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The Soviet Doctrine of the Closed Sea

JOSEPH J. DARBY*

The Soviet Union's maritime borders include several enclosed and semi-enclosed seas. In order to strengthen its military defenses, Russian jurists, both Tsarist and Soviet, developed and offered to the community of nations the doctrine of the closed sea. According to this doctrine, which has never become part of customary international law, the warships of all nonlittoral countries of certain designated peripheral seas would have no right to enter and navigate on those seas. Professor Darby analyzes the application of the doctrine to one of the most important of the peripheral seas on the borders of the USSR, namely the Black Sea, in light of recent history and contemporary developments in the Law of the Sea.

SOVIET PUBLIC INTERNATIONAL LAW

Writing in 1959, Gregorii Tunkin, who is generally recognized as the most authoritative spokesman of Soviet international law, stated that the international law position of a country is "determined by the basic principles of its foreign policy."¹ As far as it goes, this statement appears to be an accurate reflection of how the leaders of the Soviet Union perceive the nature and function of international law. International law is a means to be used by legal technicians to advance the foreign policy goals of the Soviet state. Soviet legal scholars, whose writings are often obtuse and highly generalized, have always been quite clear on this—no rule of international law is binding on the Soviet Union unless, through an unequivocal sovereign act, the Soviet Union has expressly and formally given its consent to be bound by it. Legal positivism, in a jurisprudential sense, has been the

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1. Tunkin, "Vstupitel'naya stat'ia," SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA 12-13, (1959).

hallmark of Soviet international law thinking.²

Over and above this teleological approach, one senses in Soviet writings on international law a hostility born of irreconcilable ideological differences. It reflects an embattled sense of "we" and "they"—a contemporary manifestation of the age-old Russian dream, Messianic in its essence, to bring to the world, by force if necessary, a doctrine, a creed, an organization that will save mankind from perdition.³

Soviet international law theories faithfully mirror this thinly disguised drive of Russia to serve as moral mediator for the world. In the early days following the 1917 Revolution, Bolshevik jurists denied the validity of international law on grounds that it was a product of the economic forces and class conflicts of the countries that developed it. This fundamental Soviet Russian ideological hostility toward the West and its entire value system has not changed, but the way in which Soviet jurists think and express themselves in terms of international law has indeed traveled a convoluted path.⁴ It is beyond the scope of this Article to review the nuances of the theories advanced over the years by Korovin, Pashukanis, Vyshinsky and Tunkin.⁵

What characterizes modern Soviet international law thinking is a marked diversity of scholarly opinion concerning its nature and its sources. Such uncertainty and confusion might appear inappropriate for a totalitarian regime where unquestioned obedience to the Party line is expected of all Soviet citizens. The problem, of course, lies in the nature of the subject matter itself. In the Marxist view, law is perceived as a superstructure resting on a base created by production relationships. Since the over 150 countries that now exist around the globe have such different (and in the case of capitalist and socialist countries, such irreconcilable) social and economic systems, how can socialist legal philosophers put together a theory of public international law which takes these differences into account and at the same

2. The Soviets stress sovereignty, equality of nation-states, and the duty of non-interference in the internal affairs of other states in resisting the international law of the West. See C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 168-71 (1968). Although positivism has assumed various connotations in public international law theory, it has been used to restrict the validity of rules to those to which states have given their consent. J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 22-23 (9th ed. 1984).

3. H. KOHN, *PAN-SLAVISM, ITS HISTORY AND IDEOLOGY* 125-60 (2d ed. 1960).

4. Glos, *The Theory and Practice of Soviet International Law*, 16 *INT'L L.* 279 (1982); B. RAMUNDO, *PEACEFUL COEXISTENCE* (1967).

5. See *WRITINGS ON SOVIET LAW AND SOVIET INTERNATIONAL LAW* 122-44 (W. Butler ed. 1966) (A bibliography of writings from 1917 to 1965). Attempts to track these changes may be found in Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, 32 *AM. J. INT'L L.* 244 (1938); Kulski, *The Soviet Interpretation of International Law*, 49 *AM. J. INT'L L.* 518 (1955); Hazard, *Socialism and International Public Law*, 23 *COLUM. J. TRANSNAT'L L.* 251 (1985).

time serves to advance long range Soviet foreign policy goals? The intractability of this problem has so far baffled Soviet theorists. Some have stoutly maintained that the USSR and the satellite peoples' democracies of Eastern Europe have created (or are in the process of creating) a new socialist international law.⁶ Others, including Professor Tunkin, have been unable to completely abandon the idea that, despite the division of the world into opposing ideological political/military blocs, there still exists a system of general principles of international law which retains universal validity.⁷

