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U.S. Freedom of Navigation Program

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U.S. FREEDOM OF NAVIGATION PROGRAM

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ABSTRACT

NAVAL FREEDOM OF NAVIGATION OPERATIONS

For the last decade, the United States has been engaged in "Freedom of Navigation" exercises with ships and aircraft in sea areas of disputed jurisdiction. At times these exercises have evoked armed responses from the nations concerned. What has been the purpose of these precipitous activities on the part of the U.S.? What is the legal basis for this activity, and has it served the interests of the international community or the United States?

This paper will examine the elements of international law pertaining to disputes rising from territorial sea claims and their impact on passage and overflight. It will review some of the historic disputes that persist today, namely the Gulf of Sidra and the Black Sea, and examine the actions the interested parties have taken. In summation, an assessment will be made regarding the benefits and disadvantages of such actions. Is there a better method for conflict resolution in this area or has the program been a success?

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INTRODUCTION

The United States, having evolved as a major maritime nation, is especially sensitive to the trend of "creeping jurisdiction" the maritime world has been experiencing during the latter half of the twentieth century. As coastal states increasingly extend their jurisdictional claims outward, the ocean space remaining for traditional high seas rights has begun to diminsh. Freedom of navigation operations consist of the U.S. practice of sailing its vessels and flying its aircraft in areas of disputed maritime jurisdiction for the purpose of asserting navigation rights. This paper will explore the specifics of this policy, where we challenge other nations, on what points we are most sensitive, and how this activity fits into the international legal system. After an examination of the policy and its roots, we will look at naval operations conducted in the Gulf of Sidra and the Black Sea. An assessment of these maneuvers, their effectiveness, and the value of the Freedom of Navigation Program will conclude the paper. Has the Program been excessive in precipitating conflict, or has it helped shape evolving international maritime law?

I. THE FREEDOM OF NAVIGATION PROGRAM

BACKGROUND

Simply put, the United States believes in the most unrestricted regime regarding navigation rights in waters adjacent to coastal states. The free and unrestricted use of the seas is absolutely paramount for maintaining free trade world-wide. Richard J. Grunawalt, faculty member at the U.S. Naval War College has addressed this concern and, more specifically, its impact on geographically constrained regions-straits.

> To understand United States policy on international straits, it is first necessary to comprehend the commercial and military importance to the United States of sea lines of communication and its dependence upon unimpeded transit through choke points formed by straits between land masses and by island chains astride sea lanes...Commercial sea lines of communication are the trade routes of seaborne commerce. Seaborne trade has been approaching 3,500 million tons annually and have accounted for 80% of trade between nations.[1]

The Freedom of Navigation (FON) Program has its roots in the late nineteen seventies. This was a time when navigational freedoms, as the United States understood them, were being seriously challenged at the Third United Nations Conference on the

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[1]Richard J. Grunawalt, "United States Policy on International Straits," Ocean Development and International Law, 18, no. 4, 445-446.

Law of the Sea. As a result, in March of 1978, the National Security Council initiated a review to propose a "precautionary measure" in the event a Law of the Sea Treaty was not inacted. The measure was quietly implemented in July of 1979 by the Carter Administration through the Joint Chiefs of Staff.[2] It, "directed U.S. air and sea military commanders to assert their rights under U.S. policy to freely traverse territorial seas claimed by other nations up to a three-mile limit, regardless of whether those nations claim broader limits."[3] It had historically been the U.S. position to claim only a three nautical mile territorial sea, in keeping with a long standing tradition of minimal coastal state encroachment on high seas transit. At the U.N Conference, currently in session, the U.S. was endorsing a 12 mile limit (as a concession) included in a "package deal" encompassing traditional navigational rights. The concern in the National Security Council review stemmed from current international law recognizing the fundamental right of transit passage irrespective of territorial sea claims. According to the State Department, in 1979, 22 nations claimed three-mile limits, 76 of the 133 coastal states claimed 12-mile limits, and 14 claimed 200-mile limits with the rest remaining somewhere in between. Although the U.S. was in the process of negotiating a new treaty to include broader territorial limits as

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[2]"Official Reaffirmation By the U.S. of a Three Mile Offshore Limit," Ocean Science News, ed. John R. Botzum, Newsletter of Nautilus, National Press Building, Washington, D.C., vol 21, no 35, 3 Sep 1979, p. 2.

[3]Ibid.

an element, in the event a Law of the Sea Treaty was not enacted, it was equally important to clearly define current U.S. policy.[4] According to the State Department in 1979, "part of the U.S. aim in reaffirming its policy was to put in one place [the] policy regarding claims to ocean space as they relate to navigation and overflight.[5]

The implementation of a Law of the Sea Treaty was generally considered a most favorable development for all concerned in 1979. Some disturbing trends had begun to emerge, however, in coastal state assertions that could have accelerated the ocean closure movement. This threatened a departure from a standard guarantee of customary navigation rights. The FON program was born to head off this development. Elliot L. Richardson, Ambassador at Large, speaking on the occasion of the launching of the Guided Missile Frigate Samuel E. Morrison on July 14, 1979 identified two developments critical to U.S. maritime interests.

> To fullfill its deterrent and protective missions our Navy must have the manifest capacity either to maintain a presence in farflung areas of the globe or to assemble such a presence rapidly. This capacity must embrace two essential components, one operational and the other political. The first is true global mobility-mobility that is totally credible and impossible to contain. The second is the right to sail and take up station without subjecting the United States to involvement with any other state.

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[4]Ibid.

[5]Ibid.

Secondly...,

> Two accelerating developments in the law of the sea challenge these operational and political premises. First, great seaward expansion in coastal state claims of sovereignty reduces the area in which deployment can remain outside the claimed territory of actual or potential combatants. Second, these claims vastly increase the number of legal chokepoints around the world- mainly straits and archipelagoes- where naval and air transit is essential to the deployment. These developments, which have not yet run their course, add greatly to the risk and cost of deploying global naval forces.[6]

Ambassador Richardson, while cautioning of the dangers inherrent in such developments strongly advocated a treaty to stem this potential tide and reach an international consensus.

> We must have a legal environment in which our own perception of our rights is unchallenged. This means the right of navigation and overflight free of foreign control, free of substantial military risk, and free of economic or political cost...The negotiating text now before the Third U.N. conference on the Law of the Sea, if incorporated in a widely ratified Law of the Sea Treaty, would meet this need. First, by establishing a 12-mile maximum limit for the territorial sea, the text would prohibit further assertions of sovereignty by coastal states beyond 12 miles, and roll back some existing claims. Second, under the text we would enjoy free and unimpeded passage through, under, and over straits and archipelag ic waters. The provisions on these subjects **emphasize the obligations of transiting states rather than the right of coastal states** to control transit.[7]

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[6]Elliot L. Richardson, "National Security, The Law of the Sea," Vital Speeches of the Day, delivered at the launching of the USS Samuel E. Morrison, Bath, Maine, 14 July 1979 (New York: City News Publishing Co.), pp. 702-4.

[7]Richardson, pp. 703-4. Emphasis added.

It is seen that the FON Program, first initiated in 1979, was originally implemented to maintain consistent pressure on coastal States with expansionist maritime views. "The 'assertion of rights' program was created prior to the adoption of the 1982 Law of the Sea Convention to begin promoting consistency of state practice with the 1982 treaty."[8] In 1979, the U.S. still preferred the traditional three-mile territorial sea but would acquiese to a maximum increase of 12 miles, providing customary navigational freedoms were preserved. This "navigational" package was [and remains] vital to the United States and represented the U.S. view of customary international law. On two well publicized official occasions since 1979, the U.S. reaffirmed its commitment to customary navigational freedoms and its right to assert these freedoms in practice. The first, on 10 March 1983 in President Reagan's Ocean Policy Statement, the U.S. announced its complete support for all navigation-related provisions in the 1982 Law of the Sea (LOS) Convention. The U.S. felt that these provisions "...generally confirm existing maritime law and practice and fairly balance the interests of all states."[9] [See Appendix 1 for text of Ocean Policy Statement] Based on this position and in the

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[8]"U.S.-Soviet Statement on Innocent Passage," Ocean Policy News, Newsletter of the Council on Ocean Law, September/October 1989, p.1.

[9]"U.S. Oceans Policy, President's Statement, March 10, 1983," Department of State Bulletin, Washington, D.C.: Department of State, June 1983, p. 70.

interest of "promoting and protecting the oceans interests of the United States in a manner consistent with those fair and balanced results in the convention,"[10] the FON program was again defined:

> The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, **acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight** and other related high seas uses.[11]

On March 26, 1986, the occasion of one of the more violent Gulf of Sidra incidents, Charles Redman, State Department deputy spokesman, defined the Freedom of Navigation Program as acting in accordance with President Reagan's March 10, 1983 ocean policy statement [mentioned above]. In his announcement he indicated:

> U.S. ships and aircraft have exercised rights and freedoms of the coasts of countries whose laws do not conform to international law as reflected in the 1982 Law of the Sea convention. Examples of the types of objectionable claims against which the United states has exercised rights and freedoms are **unrecognized historic waters claims, territorial sea claims greater than 12 nautical miles, and territorial sea claims that impose impermissible restrictions on the innocent passage of any type of vessels**, such as requiring prior notification or permission...Since the policy implementation in 1979, the U.S. government has exercised its rights against the objectionable claims of over 35 countries, including the Soviet Union, at a rate of some 30-40 per year.[12]

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[10]Ibid.

[11]Ibid. Emphasis Added.

[12]"Rights and Freedoms in International Waters, Department Statement, March 26, 1986," Department of State Bulletin, Washingtoln, D.C.: Department of State, May 1986, p. 79. Emphasis Added. [See Appendix 2 for full Department Statement].

The FON program is not designed as a hostile venture. It is intended as a peaceful exercise of international rights that "impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly states alike."[13] It is conducted in concert with diplomatic actions taken at several levels, to include formal diplomatic protests. Since 1948 the United states has filed 70 formal protests, 50 of which have been filed since the FON Program began.[14] [See Appendix 3 for a complete Dept. of State description of the Program]

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[13]"U.S. Freedom of Navigation Program," GIST, ed. Harriet Culley, Washington, D.C.: Bureau of Public Affairs, Department of State, December, 1988, p. 1.

