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INNOCENT PASSAGE AND THE 1982 CONVENTION: THE INFLUENCE OF
SOVIET LAW
AND POLICY

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THE BLACK SEA AFFAIR

The facts of the Black Sea affair, as distilled from American, British and Soviet press reports (the formal Soviet Note delivered to the United States Embassy in Moscow has not been published), suggest the following course of events: on Monday, March 10, 1986, two American naval vessels, the guided-missile cruiser Yorktown and the destroyer Caron, entered the Black Sea via the Turkish Straits. Their entrance was observed by a Soviet patrol vessel, the Ladnyi, which was ordered to continue observation of the American warships. [\[FN39\]](#) In the American view, the voyage of these two vessels was a continuation of a policy of showing the flag in the Black Sea two or three times a year. This policy had been pursued for some time, most recently in December 1985, and American naval vessels on a similar mission had exercised their rights of innocent passage in Soviet territorial waters in November 1984. [\[FN40\]](#)

At 11:11 hours on Thursday, March 13, the Yorktown and the Caron entered the territorial waters of the Soviet Union and sailed westward along *344 the southern Crimean Peninsula, approaching within 6 miles of the coast, for a period of 2 hours and 21 minutes, departing from the territorial waters at 13:32 hours on the same day. The commander of the Ladnyi issued a warning to the American vessels that they had violated the territorial waters of the USSR and requested that they leave at once. Receipt of the warning was acknowledged, but the American warships did not change course. Soviet border guard vessels and naval aircraft came to the scene and the Soviet command placed its Black Sea air and naval forces on combat readiness. [\[FN41\]](#) In its official note of protest, the Soviet Government characterized the incident as provocative and warned against "serious consequences" for which the United States would bear responsibility. [\[FN42\]](#) Two press conferences were held by the USSR Ministry of Foreign Affairs to emphasize the gravity of the situation. In their responses to press inquiries, American naval authorities indicated that the two warships were exercising their right of innocent passage in the territorial waters of the Soviet Union. [\[FN43\]](#)

The course of the American warships indicated on a map published in Izvestia confirms that the passage of the vessels was a lateral one; at no time did they take a course that could be construed as expressing an intention to enter the internal waters or ports of the

USSR. In an interview with *Izvestiia* on March 23, 1986, the Commander in Chief of the Soviet Navy, Admiral V. N. Chernavin, indicated that the *Yorktown* and *Caron* had been cautioned as soon as they entered Soviet territorial waters, i.e., that the act of crossing constituted the substance of the violation and not the subsequent behavior of the warships once they were within the territorial sea.

Press commentary on both sides, however, gave much attention to the "behavioral" factor. The initiative seems to have come from the American press. An article in the *New York Times* by R. Halloran appeared under the headline "2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence." According to Halloran, the two American warships, "heavily equipped" with electronic sensors, entered Soviet territorial waters to test Soviet defenses; the object of the exercise, he said, was to gather intelligence and to assert the right to innocent passage. Statements reported from the United States Department of Defense referred only to innocent passage: "This transit was, to the best of our knowledge, consistent with relevant Soviet law." The *Yorktown*, Halloran wrote, was equipped with an Aegis fire control system that could track hostile ships, submarines and aircraft and select, aim and fire the weapons best suited to destroy each target, as well as helicopters for gathering information. The *Caron* was said to be loaded with additional sensors and listening devices. During their sojourn in Soviet territorial waters, said Halloran, no flight or gunnery drills would be permitted, but sensory and listening activities would be engaged in. [FN44] The correspondent *345 of the *Washington Post* declared that it was "standard procedure" on such transits "to use electronic gear in order to determine whether new radars have been deployed on shore and to verify the state of readiness of Soviet forces." [FN45] The Soviet news agency, TASS, summarized Halloran's version for Soviet readers. [FN46]

Although the intelligence dimension figured only in the press polemics attending the incident, and there is no evidence available to confirm that in fact the two American warships did engage in the listening and sensory activities of which they were capable, the possibility of their having done so raises a serious question under the "Pueblo" clause [FN47] of the 1982 Law of the Sea Convention (Article 19(2)(c)), adopted in the 1983 Rules as subparagraph 4 of Article 11(1), which prohibits "any act aimed at collecting information to the prejudice of the defence or security of the USSR." A voyage undertaken expressly (in whole or in part) to test coastal state defenses, accompanied by any activities to that effect, including passive listening and sensory activities, would seem to fall within the prohibition of the 1982 Convention and the 1983 Rules unless naval powers were prepared to characterize such conduct as part of mutual "confidence-building" exercises amongst countries capable of engaging in reciprocal behavior. On the other hand, careful consideration would need to be given to distinguishing between activities undertaken by any warship for prudent self-protection and those designed affirmatively to prejudice the coastal state.