Disagreement among Soviet legal scholars concerning the proper way to compartmentalize public international law will doubtlessly continue since the Communist Party of the Soviet Union has shown little interest in intervening to lay down a hard and fast line on an issue so highly complex and so susceptible to change. A consensus among Soviet theoreticians does seem to be emerging, however, that relations between socialist countries are founded upon principles different from those which pertain to the relations which socialist countries have with capitalist countries.⁸ The Soviet Union, taking advantage of shifts in the balance of power, has assembled a sphere of influence which it refers to as the "Socialist Commonwealth." The countries which make up this new power bloc are deemed to be governed in their relations with each other by rules which reflect the social, economic and political factors which these countries have in common, namely, socialism, and the monopolization of power by the Communist Party.⁹

A second set of rules applies to the relationships which the Soviet Union must for the time being necessarily maintain with the states of the still surviving non-Communist world. These rules are unsatisfactory to the Soviets, who tolerate them as temporary until such time as, slowly but surely, all the countries of the world move from the non-Communist to the Communist bloc. During this process of "struggle and cooperation" that the Soviets have designated "peaceful co-existence," international law has been assigned the task of retaining the fruits of victory won by the Soviet Army on the battle-

6. Legal specialists I. P. Blishchenko and E. T. Usenko, for example, are cited as proponents of this view. See Hazard, Book Review, 78 AM J. INT'L L. 1018, 1019 (1984) (reviewing 1982 *Soviet Yearbook of International Law*).

7. G. TUNKIN, THEORY OF INTERNATIONAL LAW 442-43 (1974).

8. *Id.* at 47, 432.

9. J. HAZARD, COMMUNISTS AND THEIR LAW (1969) (searches for a common core of the legal systems of the Marxian Socialist states). See generally K. GRZYBOWSKI, THE SOCIALIST COMMONWEALTH OF NATIONS (1964).

fields of World War II,¹⁰ justifying the expansion of Soviet influence,¹¹ and recruiting neutral and uncommitted Third World countries to assist the Soviet Union in achieving its foreign policy goals.¹²

International law, in Soviet theory, is basically an instrument of politics. It is not a bundle of rules, principles and norms binding on states. Like all law, international law is regarded by Soviet lawyers as a means to an end. The end the USSR has in mind should be clear to those familiar with Soviet theory and practice. It is the gradual establishment of a global *pax sovietica*, a Kremlin-orchestrated world peace in which law will serve as a conveyor belt to communicate to the ruled the desires of the rulers.¹³

THE SOVIET CLOSED SEA DOCTRINE

One of the most interesting and challenging examples of the genesis and morphology of Soviet international law is the closed sea doctrine.¹⁴ For years the Russians have been attempting to win acceptance of their thesis that because of geographical, historical and military-strategic reasons, certain seas located on the periphery of the USSR should be governed by special and exceptional interna-

10. Although the Helsinki Accords, Conference on Security and Cooperation in Europe, Aug. 1, 1975, reprinted in 14 I.L.M. 1292 (1975), were not intended to be binding under the doctrine of *pacta sunt servanda*, the USSR cites the inviolability of the frontiers section in support of its position that the West has now formally recognized the East and Central European national boundaries which the USSR redrew after World War II. The West, for its part, cites the respect for human rights section to remind the Soviets of the fundamental inhumanity of their system of government.

11. See, e.g., Union of Soviet Socialist Republic-Socialist Republic of Viet Nam Treaty of Friendship and Cooperation (1978), reprinted in 17 I.L.M. 1485 (1978); Union of Soviet Socialist Republic-Afghanistan: Treaty of Friendship, Goodneighborliness and Cooperation (1978), reprinted in 19 I.L.M. 1 (1980). The Soviet invasion of Afghanistan in 1979 was justified as an act in furtherance of collective self defense under article 51 of the United Nations Charter. 80 DEP'T ST. BULL. 34C (Jan. 1980).

12. To weaken the West, the USSR joins with Third World countries in the support of United Nations resolutions which condemn the use of force in international relations, unless it is used in wars of national liberation to assist "peoples under colonial and racist regimes or other forms of alien domination." Resolution on the Definition of Aggression, art. 7, reprinted in 13 I.L.M. 710, 714 (1974).

