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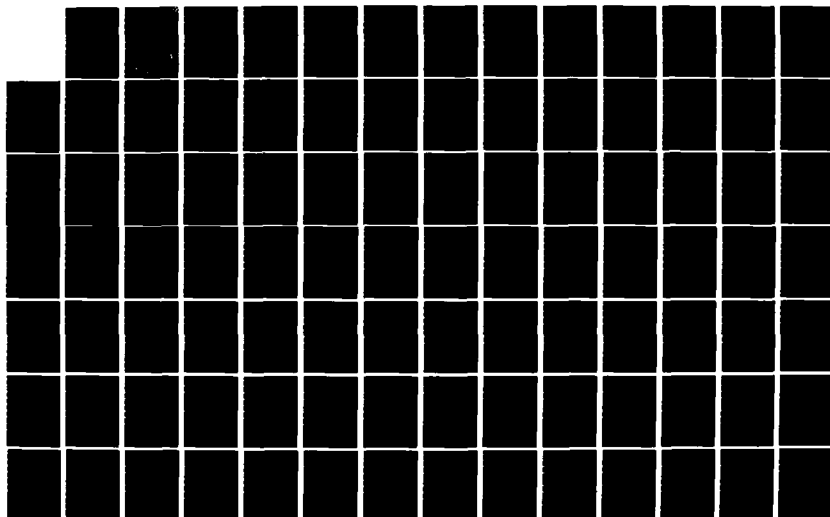

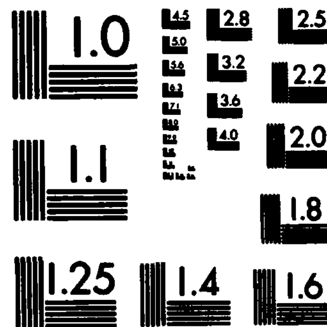


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# MEDITERRANEAN MARE CLAUSUM IN THE YEAR 2000?: AN INTERNATIONAL-LAW ANALYSIS OF PEACETIME MILITARY NAVIGATIONAL RIGHTS, PAST, PRESENT AND FUTURE, IN THE MEDITERRANEAN


by

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# DEDICATION

To my wife, Barbara Feicht Burnett, for her support and love.

Two great winds have never ceased to blow over the seas: the wind from the open sea, that of freedom, and the wind from the land, that of sovereignty. The former, for a long time has been predominant: reigning over the high seas it enters territorial waters in the form of innocent passage. It is only internal waters which are sheltered from its gusts.

-- René-Jean Dupuy, Secretary General of the Hague Academy of International Law[1]

# I. INTRODUCTION

The first gusts of the modern winds of freedom of the seas were generated in the maelstrom of competing Dutch and Portuguese interests in the East Indies in the early 1600's. Out of that controversy was born the dissertation by Hugo Grotius entitled Mare Liberum wherein Grotius defended Dutch interests in freedom of the open oceans.[2] Significantly, Grotius in his treatise chose to distinguish the freedom of the open oceans from the legal regime applicable to inner seas surrounded by land such as the Mediterranean.[3] That distinction was lost, though, in the ensuing centuries during the ascendancy to a position of primacy of the doctrine of freedom of all seas.

The years following the Second World War have seen a resurgence of the winds from the land carrying the authority of states to distances further and further removed from their coasts. Concomitantly, the shifting wind currents have generated increased demands by littoral states bordering enclosed and semienclosed seas for the creation of distinct legal regimes for the governance of those seas. One such regime, the "closed seas" doctrine, first advocated by the Soviet Union, specified that:

> [M]erchant vessels of nonlittoral states would have the same rights, including access to a closed sea, as those of littoral states. Except in time of war, the regime for merchant vessels in the closed sea would be identical to that of the high seas, apart from whatever straits regulation may be necessary. The warships of littoral states would enjoy a right of free and unrestricted navigation in closed seas beyond the territorial waters of other littoral states, but the warships of nonlittoral powers would have no right of access to closed seas.[4]

The exclusion of warships of nonlittoral powers from closed seas underlay the suggestion in the early 1960's by Nikita Khrushchev, the Soviet Premier, that the Mediterranean be made a zone of peace.[5] Khrushchev's successor Leonid Brezhnev surfaced similar ideas during speeches he made during the early seventies,[6] although the continued growth in the Soviet naval presence in the Mediterranean has gradually quieted Soviet demands for the exclusion of nonlittoral naval forces from that basin.

For some of the littoral countries, though, the concurrent presence of the Soviet and American fleets in the Mediterranean has transformed that Sea into an area of increased tension. In so doing, according to the Albanian representative speaking at the opening session of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1973, the two superpowers have endangered the security of the countries bordering on the Mediterranean Sea:

> The leader of the Albanian people, Enver Hoxha, had said that Albania, as a country of the Mediterranean, wanted the Mediterranean basin to be a zone of peace and cooperation and had added that it was the duty of all peace-loving countries to demand the removal of those fleets and combat any attempt to impose political hegemony in that part of the world, for the Mediterranean belonged to the Mediterranean peoples and countries.[7]

Albania's call for a Mediterranean zone of peace is by no means isolated. All of the other Mediterranean littoral states with the possible exception of NATO-members Turkey, Italy, and Greece have over time promoted or endorsed the withdrawal of Soviet and American warships from the

Mediterranean with various degrees of commitment.[8] Lebanon, Syria, Algeria, Tunisia, Libya, Egypt, France, Spain, and Yugoslavia, in particular, at one time or another since 1968 have expressly stated their support for the withdrawal of all foreign naval forces from the Mediterranean.[9] Such claims, although patently contrary to superpower interests and practice, may be no more extreme now than the 200-nautical-mile resource-zone claims of Peru and Chile thirty years ago which have recently found their way into international law as generally accepted 200-nautical-mile exclusive economic zones. In the same vein, the significance of international straits such as Gibraltar for navigation purposes, while amply demonstrated by the attention devoted to such straits in UNCLOS III, pales in significance when compared to the suggestion of closure of entire seas, such as the Mediterranean, to nonlittoral naval forces.

## II. SCOPE AND METHODOLOGY

The objective of this study is to identify and assess the legal prescriptions, past, present and future, concerning peacetime warship navigation in the Mediterranean, with particular attention to those norms which threaten to close the Mediterranean to peacetime navigation by naval forces of nonlittoral states. In identifying these international legal norms, it should be recognized that the prescription of rules for the oceans and seas of the world has historically been accomplished principally through custom and practice and secondarily, and more recently, through multilateral conventions. The conventional lawmaking process in the post-WWII era has involved the negotiation in multilateral conferences sponsored by the United Nations of legal norms that, in part, codify

existing custom and practice and, in part, enumerate new prescriptive norms. The customary lawmaking process, meanwhile, is decentralized, evolving through a process of claim and counterclaim as participants in the international legal arena, principally sovereign states, propound certain claims to the seas and review and appraise the claims of others.

> It should be explained that the double function of states as both claimants and decision-makers enmeshes them in a network of affirmative mutualities and reciprocities as well as negative reprisals and retaliations. The result is that national officials who are capable of long-range calculations of national self-interest are encouraged to advance claims which are consistent with juridical principles and expectations. If they advance claims or make decisions not justified in law, they run the real risk of being subjected to retaliations.[10]

In the international arena, then, a strict recital of norms or principles of international law is inadequate. A more expansive approach is required which discusses not only the prescriptive norms to be applied in the decisionmaking process, but also the decisionmaking process itself, including the value interests whose consideration is necessary in each case. Those values include military power, wealth, well-being, and enlightenment and are separated into two distinct subcategories, viz: inclusive and exclusive.[11]

Inclusive values are those that are shared by more than one claimant in the international legal arena such as freedom of navigation on the high seas. The most important inclusive value, however, is the shared world community interest in maintaining a minimum world public order and consequently a world in which all countries and peoples enhance their own

national, community and personal values in an environment free from intimidation and aggression. Exclusive values, on the other hand, are values which are not shared by others and therefore relate solely to the claimant. For example, in the law-of-the-sea context, a claim by a coastal state to limit foreign navigation in its adjacent waters, such as the Libyan claim of sovereignty over the Gulf of Sidra, also known as the Gulf of Surt, in the Mediterranean,[12] is an exclusive claim.

To facilitate the task of analysis here, the remainder of the study is divided into four sections. The first section borrows from Justice Oliver Wendell Holmes advice that a page of history is worth a volume of logic in understanding the juridical decisionmaking process, by tracing the ebb and flow through history from ancient Greece to the convening of UNCLOS III of the legal regime and inclusive and exclusive values affecting peacetime navigational freedoms in the Mediterranean. The section that follows, after analyzing the existing geo-political character and resources of the Mediterranean with particular attention to its present-day military uses, focuses on the current peacetime navigation regime in the Mediterranean for warships both in practice and under the UNCLOS III conventional norms. The third section, relying on historical trends and existing and emerging international legal norms, analyzes the prospects through the year 2000 for peacetime military navigation in the Mediterranean, while the final section sets forth conclusions and recommendations concerning the existing and emerging navigation regime for warships in the Mediterranean.

The Mediterranean Sea, by way of introduction, is geographically an inland sea covering approximately 970,000 square miles sandwiched between the continents of Europe, Asia, and Africa. It connects with the Atlantic Ocean through the Strait of Gibraltar, with the Black Sea 2,000 miles to the east through the Straits of the Bosporus and the Dardanelles, and with the Red Sea and the Indian Ocean, through the man-made Suez Canal. The prevailing climate in the Mediterranean is temperate conducive to both fishing and navigation, which man has been doing there since the dawn of recorded western civilization thousands of years ago.

## III. HISTORICAL DEVELOPMENT OF PEACETIME NAVIGATIONAL RIGHTS IN THE MEDITERRANEAN

### A. Pre-Roman Origins

The history of the Eastern Mediterranean prior to, and apart from, the states of classical Greece and Rome records many instances where a ruler asserted exclusive dominion over the sea. In pre-classical Greece, for example, there was an ordinance "concerning the Erythrean Sea laid down by King Erythras, when he was the master of that sea, that forbade the Egyptians to enter it in a ship of war and restricted them to one merchantman."[13] Most of the claims by rulers, though, to exclusive control over the seas prior to classical Greece were de facto rather than de jure in nature, as there was little recognition of a legal concept of maritime dominion. Rulers knew that dominance at sea was desirable and possible, but the question as a matter of law and right had generally not been recognized.[14]

In classical Greece, one encounters the first recognition of a legal concept of maritime dominion.[15] When the Athenians defeated the Persian naval forces in 478 B.C., they stipulated that the latter were "not to sail west of the Cyanean and Chelidonian islands with any armored ships of war."[16] Fifty years later, in 423 B.C., when the Athenians attained a predominance over the Spartans, "they imposed upon the latter the regulation that neither Sparta nor any of her allies should sail along the coasts of Greece in war vessels or in any ships of over five hundred talents burden."[17] The Athenian ascendancy to naval dominion, then, resulted in the exclusion of other naval powers from the coasts of the Greek peninsula and the waters among the islands of the Aegean Sea.

The Athenians employed their naval power to guarantee peacetime commerce and trade and end piratical dominance of the sea. In other words, they ruled the waves in the interest of freedom of the seas, although they conceived of maritime liberty as a product of maritime dominion. They did not, however, lay down any formal rules of legal rights respecting sea dominion nor did they say whether it extended out over the open sea of the Mediterranean. Rather, they regarded sea dominion as, in the main, an adjunct of military and commercial power.

While the Greeks were dominant in the Eastern Mediterranean, the Carthaginians were ascending to command of the seas of the Western Mediterranean. At one time, Carthage even declared a penalty of death for unlicensed trading in the Western Mediterranean.[18]

## B. Roman Practice and Law

The Carthaginians, though, were soon locked in a bitter struggle with the emerging state of Rome. In one of the settlements imposed by Rome upon Carthage in the course of their long struggle, the latter was required to surrender her whole navy and its equipment and supplies and to agree not to navigate northward toward Rome beyond a certain promontory.[19] Roman practice, then, was not unlike that observed in the Eastern Mediterranean. Eventually, though, Rome succeeded to maritime dominion over not just local or limited bodies of water like the Greeks in the Aegean Sea, but the whole Mediterranean, an inland sea in one sense, but the open sea as the Romans knew it.

In consolidating its control, the Roman state was confronted with a serious threat to its commerce and trade from pirates. Pompey in 67 B.C. recognized the threat and a law was enacted which gave him not merely command at sea but rather outright authority and responsibility over all men at sea in the Mediterranean.[20] Pompey then divided up the sea and coasts into districts, cleared all of these districts of pirates, and assigned a commander with a squadron over each district.[21]

Juxtaposed with these sweeping imperial acts in Roman state practice are the subsequent legal pronouncements of the jurist Marcianus preserved in the Digest of Justinian. Marcianus announced therein that the sea and its coasts are common to all men and ownership of the sea and sand beneath it belongs to no one.[22] Since Marcianus lived in the early years of the second century of the Christian era, it follows that his dictum was known

in a written form as early as the beginning of the second century. "Since, further, Marcianus belonged to that class of jurists the official pronouncements of which were recognized as being statements of the law, it follows that the doctrine of the common right of all men to a free use of the sea was a law of the Roman Empire at the beginning of the second century . . . ."[23]

In linking the seas to a common-use concept, the Roman jurists had raised a powerful challenge to the concept of maritime dominion. The remark of Emperor Antonius "I am indeed lord of the world, but the law is lord of the sea," may be taken as a fine Roman statement of the principle of maritime freedom.[24]

The apparent contradictions between this principle of maritime freedom articulated by the Roman jurists and the maritime practice of the Roman state warrants an explanation. Simply stated, the Digest refers merely to the free use, common use, and public use of the sea by all members of the Roman state.[25] They pertain to the rights of individuals toward one another in a single national society. They are not rules of interstate or international law at all since the entire Mediterranean littoral was under Roman dominance. Thus, on closer examination, one discovers that, when Antonius spoke on maritime law, he was referring not to the law of nations but rather to Roman public law alone.[26] In sum, because the Mediterranean was a Roman lake, it was subjected both to imperial control such as that exercised by Pompey and free usage by all Romans as Marcianus proclaimed. The precedential value of Roman maritime law in the modern international-law context is necessarily constrained by the fact that her maritime

dominion was never recognized legally by other free states through treaties concluded between Rome and other powers or the free consent of the other powers.[27]

C. Middle Ages

Following the decline of the Roman Empire in the West and with the gradual disintegration of the Eastern Roman Empire, the Mediterranean Sea was divided by those states able to exercise effective control over the sea, most notably the Italian city states that had vanquished the sea power of Islam.[28] Pisa and Tuscany controlled the Tyrrhenian Sea on the western side of the Italian peninsula and imposed tolls upon those entering its waters.[29] The Republic of Genoa did likewise further north in the Ligurian Gulf.[30]

Somewhat later, at the end of the thirteenth century, on the eastern side of the Italian peninsula, Venice, eminent in her commerce, wealth and maritime power, assumed sovereignty over the whole of the Adriatic Sea.[31] It was said that Venice possessed "as full jurisdiction in the sea as in the city," and that the neighboring "gulf" belonged to Venice.[32] Venetian maritime dominion over the Adriatic included the right to levy tribute on the ships of other peoples which navigated the gulf or to prohibit their passage altogether. Neighboring cities and commonwealths soon acceded to the Venetian claims followed later by Spain and the Papacy.[33] Although initially established by naked force, the right of Venice to the dominion of the Adriatic was eventually recognized by custom and treaty and, in fact, survived long after Venice had fallen from her greatness for it

enhanced the inclusive interests of the regional community in commerce by serving as a buffer against the Saracen pirates and against encroachments by the Turks into Europe.[34]

The predominant trend, then, in state practice in the Mediterranean was in the direction of appropriation of adjacent seas. The Italian city states were motivated by an exclusive interest in securing the safety of their coasts and commerce, levying tribute for revenue purposes on foreign shipping, protecting and preserving coastal fisheries for their subjects and, most importantly, maintaining a monopoly of trade as far as possible in their own hands. Yet, at the same time, the exercise of maritime dominion by the Italian city states did have the secondary effect of purging the seas of preying Saracen and Greek pirates to the mutual benefit of all merchants and mariners.