As noted above, Soviet discontent with the two American warships lay not with their behavior but with their very presence in Soviet territorial waters. The legal grounds appear to rest on a remark attributed in the British press to V. Lomeiko, who conducted the two press conferences in Moscow on this matter, to the effect that the violation had

occurred "in the vicinity of the Soviet coast, where there are no traditional seaways." [\[FN48\]](#) Admiral Chernavin elaborated on that view: "The innocent passage of foreign warships through the territorial waters of the USSR is permitted only in specially authorized coastal areas which have been announced by the Soviet Government. In a word, there are no such areas in the Black Sea off the coast of the Soviet Union." [\[FN49\]](#)

This interpretation is not consistent with the 1982 Convention or with the 1983 Rules. Following centuries of practice embodied in customary international ***346** law and in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, the international legal system operates on a presumption in favor of the innocent passage of foreign vessels wherever they wish in the territorial sea of the coastal state, subject to the rules of international law and coastal state legislation. The 1982 Convention clarifies to an unprecedented degree the relationship between the vessel in passage and the interests of the coastal state, including the right of coastal states to declare certain areas of the seas closed to shipping, or subject to the observance of certain courses or traffic systems, in the interests of navigational safety. Article 12 of the 1983 Rules stipulates that in the Baltic Sea, the Okhotsk Sea and the Sea of Japan foreign warships are to follow the ordinary navigation routes and certain designated traffic separation schemes. So long as those sea lanes and traffic separation systems take account of subparagraphs (a)-(d) of Article 22(3) of the Convention, [\[FN50\]](#) foreign ships are bound to use them. The text of Article 12 of the 1983 Rules is consistent with Article 22 of the 1982 Convention; however, the coastal state need impose such navigational requirements, according to Article 22, only "where necessary"; their absence in no way implies that the right of innocent passage is not applicable. Since the natural configuration of the Black Sea makes navigation possible almost anywhere and traffic density apparently requires no further guidance from the coastal state, under the 1982 Convention and the 1983 Rules a foreign warship in that body of water, and in others where a similar situation exists, has the right of innocent passage. 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.

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[\[FN1\]](#). Opened for signature Dec. 10, 1982, reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5).

[\[FN39\]](#). V. Lukashin, Flot proiavil vyderzhku, Izvestiia, Mar. 23, 1986, at 3, cols. 5-7 (interview of Admiral V. N. Chernavin).

[\[FN40\]](#). Halloran, 2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence, N.Y. Times, Mar. 19, 1986, at A1, cols. 4-5. The monograph by Klimenko and Pork, *supra* note 31, was signed to press on Dec. 29, 1984.

[\[FN41\]](#). Lukashin, *supra* note 39.

[\[FN42\]](#). V MID SSSR, *Izvestiia*, Mar. 19, 1986, at 4, col. 8.

[\[FN43\]](#). Kremlin Protest on US Warships Adds to Superpower Tensions, *The Times* (London), Mar. 19, 1986, at 5, cols. 1-3.

[\[FN44\]](#). Halloran, *supra* note 40.

[\[FN45\]](#). Wilson, Soviet Ships Shadowed U.S. Vessels' Transit, *Wash. Post*, Mar. 20, 1986, at A33, cols. 1-4.

[\[FN46\]](#). *Provokatsii VMS SShA*, *Izvestiia*, Mar. 20, 1986, at 4, cols. 6-8. P. D. Barabolia, in characterizing the cruise of the two American warships as illegal, regarded the presence of missiles on the Yorktown as a threat of force under Article 19(2)(a) of the 1982 Convention, and also criticized the information-gathering activities of the mission. See Barabolia, *K voprosu o mirnom prokhode cherez territorial'noe more* (unpublished paper delivered to the 3d Anglo-Soviet Symposium on the Law of the Sea, Moscow, June 25, 1986).

[\[FN47\]](#). Butler, *The Pueblo Crisis: Some Critical Reflections*, 63 *ASIL PROC.* 7 (1969).

[\[FN48\]](#). Walker, *Moscow Claims US Ships Were Spying*, *The Times* (London), Mar. 21, 1986, at 7, cols. 1-3.

[\[FN49\]](#). Lukashin, *supra* note 39.

[\[FN50\]](#). For a brief discussion of traffic separation systems, see Zenkin, *Ustanovlenie morskikh koridorov i sistem razdeleniia dvizheniia v Konventsii OON po morskomu pravu 1982 g. (pravovye aspekty)*, in 2 *SOVETSKII EZHEGODNIK MORSKOGO PRAVA* 42 (1985).

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