13. The various functions of law in the USSR are discussed in O. JOFFE & P. MAGGS, SOVIET LAW IN THEORY AND PRACTICE 68-81 (1983).

14. See generally W. BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS 19-26 (1967); Bradshaw, *The Politics of Soviet Maritime Security: Soviet Legal Doctrine and the Status of Coastal Waters*, 10 J. MAR. L. & COM. 411, 420-25 (1979); 6 *Soviet Statutes and Decisions* 223 (1970); C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 191-94 (6th ed. 1967); W. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 116-33 (1971); F.I. KOZHEVNIKOV, MEZH DUNARODNOE PRAVO 232 (1964); F. HARTINGH, LES CONCEPTIONS SOVIETIQUES DU DROIT DE LA MER 27-30 (1960); *Bibliography on the Soviet Union and the Development of the Law of the Sea in U.S.S.R., EASTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA* 148-50 (W. Butler ed. 1985).

tional law rules. A glance at the map of Eurasia¹⁵ reveals that the international maritime boundary of the Soviet Union consists of: (a) in the southwest, the Caspian Sea (bordering on Iran); the Black Sea (bordering on Turkey, Bulgaria and Romania); (b) in the northwest, the Baltic Sea (bordering on Finland, Poland, Sweden, Germany and Denmark); (c) in the north, the Barents Sea (bordering on Spitzbergen, under Norwegian sovereignty); the Kara, Laptev and East Siberian Seas (bordering on the Arctic Circle); and, (d) in the east, the Sea of Okhotsk (bordering on Japan); the Sea of Japan (bordering on Japan and Korea); and the Bering Sea (bordering on Alaska).

It is beyond the scope of this Article to analyze the way in which the Soviets have attempted to apply the closed sea doctrine (and other legal claims justifying closure) to each of these bodies of water.¹⁶ Rather, this Article, after outlining the contours of the doctrine, will examine its relevance to the Black Sea, and discuss the possibility that, because of recent legal and military/strategic developments, the Soviets may be willing to abandon or make significant changes to their historical claim to special international law rules for their peripheral seas.

The history of Russia is largely the history of expansion. Then as now Russia's rulers knew that a country which ceases to expand starts to deteriorate. Over the centuries and continuing into our own lifetime, the traditional Russian geostrategic policy has been based on an extension of contiguous land power. Modernly, and in accord with recent developments in the law of the sea, this expansion outward from the mixed forest zone of the Eurasian plain has taken on a maritime dimension. Together with other coastal states, Russia has made unilateral and sometimes disputed claims to exercise sovereign rights over waters lying on the periphery of the Soviet Empire.

From a geostrategic point of view, a country unsure of its ability to resist a military attack will strive to keep the potential enemy as far away as possible. Until recently, Russia has never had a formidable blue water Navy. The maritime corridors leading to Russia were

15. Harben, *Soviet Attitudes and Practices Concerning Maritime Waters*, 15 JAG 149, 151 (1961).

16. A complete study of how the Soviets use international law to strengthen national perimeter defense would have to include the sector principle, which the USSR asserts to claim sovereignty over Arctic areas; the historic bay doctrine, which the Soviet Union has invoked to claim Peter the Great Bay as internal waters; the principle of straight baselines to strengthen their claim that the Northern Sea Route is an internal Soviet waterway; and the regime of innocent passage, which the Soviets have interpreted as requiring foreign warships to notify and receive permission from Soviet authorities before entering Soviet territorial waters.

used more than once by Russia's foes to harass and attack Russian lands.¹⁷ It was, therefore, in Russia's interest to develop and press for acceptance an international law doctrine that restricted or prohibited the use of these access corridors by foreign warships. Soviet legal scholars, conscious of the security interests of the USSR, have classified straits and closed seas as follows. Straits are of three types:

1. those leading into internal waters, the shores of which belong to one state. Example: the Strait of Kerch joining the Black Sea with the Sea of Azov;
2. those leading into a closed sea, the shores of which belong to more than one state. Example: the Turkish Straits joining the Aegean Sea with the Black Sea;
3. those which join the high seas and oceans. Example: the Malacca Strait linking the Indian Ocean with the Pacific Ocean.¹⁸

Closed seas are also placed in a threefold classification:

1. a sea completely enclosed by the territory of two or more states and which has no entrance to another sea. Example: the Caspian Sea;
2. a sea enclosed by a certain number of states and which is joined to other seas by one or more narrow straits whose legal status is governed by an international treaty. Example: the Black Sea;
3. a sea enclosed by the territory of two or more states and which is not the subject of an international agreement. Examples: the Sea of Japan and the Sea of Okhotsk.¹⁹