Appropriation of the seas was by no means limited to the Mediterranean. The Baltic Sea was claimed by Denmark, Sweden and, later, Poland.[35] In the North Atlantic, England staked a claim to the Narrow Seas (St. George's Channel, the Bristol Channel, the Irish Sea, and the North Channel), the North Sea, and a portion of the Atlantic Ocean bounded by a line from Cape Finisterre in Spain northward around the British Isles to Norway.[36]

The discovery of the New World, meanwhile, saw Spain and Portugal ascend to positions of maritime preeminence. They claimed dominion of the Western Mediterranean in succession to Rome[37] and, then, in 1494, in the Treaty of Tordesillas agreed to a division of the oceans between

themselves.[38] Spain claimed the exclusive right to navigation in the western portion of the Mediterranean, in the Gulf of Mexico, and in the Pacific.[39] Portugal assumed a similar right in the Atlantic south of Morocco and in the Indian Ocean.[40] In 1506 a Papal Bull approved and confirmed the Treaty of Tordesillas and instructed on its inviolable observation.[41] The practice of claiming such exclusive sovereignty had become the accepted standard of international law and was generally recognized by both the jurisconsults of that day and also the various foreign offices.[42]

The ensuing decades, though, saw an erosion of the sovereign-seas concept. First, the British claimed the right to freedom of the seas beyond their Narrow Seas. Thus, in 1580, the Queen of England, Elizabeth I, when confronted by a protest from Spain concerning a voyage by Sir Francis Drake through the Pacific, declared: "[T]he use of the sea and air is common to all . . . . [T]itle to the ocean [cannot] belong to any people or private persons; forasmuch as neither nature nor public use and custom permitteth any possession thereof."[43] Six years later, Drake's fleet defeated the Spanish Armada in the West Indies effectively terminating Spain's exclusive claim to vast high-seas areas in the Western Hemisphere. The British were not alone, though, as the Dutch challenged the Portuguese and Spanish attempts to exclude Dutch shipping from Far Eastern waters. That controversy was to touch off a great juridical debate between proponents of the principle of freedom of the seas (mare liberum) and those who regarded as lawful the appropriation of vast areas of the oceans by one state (mare clausum).

D. Mare Liberum versus Mare Clausum Controversy

In 1609 Hugo Grotius published Mare Liberum for the purpose of defending the right of the Dutch East Indies Company to free navigation and commerce in the East Indies as against Portuguese pretensions of sovereignty in the East Indies seas. Grotius predicated his defense of peacetime navigational freedom of the oceans on four basic arguments: (1) the open seas are impossible of permanent occupation and that which cannot be occupied cannot be the property of anyone, sovereign, pope or otherwise; (2) navigational uses of the open seas are inexhaustible obviating the need for management and control by a sovereign; (3) the fluidity of the open seas renders them impossible of frontier demarcation, a necessary prelude to dividing the seas among sovereigns; and (4) freedom of the high seas is but an adjunct of the more basic right to free commerce and communication.[44] In advancing these arguments, Grotius felt that maritime liberty in peacetime represented good policy from a national and general international viewpoint.[45] Moreover, he identified the Dutch position with general human welfare,[46] in effect, advocating the inclusive interests of the world community in navigation of the open seas.

The legal authorities cited by Grotius in support of his arguments were borrowed extensively from the Digest of Justinian. Grotius was forced, however, to transpose the Law of Marcianus on free use of the Mediterranean by Roman subjects so as, first, to include within its coverage completely sovereign states possessing equal stature under international law and, second, to make the Roman law applicable to all open oceans on the face of the globe, not merely those waters contained in the

known world under Roman dominion.[47] Grotius chose, however, in his analysis, as mentioned in the introduction to this study, to exclude inner seas, such as the Mediterranean, from the coverage of his lofty principle of freedom of the oceans.[48] The first inklings in modern juridical writings, then, of a "closed seas" doctrine had surfaced.

The responses to Grotius' argument for freedom of the seas were legion.[49] They emanated not only from Spain and Portugal, but also from other states such as England that had articulated claims to extensive territorial seas. The first noteworthy respondent was William Welwood, an Englishman, who perceived Grotius' book as a disguised attack on Britain's claims to exclusive fisheries jurisdiction off the coasts of that nation. In his book De Dominio Maris Welwood found a duty on the part of rulers of coastal states to preserve uses of the adjacent sea to the benefit of the coastal state's people. For Welwood, the right of navigation in the adjacent sea by any vessel was the preserve of the coastal state sovereign.[50]

In 1635, the most influential of Grotius' respondents, John Selden, published Mare Clausum sev de Dominio Maris, in which he further elaborated on Welwood's work defending the British territorial-sea claims.[51] Selden also attacked Grotius' views by (1) denying the exhaustibility of the seas in instances of promiscuous abuse, (2) pointing out that limits could be set in the open sea by nautical science, and (3) maintaining the sea's physical susceptibility of appropriation as demonstrated by the precedents set by the Italian city states in the Middle Ages, the Turks in the Black Sea, and the Poles in the Baltic Sea.[52]

Although Grotius had left a gap in his analysis by admitting the susceptibility of inner seas to national dominion, Selden chose not to exploit that distinction to the fullest since he could not treat the inner seas, as specially adapted to national dominion without implying some doubt concerning the outer sea's susceptibility to sovereign appropriation.[53] Nevertheless, Selden clearly supported the principle that the Mediterranean could be appropriated by a sovereign.[54] Moreover, Selden denied the necessity for a sovereign to possess the adjacent shores of a sea before it could appropriate the sea finding instead that the presence of naval forces might be sufficient to accomplish that task. For those seas under a state's dominion and susceptible to closure by the sovereign, Selden conceded that "to prohibit innocent navigation would be contrary to the dictates of humanity; but he held that the permitting of such innocent navigation does not derogate from the dominion of the sea -- it is comparable to the free passage on a road across another's land -- and it cannot always be claimed as a right."[55] Selden's remarks on innocent navigation suggest the nascent development of the doctrine of innocent passage, a concept analyzed in greater detail later in this study.

The Grotius-Selden controversy reflected only too clearly the ongoing struggle between the winds of freedom blowing in from the open seas on the wings of rapidly growing world commerce and trade and the winds of sovereignty coming off the coast driven by historical practice and theology in the form of Papal Bulls. The contest, though, was not waged over navigation rights in the Mediterranean since the lucrative trade routes with the Far East and the New World lay outside the Mediterranean in the

open oceans. Thus, one finds little discussion of the Mediterranean and an apparent willingness on both sides to concede that inner seas may be appropriated by a sovereign with forseeable adverse consequences for peacetime navigational uses of that sea by vessels of nonlittoral states. In fact, France claimed from the 15th to the 18th century rights to an adjacent sea in the Mediterranean, the extent of which remained highly variable, but eventually crystalized in a zone with an exterior limit of 100 miles.[56]

E. Triumph of the Doctrine of Freedom of the Seas, 1650-1945

By the end of the seventeenth century, the principle of mare liberum had gained the upper hand. Moreover, an effort was made to define as narrowly as possible the "inner seas" concept, as well as the breadth of waters adjacent to a coastal state subject to its sovereignty. Cornelius van Bynkershoek, a great Dutch jurisconsult, writing in 1702 on the "inner seas" concept asserted that:

> [N]o valid claim over the sea can be made on the basis of sovereignty over neighbouring [sic] land unless the shores of the sea belong to one State that exercises effective control over it, and the said sea communicates with the rest of the ocean only by straits that are so narrow that they can be controlled by the State from its coast.[57]

Control of such straits from the coasts could only be effected, according to principles espoused by Bynkershoek, when overlapped by the range of coastal defense guns on both sides of the strait.[58] When another jurist suggested three miles as the range of cannon shot,[59] the concrete

translation of Bynkershoek's principle into reality meant straits six miles or less in width, both sides of which were occupied by one state, might be controlled by the littoral state.

Under Bynkershoek's principle, since the Mediterranean littoral was not occupied by only one sovereign and the Strait of Gibraltar exceeded six miles in width, the Mediterranean did not constitute an inner sea and therefore was not subject to the exclusive dominion of a sovereign or closure from peacetime navigational uses. Significantly, a few years later, the German mathematician and philosopher, Christian Wolff in analyzing the right to navigate "occupied seas," a concept similar in content to the "inner seas" concept, concluded that: "Every nation has the right to navigate even the occupied seas, unless there should exist just fear of loss."[60] Like Selden before him, Wolff was flirting with the concept of innocent passage.

A broadly conceived "closed" or "inner" seas concept was by no means vanquished, though, as the Baltic littoral powers repeatedly endeavored by treaty in the eighteenth and nineteenth centuries to exclude permanently nonlittoral naval forces from the Baltic Sea. The major maritime powers, England, France and the Netherlands, however, refused to accept such a regime.[61]

In the Black Sea, until 1774, when Russia gained a foothold on the littoral, that body of water was considered to be an Ottoman lake.[62] Navigation through the Bosporus was prohibited to foreign merchantmen and warships alike.[63] After 1774, Russia sought to continue the exclusionary

rule for nonriparian warships which they achieved in treaties with Turkey commencing in 1789 and continuing through 1833. But:

> The London Conference of 1840 and 1841 signified the turning point in the history of the Black Sea. Since then, and through subsequent international agreements, such as the Paris Treaty of 1856, the London Convention of 1871, the Lausanne Convention of 1923 and the Montreux Convention of 1936 [discussed in greater detail later in this study], the Black Sea powers ceased to be the sole legislators of the legal regime in the area. Russia, and later the Soviet Union resented this practice, as all the quoted international conventions were unfavourable for them: they either completely closed the Black Sea to warships, including Russia's, or forbade the egress of Russian naval vessels, and at times completely opened the Black Sea to warships of all powers; but while they sometimes restricted, they never banned the ingress of naval vessels of nonriparian States.[64]

While the "inner seas" concept was eroding with the passing centuries, the broad claims to marginal waters were also receding. The British had, as previously mentioned, advanced extensive claims to the Narrow Seas around the British Isles. Passage through those waters was at the discretion of the British sovereign, who insisted as a matter of practice, confirmed in the Anglo-Dutch Treaty of 1653, that foreign ships in the British seas, such as the English Channel, must strike their topsails in deference to the British sovereign.[65] In defense of the British position, Vattel, another Dutch jurist, claimed that a nation can appropriate a marginal sea as a means of security. Vattel continued: "These marginal seas, thus subject to a Nation, are part of its territory and may not be navigated without its permission."[66]

With the ascendancy of Great Britain to supremacy of the seas after its victory at Trafalgar during the Napoleonic Wars, her claims to sovereignty over broad expanses of the North Sea and Atlantic, along with the practice of salutes by foreign vessels in those waters, quietly slipped into oblivion as she used her Navy to open the way for her merchant ships to sail freely over the Seven Seas.[67] The doctrine of freedom of the seas now ruled the world, including the Mediterranean Sea. Lord Stowell in the case of Le Louis in Great Britain summed up the rule in one sentence: "[A]ll nations . . . have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation."[68] In a similar vein, Justice Story wrote for the Supreme Court of the United States in The Marianna Flora: "Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there."[69]

At the same time, the concept of a narrow territorial sea, such as that articulated by Bynkershoek, continued to survive. Freedom of passage through those seas by foreign vessels was slow to develop as rigid conceptions of territorial sovereignty dictated that passage remain a tolerance subject to the coastal state's discretion. Selden and Wolff's writings, though, had recognized that non-threatening passage through seas subject to sovereign dominion, ought to be tolerated by the coastal sovereign. Vattel similarly held in the territorial sea that: "[A] Nation cannot refuse access to non-suspected vessels, for innocent purposes, without infringing its duty."[70] It was not until the middle of the

nineteenth century, however, that the concept of a right of innocent passage in the marginal seas obtained serious consideration. The practical catalyst to the assertion and acknowledgment of this right of passage was the proliferation in that century of economies reliant on the process of maritime trade.[71] Because the driving force for this doctrine was the mutually-shared inclusive interests of the world community in commerce, there was a general acceptance by the close of the nineteenth century of the doctrine of innocent passage for merchant vessels. Their passage through territorial waters of a coastal state, then, was not subject to that coastal sovereign's consent or prior authorization.

For warships, though, the interest in peacetime navigational freedoms was not as widely shared by the world community for reasons succinctly stated by the American delegate, Elihu Root, in his argument to the North Atlantic Coast Fisheries Tribunal in 1912: "Warships may not pass without consent in this zone because they threaten. Merchant-ships may pass and repass, because they do not threaten."[72] Predicated on the "threatening" nature of warships, many states continued to insist on prior authorization before a foreign warship could transit its territorial waters in the Mediterranean or elsewhere.