[14]"U.S. Freedom of Navigation Program," p. 2.

II. 1982 LAW OF THE SEA CONVENTION

As previously mentioned, when the United States speaks of "freedom of navigation," it refers to the navigation-related articles in the 1982 Law of the Sea Convention. The U.S., although not a party to the Convention, acknowledges that these articles reflect evolving international law and supports them fully. Areas where the U.S. has chosen to exercise these freedoms include the realms of both innocent and transit passage as well as illegal baseline delimitation and historic waters claims. Actions undertaken in these areas are done so with the understanding that the extent of the territorial sea is limited to 12 nautical miles in accordance with Article 3 of the Convention. A close look at the meaning of these articles will shed some light on why these operations are conducted. Part II of the 1982 Convention deals with the territorial sea, its extent, and the innocent passage regime. Differences in interpretation of these articles have led to disputes over U.S. operations conducted in their name. Innocent passage is discussed specifically in section 3 and includes Articles 17-32. The following excerpts are noteworthy:

Article 17
Right of Innocent Passage

> Subject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18
Meaning of Passage

1. Passage means navigation through the territorial sea for the purpose of:

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

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

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[15]

Areas of contention include the precise meaning of "innocent" activities. Article 19 addresses this, but is the list exhaustive? That is to say, are all other activities not listed in the article innocent?

Article 19
Meaning of Innocent Passage

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

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

(a) any threat or use of force against the sovereignty, territorial integrity or political independenceof the coastal State...

(b) any exercise or practice with weapons of any kind;

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[15]United Nations Convention on the Law of the Sea, 1982, Articles 17, 18.

(c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;

(d) any act of propaganda aimed at affecting the defense or security of the coastal State;

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

(f) the launching, landing or taking onboard of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of willful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfacing with any system of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.[16]

Warships are not uniquely addressed here, but does that specifically exclude them? The U.S. does not believe that a separate regime is required for warships. Other nations, however, are not in complete agreement on this point. Admiral Bruce Harlow, USN, retired, in a workshop sponsored by the Law of the Sea Institute in 1986 commented that, "41 nations or more have claimed the right to demand prior authorization or notification of warships as a concomitant part of the right of innocent passage."[17] This,

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[16]United Nations Convention on the Law of the Sea, 1982, Article 19.

[17]International Navigation: Rocks and Shoals Ahead? A Workshop of the Law of the Sea Institute, ed. Jon M. Van Dyke, Lewis M. Alexander, Joseph R. Morgan, (Hawaii: Law of the Sea Institute, 1983), p. 161.

he said in the context of transiting international straits that overlap territorial waters. These claims aside, "transit passage," as provided in the 1982 Convention make no exceptions for warships. Articles 37-39 are specific in this regard:

Article 37
Scope of this Section

> This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Article 38
Right of Transit Passage

> 1. In straits referred to in Article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics...[18]

The Convention appears straight forward on these issues, however, differences in interpretation have caused the U.S. to assert its position in other than diplomatic channels. Why?

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[18]United Nations Convention on the Law of the Sea, 1982, Articles 37, 38.

WHY OVERT ACTIONS?

International law is a unique development. Based on the premise that, "order and not chaos is the governing principle of the world," it is in the State's best interest to abide by an established law common to all participants.[19] Since no "higher authority" binding nations exists, this must be the impetus for cooperation in an international context. Gerhard von Glahn in his work, Law Among Nations, cites enlightened self-interest, necessity, credibility, habit, world opinion, and social approval as additional elements compelling states to accept international law.[20] International law developed either through customary practice or treaty is enforced through diplomatic protests (preserving the integrity of the law), mediation, arbitration or reference to and action by an international agency (such as the United Nations).[21] The problem with these methods, however, is that the present international adjudication system is weak. In regard to protests, von Glahn admits that, "although minor violations of the law may be corrected in consequence of such protests, major international violations of the law in most instances remain

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[19]Gerhard von Glahn, Law Among Nations, 5th ed. (New York: Macmillan Publishing Co., 1986), p. 6.

[20]Ibid.

[21]Ibid, p. 8.

unaffected by lodging diplomatic protests."[22] For nations perceiving these violations of law, it is absolutely paramount to take action and avoid acquiescence. Freedom of navigation operations are precisely that. Actions more powerful than mere diplomatic protests, that reserve the legal rights of the state. As the bureau of Public Affairs at the State Department puts it:

> Operational Assertions: Although diplomatic action provides a channel for presenting and preserving U.S. rights, the operational assertion by U.S. naval and air forces of internationally recognized navigational rights and freedoms complements diplomatic efforts. Operational assertions tangibly manifest the U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other countries.[23]

In practices not spelled out in treaty law, it is essential to assert the state's interpretation of existing common law. This activity, taken in the aggregate, further shapes and legitimizes customary law. Elliot Richardson, commenting on the U.S. decision to challenge other states' territorial sea claims in excess of those held by the United States noted:

> If we hang back from acting upon our own understanding of the applicable principles of international law, we pay a price in terms both of constraints on the mobility of our forces and of the credibility of our will to use them. An additional cost is the further erosion of the very principles we proclaim, for the survival of any principle of customary international law depends upon the consistency of its observance in practice.[24]

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[22]Ibid.

[23]"U.S. Freedom of Navigation Program," p.2.

[24]Elliot L. Richardson, "Power, Mobility, and the Law of the Sea," 58 Foreign Affairs, (Spring 1980), p. 154.

When the policy of exercising U.S. naval forces for the purpose of challenging excessive territorial sea claims was first made known, U.S. delegates to the LOS Convention contended, "that the procedures in question were intended merely to give consistent and non-provocative application to the view of international law we [U.S.] had long maintained."[25] For these reasons, the U.S. felt it necessary to assert its view, and help shaped the development of customary international law.

WHERE DOES THE U.S. CONDUCT FREEDOM OF NAVIGATION OPERATIONS?

The U.S. is not theoretically limited to where it conducts these operations. Essentially, anywhere states claim "excessive" jurisdiction of the sea is an appropriate location to make challenges. Using the navigation articles of the LOS Convention as a guide (indicative of current customary law), anywhere territorial sea claims exceed 12 nautical miles, exclusive economic zone proclamations include navigational regulation, or baselines are drawn enclosing "suspect" historic bays, the U.S. can make legitimate challenges. Figure 1 details the number of countries

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[25]Richardson, p. 148.

this could potentially include. Similarly, Figure 2 shows the number of states making excessive navigational regulations within their EEZ. The third major area of jurisdictional dispute, historic bays, includes an evolving body of international law. Not specifically outlined, but alluded to in the LOS Convention, historic bays have generally been reognized internationally only if the claimant state: (1) maintained a continuous and effective use of authority in the area, (2) there has been a significant passage of time, (3) the claimant state has international character, (4) an explicit claim of sovereignty has beenmade, and (5) other nations have exhibited acquiesence to these claims. Figure 3 depicts 39 bays with varying degrees of legitimacy. Given the number of locations potentially available in all three categories, the U.S. could conduct challenges world-wide, [and does].

Although a broad field, freedom of navigation operations in recent years have been limited in scope for competing political reasons. As Elliot Richardson pointed out:

> The erosion of the traditional rules and the trend toward expanding claims of coastal state jurisdiction have progressively increased the risk that deployments to distant regions of the globe will encounter some form of challenge by third states along the way. Whenever it arises, this prospect faces us with an uncomfortable choice. One alternative is to go full speed ahead, thereby generating hostility and exposing us to political and economic costs...If we make our consistent policy to damn the torpedoes, the costs will be cumulative.[26]

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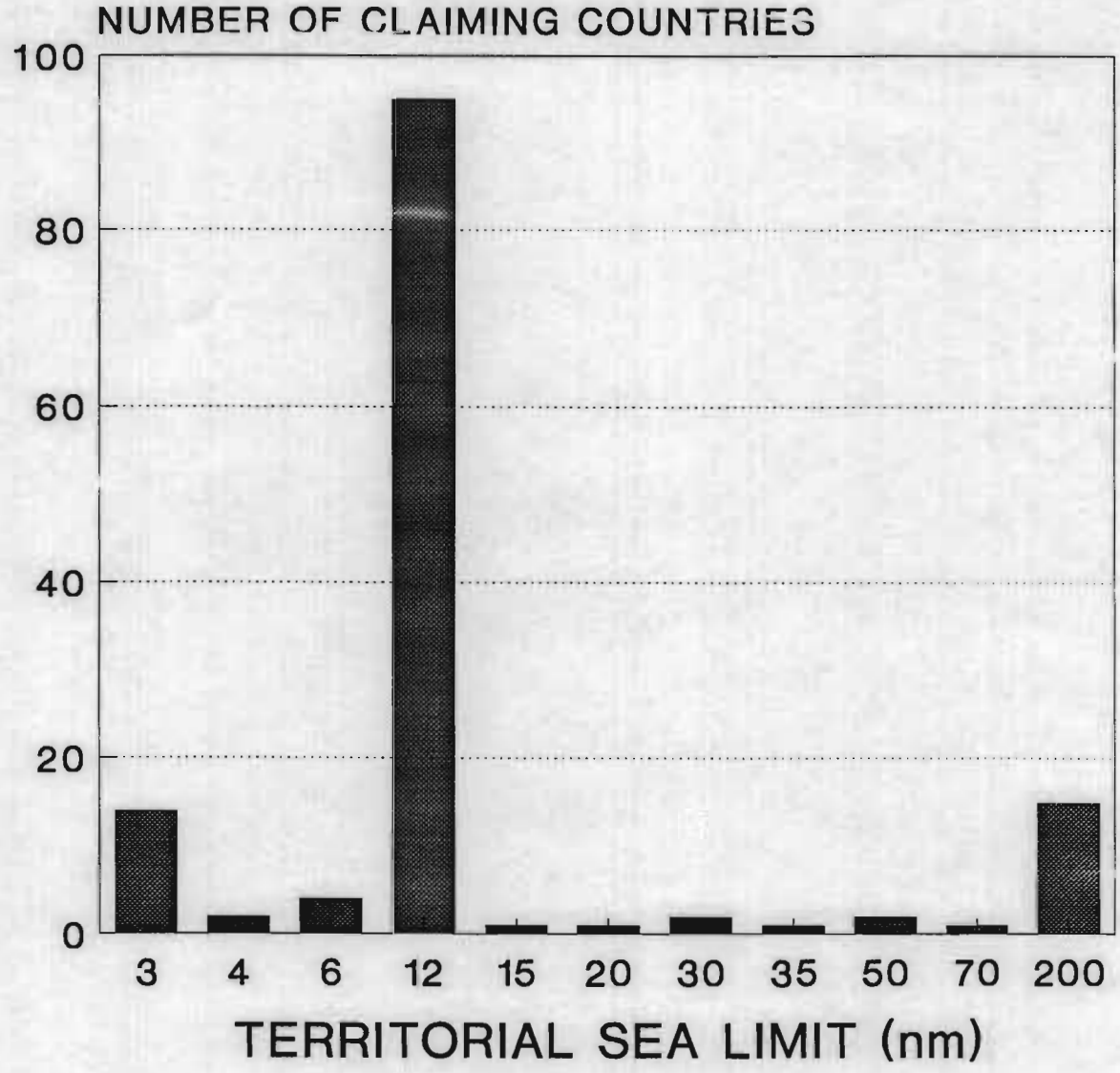
[26]Richardson, pp. 153-4.