Once having defined what they mean by a closed sea, the Soviet publicists proceed to explain the legal consequences which flow from these definitions. Most significantly, only the coastal states bordering on a closed sea have the right to determine its legal regime. States not contiguous to a closed sea have no rights to it unless those rights are expressly granted to them by the contiguous coastal states. Soviet writers, looking forward to the best of all possible worlds, envisage a typical closed sea regime as follows: commercial navigation by noncoastal states normally would be permitted, at least in peacetime; warships of coastal states would be permitted unrestricted freedom of navigation beyond the territorial seas of other contiguous states; and warships of noncoastal states would have no right to enter a closed sea.²⁰

Clearly the Soviet doctrine of the closed sea is completely unacceptable to the navies of the Free World. It has the potential, however, of being adopted by other countries possessing similar geo-

17. See generally R. BATHURST, UNDERSTANDING THE SOVIET NAVY 49-73 (1979).

18. Dranov, *Chernomorskie Prolivy: Mezhdunarodno-Pravovoi Rezhim* (1948), in W. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA, *supra* note 14, at 123.

19. Bakhov, *Voenno-morskoi Mezhdunarodno-pravovoi Spravochnik*, in W. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA, *supra* note 14, at 125-26.

20. The regime so described represents a distillation of the principal components of positions taken by pre-Revolutionary Russian and Soviet scholars. See W. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA, *supra* note 14, ch. 4.

graphical configurations (Gulf of Aquaba; Persian Gulf),²¹ thus further restricting navigational freedoms to the detriment of Free World community values.

THE BLACK SEA AS A CLOSED SEA

In late 1945, Russian armies stood in undisputed control over vast stretches of East and Central Europe. Not satisfied with these enormous territorial gains, Stalin turned his attention to the one prize that had eluded him. Turkey, neutral during World War II, managed through all the upheavals to retain control over the Turkish Straits. Readers familiar with the history of Russia know that it was an age-old dream of the Russian Tsars to rule Constantinople and to control the Straits. Alexander I reportedly told the French Ambassador: "Geography wills that I have it, because if it goes to another I would no longer be master in my own house."²² Napoleon's response was war. Whatever else he intended when he invaded Russia in 1812, it is clear that Napoleon was determined to deny the Turkish Straits to the Russians: "Constantinople, jamais! C'est l'empire du monde!"²³ History repeated itself in 1940 when the Germans and the Russians, signatories of the Ribbentrop-Molotov Pact,²⁴ were attempting to come to an agreement concerning respective spheres of influence in Eastern Europe and the Middle East. Hitler suggested to Stalin that the Soviet Union's drive should be south in the direction of the Indian Ocean. Stalin disagreed, insisting that the Germans recognize "the focal point of the aspiration of the Soviet Union south of Batum and Baku in the general direction of the Persian Gulf," and, more significantly, that the Germans raise no objection to the establishment of a Soviet military and naval base in the vicinity of the Bosphorus and Dardanelles.²⁵ Stalin, no less ardently than his Tsarist predecessors in office, yearned to establish Russian control over the city of Constantine. The Turkish Straits were worth more to the Soviets "than all the [Soviet] conquests that Germany

21. See Alexander, *Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas*, 2 OCEAN DEV. & INT'L L. 151, 156 (1974) (provides a map showing some 25 semi-enclosed seas around the world).

22. V. PURYEAR, *NAPOLÉON AND THE DARDANELLES* 325-26 (1951), in F. VÁLI, *THE TURKISH STRAITS AND NATO* 12 (1972).

23. F. VÁLI, *supra* note 22, at 12.

24. Treaty of Nonaggression Between Germany and the Union of Soviet Socialist Republics, in *NAZI-SOVIET RELATIONS 1939-41: DOCUMENTS FROM THE ARCHIVES OF THE GERMAN FOREIGN OFFICE* 76-78 (R. Sontag & J.S. Beddie eds. 1948).