In the process of establishing the free and uninterrupted use of the seas for the ships of all nations, the great commercial powers had to extinguish piracy wherever it existed. Until the start of the nineteenth century, Great Britain in common with other nations, had paid an annual subsidy to the Bey of Algiers as an insurance against attacks by the pirates of the Barbary Coasts.[73] But in 1816, the British, accompanied by

six Dutch cruisers, destroyed the nests of Algerian pirates.[74] During the same time period, the American Navy wrote a magnificent chapter in its history in the war with the Barbary Coast pirates[75]. As a consequence of the British and American operations, the Mediterranean and the Western Atlantic were freed from the piratical scourge which had rendered navigation in those waters dangerous for many years. Significantly, the strong punitive action taken by legitimate users of the Mediterranean Sea presaged the outlawry of piracy under international law. Thus, Lord Stowell's judgment in Le Louis announced: "With professed pirates, there is no state of peace. They are the enemies of every country and at all times; and therefore are universally subject to the extreme rights of war . . . ."[76]

Even though freedom of the seas was preeminent, the prescription against piracy meant that a right to regulate the open seas had been conferred upon the international community of nations to preclude a state of anarchy or lawlessness. The demise of piracy in the Western Mediterranean was followed in the latter part of the nineteenth century with the inauguration of the Suez Canal in 1869.[77] Passage through the Canal increased rapidly as it soon became an international waterway between the Indian Ocean and Europe and the Atlantic Ocean. In recognition of this international usage, in 1888, the Constantinople Convention was signed by Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain, and Turkey. It provided, in pertinent part, that:

> The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

> Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.[78]

At the western end of the Mediterranean, freedom of navigation in the Strait of Gibraltar was acknowledged in the Anglo-French Declaration of April 8, 1904, which Spain later adhered to in the Franco-Spanish Treaty of November 27, 1912.[79] The Anglo-French Declaration included a prohibition against the erection of any fortifications or strategic works upon specified parts of the African shore of the Strait.

The closing of the Turkish Strait of the Dardanelles, ten years later, during World War I prompted similar efforts to secure freedom of transit and navigation there in time of peace and of war, a status which was recognized in the Treaty of Lausanne in 1923.[80] Thirteen years later, on July 20, 1936, a superseding Convention was signed at Montreux by Great Britain, Turkey, France, Greece, Bulgaria, Italy, Japan, Rumania, Yugoslavia, the Soviet Union and, a few years later, Italy, which stipulated the complete freedom of navigation and transit of the Turkish Straits in time of peace as in war of merchant ships of all nations, subject to the payment of charges and the regulation of sanitary measures as prescribed by the Convention.[81] As regards warships, in peacetime, nonlittoral powers were subject to aggregate tonnage limitations and a total ban against their submarines and capital ships over 15,000 tons passing through the Straits, while the littoral powers were constrained by (1) a requirement for prior notification to Turkey of planned warship

transits; (2) a prohibition against passage of aircraft carriers; and (3) several procedural restrictions on passage of other large capital ships and submarines.[82]

While the transit regime for the straits and canals affording access to the Mediterranean Sea was codified in international conventions and declarations by the 1920's, the League of Nations was endeavoring to codify general principles of peacetime maritime law. The League's efforts culminated in the first Conference on "the Progressive Codification of International Law," as it was styled, which met at The Hague from March 13 to April 12, 1930.[83] The Conference was unable to agree on a treaty as it encountered difficulties in reaching a consensus related to two areas: (1) the breadth of the territorial seas, with twenty states supporting three miles, four Scandinavian states backing four miles, and twelve nations advocating six miles; and (2) the right of a state in a contiguous zone extending up to twelve miles from its coast to take measures to prevent infringement of its customs and sanitary regulations, a right which was opposed by the maritime powers of Great Britain, Japan and the United States.[84]

The Conference was successful, meanwhile, in preparing a Draft on "The Legal Status of the Territorial Sea," which even though only a Draft constituted an important document in the history of codification of the law of the sea. The Draft recognized in article 5 the right of innocent passage of merchant vessels provided that: "[N]o act must be done prejudicial to the security, the public policy, or fiscal interests of the State."[85] Article 6 of the Draft permitted a coastal state, in conformity

with international usage, to provide in the territorial sea for (a) the safety of traffic and protection of channels and buoys; (b) protection against pollution of any kind; (c) protection of the products of the territorial sea; and (d) protection of the rights of fishing, shooting and analogous rights belonging to the coastal state.[86] For warships in the territorial sea, article 12 of the Draft provided: "As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea, and will not require a previous authorisation or notification. The coastal State has the right to regulate the conditions of such passage. Submarines shall navigate on the surface."[87]

The Hague Codification Conference had formulated a legal regime for the territorial sea which heavily influenced the subsequent work of both the International Law Commission following the founding of the United Nations in 1945 and the First United Nations Conference on the Law of the Sea (UNCLOS I) which convened at Geneva in 1958. While the prevailing winds in the Mediterranean and on the open oceans in the 1930's were clearly those of freedom, the creation of specific legal regimes for the Suez Canal, the Turkish Straits, and the Strait of Gibraltar demonstrated that the law was not solely universal in its nature and character. Instead, regional solutions to navigation rights in peacetime were considered both functional and permissible. Mediterranean regionalism, though, was not limited to its access straits and canals. In 1929, the non-governmental International Commission for the Scientific Exploration of the Mediterranean Sea was established in Madrid in order to promote oceanographic and biological studies in the Mediterranean by scientists

from both Mediterranean and non-Mediterranean states.[88] To this day, the Commission still exists,[89] although the organization has been supplanted in importance by other Mediterranean regional organizations.

F. First Decade Following World War II: Security Interests and Creeping Unilateralism and Regionalism in the Mediterranean

The end of World War II, with the Western European powers left in economic shambles and the United States emerging economically unscathed, inaugurated a new world geo-political balance. The Soviet-American wartime alliance, meanwhile, quickly went into deep freeze with the start of the Cold War as Eastern Europe fell under the Soviet sphere of influence. The East-West military confrontation was later institutionalized with the formation by the western industrialized nations of the North Atlantic Treaty Organization (NATO) and by the Eastern European Powers of the Warsaw Pact.

Although the interests of the United States by 1946, as reigning mistress of the seas, clearly dictated the maximizing of the doctrinal freedom of the seas, that fact went unobserved by her leadership in 1945, when President Roosevelt approved in principle and, after his death, President Truman signed in fact two Proclamations claiming unilaterally for the United States the continental shelf and fisheries resources contiguous to the American coast.[90] The American precedents, together with technological innovations such as the purse seine, sonar, radar, and off-shore drilling, which permitted increased exploitation of the living resources of the sea and the petroleum resources of the continental shelf,

touched off a wave of unilateral, exclusive coastal state claims to large expanses of their adjacent seas that continues largely unabated to this day.[91]

In the Mediterranean, the unilateral coastal state claims to waters beyond a narrow three-mile territorial sea first appeared on the northern and eastern littoral. France and Italy claimed a twelve-nautical mile contiguous zone for customs purposes.[92] Egypt, Israel and Yugoslavia extended their territorial seas from three- to six-nautical miles.[93] Lebanon claimed a six-nautical-mile contiguous security zone.[94] Israel and Libya each staked claims to their continental shelf.[95]

The most noteworthy unilateral claims in the Mediterranean, though, during the decade following World War II were advanced by Albania. As a member of the Eastern bloc, which traditionally maintained small coastal navies and fishing fleets, Albania exhibited little interest in maritime freedom. Instead, in 1946, Albania attempted to close the Corfu Channel, part of the strait lying within Albanian territorial seas and part within Greek territorial seas.[96] That was followed in 1952 by Albania's claim to a ten-nautical-mile territorial sea and a twelve-nautical-mile contiguous fishing zone.[97]

Albania's claims in the Corfu Channel drew immediate criticisms from the Western European powers and the United States, which maintained a significant military presence in the Mediterranean dependent upon unencumbered warship navigation throughout that Sea. In May 1946, two British warships were fired upon by Albanian coastal batteries, while the ships were transiting the Albanian part of the strait.[98]

The incident touched off a series of diplomatic notes between the British and the Albanians, involving a claim of innocent passage by the former and a claim of competence by the latter to require previous notification and authorization for passage by foreign warships and merchant vessels.[99] When diplomacy failed, the United Kingdom elected to test the Albanian attitude by sending warships through the strait. During the attempted transit, two British destroyers struck mines with considerable damage and loss of life. The Channel, significantly, had previously been cleared of mines by the British and had been regarded as safe for passage. In November 1946, the United Kingdom announced its intention to sweep the Albanian part of the strait and accomplished its task without the consent of Albania.[100]

The United Kingdom then invoked the compulsory jurisdiction of the International Court of Justice. That Court in 1949 rendered a decision entitled the Corfu Channel Case,[101] finding Albania internationally responsible for the death and destruction to the British warships and seamen and bound to pay due compensation to the United Kingdom for having failed to warn the British warships of the existence of the minefield in its waters. In the Court's opinion, this responsibility rested on "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[102]

Having resolved the British damage claim, the Court then proceeded to address the Albanian claim that the British warships in transiting the Corfu Channel violated Albanian sovereignty for which the United Kingdom was responsible. The British argued that the Channel belonged to the class of international highways through which a right of innocent passage existed. In holding that the Corfu Channel should be classed among international straits, the Court stated:

> It may be asked whether the test is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation. 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. Nor can it be decisive that this strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.[103]

With respect to passage through such straits, the Court added:

> It is . . . generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is _innocent_. 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.[104]

Passage by the British warships through Corfu Channel, according to the International Court, was innocent even though the ships transited the strait for the express purpose of contesting the Albanian claim. The Court dismissed Albanian's contention that the manner of the warships' passage

rendered it non-innocent, for the ships had proceeded through the strait in a single column with their guns unloaded trained fore and aft, a normal position while at sea in peacetime. Both the extensive and systematic reconnaissance of the Albanian coastal defenses carried out by the warships during the passage and the fact that the men of all four British warships were at battle stations throughout the passage were regarded by the court simply as prudent precautions in light of the previbus shelling by Albanian coastal guns.[105]

The Court's decision is made all the more remarkable by its expansive definition of "passage in peacetime." In 1946, Greece was fighting with the support of the British, a communist-supported insurgency. The Court recognized in its decision that Greece "considered itself technically in a state of war with Albania . . . ." and considerable tension existed in the region.[106] The Court found those facts insufficient though to justify Albania's denying access to the Corfu Channel for warships of the United Kingdom, even though the latter was widely regarded as the principal bulwark of Albania's opponent, Greece.[107]

The clear import of the Corfu Channel Case is that coastal authority over passage of warships through straits is limited to the exclusion of non-innocent passage. An underlying premise to the court's decision was the implicit assumption that the character of the vessel did not necessarily determine whether passage through straits is innocent. Rather, the Court assimilated warships to merchant vessels with respect to protection of the right of access to international straits. This represented a significant departure from the assertions expressed by Root

and others that the military character of a warship is in itself inconsistent with the nature of innocent passage.[108]

Significantly, the court found it unnecessary "to consider the more general question . . . whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait."[109] But Judge Azevedo, dissenting in the Corfu Channel Case, did consider this question. He noted that all the arguments in favor of a right of innocent passage in the territorial sea "are clouded in confusion . . . sufficiently to bar the recognition of a custom . . . ."[110] In support of his contention, Azevedo cited examples of nations which required previous authorization for foreign-warship transit of their territorial waters and condoned their power to do so.[111] Even though the regime of innocent passage of warships in time of peace through territorial waters other than those overlapping an international strait had not been affirmed in the Corfu Channel Case, the Court's decision marked a major victory for the inclusive interests of the world community in uninterrupted navigational uses of international straits in peacetime.

While the contest over the Corfu Channel was being litigated before the International Court of Justice, the Food and Agriculture Organization of the United Nations was sponsoring the establishment of a General Fisheries Council for the Mediterranean [hereinafter referred to as Mediterranean Fisheries Council], which was accomplished by international agreement among six Mediterranean riparian states on September 24, 1949.[112] Since then, all of the Mediterranean littoral states with the exception of Albania and Syria have become members of the Mediterranean Fisheries

Council.[113] Like the International Commission for the Scientific Exploration of the Mediterranean before it, the Mediterranean Fisheries Council is a regional organization with no regulatory functions that directly affect navigational uses of the Mediterranean.[114] Instead, the Council's functions are basically limited to the coordination of research and development activities related to the fisheries of the Mediterranean Sea.[115]

The precedential value of the Mediterranean Fisheries Council, however, for purposes of this study, lies not in its powers and functions, but rather its regional character. Subsequent sections of this study will demonstrate how the theme of regionalism first evinced in the Mediterranean Fisheries Council and the International Commission for the Scientific Exploration of the Mediterranean has continued to grow eventually providing a safe haven for shared peacetime navigational uses of the Mediterranean Sea from the coastal winds of sovereignty.

### G. UNCLOS I and II

Contemporaneous with the creeping unilateralism and regionalism in the Mediterranean in the first decade following World War II, the United Nations was endeavoring, pursuant to article 13 of its Charter,[116] to negotiate a comprehensive, universal law-of-the-sea treaty. The initial task of drafting was undertaken by the International Law Commission and culminated in the convening of UNCLOS I in Geneva on February 24, 1958, with eighty-six delegations present.[117] That Conference was followed two years later by UNCLOS II which focused on contentious issues left

unresolved at UNCLOS I.[118] The two Conferences succeeded in many respects, where the Hague Codification Conference of 1930 had failed, when they adopted at the conclusion of their work four Conventions dealing with: (a) the territorial sea and contiguous zone; (b) the high seas; (c) fisheries and conservation of the living resources of the high seas; and (d) the continental shelf, plus an Optional Protocol on Dispute Settlement.

Those four Conventions subsequently entered into force in the mid-1960's.[119] To date, though, none of the Arab countries situated on the southern and eastern littoral of the Mediterranean have ratified, or acceded to, any of those Conventions.[120] Significantly, many of the southern and eastern littoral states only gained their independence from the Western European colonial powers in the fifties and sixties. These new states, along with the rest of the emerging Third World generally, rejected the four Conventions as weighted too heavily toward the interests of the major maritime powers without adequately accommodating the aspirations and interests of the newly-independent states.

The Mediterranean littoral states which did elect to become parties to one or more of the four Conventions were limited to European states, of which only Spain, Yugoslavia, and the United Kingdom (Gibraltar) became parties to all four Conventions.[121] Of particular interest, for purposes of this study on navigational uses of the Mediterranean, those three countries were joined in the case of the Convention on the Territorial Sea and Contiguous Zone [hereinafter referred to as the Territorial Seas Convention] by Italy, Israel, and Malta[122] and in the case of the Convention on the High Seas [hereinafter referred to as the High Seas

Convention] by Albania, Israel, and Italy.[123] Even though the four Conventions failed to gain universal acceptance as binding conventional law in the Mediterranean, the legal regime codified in those Conventions on peacetime navigation of the seas represents a major stage of development in the ongoing evolution of the law of the sea which warrants the detailed exposition of its substantive content that follows.