FIGURE 1

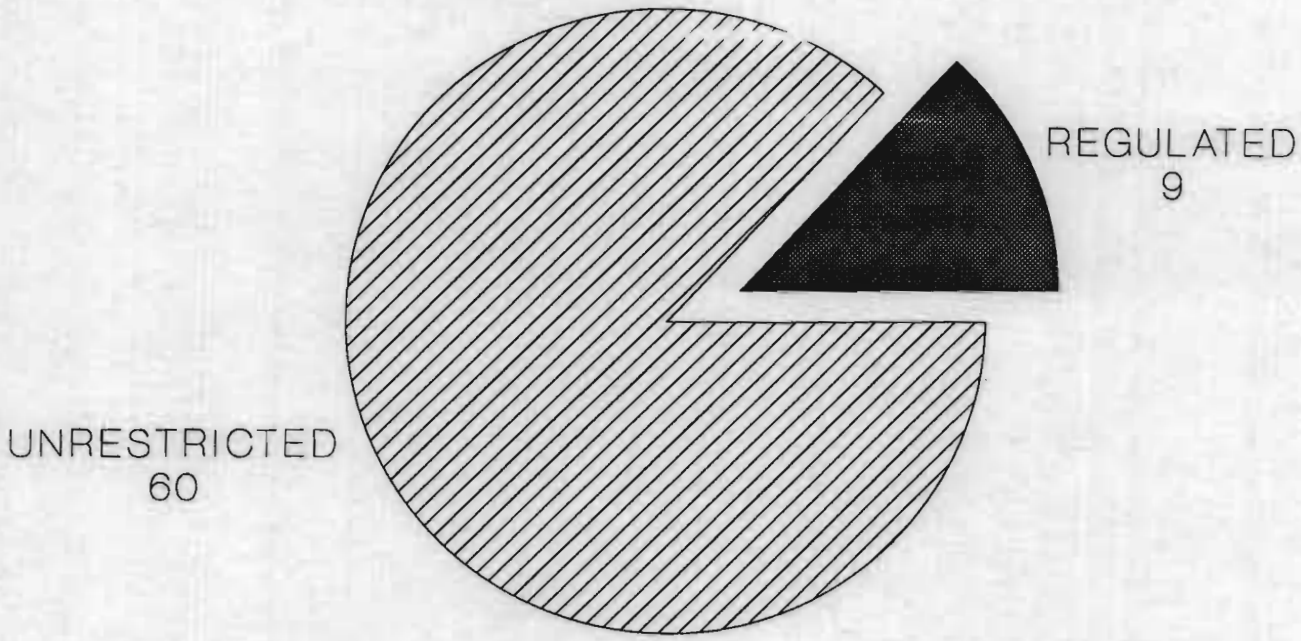
MARITIME CLAIMS
Territorial Sea



Note: Data from Lewis M. Alexander, Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States, (Peacedale, RI: Offshore Consultants, 1986), p. 86, Table 1.

FIGURE 2

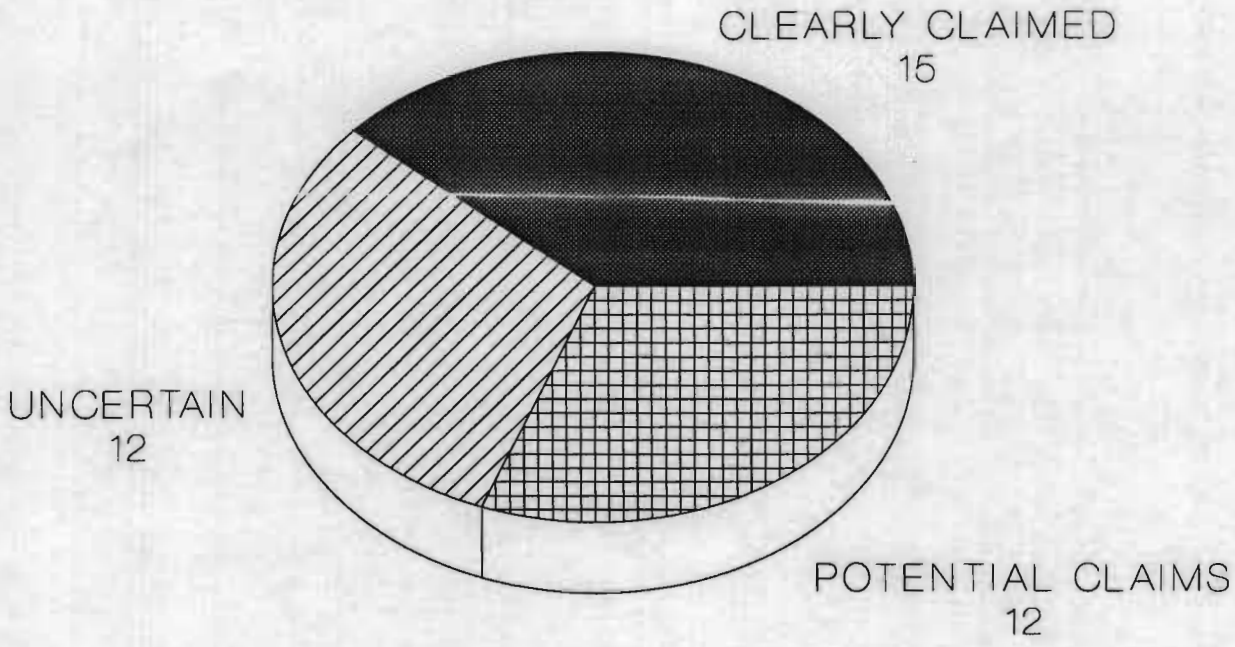
EEZ PROCLAMATIONS ALLOWING GOVERNMENT REGULATION OF NAVIGATION



Note: Data from Table 11, 11-B, Alexander, pp. 91-92

FIGURE 3

HISTORIC BAYS
CLAIMED AND POTENTIAL



Note: Data from Table 7, Alexander, p. 89

In the Mediterranean Sea, the United States challenged Libya's claim to the Gulf of Sidra as an historic bay and crossed 32 degrees 30' north latitude, the vaunted "line of death," to exercise freedom of navigation on the high seas. This action on 24 March 1986 drew an armed response from Libya and ultimately resulted in the death of some 150 Libyans at the hands of the Sixth Fleet.[27] On two separate occasions in the 1980s the Libyans, (again), lost fighter aircraft while attempting to intercept and attack U.S. carrier-based aircraft exercsing their rights by flying in international airspace. Over these two occasions a total of four aircraft were lost. On 13 March 1986 and again on 12 February 1988, the guided missile cruiser Yorktown and the destroyer Caron entered Soviet territorial waters and exercised the right of innocent passage in the Black Sea. This action resulted in confrontations between the Superpowers although it did not precipitate the use of arms.

In each case, the operations represented a consistent application of U.S. interpretation of international law. Although these maneuvers risk heightening political tension, they serve to help coalesce evolving customary law. In both cases something positive has ultimately resulted. The Libyans, while remaining persistent, are not as vocal in their insistence of a "Line of

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[27]International Navigation: Rocks and Shoals Ahead?, p. 6.

III. CASE STUDY: THE GULF OF SIDRA

The Gulf of Sidra [alternately called Surt, Sirte, Sirt] has been a source of contention for navigational freedoms since the days of the North African Barbary Coast pirates in the late 1700's. In modern times, the Gulf of Sidra first came to the forefront in a navigational sense in 1973. In October of that year, Libya announced that it considered all water in the Gulf south of 32 degrees 30' north latitude to be internal waters.[28] Prior to this, Libya delimited its territorial sea at 12 nautical miles under Article 1 of its Law of February 18, 1959. The 1959 law replaced a previously established territorial sea of 6 nautical miles, extending from the coast, which had been in place prior to Libya's independence. After the overthrow of King Idris I on September 1, 1969 by a Revolutionary Command Council led by Colonel Muammar el-Quaddafi, the new government announced its claim to the Gulf of Sidra as internal waters.[29] [Appendix 4 details the content of the

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[28]"Navigation Rights and the Gulf of Sidra," Department of State Bulletin, Washington, D.C.: Department of State, February, 1987, p. 69.

[29]Yehuda Z. Blum, "Current Developments, The Gulf of Sidra Incident," The American Journal of Internaational Law, vol 80, (1986), p. 668.

Libyan statement] Upon receiving the diplomatic note from the Libyan Embassy the Unted States sharply protested the assertion and replied officially in February of the following year. The U.S. characterization of the claim was that it was unacceptable and a violation of international law.[30] [Appendix 5 includes the U.S. reply noting the illegality of Libya's claim] The Gulf of Sidra, encompassing 22,000 square miles of the Mediterranean Sea extends southward 140 miles and is bordered to the east, south and west by Libya. If legally recognized as sovereign Libyan territory, the Gulf of Sidra would account for a significant reduction in the Mediterranean's high seas regions in addition to a dramatic change in existing territorial boundary delimitation. The untenable basis of this claim established the incentive for the U.S. to select the Gulf as one of the locations for Freedom of Navigation exercises. Figure 4 depicts the Gulf and its relation to the Mediterranean Sea.