25. F. VÁLI, *supra* note 22, at 60; G. KENNAN, *SOVIET FOREIGN POLICY 1917-1941* 110-11 (1960).

had agreed to or would agree to in Poland, Persia or Afghanistan.”²⁶ But Hitler’s plans to smash the British Empire envisaged a German thrust down the Balkan Peninsula, across the Levant and on to Suez. If Stalin wanted the Turkish Straits as a means of egress to the Mediterranean Sea and thence to the Atlantic and Indian Oceans, Hitler needed them as a bridge to Asia Minor and Africa. Germany in 1940, unlike France and England in 1915,²⁷ was therefore unwilling to permit Russia to take the Turkish Straits. Disagreement concerning the future of the Straits contributed substantially to the failure of the Molotov mission to Berlin in November 1940. It also convinced Hitler of the necessity to attack the Soviet Union at the earliest practical opportunity.²⁸

It is interesting to note that, although Hitler was not prepared to permit the USSR to sweep Bulgaria and Turkey into its orbit and to permit the Soviet Union to assume military control over the Turkish Straits, he was prepared to agree to a revision of the 1936 Montreux Convention²⁹ in a manner entirely consistent with Russia’s desire to view the Black Sea as a closed sea.³⁰

Recollection of this willingness on the part of the German dictator to recognize a special Soviet interest in a Black Sea regime may have encouraged Stalin to propose in 1946 that the Montreux Convention be revised to reflect the following principles: (1) the Straits should always be open to the passage of merchant ships of all countries; (2) the Straits should always be open to the passage of warships of the Black Sea powers; (3) passage through the Straits for warships of nonlittoral states of the Black Sea shall not be permitted except in special cases; (4) the establishment of a legal regime of the Straits should fall within the competence of the Black Sea powers; and (5) Turkey and the Soviet Union shall organize joint means of defense of the Straits.³¹

The Russians were not successful in the immediate post-World War II period in their efforts to establish a new regime for the Turk-

26. G. GAFENCU, *PRELUDE TO THE RUSSIAN CAMPAIGN* 100 (1945).

27. Secret Agreements Regarding Constantinople and the Straits between Great Britain and Russia, and between France and Russia, in F. VÁLI, *supra* note 22, at 177-82.

28. G. KENNAN, *supra* note 25, at 111, indicates that formal orders for *Operation Barbarossa* were issued on December 18, 1940; L. FISHER, *RUSSIA’S ROAD FROM PEACE TO WAR* 426 (1969), suggests that as early as July 31, 1940, Hitler had given oral orders to his generals to prepare the attack on the USSR. See also McGhee, *Turkey Joins the West*, 32 *FOREIGN AFFAIRS* 617, 620 (1954).

29. Convention Regarding the Regime of the Straits, 173 L.N.T.S. 213, reprinted in 31 *AM J. INT’L L.*, Supp. 1 (1937) [hereinafter cited as Montreux Convention]; see F. VÁLI, *supra* note 22, at 200-23.

30. L. FISCHER, *supra* note 28, at 422; G. GAFENCU, *supra* note 26, at 110; F. VÁLI, *supra* note 22, at 60.

31. See F. VÁLI, *supra* note 22, at 71-72, 246-50.

ish Straits. The Turks, correctly analyzing the phrase "joint means of defense" to mean the establishment of a Soviet naval base on the Straits, resisted and found in the United States strong support for their position that, although certain provisions of the Montreux Convention have doubtlessly been overtaken by technology and advanced weaponry, convening a conference to revise and update the Convention would only open up a Pandora's box of troubles. At the present time, the 1936 Montreux Convention continues to govern the legal regime of the Turkish Straits.³² Turkey is the sole interpreter of the provisions of the Montreux Convention, and taking into account its precarious position so close to the expanding military power of the USSR, Turkey can be relied upon to do its best to interpret these provisions consistent with its own national security.³³

Articles 10 and 14 of the Montreux Convention permit nonlittoral Black Sea powers to send certain types of light surface warships into the Black Sea.³⁴ These provisions alone, it must be emphasized, are incompatible with the Soviet doctrine of the closed sea, the essential characteristic of which is the alleged right of the closed sea coastal states to exclude naval vessels of nonlittoral powers.

HIGH SEAS, CLOSED SEAS AND INTERNATIONAL LAW

The international law question can be put quite succinctly: Are the enclosed and semi-enclosed seas on the periphery of the Soviet Union high seas or not? If they are high seas, they are open to the merchant and naval vessels of all states, coastal or noncoastal. Freedom of the high seas means that the United States and other NATO

32. Montreux Convention, *supra* note 29. The United Nations Convention on the Law of the Sea has no effect on the Montreux Convention's jurisdiction. United Nations Convention on the Law of the Sea, art. 35(c), *done* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261, 1276 (1982) [hereinafter cited as LOS Convention].

