to submarine defense duties, and
expediting procurement of necessary technical equipment. \(^{265}\) In addition, Sweden has tightened its relevant rules to permit the use of
“armed force—with the aim of forcing submarines to the surface—
... without prior warning against foreign submarines found sub-
merged in Swedish internal waters.” \(^{266}\)

The Minister of Defense recently announced:

> Any power deliberately violating Swedish territorial waters must take the
whole risk and the whole responsibility if a submarine and its crew come to
harm. There shall be no doubt about Sweden’s determination to prevent
future violations.

> Sweden’s capability to take action against foreign submarines is now be-
ing gradually improved. We shall continue to heighten the risks foreign in-
truders will have to take until such time as violations of this kind cease. \(^{267}\)

This statement unmistakably highlights the shift in Swedish policy
toward a stronger anti-submarine defense posture. This shift will un-
doubtedly affect the rational calculus of advantage and deterrence of
political and military leaders of the submarines’ flag State concern-
ning the increased risks of detection and destruction in Swedish
waters. \(^{268}\)

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264. Concerning the 1982 incident, although “restrictions concerning the use of mines were ordered for acceptable reasons of safety ... more depth charge and mine fire was ordered and executed by the Swedish military than ever since World War II.” SUBMARINE DEFENCE COMMISSION REPORT, supra note 11, at 4.

265. Statement by the Minister of Defense, Mr. Anders Thunborg, concerning the Supreme Commander’s report on the submarine incidents in the summer of 1983, at 1-2 (Sept. 16, 1983).

266. SUBMARINE DEFENCE COMMISSION REPORT, supra note 11, at 5.

267. Statement by the Minister of Defense, supra note 265, at 3.

268. Cf. Newsweek, May 9, 1983, at 36 (“With irritation rising in Sweden and Norway, the chances for more dangerous naval confrontations between the Soviets and the West seem likely to increase.”).
In view of this article's criteria of analysis, the decision for submerged intrusion in these cases probably came from the political leaders of the flag State, to the submarines' commanders. Swedish authorities apparently regarded the instances first as breaches of the international rule requiring submarines to navigate on the surface. In response, the coastal State authorities utilized internationally recognized naval procedures to warn the submarines they were in territorial waters and request them to surface. This failing, Sweden attempted with depth charges to expel the intruders. Only in those instances involving direct threats to their secret naval bases did they take further measures allowed by the right of protection against non-innocent passage. This right, as embodied in the 1958 and 1982 Conventions, equates to the customary rights of self-defense. After determining, by objective analysis, that the submarine's continued submerged presence near a top-secret naval base was not an exercise of innocent passage through the territorial sea, Sweden was justified in applying the minimal force necessary to protect its security. Because of the difficulty of identifying with absolute certainty the flag State of a submerged contact, Sweden could do little else than register a protest with the government believed to be responsible and apply increased measures of self-defense to deter or identify the intruders.

While a submarine may theoretically transit submerged without impairing its innocence, the presumption dictates against innocence in the case of one found lurking in the territorial sea. See D. O'Connell, supra note 61, 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.”); V. Šebek, supra note 262 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 60, at 143. The presumption against innocence becomes conclusive against one found deep within internal waters. See Submarine Defence Commission Report, supra note 11, at 4-5.

269. See observation of the Submarine Defence Commission, supra note 255.
272. See supra notes 225-36 and accompanying text.
273. See 1 D. O'Connell, supra note 20, 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 . . . .
The Hardangerfjord Submarine Incident

On April 27, 1983 at about 10 a.m., two civilians observed what appeared to be a submarine conning tower heading south-west out of Hardangerfjord on the Norwegian coast about 120 miles west of Oslo.\textsuperscript{274} The sighting was communicated to the Maritime Operations Centre, South Norway, in Stavanger within a half-hour. After interviewing the two observers, the Centre ordered an immediate search for a possible submarine.\textsuperscript{275} Less than three hours elapsed before one corvette, two submarines, and a P-3 Orion anti-submarine aircraft were involved in the search. The search force was augmented the following day by three frigates, one of which discovered a sonar contact in nearby Klosterfjord, east of the island of Stord. The frigate "fired a single Tern antisubmarine missile as a warning and a clear indication [to the submarine] that a search was in progress."\textsuperscript{276} The following week, search efforts revealed ten possible submarine contacts in the vicinity. Attacks by units of the Royal Norwegian Navy and Air Force expended twenty-four Tern missiles and six depth charges with no visible result. An investigation by the Chief of Defense concluded that one, or possibly two, foreign submarines had been in Norwegian internal waters, with another submarine "outside the territorial border."\textsuperscript{277} The submarines' possible objectives included preparing to exploit the strategic importance of Norwegian territorial waters as a potential operational area for submarines in a conflict, testing Norwegian anti-submarine response and defense capabilities, gathering intelligence concerning Norwegian defense installations, landing personnel and equipment relative to contacting agents, and placing various types of equipment on the seabed.\textsuperscript{278}