In analyzing the navigation regime contained in the four Conventions, it is functionally useful to study the ocean space according to the distinct vertical and horizontal zones recognized by the Conventions. For example, ocean space is divided vertically into the navigable surface, the water column, the seafloor, and the subsoil. The navigable waters and water column, in sum, are divided horizontally from the land seaward into internal waters, territorial waters, the contiguous zone, and the high seas. The seabed lying under the various water zones is divided horizontally into the internal and territorial seabed, the continental shelf, and the deep seabed. Significantly, the rules regulating the horizontal water zones of ocean space are not necessarily the same as those regulating the seabed zones subjacent to those waters.[124] Since the area of concern here is peacetime navigational use of the surface and subsurface waters, the analysis of the four Conventions that follows focuses principally on the legal regime governing the waters of ocean space rather than the subjacent seabed.

## 1. Legal Regime Governing the Navigational Uses of the Waters of Ocean Space

### a. Internal Waters and Territorial Sea

The point of departure in any discussion concerning the legal regime of ocean space under the 1958 Conventions is the location of the baseline. Waters on the landward side of that baseline constitute internal waters while waters abutting the baseline on the seaward side constitute territorial seas.[125] Generally, the baseline follows the sinuosities of the coastline at the low-water line,[126] except when the coastline is deeply indented or there is a fringe of islands along the coast, in which case straight baselines following the general direction of the coast are employed.[127] Baselines are also drawn around islands[128] and across the entrances to historic bays and bays less than twenty-four miles in width at the entrance with the proviso that non-historic bays must be "as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation."[129]

In addition to demarcating the internal waters, the baseline also serves as the point from which the breadth of the territorial sea and contiguous zone is measured.[130] Originally, with Bynkershoek, that breadth was no greater than the range of a cannon. The delegates at UNCLOS I and II, though, like the Hague Codification Conference of 1930 before them, failed to reach agreement on the breadth of the territorial sea, although most states, including all of the Mediterranean littoral states at that time, claimed a breadth of twelve or fewer miles.[131]

In the internal waters and the territorial seas, under the Territorial Seas Convention, the coastal state exercises sovereignty,[132] subject only to the right of innocent passage through the territorial sea.[133] That right permits foreign vessels to transit the territorial sea of the coastal state in order to enter or exit its internal waters or simply to traverse the territorial sea without entering internal waters.[134] Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state.[135] The coastal state may take all necessary measures to prevent every passage which is not innocent.[136]

For passage which is innocent, the coastal state is prohibited from hampering passage or levying charges on foreign vessels, unless the charges are assessed without discrimination as payment for specific services rendered to the vessel.[137] Moreover, a duty is imposed on the coastal state, as recognized in the Corfu Channel Case, to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.[138] If essential for its security, a coastal state may hold this right of innocent passage in temporary abeyance in its territorial sea, except that no suspension of the right of innocent passage is permitted in straits used for international navigation.[139]

The application of the right of innocent passage to warships was hotly disputed in the drafting of the Territorial Seas Convention. In 1954, the International Law Commission agreed that innocent passage should be granted to warships without prior authorization or notification.[140] The following year the Commission reversed itself and established the right of a state to insist upon prior notice-authorization. The culmination of its

negotiations was Draft Article 24 which read: "The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage . . . ."[141] The accompanying commentary elaborated:

> While it is true that a large number of States do not require previous authorization or notification, the Commission can only welcome this attitude, which displays a laudable respect for the principle of freedom of communications, but this does not mean that a State would not be entitled to require such notification or authorization if it deemed it necessary . . . . Since it admits that the passage of warships through the territorial sea of another State can be considered by that State as a threat to its security, and is aware of a number of States that do require previous notification or authorization, the Commission is not in a position to dispute the right . . . to take such a measure.[142]

Countries which denied to warships a fundamental right of innocent passage were no doubt pleased with this result.

In 1956, the United States endeavored during the Commission's meetings to amend Draft Article 24 to delete the word "authorization"[143] It would have left intact a simple "notice" standard. The American proposal, however, was defeated and the Draft Article was adopted unchanged by the Commission for submission to UNCLOS I.[144]

Two years later, in Geneva, at UNCLOS I the tables suddenly turned. The United States succeeded in getting the notice-authorization dictate of Draft Article 24 struck down.[145] Neither notice nor authorization for warship passage was to be <u>specifically</u> required by international law.

The victory of the United States proved more illusory, though, than real. States seeking to relegate innocent passage of warships to a privilege pointed to the broad regulatory powers now granted to them in the new Convention.[146] They claimed that the convention allowed, or at least did not prohibit, the imposition of a notice-authorization barrier by virtue of the following articles:

Article 17

> Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law . . . .[147]

Article 23

> If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards _any_ request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.[148]

These provisions were sufficiently vague that they set the stage for a multitude of unilateral declarations by coastal states. Seven countries following the lead of the Soviet Union submitted prior-notice-authorization reservations to article 23 upon signing the Territorial Seas Convention.[149] The proponents of the reservations claimed that these requirements were essential to dispel the ambiguities of the new treaty. Moreover, they argued that such reservations did not contravene the intentions of UNCLOS I and II.[150]

In resistance to notice-authorization, other readers of the Convention argued that its silence "implies that the Conference did not approve of

article 24 of the Report of the International Law Commission . . . ."[151] Those proponents on behalf of the Western maritime powers pointed out that the innocent-passage provisions were found in section III, sub-section (A), entitled "Rules Applicable to All Ships," of the Territorial Seas Convention.[152] Article 14 therein extended the right of innocent passage to ships of all states while paragraph 6 of that article stipulated that "Submarines are required to navigate on the surface and to show their flag . . . .,"[153] which necessarily implied that submarines enjoyed the right of innocent passage under this condition. The remaining subsections (B), (C), and (D) of Section III then established specific standards applicable respectively to "Merchant Ships," "Government Ships Other than Warships," and "Warships."[154] These standards were intended to supplement the general rules of subsection (A), again implying that the right of innocent passage extended to warships along with other government vessels and merchant ships.[155]

The advocates for warship innocent-passage rights also argued that article 23, which permits coastal states to request foreign warships not complying with coastal state regulations concerning passage through territorial waters to leave, does not support the Soviet position on prior notice or authorization for warship innocent passage. Rather, it is argued that article 23 implicitly assumes that warships have the right of innocent passage and it merely prescribes the remedy for the coastal state in the event the foreign warship in its territorial sea fails to adhere to regulations concerning passage.[156] On balance, the better-reasoned argument holds that the Territorial Seas Convention recognizes the right of

warship innocent passage without the necessity for prior authorization or notification,[157] although contrary legal claims on this subject demonstrate the continuing concern by coastal states for the threat to their security posed by uninvited foreign warships passing close to their shores.

Overall, the balance of interests struck in the territorial sea under the Territorial Seas Convention favors the exclusive interests of the coastal state. An accommodation is made, however, in the area of navigational uses of the surface waters for the inclusive interests of the world community in free and uninterrupted trade and communication by preserving the regime of innocent passage with only the applicability of that right to warships in dispute.

b. Contiguous Zone

The contiguous-zone concept, as previously mentioned, encountered considerable resistance at the Hague Conference of 1930. By 1958, however, there was general acceptance of the coastal state's right to protect certain interests in an area adjacent to its coasts but extending beyond the narrow band of its territorial seas. Thus, the Territorial Seas Convention recognizes a zone on the high seas contiguous to the territorial sea, the outer limits of which may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.[158] In this zone on the high seas, the coastal state is permitted to exercise the control necessary to enforce its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea.[159] Aside from the protection of these interests, the contiguous zone remains subject under

the 1958 Conventions on the law of the sea, to the legal regime governing the high seas which is analyzed in the next subsection of this study.[160]

In drafting the contiguous-zone article, a proposal was advanced before, first, the International Law Commission and, second, UNCLOS I that security interests be included among the protected interests for the coastal state. That proposal was rejected both by the Commission and by the plenary sessions of UNCLOS I, because any threat to the security of a coastal state was considered adequately protected by the inherent right of self-defense under general principles of international law and article 51 of the United Nations Charter.[161]

In the Mediterranean, although widespread ratification of the Territorial Seas Convention was not forthcoming, there was general acceptance through state practice of the scope and breadth of purpose of the contiguous-zone concept articulated in the Convention.[162] Two states, though, Lebanon and Egypt, departed from the general norm and established zones for <u>security</u> purposes contiguous to their territorial seas, with Egypt extending the outer limits of that zone six miles beyond the Territorial Seas Convention's twelve-nautical-mile limit.[163]

### c. High Seas

The High Seas Convention was the only one of the four Conventions adopted at UNCLOS I that explicitly purported in its preambular clause to codify rules of international law.[164] According to that Convention, the high seas "means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."[165] Those seas are

declared open to all nations and no State is permitted to subject any part of them to its sovereignty.[166] The freedoms appertaining to the high seas are broadly and non-exhaustively drawn to include freedom of navigation, overflight, fishing, laying of submarines cables and pipelines, and any other freedoms recognized under general principles of international law.[167] States in exercising these freedoms are required to show "reasonable regard" for the interests of others in their exercise of the freedom of the high seas.[168] The "reasonable regard" standard recognizes, in effect, that accommodations are necessary in practice between and among freedoms exercised by all states.[169]

Among the traditional uses of the high seas recognized by the general principles of international law, but not specifically mentioned by the High Seas Convention, is the right of a state to employ the high seas for military purposes. For example, military vessels are allowed to traverse the waters of the high seas under the principle of freedom of navigation.[170] The Convention fails, however, to delineate expressly the other military uses of the high seas which are permissible. An examination of two proposals which were submitted during UNCLOS I for purposes of restricting military maneuvers and nuclear-weapons tests on the high seas is instructive on this matter.

The first, known as the Three Power Proposal, because it was supported by Albania, Bulgaria and the Soviet Union, endeavored to curtail the establishment by the major naval powers of zones for military maneuvers or training practice on the high seas in the neighborhood of the coasts of foreign states or on international sea routes.[171] The major naval powers

had traditionally conducted military maneuvers and target practice on specific portions of the high seas preceded by publication of a notice to mariners and pilots. Shipping was not, however, precluded by this notice from entering the zone; nor was the zone used as a pretext for asserting jurisdiction over foreign nationals entering the zone.[172] Rather, the maritime powers sought to avoid the appearance that they were subjecting the area of use to sovereignty. Even so, the record reflects that the military zones were, in fact, put to extensive, long-term, exclusive use.[173] The Three Power Proposal, though, was decisively rejected by the UNCLOS I plenary session,[174] an acknowledgment, in effect, that military-maneuver and target-practice zones, though exclusive, were not violative of the international-legal regime governing the high seas.[175]

The Eastern European states next sought adoption of the Four Power Proposal supported by Czechoslovakia, Poland, Yugoslavia, and the Soviet Union, which would prohibit all states from testing nuclear weapons on the high seas.[176] Several delegates in the UNCLOS I sessions insisted that nuclear-test detonations were intimately related to the whole disarmament issue which fell outside the bailiwick of the Conference.[177] Other delegates countered that nuclear testing constituted a high-seas use which should be discussed at UNCLOS I.[178] Ultimately, the Four Power Proposal was never subjected to a vote as the Conference accepted a compromise proposal by India to refer by resolution the entire matter of nuclear-weapons tests on the high seas to the United Nations General Assembly.[179]

> Following the rejection of the Three Power Proposal and the expedient compromise solution on the Four Power Proposal, the delegates immediately

> proceeded to adopt the joint proposal of the United Kingdom and Ireland subjecting each permissible use of the high seas to the condition, mentioned above, that it be undertaken with reasonable regard to the interests of other States in the exercise of the freedoms guaranteed them. In doing so, the Conference silenced those nations which maintained that international law does not countenance military uses of the high seas either lengthy in duration, yet spatially circumscribed (maneuvers), or short in duration, but encompassing vast geographical areas (nuclear tests). Any military use of the high seas was permissible as long as it was reasonable. In comparison, though every use inevitably precluded some other State from undertaking a simultaneous use of the same area, such use was not ipso facto unreasonable or violative of the provision proscribing subjection of the high seas to State sovereignty. If the benefits derived from the particular exclusive military use outweighed the inconvenience caused to inclusive uses of the seas, and the utilizing State refrained from either exercising exclusive jurisdiction over foreign nationals within the area or preventing them from traversing the area, then the activity comported with the provisions of the Convention.[180]

Contemporaneous with the Three and Four Power Proposals, the Eastern bloc represented by Rumania and the Ukrainian Soviet Socialist Republic also sought recognition in the Two Power Proposal for the "closed seas" doctrine long advocated by the Soviet Union, whereby nonlittoral naval forces would be excluded from those closed seas recognized by practice or agreement. The proposed amendment would have added to the draft article defining the high seas the following sentence: "For certain seas a special regime of navigation may be established for historical reasons or by virtue of international agreements."[181] It was prompted by the last sentence in the International Law Commission's Commentary on the draft article which stated: "These rules [defining the high seas] may, however, be modified for historical reasons or by international arrangement."[182] The sentence

apparently originated in a remark by S. B. Krylov, then the Soviet Representative to the International Law Commission, concerning "[c]ertain waters, such as land-locked seas . . ." which had "special circumstances."[183] Mr. Krylov had added that he was "not proposing to amend the article, but merely to insert in the commentary a reference to the fact that certain waters had special characteristics."[184] Turkey relied on Krylov's statements in asserting at UNCLOS I that the Commission's Commentary referred only to internal waters not the Black Sea.[185]

The Ukrainian representative made it clear, though, that the amendment comprehended at least the Black Sea and waters surrounding archipelagos.[186] There was no suggestion, however, that the proposed amendment applied to the Mediterranean as a whole.