33. Probably the most controversial Turkish interpretation of the Montreux Convention was made in 1976, when Turkey permitted the 40,000 ton Soviet naval vessel *Kiev* to transit the Straits on the theory that, as the Soviets suggested, it was an "anti-submarine cruiser" rather than an aircraft carrier. Annex II, pt. B(1) of the Convention, in defining what is a "capital ship" entitled to transit, expressly excludes aircraft carriers. See Froman, *Kiev and the Montreux Convention: The Aircraft Carrier That Became a Cruiser to Squeeze Through the Turkish Straits*, 14 SAN DIEGO L. REV. 681 (1977). The Soviets are currently building an even larger (65,000 to 75,000 ton) carrier at their Nikolayev Yard on the Black Sea. When this vessel is operational (1988-1990), the Turks will again have to render an opinion interpreting the Montreux Convention. See Barger, *Carrier Construction on Black Sea Promises Soviet Treaty Violation*, ARMED FORCES J. INT'L L. 32 (1985).

34. Montreux Convention, *supra* note 29.

navies have the right to navigate and fly over these waters.³⁵ Concomittantly, international law gives to all merchant and military vessels a right of access to these waters. In the pre-UNCLOS III era this right depended on an interface between the high seas freedoms and the regime of innocent passage as variously interpreted and applied by coastal states to their territorial waters.³⁶ This state of affairs was unsatisfactory to the major maritime powers, which insisted that any new Law of the Sea treaty provide firm and unequivocal guarantees for the right of unimpeded transit passage through international straits. This right of submerged transit and overflight passage, codified in articles 34 through 45 of the United Nations Convention on the Law of the Sea (LOS Convention), has now become part of the fabric of customary international law.³⁷

To be sure, with regard to the peripheral bodies of water mentioned above, the USSR is entitled to claim a territorial sea,³⁸ an

35. Convention on the High Seas, done Apr. 29, 1958, art. 2, 13 U.S.T., 2312 T.I.A.S. No. 5200, 450 U.N.T.S. 82; LOS Convention, *supra* note 32, art. 87.

36. Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (especially articles 14-17) [hereinafter cited as Territorial Sea Convention].

37. In fairness, the question remains hotly debated as to whether the United States, after refusing to adhere to the LOS Convention because of its objectionable deep seabed mining provisions, is entitled to unobjectionable rights stated elsewhere in the LOS Convention. Second and Third World countries, stressing a contractual (package deal) theory, tend to deny that a nonratifying United States can derive any third party beneficiary rights (under article 36 of The Vienna Convention on the Law of Treaties) from the LOS Convention. See Grolin, *The Future of the Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Situation*, 13 OCEAN DEV. & INT'L L. 1, 23 (1983). There is also disagreement on the narrower question of whether the transit passage provisions of the LOS Convention permit submerged passage. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 95 (1980) (answering the question in the affirmative). Reisman, *The Regime of Straits and National Security*, 74 AM. J. INT'L L. 48, 71 (1980) (answering the question in the negative). Some observers are uncertain whether the United States can rely on custom when asserting navigational rights. See, e.g., Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902, 918 (1980); Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006, 1018-19 (1982). Grzybowski, *Reflections on UNCLOS III*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 581, 583 (1982), is persuaded that "under the doctrine of *opinio juris sive necessitatis*, regimes of international straits . . ., as provided for in the LOS Convention, seem to be a part of the traditional law of the sea."

The official position of the United States has been stated as follows:

In nonseabed areas . . . the United States does recognize the existence of an international law of the sea entirely independent of — though reflected in — the Law of the Sea Convention and based upon accepted principles of customary international law. The United States will continue to honor those principles and will assert its rights consistent with those principles on a global basis.

Malone, *Freedom and Opportunity: Foundation for a Dynamic Oceans Policy*, 84 DEP'T ST. BULL. 76, 77 (Dec. 1984).

38. LOS Convention, *supra* note 32, part 2, at 1261, secs. 1-3; Territorial Sea Convention, *supra* note 36. Article 5 of the 1982 Law on the State Boundary of the USSR establishes a 12-nautical mile territorial sea for the USSR. See THE U.S.S.R., EASTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA (W. Butler ed.

exclusive economic zone,³⁹ a continental shelf,⁴⁰ and arguably, to take provisional unilateral measures to protect its interests in deep seabed mining.⁴¹ None of these regimes impacts adversely on the right of foreign states not bordering on the peripheral seas to navigate or otherwise make permissible use of them, provided that such rights are exercised with due regard for the rights of other states.⁴²