A close examination of Libya's boundary claim indicates the Gulf closure line represents the establishment of an "Historic Bay" rather than the drawing of a straight baseline simply joining points on a coast. The latter would technically apply only in, "localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.[31] This is not the case for the relatively smooth and

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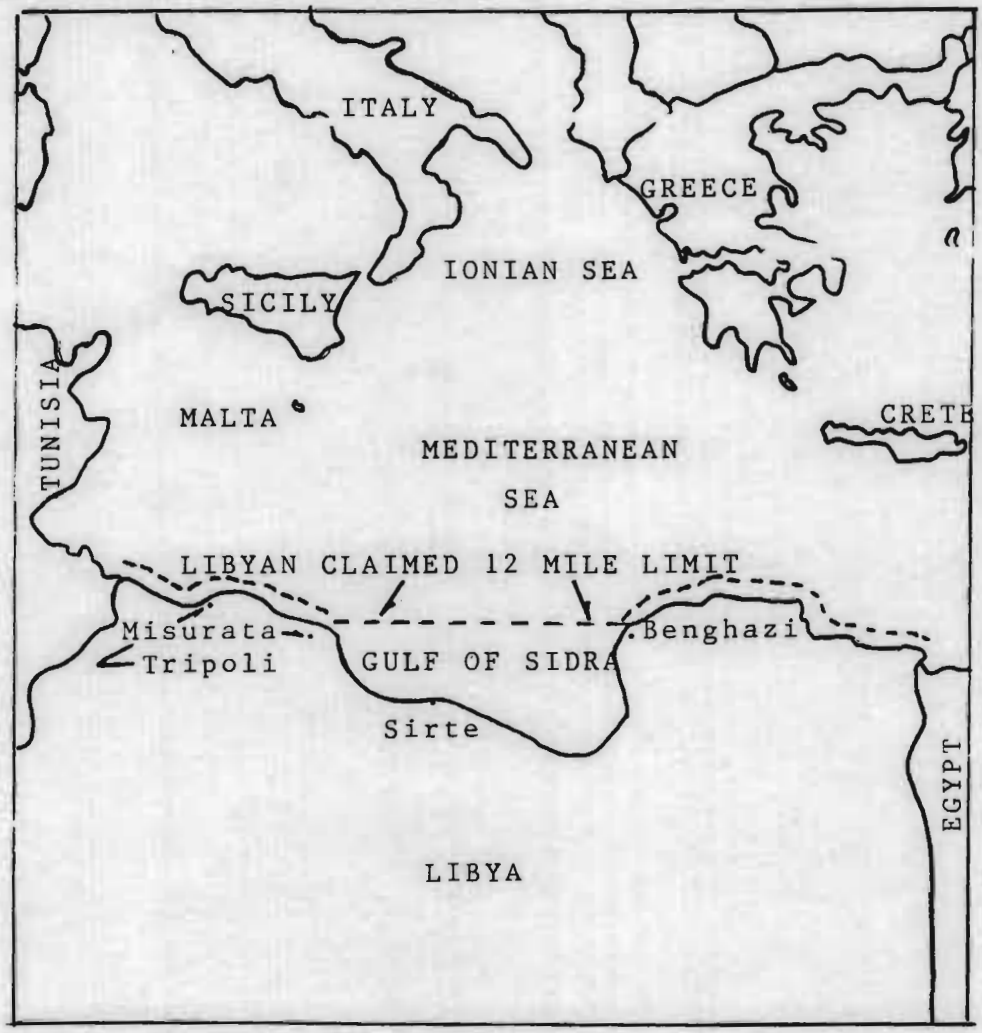
[30]Blum, p. 669.

[31]Blum, p. 671, (from Article 4. (1), Territorial Sea Convention, April 29, 1958).

FIGURE 4

GULF OF SIDRA



"island-less" Gulf of Sidra. This now brings us to the question of bays and their legal delimitation. Juridical bays can be established by closing off their entrances and applying the "semi-circular" rule. Under existing international law, a juridical bay closure line can not exceed 24 nautical miles in accordance with both the 1958 Territorial Sea Convention (Article 7) and the 1982 UN Convention (Article 10). The Libyan closure line drawn at 32 degrees 30' north exceeds the internationally accepted limit by more than twelve times.[32] We are now left only with the concept of historic bays and their definition since the Gulf closure line does not legally qualify as either a straight baseline or a juridical bay as defined by existing international law.

Article 7 of the Territorial Sea Convention of 1958 and Article 10 of the 1982 Law of the Sea Convention both stipulate that their provisions do not apply to "historic bays." The definition of 'historic bay,' however, is somewhat ellusive. According to the U.S. Department of State current law and custom dictates the following;

> By custom, nations may lay historic claim to those bays and gulfs over which they have exhibited such a degree of open, notorious, continuous, and unchallenged control for an extended period of time as to preclude traditional high seas freedoms within such waters. Those waters (closed off by straight baselines) are treated as if they were part of the nation's landmass, and the navigation

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[32]Blum, p. 671.

> of foreign vessels is generally subject to complete control by the nation.[33]

Prior to the 1973 Libyan announcement, no Libyan claim had ever been made for the Gulf of Sidra. Libya, both before and after independence, measured its territorial sea from a coastal baseline- a distance of 6 and 12 nautical miles alternatively. According to Yehuda Z. Blum, Chairman at the Hebrew University in Jerusalem and scholar in maritime law:

> ...no trace of evidence seems to exist of a "historic" claim to the waters of the Gulf of Sidra during the preindependence period. Equally revealing in this regard is the fact that no mention is made of the Gulf of Sidra in the survey of historic bays (or bays claimed as such) contained in the Memorandum on Historic bays prepared by the UN Secretariat for the first UN Conference on the Law of the Sea.[34]

Based on the geographical facts and the lack of any historical precedence to the contrary, the U.S. maintains that Libya is legally limited to a 12 nautical mile territorial sea measured from the coast's low water line; " ...within which foreign vessels enjoy the limited navigational rights of innocent passage. Beyond the territorial sea, vessels and aircraft of all nations enjoy freedom of navigation and overflight."[35] Armed with this legal contention and in the interest of actively displaying non-acquiesence, the U.S. delierately and systematically conducts naval

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[33]"Navigation Rights and the Gulf of Sidra," p. 70.

[34]Blum, p. 672.

[35]"Navigation Rights and the Gulf of Sidra," p. 70.

exercises in the Gulf of Sidra. These operations, all conducted well beyond a 12 nautical mile line from the Libyan coast have repeatedly drawn armed responses from Libya. Of particular note is the Libyan reaction on two specific occasions: August 1981 and March 1986. An analysis follows:

GULF OF SIDRA I: 19 AUGUST 1981

On 19 August 1981 at 1:20 AM EDT, two U.S. Navy F-14 "Tomcat" aircraft from the USS Nimitz were fired upon by two Libyan SU-22 "Fitters" in the Gulf of Sidra aproximately 60 nautical miles from the Libyan coastline. The action occurred during a previously scheduled two-day naval exercise in the Gulf that was preceded by notices to airmen and mariners on the 12th and 14th of August. Figure 5 depicts the location of the action. Following the attack, which consisted of an "Atoll" heat seeking missile firing by one of the Libyan aircraft, the two F-14s maneuvered defensively and positioned themselves behind the SU-22s. Once behind, each F-14 shot one AIM-9L "Sidewinder" at the two aircraft resulting in their destruction. Figure 6 illustrates the air combat maneuvers involved in the aerial engagement. The entire engagement lasted aproximately one minute. The Libyan response, as expected, was strong.