Norway's 1951 rules regarding warship passage require diplomatic clearance for entry into Norwegian waters, except for warships exercising innocent passage in the territorial sea and those in evident distress.\textsuperscript{279} Foreign submarines "are also required, when in Norwegian territorial waters, to be fully surfaced." Submarines traveling sub-

\textsuperscript{275} Id.
\textsuperscript{276} Id. note 274, at 2.
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 2-6.
\textsuperscript{279} Id. at 1. "Norwegian territorial waters extend out to . . . four nautical miles from the base-line. . . . The seas beyond the territorial waters are international waters. The seas between the base-line and the four-mile limit are outer waters of the territorial sea, and those within the base-line, inner waters of the territorial sea." Id. The latter are more commonly known as internal waters.
merged in Norwegian waters without receiving prior clearance “can be brought to the surface by use of force.” 280 In 1976, as the result of recommendations stemming primarily from an extensive submarine pursuit in Sognefjord about four years earlier, the Ministry of Defense adopted more stringent rules in dealing with possible violations of Norwegian territory by foreign submarines. 281 This change decreased the degree of warning required to be given an intruding submarine. For instance, “[i]n the event of clear violations of Norwegian territory in which there is no question of navigational error, as a general rule, no warning will be given before an attack is launched.” 282 If a navigational error is possible, a warning is given to alert the submarine of detection and to afford the vessel “the opportunity to surface or to alter its course out of Norwegian territory.” 283 

On April 29, 1983, the Norwegian government issued the following supplementary guidelines specifically for the submarine hunt in progress in the outer Hardangerfjord:

If new contact is made with a possible submarine, weapons are to be used for the purpose of forcing it up to the surface regardless of the potential danger of losing the submarine.

If a possible submarine does not surface voluntarily, the State that has ordered its submarine, contrary to international law, into another country’s territory must bear the responsibility should the submarine be damaged or destroyed and human life lost.

If a possible submarine wishes to surface, or if Norwegian authorities receive a message to this effect from the State to which the submarine belongs, the use of weapons will be stopped.

If it may be assumed that a possible submarine can no longer escape, one should avoid using such powerful weapons as will entail imminent risk of the submarine being lost.

If a possible submarine tries to escape and it is not otherwise possible to prevent its escape, Norwegian authorities will, as a last resort, permit the use of all available weapons. 284

In connection with these orders, the search forces had at their dispo-
sal depth-charges, Tern missiles, and torpedoes. The purpose in employing these weapons against a possible submarine was “not to sink it, but to force it to the surface.”

Although the search in this case involved a submerged submarine in internal waters, the applicable procedures and sanctions would be identical for a submarine confirmed to be passing non-innocently upon or beneath the surface of the territorial sea. Only the right of innocent passage distinguishes the legal regime of the territorial sea from that of internal waters. The measures adopted by the Norwegian government and the actions taken by the navy and air force were reasonable, restrained, and consistent with the right of protection embodied in the innocent passage articles of the 1958 and 1982 conventions and other rules of international law.

Both the uncertainties of perception, decisionmaking, and execution, and the rational calculus of advantage and deterrence manifest themselves in this scenario. “Norway’s fiords, which frequently penetrate more than 100 miles into the country’s interior, stretch a coast that would otherwise be about 1600 miles out to an effective 12,500, half the earth’s circumference.” Patrolling the entire coastline for submarines during peacetime is not operationally feasible. Accordingly, the armed forces must rely heavily upon sightings by the coastal population and airline pilots flying in coastal areas. Once the submarine sighting is communicated to an authority, the established Norwegian procedure for determining and acting upon violations of its territorial and internal waters largely parallels the process previously described: verification of details.