If the waters in question are not high seas, what are they? Internal waters of the USSR? Obviously not, since they are not waters on the landward side of the baseline of the Soviet Union's territorial sea. The Aral Sea and Lake Baikal would meet this definition, but not the peripheral seas mentioned in the second section above, all of whose closing lines are either more than twenty-four miles (all the northern seas bordering the Arctic Circle) or, in cases where a sea is closed by a strait less than twenty-four miles wide (the Black Sea), the Soviet Union is not the only state to share its shores. Since "internal waters" are defined with reference to the coastal state's territorial sea, the coastal state wishing to claim a bay, lake, gulf or sea as "internal waters" must be the only country bordering that body of water.⁴³

Are any of the seas mentioned above "historic bays" or "historic seas"? An historic bay or sea is one the waters of which have come to be viewed as territorial over a long period of acquiescence by non littoral states, regardless of the distance between the headlands.⁴⁴ Once recognized, historic waters are assimilated to the regime of internal waters and are subject to the unlimited sovereignty of the coastal state. Soviet publicists, and at times the Soviet government, have claimed various bodies of waters as "historic waters." For instance, the White Sea, the Sea of Azov, the Gulf of Riga and Peter

1985) [hereinafter cited as Butler].

39. LOS Convention, *supra* note 32, part V. Edict on Provisional Measures for the Preservation of the Living Resources and for the Regulation of Fishing in Marine Areas Adjacent to the Coast of the U.S.S.R.. Butler, *supra* note 38, at F-1.

40. LOS Convention, *supra* note 32, part VI. Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. Decree on the Continental Shelf (1968) and other Soviet laws pertaining thereto, Butler, *supra* note 38, at G-1.

41. LOS Convention, *supra* note 32, arts. 133-97. Edict on Provisional Measures to Regulate the Activity of Soviet Enterprises Relating to the Exploration and Exploitation of Mineral Resources of Sea-bed Areas Beyond the Limits of the Continental Shelf (1982), Butler, *supra* note 38, at W-1.

42. LOS Convention, *supra* note 32, arts. 58 & 87.

43. LOS Convention, *supra* note 32, art. 8.

44. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 357-58 (1962).

the Great Bay have all been identified as "historic waters" in Soviet legal pronouncements.⁴⁵ Whether these unilateral claims by the Soviet Union are entitled to respect by other states depends, in the absence of an express agreement, on the existence of a number of factors: (1) the claiming state must exercise sovereign authority over the area; (2) such exercise of authority must have been exercised regularly for a considerable period of time; and (3) other states must acquiesce in such exercise of authority.⁴⁶

When the Soviet Union in 1957, acting through the Council of Ministers of the USSR, proclaimed Peter the Great Bay to be part of the internal waters of the USSR and, with the exception of the shipping lanes leading to the port of Nakhodka, closed to foreign ships and aircraft, several nations (first and foremost Japan) filed vigorous diplomatic protests.⁴⁷ These paper protests are of course evidence of a lack of acquiescence in the Soviet claim by the foreign offices of the countries concerned, but it would be imprudent to consider this action sufficient to have defeated once and for all the international law validity of the Soviet claim. As pointed out in the Soviet note of January 7, 1958, the People's Republic of China expressed its contemporaneous approval of the Soviet claim.⁴⁸ Important also is the practice of states. Do other states freely exercise high seas rights on Peter the Great Bay, or are the Soviets actively asserting their claimed exclusive sovereignty over trespassing foreign vessels and aircraft? Nonuse may be mistaken for acquiescence. Effectively unchallenged unilateral claims may ripen into prescriptive rights.⁴⁹

These are all questions related to the practice of international law, which has been described as a process of claim and counterclaim,⁵⁰

45. Butler, *supra* note 38, at 104-15.

46. L. SOHN & K. GUSTAFSON, *THE LAW OF THE SEA IN A NUTSHELL* 58 (1984), Johnston, *Canada's Title to Hudson Bay and Hudson Strait*, 1934 BRIT. Y.B. INT'L L. 1, 5.

47. The USSR Council of Ministers Decree is at *The Legal Regime of Internal Sea Waters*, 6 SOVIET STATUTES AND DECISIONS 209 (1969-1970). For the United States protests of August 12, 1957, and March 6, 1958, see *U.S. Protests to U.S.S.R. on Closing of Peter the Great Bay*, 37 DEP'T ST. BULL. 388 (1957); *U.S. Repeats Protest on Closing of Peter the Great Bay*, 38 DEP'T ST. BULL. 461 (1958). For the Soviet note of January 7, 1958, see 38 DEP'T ST. BULL. 461-62. The British note appears in *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment* 7 INT'L & COMP. L. Q. 112-13 (1958). See generally Butler, *supra* note 38, at 110.