FIGURE 5

LOCATION OF FIRST INCIDENT

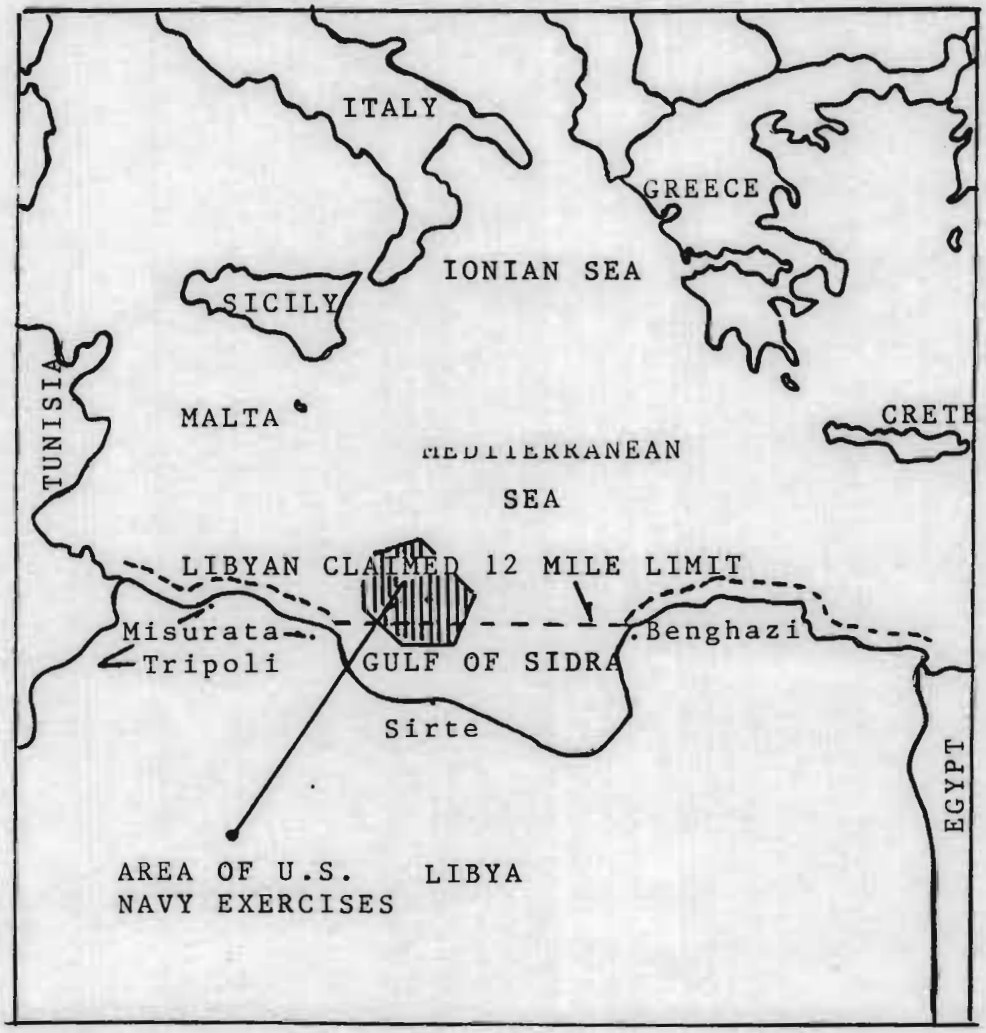
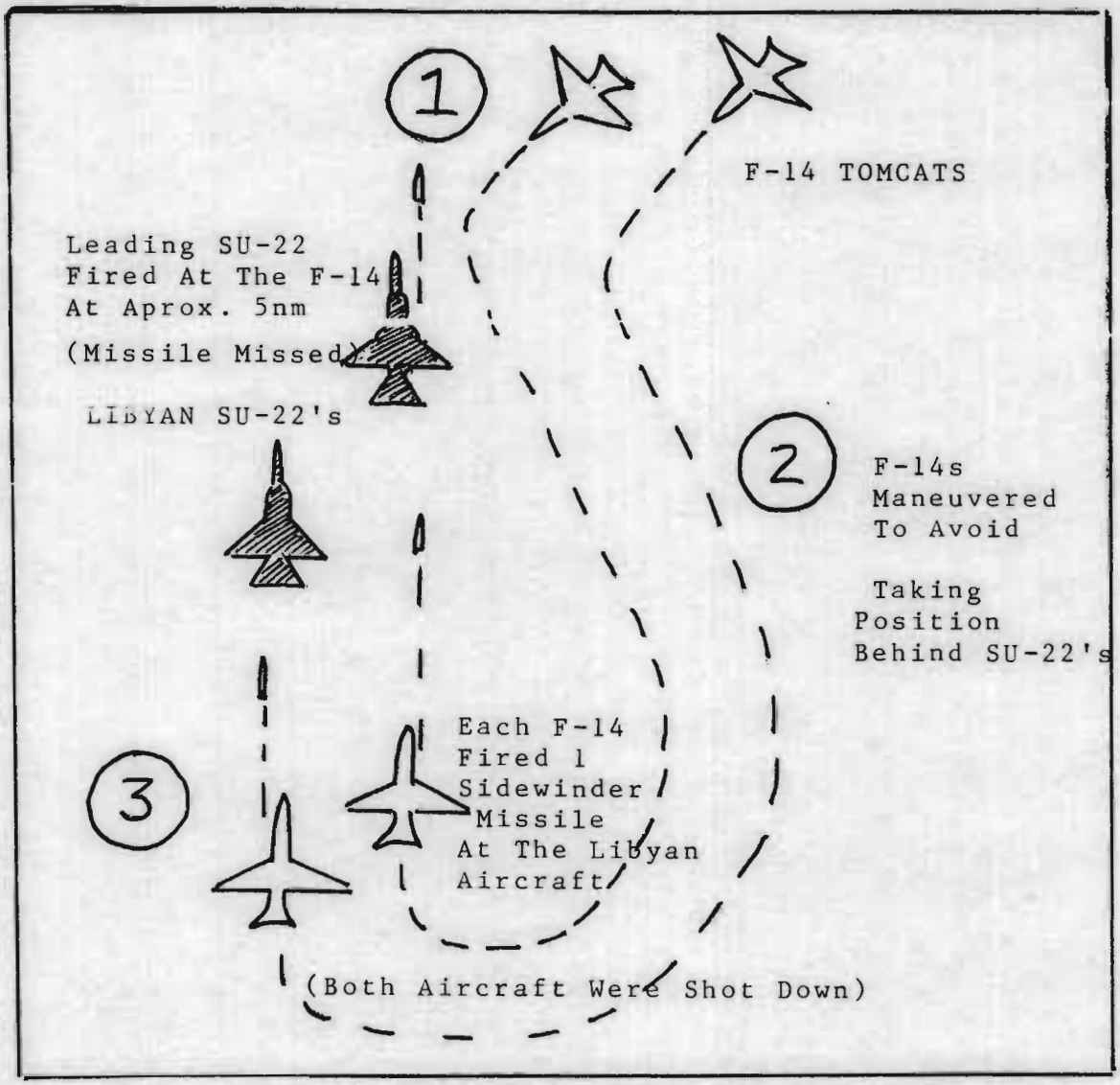


FIGURE 6

AIR COMBAT MANEUVERS



In their response, the Libyans accused the U.S. of, "International Terrorism," of "plotting aggression against Libya in carrying [out] the maneuvers in the Gulf of Sidra," and declared the American action as a "flagrant and overt violation of international law."[36] The U.S., similarly annoyed, issued a protest note to the Libyans viewing the attack as unprovoked and taking place in international waters. Appendix 6 details the contents of the note along with the assertion that the U.S. would meet any further challenges with force if required.

At the root of the incident, of course, was the U.S. refusal to recognize the Gulf as Libyan internal waters. In 1981 an additional element exacerbated the conflict- the question of the extent of the territorial sea. At that time, the U.S. (along with 21 other countries) officially recognized three nautical miles as the maximum extent of the territorial sea. Some 80 other countries, including Libya, set 12 nautical miles as the limit. The question of the Gulf falls into a different category, however; that of establishing legal baselines as previously discussed. The fact, though, that an international standard was still in the making for the definition of the territorial sea only served to intensify sentiments on both sides. The fact that the engagement

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[36]John Kifner, "Tripoli, In a Protest Note, Accuses U.S. of 'International Terrorism,'" New YorkTimes, 20 August 1981, p. A1.

By August of 1981 the U.S. had been conducting Freedom of Navigation Exercises for 2 years- actively displaying non-acquiescence to controversial territorial sea claims. In August of 1981 the U.S. still supported a three nautical mile territorial sea limit- in the face of a large percentage of States advocating a 12 nautical mile limit. This would soon change. With regards to Libya, the U.S. would continue to challenge 32 degrees 30' North Latitude as an illegal baseline scheduling periodic exercises in the region. Libya, likewise, would continue to assert her sovereignty over the Gulf. Armed conflict did not precipitate again in this theater until March of 1986.

GULF OF SIDRA II: 24 MARCH 1986

On March 23, 1986 U.S. naval forces conducting exercises in the vicinity of 32 degrees 30'N in the Gulf of Sidra were fired upon by land-based surface to air missiles from Surte (also termed Sirte and Sidra). The source of the attack was a missile and radar installation on the south western shore of the Gulf. As before, the U.S. claimed the attack took place on [or above] the high seas, while the Libyan government maintained their territorial integrity had been breached. The ensuing twenty four hours saw additional surface-to-air missile firings from ground based sites bordering the Gulf to the south, while U.S. naval forces responded

with air and surface launched missile attacks on Libyan patrol boats and surface-to-air missile installations. After the action, the Libyans had fired aproximately six land-based surface-to-air missiles (SA-5 and SA-2 variants) at carrier based aircraft. The U.S. responded with numerous harpoon missile attacks on patrol boats operating in the vicinity of the battle force. In addition to attacking hostile patrol boats, the U.S. naval units launched high speed anti-radiation missile (HARM) attacks on the installations that had previously fired upon U.S. aircraft. U.S. forces involved in the Gulf exercises follows:

U.S. Forces in the Sixth Fleet (March 1986)

Flagship	USS Coronado
Aircraft Carriers	USS America Saratoga Coral Sea
Guided Missile Cruisers	USS Ticonderoga Yorktown Biddle Richmond K. Turner
Destroyers	USS Scott Mahan Peterson Caron
Frigates	USS DeWert Halyburton Jack Williams Pharris Vreeland Donald B. Beary Paul Jesse L. Brown

Frigates (continued)

Capodano
Ainsworth
Aylwin
Garcia [40]

The ships assembled in the Sixth Fleet in the vicinity of Libya represented an unusual concentration of naval power for the Mediterranean- three complete carrier battle groups. The ships, collectively called Battle Force 60, had been conducting coordinated operations coincidental to Freedom of Navigation Exercises in the Gulf. A group this large, however, had never before been assembled in this region for this single purpose. It would be naive to think that there were no ulterior political motives for this naval activity. During the Winter of 1986, anti-Western terrorist activity had risen to alarming levels while relations between the U.S. and Libya continued to deteriorate. A groundswell of evidence was beginning to show that Libya had more than a rhetorical role in "state sponsored terrorism." While the actions of Battle Force 60 stand alone on their right to conduct peaceful exercises on the high seas and to defend themselves if attacked, their presence and subsequent operations became precipitous when cast together with rising political tension. It is not unusual, then, that open hostilities resulted from Freedom of Navigation Exercises amid a backdrop of hostile dialog between Washington and Tripoli. The sequence of events in the Gulf of

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[40]John M. Goshko, "Terrorist Reprisals by Libyans Likeliest Overseas, Experts Say," The Washington Post, 26 March 1986, p. A22.

Sidra on 23-24 March 1986 follow:

23 March

U.S. naval forces begin peaceful exercise as part of the Freedom of Navigation Program. U.S. forces operate in international waters and airspace. Aviation safety notifications are filed in advance, in accordance with standard international aviation practice.

24 March

Shortly Before 8:00 AM EST:

2 SA-5 Surface-to-air missiles are fired at U.S. aircraft flying over the Gulf from Libyan missile installation in the vicinity of Sirte.

Over the next few hours...

Several more SA-5s are fired at U.S. aircraft from same sites.

3:00 PM (EST):

2 HARM air-to-surface missiles are fired by U.S. Navy A-7 at the radar installations. Radar site is knocked out.

2:00 PM (EST):

Libyan cruise missile equipped patrol boat comes within missile range of U.S. ships in the Gulf (well off the Libyan coast). U.S. Commander on scene determined the craft had hostile intent and ordered A-6 aircraft to attack. 2 Harpoon cruise missiles are fired at craft heavily damaging it.

4:30 PM:

Second patrol boat approaches U.S. forces and is driven off by attack aircraft.

6:00 PM:

Third patrol boat approaches USS Yorktown and is attacked with 2 Harpoon missiles.

6:47 PM (EST):

2 HARM air-to-surface missiles are fired by A-7 aircraft at radar installation that has become active after the first attack. Installation is, again, knocked out.