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285. The missiles are also referred to as “Terne” missiles. “The depth charges will be made to detonate at the same depth as the depth of the submarine. The Terne-missiles are equipped with proximity fuses so that the charge goes off upon passing the submarine within a certain distance. The most precise [sic] and powerful antisubmarine weapons are torpedoes.” Foreign Submarines, supra note 278, at 9.

286. Id.

287. See supra text accompanying notes 23 & 24.


289. See supra text accompanying notes 147-51, 239-41.

290. See supra text accompanying notes 241-45.

291. Doe, supra note 251.

292. Those conditions favouring a foreign submarine, as well as technological limitations and limited resources in the antisubmarine sector, make it difficult to obtain effective warning of the submerged entry of foreign submarines into Norwegian territorial waters.

In the event that a foreign state should send a submarine into, e.g., the Sognefjord og [sic] Hardangerfjord, there are small chances of its being detected against its wishes. Apart from an occasional village, these areas are very sparsely populated. Moreover, there is plenty of water, it is easy to navigate, the use of periscope and radar can be limited and it is not difficult to find desolate stretches for snorkeling without too great a risk of detection.

Foreign Submarines, supra note 278, at 4-5.
evaluation, communication to operational headquarters for further evaluation and decision, communication of the decision back down the chain, and so on.\footnote{This case involves the intentional decision by one or more submarine commanders, undoubtedly under orders issued by a military superior and probably with the knowledge of the highest governmental officials, to undertake a non-innocent mission through the territorial sea and into the internal waters of a foreign State. Apparently, the submarines' flag State found Norwegian waters of such great interest and importance that the State was "willing to run a great risk and cause political strain"\footnote{The higher risk of loss of a submarine and its crew will be sufficient to deter further violations of Norwegian waters remains to be seen. What has tipped the scale toward greater severity} in the face of the likelihood of a non-lethal response should any of the submarines be detected. With the increasing stringency of Norway's rules regarding submarine incidents, the parameters of the old calculus have changed. Whether the higher risk of loss of a submarine and its crew will be sufficient to deter further violations of Norwegian waters remains to be seen. What has tipped the scale toward greater severity}
in Norway's response is the blatant character of the intrusions\textsuperscript{295} and the "great vulnerability of [its] territorial waters to violations."\textsuperscript{296} Add to this the unlikely prospect that any submarine detected would attempt to fight back, and the stage is set for a much bolder approach by coastal States to future submarine incidents.

**CONCLUSION**

The foreign warship's right of innocent passage through territorial waters is essential to 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 ships 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 national claims to various degrees of control over the seas, the usage of inoffensive passage 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 Convention.

Building upon the customary innocent passage right, the 1982 Convention establishes separate transit regimes for the territorial sea\textsuperscript{297} and broader, more flexible regimes for international straits\textsuperscript{298} and newly-recognized archipelagic waters.\textsuperscript{299}

These transit rights are contingent to a greater or lesser degree upon the behavior of vessels exercising the rights and the practices of States policing 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 still fraught with danger.

Judging the quality of warship passage involves recognizing the occurrence of non-innocent passage and determining an appropriate

\textsuperscript{295.} Most of the observations have been made in daylight, often under particularly favourable observational conditions, which would normally cause any experienced submarine commander to exercise the utmost caution.

\textsuperscript{296.} Id. at 5.

\textsuperscript{297.} Id. at 10.

\textsuperscript{298.} 1982 Convention, supra note 15, arts. 27-32.

\textsuperscript{299.} Id. arts. 46-54.
response. Recognition requires combining accurate factual data with appropriate legal standards. Decisions regarding the innocence of passage result primarily from a rational calculus which includes simultaneous, unilateral consideration of the interests and values of both actors. Those values likely will reflect the government’s identity as a developing or developed nation, and a coastal state or maritime power. Coupled with internal institutional biases and political pressures, these values and goals shape a decisionmaking process that is both complex and contingent.

Broad options exist for sanction and peaceful resolution of disputes. The 1982 Convention steps beyond tradition by requiring the parties to attempt to resolve disputes peacefully, either by voluntary means or, failing that, by a flexible but compulsory framework for binding decisions. Insofar as the 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 strengthen certainty and trust in international dealings and confidence in and respect for the international legal order. To the extent that the compulsory procedures fail to remove dispute resolution from the realm of force, they foster indeterminacy 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. The world has 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 1982 Convention, but even if the Convention never enters into force, the 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.