The United States and others perceived that the Two Power Proposal sought recognition in international law of the "closed seas" doctrine and opposed it as a grave menace to the freedom of the high seas.[187] Faced with considerable opposition, the Rumanian and Ukrainian delegates, rather than risk a formal recording of a lopsided vote against the closed sea amendment, chose to withdraw their proposal just before it was put to a formal vote.[188]

The defeat of the Two, Three, and Four Power Proposals spelled victory in a conventional-law context for optimum peacetime navigational uses by warships of the waters located seaward of the outer boundary of the territorial sea. This was further reenforced by article 8(1) of the High Seas Convention which immunized warships from the jurisdiction of any state

other than the flag state.[189] In this connection, article 8(2) of that Convention defined "warship" in specific and detailed terms as:

> [A] ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.[190]

Immunity for warships did not mean, however, that naval vessels were free to ignore the "reasonable regard" standard by which their flag state was bound. Moreover, the flag state was required by the Convention to ensure that all of its vessels, military or otherwise, in accordance with generally accepted international standards, did not discharge oil or radioactive waste and took the requisite steps to ensure safety at sea.[191] To guarantee further the open use of the seas, the High Seas Convention, borrowing from earlier precedents, such as the Barbary Coast wars in the early 1800's, also outlawed piracy.[192]

In sum, the free and uninterrupted use of the high seas by military and commercial vessels was guaranteed under the High Seas Convention with the constraints of the "reasonable regard" test and international-standard setting on safety at sea, piracy and pollution incorporated to avoid disruptive practices or lawlessness, thereby optimizing the peaceful enjoyment by all nations of freedom of navigation. The analysis turns now to a brief examination of the legal regime for the seabed and subsoil under the 1958 Conventions and its effect, if any, on navigable uses of the superjacent waters.

2. Legal Regime Governing the Seabed and Subsoil of Ocean Space

The seabed and subsoil of the territorial waters and, by implication, the internal waters are subject to coastal state sovereignty under the 1958 Conventions.[193] This corresponds to the coastal state's sovereignty over the superjacent internal waters and territorial sea. The coastal state is precluded therefore from exercising its sovereignty over the seabed and subsoil of the territorial sea in a manner which hampers foreign-state innocent-surface passage.

Beyond the seabed of the territorial sea lies the continental shelf, first subjected to a legal claim by the United States in the Truman Proclamations of 1945. That shelf is defined, according to the 1958 Convention on the Continental Shelf [hereinafter referred to as the Continental Shelf Convention] as:

> [T]he seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[194]

The coastal state exercises over this shelf sovereign rights, but not absolute sovereignty, for the purpose of exploring and exploiting its natural resources.[195] According to the Convention, these rights are exclusive and effective even without actual occupation,[196] but "do not affect the legal status of the superjacent waters as high seas . . . ."[197] Moreover, "[t]he exploration of the continental shelf and the exploitation

of its natural resources must not result in any unjustifiable interference with navigation . . .,"[198] a test analogous to the "reasonable regard" test on the high seas.

While the coastal state is permitted under the Continental Shelf Convention to construct and maintain or operate installations or devices on the continental shelf with 500 meter safety zones around them: "Neither the installation or devices, nor the safety zone around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation."[199] In sum, the Continental Shelf Convention prohibits a coastal state from exploration and exploitation of its continental shelf in a manner that unjustifiably interferes, particularly in international sea lanes, with the high seas freedom of navigation. Beyond the limits of the continental shelf on the deep seabed, nothing in the four 1958 Conventions applicable there alters the previously analyzed legal regime for navigation on the high seas.

### 3. Assessment

The 1958 Conventions on the law of the sea constituted a high-water mark in a conventional-law framework for the doctrinal freedom of the seas from which the law of the sea has been retreating ever since as later sections of this study will illustrate. Generally, under the 1958 Conventions, freedom of navigation by warships and merchant vessels in peacetime on the high seas, including over the continental shelf of a coastal state, was unrestrained save for (1) the "reasonable regard" test, (2) international-standard setting on pollution, safety at sea and piracy

which protected inclusive, shared uses of the ocean space and (3) the contiguous-zone concept which represented a limited intrusion on the high seas to protect legitimate coastal state interests. In the territorial sea and its subjacent seabed, freedom of navigation was guaranteed for merchantmen so long as the passage was innocent. While the Territorial Seas Convention appeared to extend similar innocent-passage rights to foreign warships, that interpretation encountered considerable resistance among those Convention signatories with small coastal navies who perceived a threat to their security in foreign warships passing through their territorial seas.

Further elaborating on the right of innocent passage, the 1958 Conventions required that the right be nonsuspendable when traversing territorial seas overlapping a strait used for international navigation. This provision encountered considerable resistance, though, particularly from the Arab states which sought recognition of a legal regime in connection with the ongoing Arab-Israeli conflict, whereby the Strait of Tiran leading into the Gulf of Aqaba would be subject to closure for transiting vessels coming to or from the Israeli port of Eilat.[200] For this and a multiplicity of other reasons previously analyzed, the Geneva Conventions won scant formal following, although wider acceptance in practice, among the Mediterranean basin countries.

## H. Ocean Policy Interregnum: The 1960's

The start of the 1960's brought to a close UNCLOS I and II which had failed to fix the breadth of the territorial sea. In the Mediterranean the

littoral states of Albania, Egypt and Libya which had advanced claims in the previous decade to ten- or twelve-nautical-mile territorial seas were joined at the twelve-mile mark by Algeria, Cyprus, and Syria in the sixties.[201] Contemporaneously, Tunisia and Turkey[202] extended their territorial seas to six nautical miles joining Greece, Israel, Italy, and Yugoslavia. Only France, Monaco, and the United Kingdom (Gibraltar) continued to insist on three nautical miles for the width of their territorial seas.[203]

As the territorial seas around the Mediterranean were experiencing an evolutionary expansion, unilateral claims to adjacent fishing zones and contiguous zones also proliferated.[204] Only two countries, Egypt and Syria, though, asserted any national claims during the 1960's to jurisdiction or control over adjacent waters extending more than twelve nautical miles from their coasts. Egypt claimed a contiguous zone which extended seaward eighteen nautical miles from the baseline from which its twelve-nautical-mile territorial sea was measured.[205] In 1963 Syria passed a legislative decree claiming a similar eighteen-nautical-mile contiguous zone.[206] Of particular note is the fact that none of the Mediterranean littoral states advanced exclusive claims during the sixties to 200-nautical-mile zones adjacent to their shores for such purposes as resource exploitation, even though zones of that breadth, such as the 200-nautical-mile territorial-sea claims of Chile, Ecuador, and Peru, were gaining increasing popularity elsewhere in the world community of nations.[207]

While the sixties was beset by a proliferation of unilateral, exclusive claims in the law-of-the-sea context, the East-West confrontation

generally eased in those areas where the Soviet Union and the United States found that their mutual interests dictated some form of accommodation. In July 1963, they agreed on the Limited Nuclear Test Ban Treaty[208] which prohibited, inter alia, the testing of nuclear weapons on or beneath the surface of territorial waters or the high seas,[209] admittedly an unlikely occurrence in the Mediterranean. Since then, practically all of the Mediterranean states with the exception of Algeria, Albania, France and Monaco have become parties to that Treaty.[210]

While the Test Ban Treaty was being negotiated, the United Nations began to wrestle with the general problems presented by nuclear weapons. In 1961, the Eighteen Nation Disarmament Conference was created to provide a forum in which members of the United Nations could discuss disarmament questions of common interest, particularly with respect to nuclear disarmament.[211] In 1969, both the United States and the Soviet Union submitted draft treaties to the Conference on demilitarization of the seabed. The Soviet draft treaty advocated total demilitarization of the seabed and ocean floor,[212] while the American draft treaty called for denuclearization of the seabed environment.[213]

Several years later, after extensive negotiations the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof [hereinafter referred to as the Seabed Treaty] was executed.[214] Eight Mediterranean reparian states have since become parties to that Treaty.[215]

The primary purpose of the Seabed Treaty is reflected in its opening article:

> The States Parties to this Treaty undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of a seabed zone, . . . any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.[216]

The zone of prohibition here is co-terminous with the twelve-mile outer limit of the contiguous zone fixed by the Territorial Seas Convention.[217] Thus, the Seabed Treaty proscribes the deployment of nuclear weapons and other weapons of mass destruction on the seabed outside the twelve-mile contiguous zone surrounding a signatory's shores.[218]

In prescribing this seabed nuclear-weapons ban, the Seabed Treaty recognizes in its preamble "the common interest of mankind in the progress of the exploration and use of the seabed and the ocean floor for <u>peaceful purposes</u> . . . ."[219] The term "peaceful purposes" is undefined and has generated conflicting interpretations[220] that have become increasingly important since articles employing the phrase "peaceful purposes" have been incorporated during UNCLOS III in the text of the United Nations Convention on the Law of the Sea [hereinafter referred to as the LOS Convention].[221]

The controversy revolves around whether peaceful purposes means "non-military" purposes which would then prohibit even defensive military activities on the seabed or simply "non-aggressive" purposes which condones defensive military activities. The view of the nonaligned nations in the

United Nations is that the use of a specific environment for peaceful purposes necessarily precludes all military activities there, whatever their purpose, and that there is no reason to alter this interpretation with respect to the Seabed Treaty.[222] The Soviet Union also equates peaceful purposes with "non-military" purposes and applies the same line of reasoning to the Seabed Treaty.[223]

This controversy, though, did not originate with the Seabed Treaty. Rather, it first attracted attention with respect to the Antarctic Treaty[224] and the Outer Space Treaty,[225] both of which employ the phrase "peaceful purposes."

The Antarctic Treaty recognizes in the preamble that: "[I]t is in the interests of all mankind that Antarctica shall continue forever to be used exclusively for <u>peaceful purposes</u> and shall not become the scene or object of international discord . . . ."[226] Article I(1) of the Treaty reenforces this by mandating that: "Antarctica shall be used for peaceful purposes only. There shall be prohibited, <u>inter alia</u>, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons."[227] Article I(2) of the Treaty permits the use of military personnel or equipment in Antarctica only for scientific research or other peaceful purposes.[228] The state parties to the Antarctic Treaty are also committed under article XI therein to resolution of all disputes involving Antarctica by peaceful means.[229] The broad sweep of these provisions appears to indicate that all activities of a military nature, even those solely for defensive purposes, are proscribed in Antarctica since disputes

there must be resolved by peaceful means. The Antarctic Treaty, then, arguably employs, according to many legal commentators, a "non-military purpose" definition for the phrase "peaceful purposes."[230]

With respect to the Outer Space Treaty, the preamble contains a provision almost identical to that contained in the Seabed Treaty recognizing "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes . . . ."[231] Article IV(2) reenforces this by mandating that:

> The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.[232]

In marked contrast to the Antarctic Treaty, this article does not prohibit all activities of a military nature on celestial bodies. Moreover, attempts during the drafting of this article to prohibit the use of military equipment on the moon or other celestial bodies failed.[233]

Advocates of the "non-military" definition of the term "peaceful" acknowledge that their definition does not reflect the practice of major space powers.[234] Specifically, while the pronouncements of the Soviet Union for political purposes favor the "non-military" interpretation, their space activities suggest adherence to the same "non-aggressive" school of thought as the United States.[235] Moreover, the "non-military" definition

fails to explain satisfactorily article III of the Outer Space Treaty which extends to the moon and other celestial bodies the applicability of the Charter of the United Nations, which recognizes the right of self-defense and defines "peaceful" as "non-aggressive."[236]

Several writers advocating the "non-military" definition for "peaceful purposes" have relied heavily upon article I(1) of the Outer Space Treaty, which requires that the exploration and use of outer space be carried out for the benefit, and in the interests of, all countries, claiming that all military activities in outer space are thereby proscribed, since such activities are inconsistent with the interests of all countries.[237] But:

> [T]here is a serious flaw in the basic premise that military activity can only benefit the nation or group of nations engaged in such activity and therefore cannot benefit "all countries" as required by Article I. Peace, of course, benefits all nations and such arguments overlook the very real benefit to world peace served by some military activities. The verification of arms control agreements by military space activities is one that immediately comes to mind. Such activity is obviously stabilizing rather than destabilizing.[238]

Further undercutting the "common interests" argument is the rejection during the negotiations of the Outer Space Treaty of the amendment proposed by India which would have totally demilitarized outer space.[239] The better view, then, consistent with state practice, the Treaty text and its travaux preparatoires, and the inclusive interests of the world community in military space activities that deter aggression, is that the Outer Space Treaty employs a "non-aggressive" definition, rather than the Antarctic Treaty's "non-military" definition, for the term "peaceful purposes."

Returning now to the "peaceful purposes" preambular clause of the Seabed Treaty, the Treaty text does not proscribe all military uses of the seabed, both defensive and offensive.[240] Rather, it prohibits the emplacement or emplantment of certain types of weapons on the ocean floor. This weaponry ban extends only to "nuclear weapons or any other types of weapons of mass destruction,"[241] such as bacteriological and chemical weapons. It does not prohibit nuclear devices which rely on non-weaponry applications of nuclear energy.[242] Moreover, from the use of the terms "emplace," "emplant," "seabed," "subsoil," and "ocean floor," the Seabed Treaty appears to refer to fixed installations and to exclude from the weapons ban submarines equipped with mass-destruction weapons even though riding at anchor or lying on the seabed.[243] Similarly, other vehicles carrying such weapons that are capable of navigating when they are in contact with the seabed may escape the Seabed Treaty's coverage by virtue of the fact that they are mobile and not fixed to the ocean bottom, particularly if they are also capable of navigating independently of the seabed.[244] In essence, navigational use of the seas, including the Mediterranean, are unaffected by the Seabed Treaty.

With respect to the "peaceful purposes" controversy, the leeway afforded the signatories of the Seabed Treaty concerning military uses of the seas indicates that its use of the term "peaceful purposes" in the preamble like the Outer Space Treaty can only mean "non-aggressive" purposes.[245] The preamble, in fact, declares that the Seabed Treaty is only "a step towards the exclusion of the seabed, the ocean floor and the subsoil thereof from the arms race . . . ."[246] Similarly, under article V,

the parties pledge to pursue negotiations in good faith to save the ocean floor, seabed and subsoil thereof from the arms race.[247] In sum, the use of the term "peaceful purposes" has come to be associated with a total proscription against military activities in an environment such as the Antarctic, when coupled with a broad prohibition against any activities of a military nature, and a limited prescription against aggressive activities in an environment such as the seabed and outer space, when lacking such a total prohibition against all activities of a military nature.

Outside the arms control arena, the process of negotiation and accommodation between the superpowers which had produced the Seabed Treaty was also emerging on maritime freedom issues as unilateral coastal state claims continued to encroach on navigational uses of the seas. In the late sixties, the United States and the Soviet Union reached an understanding whereby the former indicated its willingness to accept a twelve-mile territorial sea if freedom of transit, not innocent passage, could be provided through and over all international straits that would be overlapped by such territorial seas.[248] Accommodation between the superpowers on these issues proved easier to achieve, though, than the concurrence of their respective allies. In discussions with her NATO allies, the United States encountered resistance particularly from Italy and Greece on the proposed provisions on freedom of transit through international straits.[249]

The superpowers persisted calling for the initiation of international negotiations to discuss navigation and fisheries issues. Concurrently, Ambassador Pardo of Malta was proposing the establishment of an

international legal regime for the deep seabed.[250] Prompted by these initiatives, the General Assembly of the United Nations voted in December 1970 to convene UNCLOS III in 1973.[251] While the world community prepared for UNCLOS III, the Mediterranean states were addressing severe pollution problems in the Mediterranean.