25 March

12:20 AM (EST):

A-6 aircraft with Harpoon attacks another approaching patrol boat, damaging it.

[41]

In response to the attacks on the U.S. fleet President Reagan stated:

> This attack was entirely unprovoked and beyond the bounds of normal international conduct. U.S. forces were intent only upon making the legal point that, beyond the internationally recognized 12 mile limit, the Gulf of Sidra belongs to no one and that all nations are free to move through international airspace. We deny Libya's claim, as do almost all other nations, and we condemn Libya's actions. [42]

What is most interesting to note is that the U.S. shifted its position on territorial sea delimitation to 12 nautical miles by 1986. The central issue in the Gulf of Sidra had always been one

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[41]Sequence of events compiled from multiple sources. Goshko, p. A22.
"Gulf of Sidra Incident," Letter to the Speaker of the House and the President Pro Temp of the Senate, March 26, 1986," Presidential Papers, Administration of Ronald Reagan, 1986, Mar 27, p. 423.

[42]"Libya Fires on U.S. Vessels In International Waters, White House Statement, 24 March, 1986," Department of State Bulletin, Washington, D.C.: Department of State, May 1986, p. 77.

of illegally drawn baselines. In 1981, however, the issue was additionally exacerbated by a 3 nautical mile versus a 12 nautical mile territorial sea dispute with Libya. Since the 1982 LOS Convention, it appears the 12 nm territorial sea had achieved nearly universal international recognition.

Since 1986, tensions with Libya over the Gulf of Sidra remain unresolved. The U.S. still conducts periodic operations in the vicinity to preserve legal rights, although in a much less demonstrative manner than previously. Most recently, in 1988, another altercation resulted when Libyan ground controlled aircraft attempted the intercept of U.S. carrier based fighters. The result was the shoot down of the Libyan interceptor. Libya, on their part, have toned down the rhetoric somewhat, but still contend the Gulf is part of their territorial sea. The next section will explore the Freedom of Navigation Program in a different realm- the question of innocent passage and rights afforded foreign vessels in territorial waters.

IV. CASE STUDY: THE BLACK SEA AND INNOCENT PASSAGE

The Soviet Union has had a long and sinuous history over its exact position on the rights included in innocent passage. The first major seapower to begin enacting legislation implementing the 1982 LOS Innocent Passage provisirons, the Soviets enjoyed the potential for establishing precedent and influencing policy in a manner consistent with their own interpretation. W.E. Butler, noted expert on Soviet legal maritime issues and I.L.M. corresponding editor for the U.S.S.R., has studied Soviet Law and its development for many years. He has found that from a historical perspective the Soviet Union has acknowledged the rights of innocent passage begining in the 1920s in their "Instruction for the Navigation of Vessels in Coastal Waters within Artillery Range of Shore Batteries in Peacetime," of July 5, 1924. This instruction provided that, "both Soviet and foreign merchant vessels had the right to unhindered passage within Soviet territorial waters save in special zones."[43] Subsequent statutes were enacted governing similar provisions in 1927 (The State Boundary), and 1936 (Rules for the Entrance of Vessels into Areas

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[43]W.E. Butler, "Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy," The American Journal of International Law, vol 81, (1987), p. 331.

of Restricted Movement). On March 28, 1931, "Provisional Rules for Foreign Warships Visiting USSR Waters," were promulgated based on the 1927 Statute.[44] In all these laws the concept of innocent passage was supported, although specific language was often absent. The 1931 Provisional Rules **did** require prior authorization from the Soviet government for visiting warships, but this was limited to actual port visits to internal waters. Soviet jurists of the era contended that authorization was only required to enter internal waters and that, "foreign warships also may pass in territorial waters without receiving previous authorization therefore and without a prior notification concerning the passage."[45] As World War II emerged, however, more restrictive views became commonplace. Citing divergent state practice and lack of an international consensus, Soviet policy insisted on the right of prior notification and authorization for warships to transit territorial waters.

Internationally, the concept of untethered innocent passage remained alive. The passage of the 1958 Convention on the Territorial Sea essentially made only one "coastal state concession" regarding control over innocent passage in Article 23. I stated:

> If any warship does not comply with the regulations of the coastal State concerning passage through the

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[44]Ibid, p. 332.

[45]Butler, p. 332.

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.[46]

The Soviet Union in response to this development entered a reservation to article 23 and declared that the State, "has the right to establish a procedure of authorization for the passage of foreign warships through its territorial waters."[47] In addition, the Soviet Union clarified its position on innocent passage by modifying its existing laws. These changes included an authorization procedure for foreign warships [Article 16 of the 1960 Statutes], and a set of rules stipulating that consent for the passage of foreign warships in territorial waters must be requested through diplomatic channels 30 days prior to their entry.[48]

The 1982 LOS Convention provisions regarding innocent passage were being incorporated into Soviet legislation before the Convention itself was formally opened for signature. In the Soviet "Rules of Navigation and Sojourn of Foreign Warships in the Territorial Sea of the USSR and in the Internal Waters and Ports of the USSR," [see Appendix 7 for excerpts], the law is laid down in a manner which is roughly consistent with the 1982 Convention, yet not precise in reproducing the Convention's express language.[49]

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[46]Butler, p. 333, [From the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958].

[47]Ibid.

[48]Ibid.

[49]Ibid., p. 337.

In W. E. Butler's analysis, the concept of innocent passage as a pure right of foreign vessels is departed from in the Soviet interpretation. "The 1983 Rules (Soviet) proceed from the premise that foreign warships enjoy a right of innocent passage on **condition** that the **procedure** for exercising that right is observed.[50] The rules represent a departure from their previous contention that innocent passage must have prior notification and authorization, however, they are subtle in their effective restrictions.

Article 22 of the LOS Convention permits coastal states to establish navigational sea lanes and traffic separation schemes in the interest of safety where needed and with regard to recommendation from competent international organizations. Foreign vessels, on their part, are obliged to follow these where established. Article 12 of the Soviet 1983 Rules specifies sea lanes for traversing the territorial sea in only three areas: the Baltic, Sea of Okhotsk and the Sea of Japan. Due to traffic density in those areas, this may be wise, but the omission of sea lanes in other areas by no means negates innocent passage in the spirit of the Convention (according to U.S. interpretation). The Soviet Union did not share this view. This has been a major cause of concern since the USSR, being the first major maritime power to begin implementation of legislation stemming from the Convention,

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[50]Butler, p. 338. [Emphasis Added]

would be setting new and unsettling precedents. As Butler stated, "Now that Soviet legislation [had] begun to give effect to the 1982 Convention in anticipation of ratification, doctrinal positions based on something more than merely a restatement or summary of the Convention [were] beginning to emerge."[51]

BLACK SEA I: 13 MARCH 1986

In view of coalescing Soviet Law and the U.S. commitment to systematically act in a manner consistent with the Convention's innocent passage provisions, U.S. ships have been sent to the Black Sea periodically to exercise innocent passage rights. As noted above, the Black Sea is conspicuously absent absent from the Soviet Law of 1983 which specified sea lanes for territorial sea transit in only three regions. U.S. interpretation of the Convention maintains that while sea lanes can be established where needed for safety, they do not represent an exhaustive list of areas open to innocent passage. Innocent passage exists in territorial seas everywhere except when specifically stipulated otherwise- and these areas are limited by definition in the Convention.

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[51]Butler, p. 339.

Richard Halloran, writing for the New York Times on 19 March 1986 headlined his story, "Two U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence." In his opening paragraph he further wrote, "Two U.S. warships heavily equipped with electronic sensors entered Soviet territorial waters in the Black Sea...to test Soviet defenses, Pentagon officials said."[52] Quoting the unnamed official he further wrote that the purpose of the exercise was to gather intelligence, and to assert the right of innocent passage.[53] The Pentagon, responding officially, indicated that the entry of the ships into Soviet waters "was simply an exercise of the right of innocent passage." A Whitehouse spokesman stated the maneuver was not intended as a provocative act and that "the transit was, to the best of [their] knowledge, consistent with relevant Soviet law."[54]

The issue of intelligence gathering is a significant point in that it could be argued the ships were engaged in activities "to the prejudice of the defense or sucurity of the USSR," [from the USSR 1983 Rules II, subparagraph 4 of Article 11 (1), based on the 1982 LOS Convention Article 19 (2)(6)]. Butler makes this point but concludes the Soviet protest is based on the breech of their

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[52]Richard Halloran, "Two U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence," The New York Times, 19 March 1986, p. A1.

[53]Ibid.

[54]Ibid.

territorial sea and not on the alleged activities that took place once in their waters. The issue of intelligence gathering in this sense becomes a moot point because it is impossible to prove if it is conducted passively. How does one know if you are using a listening device, and what is the benefit of crossing into the territorial sea for this express purpose if you can achieve the same results from beyond the 12 nautical mile limit?

Soviet reaction was heated calling the incursion a "provocative act." A Soviet patrol vessel, the Ladny, shadowed the U.S. ships involved, the Cruiser Yorktown and the Destroyer Caron, from 10 March when they entered the Black Sea to the point where they traversed Soviet territorial waters. According to the Soviet press in an Izvestia interview with Admiral Chernavin Commander in Chief of the USSR Navy:

> On March 13, at 11:11 a.m., the cruiser Yorktown and the destroyer Caron violated the USSR state border and entered an area south of the Crimean Peninsula...
>
> The American ships responded that the warning had been received. But, despite this, the Americans continued to hold to the same course. At this point border vessels of the USSR State Security Committee entered the area of the incident,and fleet warplanes flew in...
>
> ...the Command ordered the fleet's strike force to a higher level of combat readiness. The ships and aircraft were immediately put on combat alert...
>
> At 1:32 p.m., the Americans left the USSR's territorial waters after spending a total of more than two hours in

them...[55]

Admiral Chernavin succinctly stated the USSR's position at the end of the interview stating:

> I would like to use this opportunity to recall that all sailors know that the peaceful passage of foreign warships through USSR territorial waters is permitted only in specially authorized coastal areas announced by the Soviet government. But in fact, there are no such areas off the Soviet Union's shores in the Black Sea.[56]

This underlines the fundamental differences in Soviet and U.S. interpretation of innocent passage. Butler points out that this view is inconsistent with the 1982 Convention. Article 22 of the Convention states that while a coastal state may, where necessary, impose navigational requirements, their absence does not restrict innocent passage. In summarizing, Butler adds, "the right of innocent passage is not a 'gift' of the coastal state to passing vessels but a limitation of its sovereignty in the interests of international intercourse."[57] Following the exchange of diplomatic notes, the Soviet Union and the U.S. remained at an impasse on this point. The U.S. intention, however, was to continue with the Freedom of Navigation Program and implement its systematic application of navigational freedoms.

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[55]V. Lukashin, "Fleet Shows Restraint," Interview with Admiral of the Fleet V. N. Chernavin, USSR, by staff correspondent Izvestia, 23 March 1986, The Current Digest of the Sovist Press, vol 38, no. 12, p.32.

[56]Lukashin, p. 32.

[57]Butler, p. 346.

BLACK SEA II: 12 FEBRUARY 1988

On 12 February 1988, the guided missile cruiser Yorktown (again) and the destroyer Caron entered the territorial waters of the USSR south of the Crimea in the Black Sea as part of the Freedom of Navigation Program. The two ships were met by Soviet naval vessels and were "bumped" or "shouldered off" after being warned by radio and flag hoist to tleave the waters. According to a New York Times account of the incident:

> Faced with a similar situation two years ago, the Soviet Union took no action to prevent the passage by the same two American ships in the same location. But several days later, Moscow objected strongly to their presence.[58]

In response to the action, State Department spokesman Phylis Oakley stated that, "we intend to continue exercising our rights under international law...the soviets are obliged to comply with their international commitments."[59] The Reagan administration issued a diplomatic protest stating that, again, the U.S. action had done nothing to provoke the Soviet Union.

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[58]John H. Cushman Jr., "Two Soviet Warships Reportedly Bump U.S. Navy Vessels," The New York Times, 13 February 1988, p. 6, col 5.

[59]Ibid.

The USSR Ministry of Foreign Affairs, for their part, lodged a "resolute protest" with the American Embassy in Moscow that closely recounts the incident. [For details see Appendix 8] A Pravda article by A Gorokhov appearing on 14 February colorfully portrays the soviet position and the conceptual gap that exists between the U.S. and Soviet interpretation of innocent passage. Some excerpts follow:

> One might suppose that the Pentagon's comments will once again come down to the "right of peaceful passage for warships." But passage to where, and for what reason? surely not from Odessa to Poti? Yes, warships can cross territorial waters by very short routes that do not lead to inland waters or ports. However, the coastal state can designate these routes. Who else should regulate traffic through "its own" waters? That comes not from our homegrown statutes but from the UN Convention.
>
> On what routes have we authorized peaceful passage for foreign warships? this is the so-called traffic-separation system in the areas of the Kopu Peninsula and the Porkkala lighthouse (the Baltic Sea), Cape Aniva (Sakhalin Island) and the Fourth Kurile strait (Sea of Okhotsk), and Cape Crillon (Sakhalin Island), In short, one may enter "without knocking" there. In any other place, as not only good manners but also international norms suggest, one should knock first.[60]

With the differences in perspective here, it is not surprising that U.S./Soviet positions on innocent passage remained at an impasse for so long. Of note, however, is the forcefulness of the Soviet response in 1988 as compared to that in 1986.

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[60]"U.S., Soviet Naval Ships Collide Off Crimea," USSR foreign Ministry Protests "Provocative" Intrusion into Soviet Territorial Waters by Destroyer, Cruiser, Collision with Soviet Craft, from Pravda and Izvestia, 14 February, The Current Digest of the Soviet Press, vol. 40, no. 7, 1988, p. 19.

V. CONCLUSION: THE EFFECTIVENESS OF THE PROGRAM

As can be seen, the U.S. FON Program initiated in 1979 has been applied consistently, specifically with regard to two countries, the Soviet Union and Libya. Although the purpose of the program is to systematically reserve legal rights with a U.S. interpretation of exisiting international law, the measures at times have been viewed as provocative and belicose. In the case of the Gulf of Sidra and Libya there appears to be a stalemate and little, if any, official dialog. This is not the case with the Soviet Union, however. In September of 1989 Soviet Foreign Minister Edward A. Shevardnadze met with Secretary of State Baker for the "Wyoming Ministerial" where a broad range of topics were covered ranging from START and a Chemical Weapons Ban to Law of the Sea Issues and boundary delimitation in the Bering Sea.

Prior to concluding the Ministerial the U.S. and the Soviet Union signed a joint statement endorsing the provisions of the 1982 Law of the Sea Convention which refer to the traditional uses of oceans. [Appendix 9 details the contents of the joint statement] Additionally, both countries "recognized the need to encourage all States to harmonize their internal laws, regulations and practices

with these provisions."[61] Attached to the joint statement was a "Uniform Interpretation of Rules of International Law Governing Innocent Passage." [Appendix 10 contains the Uniform Interpretation] In paragraph 2 of the Uniform Intepretation, the language regarding innocent passage is specific:

> 2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.[62]

Equally specific, in paragraphs 5 and 6, is the right of coastal states to prescribe sea lanes and traffic separation schemes where needed to protect the safety of navigation.

> In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage...Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.[63]

With the signing of the Joint Statement and the Uniform Interpretation, the U.S. had achieved diplomatically what it sought

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[61]"Joint Statement by the United States of America and the Union of Soviet Socialist Republics," Department of State Bulletin, Washington, D.C.: Department of State, November 1989, p. 25.

[62]Ibid., p. 26.

[63]Ibid.

in the beginning in 1979. A clear recognition of innocent passage and the "traditional" rights of navigation. The Joint statement further indicated that, "both governments [have] agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules."[64] Here we see in addition to a common understanding, a commitment by the USSR to modify their existing 1983 Rules governing innocent passage.

Given these latest developments it can be convincingly argued that the Freedom of Navigation Program has been a complete success. The systematic and demonstrative assertion of navigation rights has eventually led to a major maritime power (and signatory of the 1982 Convention) to adopt a precise view paralleling U.S. interpretation. This consensus-building serves to solidify evolving International Law and customary practice. Coverage of the Joint Statement, appearing in Pravda's second edition on 25 September 1989 included the following:

> A joint statement by the USSR and the United States was [also] signed on a common interpretation of the norms of international law regulating peaceful passage through territorial waters, which eliminates a potential source of friction in relations between the two countries. Approval was given to a working document entitled "Mutually Acceptable Conditions Concerning Recognition of the Jurisdiction of the UN International Court." In furtherance of this, the sides agreed to propose discussing this matter with the other three permanent

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[64]"Joint Statement," p. 25.

members of the UN Security Council.[65]

Reduction of friction is, indeed, an essential element in improving international relations. Perhaps the only negative impact of the FON Program is that it acutely identified specific areas of disagreement. Between the Superpowers it resulted, at its worst, in a "bump in the Black Sea," where elsewhere it resulted in the drawing of a "line of death" which, unfortunately, proved all too true for those aserting its inviolability. As dialog continues so does the scope of mutually beneficial agreements. Effective 1 January 1990, the U.S. and the USSR signed an agreement on the Prevention of Dangerous Military Activities. This agreement serves to augment the already existing U.S./USSR Prevention of Incidents at Sea Agreement. Taken in total, the Freedom of Navigation program served the international interests of the U.S. well. Precedence has now been established both in practice and in written agreement that reinforces the traditional navigation articles of the 1982 Convention. This ultimately serves in the formation and solidification of previously evolving international law. In the final analysis, uniform interpretation of rules governing the sea- whether stemming from treaty law or unambiguous common law- must be sought. All nations have competing interests, but Elliot Richardson succinctly stated the bottom line a decade ago in

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[65]"Shevardnadze-Baker 'Joint Statement,'" from PM 09084589 Moscow Pravda in Russian Second Edition 25 September 89, p. 5, Foreign Broadcast Information Service-Soviet, 89, 184, 25 September 1989, p. 32.

noting, "among the interests that will have to be weighed in the end is our interest in the avoidance and prevention of conflict. We as part of the world community- are strengthened by the strengthening of the rule of law."[66]

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[66]Richardson, p. 64.

APPENDIX 1

U.S. OCEANS POLICY
PRESIDENT'S STATEMENT, MARCH 10, 1983

The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July I announced that the United States will not sign the UN Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the convention's deep seabed mining provisionsare contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in those concerns. Some important allies and friends have not signed the convention. Even some signatory states have raised concerns about these problems.

However, the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing law and practice and fairly balance the interests of all states.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the convention and international law.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans- such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an exclusive economic zone in which the United states will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide U.S. jurisdiction for mineral resources out to

200 nautical miles that are not on the Continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight. My proclamation does not change existing U.S. policies concerning the Continental Shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to U.S. jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The proclamation also reinforces this government's policy of promoting the U.S. fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the U.S. interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will, nevertheless, recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

The exclusive economic zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

The policy decisions I am announcing today will not affect the application of existing U.S. law concerning the high seas or existing authorities of any U.S. Government agency.

In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a useful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.

The Administration looks forward to working with the congress on legislation to implement these new policies.

Source: Weekly Compilation of Presidential Documents of March 14, 1983.

APPENDIX 2

RIGHTS AND FREEDOMS IN INTERNATIONAL WATERS DEPARTMENT STATEMENT, MARCH 26, 1986

The United States is committed to the exercise and preservation of navigation and overflight rights and freedoms around the world. That is the purpose of the freedom of navigation program. In fulfillment of the objectives of that program, U.S. ships and aircraft exercise rights and freedoms under international law off the coasts of numerous countries.

In this regard, the United States acts in accordance with President Reagan's March 10, 1983, ocean policy statement, which stated U.S. willingness to recognize the rights of other countries in the waters off their coasts, as reflected in the 1982 UN Convention on the Law of the Sea, so long as those countries respected the rights of the United States and other countries in those waters under international law.

U.S. ships and aircraft have exercised rights and freedoms off the coasts of countries whose laws do not conform to international law as reflected in the 1982 Law of the Sea Convention. Examples of the types of objectionable claims against which the United States has exercised rights and freedoms are unrecognized historic waters claims, territorial sea claims greater than 12 nautical miles, and territorial sea claims that impose impermissable restrictions on the innocent passage of any type of vessels, such as requiring prior notification or permission. The United States, of course, exercises navigation and overflight rights and freedoms as a matter of routine off the coasts of countries whose maritime claims do conform to international law. Since the policy implementation in 1979, the U.S. Government has exercised its rights against the objectionable claims of over 35 countries, including the Soviet Union, at the rate of some 30-40 per year.