### I. Dawn of the Seventies: Regionalism and Vessel-Source Pollution in the Mediterranean

The intensive industrialization of coastal areas in European Mediterranean countries during the 1950's and 1960's and the rapid growth of urban-industrial nodes on the North African coast had, by the end of the sixties, generated heavy pollution in the Mediterranean leading many to proclaim that it was dead or dying.[252] The principal sources of pollution were landbased including as much as 1,000 million tons of industrial waste and untreated sewage dumped in the Mediterranean every year.[253] Another 300,000 tons of petroleum, though, spilt from ships each year, also had to be taken into account.[254] Particularly troublesome was the fact that this pollution was exceeding the absorptive capacity of the Mediterranean Sea,[255] due in large part to the fact that the turnover of the first 150 meters of water in the Mediterranean with the Atlantic requires a period of almost eighty years.[256]

In response to the oil spill problem, all of the Mediterranean states, excepting only Albania and Turkey,[257] became parties to the International Convention for the Prevention of Pollution of the Sea by Oil of 1954, as amended on April 13, 1962,[258] [hereinafter referred to as the Oil Pollution Convention], which prohibited the dumping of oil in the Mediterranean

within 100 miles of the coast.[259] Navigational freedoms on the sea, however, were not significantly impaired by this Convention as enforcement was left to the jurisdiction of the flag state and naval ships were exempted from the Convention's coverage.[260]

With respect to oil-pollution casualties on the high seas, the question of the right of intervention arose in relation to the _Torrey Canyon_ oil spill in March 1967 off the British coast. That led to the adoption in November 1969 of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[261] [hereinafter referred to as the Intervention Convention], which empowers states to take the necessary steps on the high seas to prevent, mitigate, or eliminate grave and imminent danger to their coastline from _Torrey Canyon_-type situations.[262] The right of intervention was limited to a maritime casualty resulting in oil pollution which involved a privately owned ship of one of the contracting parties. It did not apply to pollution casualties involving warships, state-owned vessels used on government non-commercial service or privately owned vessels of a flag state which was not a party to the Intervention Convention.[263] A Protocol in 1973 to the Intervention Convention extended the Convention's coverage to maritime casualties involving substances other than oil.[264] Again, as with the 1954 Oil Pollution Convention, navigational freedoms were only minimally impaired by the Intervention Convention and its 1973 Protocol, since only privately owned ships of a state party suffering a maritime casualty were affected. In the Mediterranean, ten riparian states have since become parties to the Intervention Convention.[265] For the other

Mediterranean states, some legal commentators have contended that the Intervention Convention merely codifies an existing right of intervention inherent to all coastal states.[266]

While the 1954 Oil Pollution Convention and the Intervention Convention provided limited safeguards against vessel-source pollution with minimal disruption to navigation, certain nations led by Canada in 1969 were unilaterally proclaiming broad pollution-prevention zones adjacent to their shores with coastal regulations governing ship construction, navigational aids, and qualifications of ships masters, which substantially hindered navigational freedoms for foreign vessels.[267] In the Mediterranean, the littoral states, none of whom claimed pollution-prevention zones like Canada,[268] opted instead for an ambitious regional program for the protection of the Mediterranean from pollution. Instigators of this regional effort included the existing Mediterranean regional organizations, specifically, the Mediterranean Fisheries Council, which voted in 1969 to support a research study of Mediterranean pollution as a prelude to future considerations of legal control measures,[269] and the International Commission for the Scientific Exploration of the Mediterranean Sea, which became involved in that research study.[270]

Those organizations were later joined in 1975 by the United Nations Environment Programme, which drew up an action plan for the Mediterranean, designed to integrate planning of pollution-control efforts in the Mediterranean,[271] including, _inter alia_, the establishment of a cooperative network of 80 laboratories and research institutions in fifteen Mediterranean countries for research on subjects such as oil pollution and

coastal transport of pollutants.[272] This led the following year to the conclusion in Barcelona of a Convention for the Protection of the Mediterranean Against Pollution [hereinafter referred to as the Barcelona Convention],[273] a Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft [hereinafter referred to as the First Protocol],[274] and a Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency [hereinafter referred to as the Second Protocol].[275] To date, fifteen Mediterranean states have ratified these three agreements.[276]

The Barcelona Convention committed states to "take all appropriate measures . . . to prevent, abate, and combat pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area."[277] The First Protocol prohibited the dumping of substances on a black list, required a prior special permit to be issued by a competent national authority for the dumping of substances on a gray list, and required a general permit for the dumping of all other wastes or other matter.[278] Aside from enforcing these restrictions on its flag vessels or in its territory, a state party was also permitted to implement the First Protocol outside its territory for all ships, except those on government non-commercial service, "in areas under its jurisdiction in this matter,"[279] language which could be interpreted as an open-ended invitation to state claimancy of offshore pollution-prevention zones.

The Second Protocol called for cooperation among Mediterranean states whenever the presence of oil or other harmful substances polluting or

threatening to pollute the seas presents a grave and imminent danger to the marine environment, coast, or related interests of one or more contracting parties.[280] To oversee implementation, the Protocol provides for setting up of a regional oil-combatting center, since established in Malta, to develop and apply a communication system for receiving, channelling and dispatching reports on discharges or spillages of oil or other harmful substances observed at sea.[281] Although this Second Protocol is similar to the Intervention Convention and its 1973 Protocol, since it covers marine incidents involving both oil and other harmful substances posing a grave and imminent danger to the marine environment, it contains fewer constraints as to types of ships or incidents covered. For example, it authorizes a state party confronted with a grave and imminent danger to its marine environment from any ship, military or civilian, not necessarily involving a maritime casualty, "to take every practicable measure to avoid or reduce the effects of pollution" . . ., while safeguarding "the persons present on board the ship and, to the extent possible, the ship itself."[282] Because this grant of intervention authority under the Protocol to coastal states is broader than the Intervention Convention with respect to ships and marine pollution threats covered, the possibility of impairment of navigational freedoms is greatly enhanced under the Second Protocol when juxtaposed with the Intervention Convention.

The years following the adoption of the Barcelona Convention and Protocols have witnessed continuing growth in the strength of the regional agreements as a consensus was reached on a cost-sharing formula for the organization's budget,[283] programs were adopted to enhance cooperation

among the Mediterranean states in the field of integrated planning for environmentally sound socio-economic development,[284] and a Protocol for the Protection of the Mediterranean Sea Against Pollution From Land-Based Sources was adopted.[285] The littoral states had managed, then, notwithstanding their political, economic and cultural differences, to draw on a sense of Mediterranean "identity" and a commonality of interests in protecting the Mediterranean Sea environment to forge a consensus for regional action. Throughout these developments, significantly, the Mediterranean states unanimously rejected direct big-power involvement in the region's environmental affairs.[286]

J. Overview

The development of the legal regime governing peacetime navigation in the Mediterranean reflects an ongoing clash between inclusive community interests and exclusive coastal state interests. From ancient Greece through the Middle Ages, exclusive coastal state claims designed to control the sea lanes and eliminate anarchy and piratical lawlessness predominated in large portions of or, in the case of Rome, throughout the Mediterranean. Navigational rights in peacetime were exercised at the discretion of the reigning maritime sovereign. Those exclusive state claims began to recede, though, starting in the seventeenth century in the face of emerging community interests in free and unencumbered trade and communication the world over. After the demise of the Barbary Coast pirates, the doctrinal freedom of the seas reigned supreme both in law and in fact in the Mediterranean during peacetime. But the end of World War II saw a resurgence of the winds of sovereignty blowing off the land driven by new

technology which permitted massive exploitation of the resources of the seas, and subjacent seabed and subsoil in the areas adjacent to coastal states. Contemporaneously, the Mediterranean states drawing on a commonality of interests in regional research and pollution-prevention problems initiated the development of a regional law of the sea through the creation of regional institutions and agreements. The stage was now set for UNCLOS III and codification of the emerging law-of-the-sea norms.

## IV. PRESENT-DAY NORMS ON PEACETIME NAVIGATIONAL RIGHTS FOR WARSHIPS IN THE MEDITERRANEAN

Drawing on the groundwork and historical context developed in the previous section, the focus of attention in this section of the study is the existing peacetime navigational rights for warships in the Mediterranean including the emerging norms governing such navigational rights set forth in the LOS Convention, which was recently opened for signature on December 10, 1982, with 117 nations including ten Mediterranean states signing it.[287] While the LOS Convention is not expected to obtain the requisite 60 ratifications or accessions needed to enter into force as binding conventional international law for many years to come, it nevertheless constitutes a critical source of present-day navigational norms particularly where its provisions codify existing customary international law.

The general proposition that the LOS Convention reflects, with respect to navigation rights, existing customary international law has attracted some support. For example, the introductory note to the American Law

Institute's <u>Restatement of the Foreign Relations Law of the United States</u>, tentative draft 3, states: "Except with respect to Part XI of the Draft Convention [relating to deep seabed mining], this Restatement, in general, accepts the Draft Convention as codifying the customary international law of the sea, and as law of the United States."[288]

Other experts have gone in the same direction, but not quite as far claiming, for example, that: "The principles worked out by UNCLOS III can constitute, at least potentially, a major factor in the creation of an extremely important new body of [customary international] law . . . ."[289] This line of thinking certainly indicates an importance for the LOS Convention that transcends the actual treaty itself. In point of fact, the United States, while declining to sign the LOS Convention for reasons primarily related to the regime created therein for deep seabed mining, has stated that it is prepared to accept the balance of interests relating to navigation reflected in the LOS Treaty and "will exercise and assert its navigation . . . rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention."[290] The LOS Convention, then, insofar as it addresses navigation rights, has attracted some support from non-signatories. Before delving more deeply into the LOS Convention and existing practices in the Mediterranean pertaining to warship navigation rights, an examination of the current law-of-the-sea decisionmaking process in the Mediterranean with insights into the participants, relationships among them, and uses both military and non-military of that Sea is considered instructive.

## A. Decisionmaking Process

### 1. Participants

The Mediterranean littoral and islands are presently divided politically among seventeen nation states consisting of Albania, Algeria, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Morocco, Spain, Syria, Tunisia, Turkey and Yugoslavia, plus the city state of Monaco and the British dependency of Gibraltar. Relations among these political entities are rife with disputes. For example, Greece and Turkey, although NATO allies, are still squabbling over Cyprus and their maritime boundaries in the Aegean Sea.[291] Spain still claims Gibraltar from Britain but refuses to surrender her five "presidios" in Morocco to that country.[292] Morocco and Algeria are at odds over their common boundary just as Italy, Tunisia, Malta, and Libya are entangled over their maritime boundaries.[293] Cyprus, 40 percent of which has been occupied by Turkey since 1974, has been partitioned de facto into Greek and Turkish Cypriot states.[294] Libya continues to harbor ambitions over its neighbors' lands. Lebanon has tragically been torn apart by civil strife complicated by the intervention of foreign forces -- Syrian, Israeli, and Palestinian. And, of course, Israel remains confronted, after numerous wars in her brief life, with the hostility of nearly all of her Arab neighbors.

At the same time, the recent history of the region also reflects many instances where tensions and differences have been resolved amicably such as boundary disputes involving the Ionian, Aegean and Dodecanese Islands and continental-shelf-boundary delimitations between Italy and Greece and

Italy and Tunisia.[295] Most remarkable, though, is the fact that Egypt and Israel are at peace, no longer declared enemies.

Superimposed on this kaleidoscope of small-power problems in and around the Mediterranean are the big-power rivalries. Britain and France are competing for restoration of some of their former influence in the Middle East with the latter advocating the withdrawal of nonlittoral naval forces from the Mediterranean, an act which would leave it, by process of elimination, the predominant Mediterranean naval force.[296] At the same time, the United States and the Soviet Union engage in a gigantic chess game in the basin using countries and peoples as their pawns, knights and castles.

While the principal participants in the decisionmaking process for the Mediterranean are nation states, the problems of the Mediterranean have also evoked the interest of regional organizations such as the Organization of African Unity, the European Economic Community, NATO, the Warsaw Pact, and the League of Arab States, each of which played a representative role in the UNCLOS III negotiating sessions. To a large extent, the politics of the Mediterranean where socialist east meets capitalist west, developed north meets underdeveloped south and Arab Middle East meets Judeo-Christian Europe reflects the confluence of her geography linking three continents. Despite this wide diversity of cultures and political perspectives, though, certain organizations have developed in recognition of the ecological unity of the Mediterranean including the International Commission for the Scientific Exploration of the Mediterranean, the Mediterranean Fisheries Council, and the Barcelona Convention and its three Protocols.

Superimposed on these diverse regional organizations shaping the law of the sea for the Mediterranean is the world community of nations represented by nation states at UNCLOS III which perceive a need for a law of the sea universal in nature and character, while still adaptable to the unique problems of a particular area of hydrospace, such as the Mediterranean.

## 2. Non-Military Uses of the Mediterranean

The non-military uses of the Mediterranean are manifold and serve to explain the bases of power of the participants in the decisionmaking process for the Mediterranean basin, as well as the values at stake which have compelled the nonlittoral superpowers to station large naval forces in the basin. The coastal zone of the Mediterranean is populated by approximately 100 million people.[297] An equal number of people flock to its shores annually during their vacations[298] in search of crystal green-blue waters and a rejuvenated sense of well-being. In this connection, the Barcelona Convention and its Protocols were specifically designed to preserve the Mediterranean marine environment for the benefit of the coastal population, the tourist industry and the fishermen.

For the fishing industry concentrated principally on the northern shore, the Mediterranean yields over 1 million tons of high-quality seafood, a vital source of protein for many coastal inhabitants, although only 2 percent of the world fish catch.[299] To supplement this catch, an even larger volume of seafood consumed by the Mediterranean states is extracted by Mediterranean-based fishermen from the Atlantic.[300] These countries clearly have a collective interest both in the state of the

living resources of the region, evident in their formation of the Mediterranean Fisheries Council, and the maintenance of external fishery resources.

The Mediterranean also offers a wealth of knowledge for those who seek it. Its waters have nurtured western civilization and have traditionally served as the meeting ground, mixing bowl, and the home for the Jewish, Christian, and Muslim faiths. Today, those waters hide many archaeological treasures providing an excellent incentive for scientific exploration of the basin under the auspices of nation states and international and regional organizations, including the International Committee for the Scientific Exploration of the Mediterranean.