Source: Department of State Bulletin, June 1983, p. 70.

APPENDIX 3

U.S FREEDOM OF NAVIGATION PROGRAM

Background: U.S. interests span the world's oceans geopolitically and economically. U.S. national security and commerce depend greatly upon the internationally recognized legal rights and freedoms of navigation and overflight of the seas. Since World War II, more than 75 coastal nations have asserted various maritime claims that threaten those rights and freedoms. These "objectionable claims" include unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 nautical miles; and territorial sea claims that impose impermissable restrictions on the innocent passage of military and commercial vessels, as well as ships owned or operated by a state and used only on government noncommercial service.

U.S. Policy: The U.S. is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the U.S. protects these maritime rights is through the U.S. Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate U.S. resolve to protect navigational freedoms. The Departments of State and Defense are jointly responsible for conducting the program.

The program started in 1979, and President Reagan again outlined our position in an ocean policy statement in March 1983.

The U.S. considers that the customary rules of international law affecting maritime navigation and overflight freedoms are reflected and stated in the aises to discourage state claims inconsistent with international law and to demonstrate U.S. resolve to protect navigational freedoms. The Departments of State and Defense are jointly responsible for conducting the program.

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The U.S. considers that the customary rules of international law affecting maritime navigation and overflight freedoms are reflected and stated in the a U.S. undertakes diplomatic action at several levels to preserve its rights under international law. It conducts

bilateral consultations with many coastal states assessing the need for and obligation of all states to adhere to the international law customary rules and practices reflected in the 1982 convention. When appropriate, the Department of State files formal diplomatic protests addressing specific maritime claims that are inconsistent with international law. Since 1948, the U.S. has filed more than 70 such protests, including more than 50 since the Freedom of Navigation Program began.

Operational Assertions: Although diplomatic action provides a channel for presenting and preserving U.S. rights, the operational assertion by U.S. naval and air forces of internationally recognized navigational rights and freedoms complements diplomatic efforts. Operational assertions tangibly manifest the U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other countries. Planning for these operations includes careful interagency review. Although some operations asserting U.S. navigational rights receive intense public scrutiny (such as those that have occurred in the Black Sea and the Gulf of Sidra), most do not. Since 1979, U.S. military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 nations at the rate of some 30-40 per year.

Future Intentions: The U.S. is committed to preserve traditional freedoms of navigation and overflight throughout the world, while recognizing the legitimate rights of other states in the waters off their coasts. The preservation of effective navigation and overflight rights is essential to maritime commerce and global naval and air mobility. It is imperative if all nations are to share in the full benefits of the world's oceans.

Source: GIST, Bureau of Public Affairs, Department of State, December 1988.

APPENDIX 4

1973 GOVERNMENT ANNOUNCEMENT BY COLONEL MUAMMAR el-QADDAFI

The Gulf of Surt located within the territory of the Libyan Arab Republic and surrounded by land boundaries on its East, South and West sides, and extending North offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of the Libyan Arab Republic and is under its complete sovereignty.

As the gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start.

Through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf. 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.

In view of the aforementioned facts, the Libyan Arab Republic declares that the Gulf of Surt, defined within the borders stated above, is under 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.

Source: The American Journal of International Law, vol 80, (1986), p. 668. From: National Legislation and Treaties Relating to the Law of the Sea,26-27, UN Doc. ST/LEG/SER.B/18 (1976).

APPENDIX 5

U.S. DEPARTMENT OF STATE REPLY TO LIBYAN CLAIM
11 February 1974

The Libyan action purports to extend the boundary of Libyan waters in the Gulf of Sirte northward to a line aproximately 300 miles long...and to require prior permission for foreign vessels to enter that area. Under international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of water enclosed by this line cannot be regarded as the juridical internal or territorial waters of the Libyan arab Republic. Nor does the Gulf of Sirte meet the international law standards of past open, notorious...effective...[and] 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 the freedom of the seas...

Source: The Amercian Journal of International Law, vol 80, (1986), p. 669.

APPENDIX 6

PROTEST NOTE BY THE U.S.

The United States Government protests to the Government of Libya the unprovoked attack against American naval aircraft operating in international airspace aproximately 60 miles from the coast of Libya. The attack occurred at 0520 G.M.T. on August 19, 1981. The American aircraft were participating in a routine naval exercise by U.S. Navy forces in international waters. In accordance with standard international practice, this exercise had been announced on Aug. 12 and 14 through notices to airmen and to mariners. Prior notification of air operations within the Tripoli Flight Information Region had also been given in accordance with these notifications. The exercise, which began on Aug. 18, will conclude at 1700 G.M.T. Aug. 19.

The Government of the United States views this unprovoked attack with grave concern. Any further attacks against U.S. forces operating in international water and airspace will also be resisted with force if necessary.

Source: The New York Times, Thursday, August 20, 1981, from, State Department Release, 19 August 1981.

APPENDIX 7

Excerpts from
RULES OF NAVIGATION AND SOJOURN OF FOREIGN WARSHIPS IN THE TERRITORIAL SEA OF THE USSR AND IN THE INTERNAL WATERS AND PORTS OF THE USSR

II. Innocent Passage

Article 8 - Right of Innocent Passage

Foreign warships shall within the territorial waters (territorial sea) of the USSR enjoy the right of innocent passage on condition of observing the provisions of the present Rules, the laws and rules of the USSR relating to the regime of the territorial waters (territorial sea) of the USSR, as well as of international treaties of the USSR.

Article 9 - Purposes of Innocent Passage

The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR shall be effectuated for the purpose of traversing them without entering the internal waters of the USSR or for the purpose of passage into the internal waters and ports of the USSR or of putting out from them to the high seas.

Article 10 - Concept of Innocent Passage

Passage shall be innocent so long as it does not breach the peace, good order, or security of the USSR.

Such passage must be continuous and expeditious. It may include stopping and anchoring incidental to ordinary navigation or necessary as a consequence of insuperable force or distress, or for the purpose of rendering assistance to persons, vessels, or aircraft, in danger or distress.

Article 11 - Conditions of Innocent Passage

1. When exercising innocent passage in the territorial waters (territorial sea) of the USSR a foreign warship shall be prohibited from any of the following types of activities:

a threat or use of force against the sovereignty, territorial integrity, or political independence of the USSR, or in any other manner in violation of the principles of international law embodied

in the United Nations Charter;

any maneuvers or training with weapons of any kind;

any act aimed at collecting information to the prejudice of the defense or security of the USSR;

any act of propaganda aimed at infringing the defense or security of the USSR;

the launching, landing, or taking onboard of any aircraft or any military device;

the loading or unloading of any commodity, cargo, or currency, or the landing or bording of any person, without authorizaton of competent Soviet agencies;

any act or willful and serious pollution of the environment;

any fishing activity;

the carrying out of research or survey activities;

any act aimed at interfering with the functioning of any systems of communication or any other facilities or installations of the USSR;

any other activity not having a direct relationship to passage.

2. The passage of a foreign warship shall not be innocent if it commits the actions prohibited in accordance with point 1 of the present article.

Article 12 - Routes and Traffic Separation Systems

1. The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without entering internal waters and ports of the USSR **shall be permitted along routes ordinarily used for international navigation:**

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

in the Sea of Okhotsk: according to the traffic separation schemes in the areas of Cape Aniva (Sakhalin Island) and the Fourth Kurile Strait; (Paramushir and Makanrushi Islands);

in the Sea of Japan: according to the traffic separation system in the area of Cape Kril'on (Sakhalin Island).

2. The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of entering the internal waters and ports of the USSR or of putting out therefrom to the high seas shall be permitted only in accordance with the provisions of Part III of the present Rules and with the use of sea lanes and traffic separation schemes or along a route agreed in advance.

Source: U.S. Naval War College Operations Department, reprinted from, International Legal Materials, vol 24, Nov '85, pp 1715-22.

APPENDIX 8

RESOLUTE PROTEST LODGED BY THE MINISTRY OF FOREIGN AFFAIRS OF THE USSR WITH THE U.S. EMBASSY IN MOSCOW ON 13 FEBRUARY 1988

On Feb. 12, 1988, two U.S. naval vessels, the destroyer Caron, at 10:45 a.m. (Moscow Time), and the cruiser Yorktown, at 11:03 a.m., violated the USSR's state border in the vicinity of the south coast of the Crimea, at a point with the coordinates 44 degrees 15.6 minutes north latitude and 33 degrees 30.0 minutes east longitude. The American ships did not react to warning signals, given in good time by Soviet border craft, that they were nearing the USSR state border, and they did not make suggested changes in their course. After having gone a considerable distance into USSR territorial waters, the American warships did some dangerous maneuvering, which led to a collision with Soviet warships.

Despite this collision, the cruiser Yorktown and the destroyer Caron remained inside USSR territorial waters and left them only at 12:49 p.m., at a point with the coordinates 44 degrees 12.5 minutes north latitude and 34 degrees 05.5 minutes east longitude.

The Soviet side cannot regard the actons of the U.S. Navy as anything but aimed at undermining the process of improvement in Soviet-American relations that has been noted lately and at aggravating international tension.

The responsibility for the provocation that was committed, which led to a collision between warships of the two countries, rests wholly and completely with the American side.

The American side has been warned about the impermissibility of violating USSR laws and regulations relating to the conditions for navigating in Soviet territorial waters and about the serious consequences to which such actions may lead. It should heed this warning.

The ministry demands that the U.S. government take urgent measures to rule out such incidents in the future.

Source: Pravda and Izvestia, February 14, p. 4 [Found also in Current Digest of the Soviet Press, Vol. XL, no. 7, 1988, p. 19.]

APPENDIX 10

UNIFORM INTERPRETATON OF RULES OF INTERNATIONAL LAW GOVERNING INNOCENT PASSAGE

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United National Convention on Law of the Sea (Convention of 1982), particularly in Part II, Section 3.

2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected i Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Covention of 1982.

7. If a warship engages in conduct which violates such law or regulations or renders its passage not innocent and does not take corrective acton upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the

Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag states, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

Source: Department of State Bulletin, November 1989, p. 26.

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