Far more significant than the Mediterranean's scientific uses, though, is its role in international trade as the region accounts for approximately 15 percent of total world trade.[301] Overall, the Mediterranean countries account for 12.5 percent of all goods loaded, and 20 percent of all goods unloaded, in international seaborne shipping.[302] The figures are even higher for petroleum cargo with 24.2 percent of the world total being unloaded in Mediterranean ports and 16 percent of the world total, transported in international shipping, loaded in Mediterranean ports.[303] These figures demonstrate that Mediterranean shipping constitutes a substantial proportion of the worldwide movement of vessels engaged in international trade.

Within the Mediterranean roughly 65 percent of the value of the seaborne trade is intra-regional: the exchange of goods and materials

between Southern Europe, North Africa and the Eastern littoral countries. Western Europe dominates this regional trade as the largest purchaser of raw materials and the primary supplier of manufactured goods. Virtually every Mediterranean state is dependent upon seaborne commerce for one or more categories of vital products. Food consumes from 15 to 30 percent of the import dollars in eleven of those nations with Egypt by far the most reliant upon food imports. In addition, every country in the Mediterranean expends from 7 to 19 percent of its import monies on metals, ores or agricultural raw materials.[304]

Petroleum statistics best illustrate the economic importance of the Mediterranean. Four regional nations -- Tunisia, Egypt, Algeria and Libya -- are self-sufficient in oil, the latter two being major oil exporters. On any given day 300 to 400 tankers loaded with 25 to 30 million barrels of oil are plying this body of water. Half of the oil consumed by France, Spain and West Germany and all that of Italy, Switzerland and Austria arrives through Mediterranean ports. As a result of the upheaval in Iran, North Africa supplies close to half of the oil imported through European ports on the Mediterranean littoral. Approximately half of the oil pumped in Algeria, Tunisia and Libya and two thirds of Syria's and Iraq's export petroleum move to Western Europe by ships.[305] The military and economic importance of this seaborne petroleum trade cannot be overestimated as the Arab oil embargo of 1973-74 only too clearly demonstrated to the western industrialized countries.

Seaborne shipping in the Mediterranean is particularly vulnerable at the congested choke points at the Straits of Gibraltar and the Dardanelles

and the Suez Canal. Over 50,000 commercial ocean-going vessels are estimated to transit the Strait of Gibraltar each year.[306] That figure would be significantly higher if transits by naval ships, the cross-strait ferry traffic, fishing boat movements, coastwise trade and yacht movements were included. The commercial ocean-going vessels that pass through the Strait carry many raw commodities critical to the Mediterranean littoral economies. For example, 96 percent of the total Mediterranean imports of iron ore and 81 percent of the total Mediterranean carriage of grain are transported through the Strait of Gibraltar.[307] For the United States alone, approximately 10 percent of the total tonnage and value of its oceanborne foreign trade involves the Mediterranean basin and transit of the Strait of Gibraltar.[308] The ancient Pillars of Hercules, then, serve as a major artery for international seaborne commerce and a restrictive regime of passage for commercial vessels through the Strait would threaten the stability of the economies of a number of littoral countries and impose economic hardships on their trading partners.

At the eastern end of the Mediterranean, the Suez Canal until 1966 figured as the single most important artery for the shipment of oil to markets in Western Europe and North America. The closure of the Suez Canal as a result of the June 1967 Arab-Israeli War, though, severed that maritime artery, forcing a fundamental shift in oil transport to supertankers plying the circuitous Good Hope route to the industrialized oil-consuming countries of Western Europe and North America.[309] The subsequent reopening of the Canal on June 5, 1975, has seen a gradual resurgence of Canal traffic and, concomitantly, total shipping traffic in

the Mediterranean, although the oil routes established after 1966 have been resistant to alteration because the Canal does not permit passage of the largest deep-draft supertankers. The Egyptian Government has, however, enlarged the Suez Canal to accommodate tankers up to 150,000 tons. Moreover, virtually all economic factors that count -- tonnages, distances and tanker logistics -- when combined with the Egyptian plan to further deepen and widen the Canal, point to the reemergence of the Suez route as a primary petroleum artery.[310]

North of the Suez Canal lies the third major access artery to the Mediterranean, the Turkish Straits, which have become a vital conduit for the Warsaw Pact countries. Over 60 percent of Soviet exports and more than 50 percent of her imports (including critical grain commodities) -- not to mention those of Bulgaria and Rumania -- are conveyed through these Straits. As a result, over 18,000 ship transits of the Bosporus and Dardanelles are made yearly. Those same straits serve as the Soviet Union's primary export conduit to non-Warsaw Pact satellites such as Ethiopia, South Yemen, Syria, Libya and Cuba.[311] This trade, when combined with the free world's dependency on the Mediterranean, explains in large part the Soviet's emerging political and military involvement in that area.

In sum, the Mediterranean serves many functions of a non-military nature, the most critical of which is its role as a major artery for world oceanborne trade situated as it is at the critical juncture of three continents with access to Europe, the Middle East, the Indian Ocean, North Africa, and the Atlantic. For a power intent on domination of it, then, the Mediterranean offers very real advantages.

### 3. Military Navigational Uses of the Mediterranean

The maritime power that succeeded to domination of the Mediterranean following World War II was the United States. From the 1950's until 1980 the United States Sixth Fleet stationed in the Mediterranean usually consisted of two carriers and fifteen escorts including three or four cruisers and eight to eleven destroyers that provided anti-air (AAW) and anti-submarine (ASW) protection, an amphibious attack squadron with reinforced Marine batallion embarked, several support and auxiliary ships, a few attack submarines and a small number of Polaris or Poseidon fleet ballistic missile submarines (SSBN's).[312] In crisis situations, the Sixth Fleet has been augmented by transferring ships from the Atlantic Second Fleet based along the east coast of the United States. For example, during the 1973 Arab-Israeli conflict the normal two-carrier task force level in the Mediterranean was increased by the addition of a third task group built around the carrier USS John F. Kennedy.[313] Since 1980, though, expanding global responsibilities have necessitated the withdrawal of a carrier battle group from the Mediterranean to meet commitments in the Indian Ocean.[314]

For the Soviet Union, their naval presence in the Mediterranean was limited and sporadic until the mid-1960's. The June 1967 Arab-Israeli War changed all that, though, as the Soviets elected to station a permanent contingent in the Mediterranean. Today, the Soviet Mediterranean squadron normally consists of several missile-armed cruisers and destroyers, plus

gun-armed surface combatants, ASW frigates, a small number of landing ships, attack submarines and a large number of support ships.[315] Periodically, one of the Moskva-class missile cruiser/helicopter carrier ASW ships will operate in the Mediterranean and the VTOL (vertical take-off and landing aircraft) carrier Kiev has conducted operations in the Mediterranean.[316] The Soviets have also deployed several of the Victor-class attack submarines, reportedly one of the fastest submarines in submerged operations in the world, in an active ASW role against American submarines stationed in the Mediterranean.[317]

The Soviet squadron is generally larger in total ship numbers than the United States Sixth Fleet, although a significant number of the deployed Soviet ships are support and auxiliary vessels, which are needed to sustain the Soviet squadron in anchorages off Tunisia, Libya, Greece, Cyprus, and Egypt due to limited Soviet access to ship repair facilities and resupply installations on the littoral of the Mediterranean.[318] The surface ships of the Soviet squadron rotate from the Black Sea Fleet, except for submarines and helicopter and VTOL carriers which generally come from the Northern Fleet passing through the Strait of Gibraltar.[319] This deployment pattern is made necessary, to some extent, by the restrictions contained in the Montreux Convention on submarine and aircraft-carrier transits through the Bosporus and the Dardanelles.

The superpowers, though, are not alone with their deployed naval forces in the Mediterranean. The British keep a few combatants at Gibraltar.[320] The French keep their main naval strength homeported in the Mediterranean including two attack carriers, a dozen submarines, and a

complete range of surface combatants.[321] The Italian Navy consists of three cruisers, other smaller surface combatants and submarines for AAW and ASW roles, and a recently created Rapid Intervention Mobile Force for threats outside the purview of NATO on the southern and eastern littorals of the Mediterranean.[322] The other Mediterranean littoral naval forces are constituted principally of frigates, submarines, and fast attack craft with the surface combatants frequently armed with surface-to-surface missiles.[323] The lethality of those missiles was graphically illustrated by the sinking of the Israeli destroyer Elath in 1967 by Russian-built cruise missiles and fast patrol boats of the Egyptian Navy.[324]

For the naval forces stationed in the Mediterranean, navigational uses of the surface water and subjacent water column are a part of everyday naval operations. Those operations include transits by surface ships and submarines, as well as various antiship exercises conducted on the surface or ASW exercises conducted below. Most naval operations in peacetime are designed to effectuate or prepare for one or more of the four basic naval missions of sea control, projection of power ashore, naval presence, and strategic deterrence.[325]

Sea control is the capacity to assert one's own use of the seas and to deny that use to others.[326] The objectives include securing the seas for oceanborne shipping. The task is normally performed by submarines, aircraft, or ships capable of launching missiles,[327] a capability which virtually all of the Mediterranean littoral and nonlittoral naval forces possess in varying degrees. While this naval mission is most readily identified in a wartime setting between belligerents, a subject beyond the

scope of this study of peacetime navigation rights, it has also arisen in tense peacetime settings in the Mediterranean. For example during the Arab-Israeli Conflict of 1973, the Soviet Fleet interposed itself between the battle area and the approaching United States Sixth Fleet, following which individual missile-armed Soviet ships shadowed the major American warships and the embarked Marine amphibious unit,[328] thereby denying the United States Sixth Fleet sea control in the Eastern Mediterranean.

Projection of power ashore, meanwhile, is concerned with the impact of naval power on coastal areas and requires carrier-based tactical aircraft, naval bombardment, or amphibious assault forces.[329] Only the larger navies possess this capability in a credible fashion best demonstrated in the Mediterranean by the American marine landing in Lebanon in 1958.[330] Performance of this mission necessarily entails access to the adjacent seas and superjacent airspace of the target state.

The mission most directly related to peacetime employment of naval forces is naval presence, a role most frequently performed by surface combatants showing the "flag" in foreign ports. "In essence, it is the orchestrated, non-combat use of seapower to secure an international political objective."[331] The range of activity conducted under the umbrella of presence can vary from coercion such as British warships steaming through Corfu Channel in 1947 in defiance of Albanian territorial sea claims, to providing humanitarian aid, and can be latent or active, deterrent or supportive.[332] The success of this mission, as with the projection-of-power-ashore mission, is dependent on access to the adjacent seas of the target state.

The fourth naval mission, strategic deterrence, is reserved to the nuclear powers, primarily the Soviet Union, United States, France and United Kingdom in the Mediterranean.[333] The objectives of this mission essentially are (1) to deter all-out attack by any nation possessing a nuclear war-making capability; (2) to threaten any nation contemplating less than all-out attack with unacceptable risks of devastating response; and (3) to maintain an international political climate conducive to the actualization of foreign policy objectives.[334] Initially, this role was performed following World War II by carrier-based aircraft deployed in the Mediterranean. While this capability still exists today, the strategic deterrence mission is largely dominated now by invulnerable SSBNs. The invulnerability of the SSBN is a product of its relatively quiet propulsion system and its ability as a true submersible to remain underwater for extended periods of time.[335] Anytime these SSBNs navigate on the surface, their chances of detection increase along with their vulnerability. A requirement, then, that SSBNs navigate the Strait of Gibraltar in a surface mode involves certain risks to the accomplishment of their strategic deterrence mission, which could destabilize the existing balance of power between the superpowers.

Significantly, the entry into service of the Trident-class SSBNs for the United States with extended missile ranges substantially increases the ocean space which American SSBNs can operate in, while targeting the Soviet Union, without the necessity to patrol in the Mediterranean.[336] Even if the American SSBNs disappear from the Mediterranean, though, that still leaves the French SSBNs and the conventional diesel-powered and modern

nuclear-powered attack submarines deploying from the east coast of the United States and the North Fleet of the Soviet Union heavily dependent on access to the Mediterranean through the Strait of Gibraltar preferably in a submerged mode. In this connection, forcing those submarines to transit the Strait on the surface poses a greater hazard to navigation than submerged passage since the submarines are more ungainly on the surface and of necessity have a low surface profile.

Whether navigating the Straits in a submerged mode or operating off the coast of a littoral state, the operation and maneuver activities of naval forces in the Mediterranean, designed as they are to effectuate or prepare for one or more of the basic naval missions, promote value interests fundamental to those nation states of which security is unquestionably the most important and widely shared. In this connection, any international legal norm which seeks to place restrictions on the militarization of ocean space will not secure broad based support or general adherence, unless it guarantees international stability and state security by maintaining the existing balance of power.[337] An analysis of the existing and emerging legal prescriptions on peacetime navigational rights for warships in the Mediterranean in the context of the values they promote, particularly the security values, follows in the next section.

## B. Legal Regime Governing the Peacetime Navigation of Warships in the Mediterranean

The legal analysis that follows is constructed around the horizontal and vertical zones of ocean space which were used analytically in the earlier discussion of the 1958 Conventions on the law of the sea, with the addition, however, of the exclusive economic zone which has emerged in recent years as a newly accepted zone of both hydrospace and the seabed.

### 1. Zones of Sea Space

#### a. Internal Waters and Territorial Sea

##### (1) Baselines and Breadths of the Territorial Seas

The point of departure in any discussion of foreign warship navigation near the shores of a Mediterranean state today is the delineation of the coastal state's internal waters and territorial sea by fixing the baseline. Landward of that baseline, the coastal state enjoys virtually absolute sovereignty over the internal waters including the right to exclude foreign warships from all or certain of her internal waters,[338] to impose whatever conditions it considers necessary upon foreign warships in those waters,[339] or to require such ships to leave.[340] These rights are limited only to the extent that a visiting warship in the internal waters of a Mediterranean littoral state remains under the jurisdiction of her flag state during her stay and no legal proceedings can be taken against her for any cause.[341] Seaward of the baseline lies the territorial sea where the coastal state's sovereignty is circumscribed by the right of innocent passage. From the

perspective of the coastal state's security interests in its adjacent seas, the more waters enclosed as internal by the baseline, the greater its buffer zone against foreign warship encroachments. For the naval powers, though, the seaward movement of the baseline encloses waters as internal that would otherwise be territorial seas or high seas with a resulting loss in maneuvering space for their warships.

The rules on determining the baseline under the previously analyzed Territorial Seas Convention -- normally the low-water mark on the shore or, in exceptional circumstances, straight baselines drawn across the mouths of bays and estuaries or along deeply indented coasts or coasts fringed with numerous islands -- have since 1958 won general acceptance in the world community, as demonstrated by their incorporation without significant changes in the LOS Convention,[342] and in the Mediterranean, as demonstrated by their acceptance in state practice.[343] Almost all of the Mediterranean states use the low waterline for determining at least a portion of their baseline.[344] Ten of those states have proclaimed straight baselines along some portion of their coastline. Albania's straight baseline of 88 nautical miles declared in 1970 joins headlands along a highly indented part of her coast,[345] while Yugoslavia's baseline of 245 nautical miles links islands fringing the Yugoslav coast without departing appreciably from the general direction of the coastline.[346] France has a straight baseline system dating to 1967 totaling 276 nautical miles that encloses indented shoreline often fringed with islands and islets on its Mediterranean coast and the western shores of the island of Corsica.[347] Turkey's baseline encloses a deeply indented coast.[348] Italy, Malta, Spain, Syria, and Tunisia in the last ten years have also laid claim to

straight baselines for offshore island chains or indented shorelines.[349] While most of these straight baseline claims have provoked minimal opposition, as they generally conform to a "liberal" coastal state interpretation of the prescriptions in the Territorial Seas Convention and the LOS Convention, the fact that they continue to proliferate may pose problems for the maritime powers in the future.

Particularly troublesome has been the seaward creep of straight baselines closing off large coastal indentations. Two Mediterranean states, Egypt and Libya, in particular, have advanced broad claims to gulfs which did not satisfy the semicircularity test or twenty-four-mile-closing-line test for bays articulated in the Territorial Seas Convention and the LOS Convention. Both countries have used the historic bay exception to justify their actions.

The historic bay exception is a relatively new concept[350] dating back only as far as Dr. Drago's dissent in the North Atlantic Fisheries Arbitration of 1910, where he stated that a nation's claim to historic bays was justified.[351] General agreement exists as to the elements of a valid claim. Those elements, which the claimant state has the burden of showing, are: (1) the open exercise of authority by the claimant state; (2) over a substantial period of time; and (3) with the knowledge and acquiescence of foreign states.[352]

The historic bay claimed by Egypt in the Mediterranean is the Gulf of El-Arab, which is eighteen miles in depth and seventy-five miles wide at

its opening in the sea[353] located west of Alexandria. The Egyptian Government first announced its exercise of authority over this Gulf in 1926 in its reply to questionnaire No. 2 of the Committee of Experts for the Progressive Codification of International Law when it stated that: "[T]he extent of Egyptian territorial waters was fixed at three miles by the Decree-Laws of 21 April 1926 on Fishing and Sponge-fishing, except in the Bay of El-Arab, the whole of which, according to the Decree-Law on Sponge-Fishing, is included in the territorial sea."[354]

Articles 1(b) and 4(a) of the Royal Egyptian Decree of January 15, 1951 concerning the territorial waters of Egypt implicitly reaffirmed this result by including as inland waters of Egypt all bays along the Egyptian coast without specifying any limit.[355] Although the enactment of municipal laws claiming the Gulf of El-Arab as internal waters demonstrates Egypt's desire to act as sovereign over those waters: "Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations."[356] No official charts have ever been published to illustrate the closing line for the bay.[357] None of the legal writings that have analyzed the Gulf of El-Arab claim have disclosed any examples of the effective exercise of Egyptian authority over the Gulf by deed supplementing the proclamation.[358] The first element of the historic bay exception, then, open exercise of authority over the Gulf of El-Arab, has not been adequately demonstrated by Egypt.

The time factor in the acquisition of title over the Gulf of El-Arab, according to both judicial decisions and legal publicists, must be a fairly lengthy period. A great variety of terms are used in describing that

period including "continuous usage of long standing," "immemorial usage," "continuous and immemorial usage," and "continued and well-established usage."[359] The period cannot be fixed, however, according to an exact time frame. Rather, it remains a matter of judgment, when sufficient time has elapsed for the usage to emerge.[360]

In the case of the Gulf of El-Arab, Egypt's formal claim dates back, at best, only fifty-seven years to 1926. By comparison, in the Anglo-Norwegian Fisheries Case, Norway showed that she had prevented the British from fishing in the area for over 150 years.[361] Similarly, the Second Court of Commissioners of Alabama Claims in 1885 in discussing the status of the Chesapeake Bay concluded: "It is a part of the common history of the country that the States of Virginia and Maryland have from their earliest territorial existence [traced back to 1609] claimed jurisdiction over these waters, and it is of the general knowledge that they continue to do so."[362]

Juridical recognition of the historicity of a bay, it should be pointed out, is not necessarily constrained by the semicircularity rule. For example, in discussing the status of Santa Monica Bay which, like the Gulf of El-Arab, is very shallow (9 miles) and relatively wide at the opening to the sea (19 miles), the Supreme Court of California found the bay internal waters based on historical usage dating back 400 years.[363]

Although periods of several hundred years figure prominently in many historic bay cases, there are also instances of shorter time periods. For example, in Ocean Industries v. Greene, a Federal District Court in California in 1926 found based upon the State of California's Constitution

of 1849 and implementing legislation that the State had established jurisdiction over Monterey Bay despite its narrow depth, 9 miles and broad width, 22 miles.[364] That case is exceptional, though. Thus, in United States v. Alaska, the United States Supreme Court denied the historic bay claim of Alaska to lower Cook Inlet, even though the long-continuous usage of the inlet was traceable as far back as 1878, ninety-six years earlier.[365] Egypt's claim is only traceable to 1926 and there has been no apparent effort by Egypt to backdate that claim further to bolster its position. The elapsed period of time, then, for the historic bay claim to El-Arab is probably inadequate. It is difficult to separate this element of long-term usage, though, from that of acquiescence and knowledge by foreign states, the third component to the historic bay exception.

The Egyptian Decree of 1951 concerning the Gulf of El-Arab did not pass unnoticed by foreign states.[366] On May 28, 1951, the British Government protested through diplomatic channels against this Decree stating that it was unable to accept it as being in conformity with the rule of international law.[367] In its vote of protest, the British Government stated that no historic bay was situated in Egypt.[368] A week later, on June 4, 1951, the United States addressed a note to the Egyptian Government taking exception to the Egyptian Decree particularly those provisions dealing with bays.[369] The fact that other states did not protest this claim is not considered dispositive since the test of foreign state acquiescence is not a quantitative one, but rather a qualitative one, as analyzed in the Anglo-Norwegian Fisheries Case.[370]

That case was decided in December 1951 less than one year after the Egyptian Decree. The International Court of Justice rendered a judgment in

that case that sustained the historic bay claims of Norway and acknowledged that the coastal state was in the best position to determine its own baselines based on criteria such as its economic interests in adjacent waters, conformance of the baseline to the general direction of the coastline, and a sufficiently close link between the land and the waters claimed as internal.[371] The Egyptian position utilized an expansive interpretation of these selected criteria in supporting its historic bay claims to El-Arab.[372]

Norway's claim, though, was justified based on a deeply indented coastline subject to sovereign control without objection for over 150 years, while El-Arab, situated on a gently undulating coastline, has been claimed for less than 60 years and opposed by two major maritime powers. Clearly, the facts in the Anglo-Norwegian Fisheries Case are distinguishable from those pertaining to the Egyptian Gulf of El-Arab. Consistent with that conclusion, while the Egyptian claim has been analyzed and referenced in many treatises analyzing historic bay claims which also addressed the Anglo-Norwegian Fisheries Case, none of those writers have found the Egyptian claims legally sufficient.[373] In sum, Egypt has failed, to date, to carry its burden of proof of the historicity of the Gulf of El-Arab because of the relatively brief life span of the Egyptian claim, the opposition of several major naval powers, and the absence of adequate proof by Egypt of the exercise of effective authority over the Gulf. At the same time, it should be acknowledged that the passage of time generally works to the advantage of Egypt, enhancing the apparent historicity of its claim.

Far more recent and controversial than the Egyptian claim to the Gulf of El-Arab, though, is the Libyan claim to sovereignty over the Gulf of Sidra (also known as the Gulf of Sirte, the Gulf of Surte or the Gulf of Surt)[374] announced in a Libyan declaration of October 19, 1973, delivered to the United Nations.[375] Libya claimed the enclosed Gulf south of latitude 32 degrees 30 minutes with a closing line of 260 nautical miles as internal waters subject to:

> its complete national sovereignty and jurisdiction in regard to legislative, judicial, administrative and other aspects related to ships and persons that may be present within its limits.
>
> Private and public foreign ships are not allowed to enter the Gulf without prior permission from the authorities of the Libyan Arab Republic and in accordance with the regulations established by it in this regard.[376]

The claim is territorial in nature. Its import is that the claimed waters form part of the national territory of Libya and foreign vessels are excluded therefrom, absent Libyan consent. Several publicists have noted that the exclusion of foreign vessels is an indisputable demonstration of the desire to act as the sovereign.[377] Libya has certainly made an effort to assert its claim of sovereignty by deeds as evidenced by its interception of United States military aircraft operating over the Gulf of Sidra in August 1981 and 1983 and its announced threat in August 1983 to sink any American warships that enter the Gulf.[378] Libya's failure to halt those operations does not alter the conclusion that Libya is endeavoring to satisfy the first component of the historic bay exception for the Gulf of Sidra by openly exercising authority over the Gulf, although the continued

United States operations are germane to the issue of acquiescence in the Libyan claims by other states.[379]

In asserting sovereign authority over the Gulf, Libya claimed: "Throughout history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf . . . ."[380] Yet, in March 1973, seven months earlier, U.S. military aircraft had flown over the Gulf of Sidra and Libya had never protested the overflight as a violation of its sovereignty in the Gulf.[381] Instead, it maintained that the aircraft had entered into a "restricted area," that area being the airspace within a radius of 100 miles from Tripoli.[382] The United States responded that its planes had at no time overflown the twelve-mile Libyan-claimed territorial seas and added that any concept of a restricted area was contrary to the Convention on International Civil Aviation.[383]

Libya had never asserted a claim to the Gulf before October 1973, even though it first gained independence in 1951.[384] "The failure to assert the claim of sovereignty prior to the October 1973 Declaration, in a situation where such a claim would have been appropriate, severely diminishes any argument of historicity."[385] Particularly, when compared to customary-international-law practice, the passage of time from 1973 to the present is clearly insufficient to quality the Gulf of Sidra as an historic bay.[386] But:

> The fact that the claim was not asserted until 1973 by Libya does not necessarily lead to the conclusion that there is insufficient history or usage. However, the fact that no evidence has been brought forward

> evincing continuous usage prior to that time significantly damages Libya's contention that the bay is a historic bay. Since the burden of proving a historic claim lies with the claiming party, it can be said that Libya has failed to meet its burden.[387]

The Libyan claim fails, then, to satisfy the second element of the historic bay exception, namely, sovereign usage of the Gulf by Libya over a substantial period of time.

A similar result pertains to the third element, knowledge and acquiescence in the Libyan claim by other states. The October 1973 Declaration was followed within a few months by diplomatic protests from the United Kingdom, France and the United States.[388] The United States' reply of February 11, 1974 rejected the Libyan claim as contrary to international law, stating:

> Nor does the Gulf of Sirte meet the international law standards of past open, notorious and effective exercise of authority, continuous exercise of authority, and acquiescence of foreign nations necessary to be regarded historically as Libyan internal or territorial waters. The United States Government views the Libyan action as an attempt to appropriate a large area of the high seas by unilateral action, thereby encroaching upon the long-established principle of freedom of the seas.[389]

Beyond the formal written protests, the United States elected to challenge the Libyan claim through military aircraft overflights of the claimed waters commencing in 1977 and continuing up to the present day, much like the British had done in Corfu Channel over thirty years earlier.[390]

On one occasion in August 1981 the United States Sixth Fleet conducted missile-firing exercises that overlapped the northwestern area of the Gulf

of Sidra.[391] This area was cited as the best region of the Mediterranean to conduct such exercises because it was generally free of commercial air and sea traffic. These exercises, though, were only conducted after the requisite notifications to mariners and airmen had been published.[392] During the exercises, numerous intercepts of reconnoitering Libyan aircraft were made by American fighters and on August 19, 1981, two Libyan aircraft suddenly fired upon two United States Navy F-14s from the aircraft carrier USS Nimitz.[393] The American aircraft, then, returned the fire and shot down the Libyan aircraft.[394]

Setting aside the aggression and self-defense issues involved here [395] as beyond the scope of this study of peacetime navigational prescriptions, Libya contended in the law-of-the-sea context that the United States had violated its sovereignty in overflying the Gulf.[396] The United States countered that the Gulf constituted part of the high seas and Libya's claim was unacceptable, a violation of international law.[397] The United States position won support at the ongoing UNCLOS III session where it was reported that the experts "were well aware that Libya's attempt to stretch a baseline across the Gulf of Sidra from which to measure its territorial waters had no plausible basis either in customary international law or in the Draft Convention."[398]

Significantly, the League of Arab States during the same time period issued a press release which expressed the view that the Sixth Fleet maneuvers needlessly escalated tensions in the Middle East, but made no mention of the legitimacy of the Libyan claim.[399] The League of Arab States, then, did not affirm the legitimacy of Libya's claim, although presented with an opportunity to do so.[400] The weight of the evidence,

then, drawn from the protests and deeds of the maritime powers, the UNCLOS III negotiating sessions and, to a limited extent, the news release of the League of Arab States fails to demonstrate foreign state acquiescence in Libya's claim to sovereignty over the Gulf of Sidra.

Although the Gulf fails to qualify as an historic bay under the three-pronged analysis required by customary international law, the Libyan Declaration suggests a second legal principle for support when it states: "Because of the Gulf's geographical location commanding a view of the Southern part of the country, it is, therefore, crucial to the security of the Libyan Arab Republic. Consequently, complete surveillance over its area is necessary to insure the security and safety of the state."[401] This justification is reminiscent of the principle of vital bays that has been ascribed by some writers to Dr. Drago's dissent in the North Atlantic Coast Fisheries Arbitration in which he predicated proof of the historicity of a bay on two elements: (1) the assertion of sovereignty and (2) some particular circumstance such as geographic configuration, immemorial usage, or the requirements of self-defense.[402]

The vital bays doctrine, however, has not won recognition in customary or conventional international law except to the extent that it is embodied in the historic bay exception.[403] Thus, security needs of a coastal state are simply one consideration when looking at the legitimacy of an historic bay claim. Generally, the bays cited as internal waters by reason of the requirements of self-defense have been those which were sharply defined indentations of the coastline such as the Chesapeake and Delaware Bays.[404] Both those bays have narrow openings of twelve and ten miles respectively