48. 38 DEP'T ST. BULL. 461 (1958).

49. *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928), reprinted in 22 AM. J. INT'L L. 867 (1928).

50. The author has captured the essence of the "decision-making process" in McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-57 (1955):

The international law of the sea is not a mere static body of rules but is rather . . . a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward

of drawing lines and challenging others to dare to cross them.⁵¹ The stakes in disputed areas of the international law of the sea are high. The maximization of globally desired values tends to break down under the relentless pressure of vital national and regional interests. Realistically, rules of international law will be successful to the extent that individual nation-states can be persuaded that in respecting them, they also are maximizing their own desired values.

THE CLOSED SEA DOCTRINE IN FUTURE SOVIET STRATEGIC PLANNING

The Soviet closed sea doctrine is an unusual and highly controversial unilateral claim. The international response to it by countries outside the Soviet sphere of influence has been less than enthusiastic. A Soviet-inspired proposal, introduced by Romania and the Ukrainian SSR in 1958 to amend the draft Geneva Convention on the High Seas so as to accommodate the closed sea doctrine, had to be withdrawn by its sponsors when it became apparent that it would be overwhelmingly defeated.⁵² The Soviets fared little better during the negotiations that attended the preparation of the LOS Convention. To be sure, Part IX of the Convention includes provisions dealing with "enclosed or semi-enclosed seas," but they fall far short of outlining special rules for such defined bodies of water.⁵³ In fact, article 123 of the LOS Convention merely encourages littoral states to cooperate with each other in dealing with fishing, environmental and research matters.⁵⁴ Nothing is said about navigation. Where the terms of the LOS Convention are silent on any question, the Preamble states that "the rules and principles of general international law" shall apply.⁵⁵ Under these principles, all of the seas claimed as "closed seas" by the Soviet Union are indeed open.⁵⁶ Within the

claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers . . . weigh and appraise these competing claims . . . and ultimately accept or reject them.

51. Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, 108 U.S. NAVAL INST. PROC. 26 (1982).

52. *The Closed Sea Doctrine*, 6 SOVIET STATUTES AND DECISIONS 226, 227 (1970).

53. LOS Convention, *supra* note 32, arts. 122-23.

54. *Id.*

55. *Id.*

56. A note on terminology: Soviet legal publicists originally used the expression "closed sea" (*zakritoye morye*) to designate the special regime they desired for what otherwise would be regarded by general international law as high seas. Some Western jurists assumed that the term "closed sea" was the exact opposite of "open sea" or "high seas," a revival if you will, of John Selden's doctrine of *mare clausum* (1635). This was

framework of already existing international treaties and conventions, the Black Sea, the Baltic Sea, the northern seas fronting on the Arctic Circle, the Sea of Okhotsk and the Sea of Japan are high seas to which all the freedoms specified in article 87 of the LOS Convention attach. Moreover, as indicated above, the general rules relating to other maritime areas⁵⁷ also perforce apply to those bodies of water claimed by the Soviets to be closed seas. There is, therefore, a formidable array of fairly well-established international law principles which argue against the possibility of imminent community acceptance of the Soviet doctrine of the closed sea.⁵⁸

In face of these realities, will the Soviets back off, rethink their earlier pronouncements, and formally renounce their interpretation of the closed sea doctrine as it applies to specified seas on the periphery of the USSR? In his review of the *1982 Soviet Yearbook of International Law*,⁵⁹ John Hazard notes some Soviet interest in reconsidering the doctrine of "closed seas," but no formal action has yet been taken by the Soviet government. If the Soviet Union were ever to abandon the closed sea doctrine, it would probably be due more to the strength of its Navy than to the weakness of its legal position. As is well known, the Soviet Navy over the past two decades has made dramatic and remarkably steady advances in the construction and deployment of a large deep water operational strike force.⁶⁰ For years relegated to an auxiliary role in support of ground operations, the Soviet Navy, led by the Mahan-inspired Admiral Gorshkov,⁶¹ is now capable of executing strategic deterrence, sea

not what the Soviets meant, of course, and fearful lest they lose support because of a nominal misunderstanding, they began to use other designations, such as regional sea (*regional'noye morye*), enclosed sea (*zamknutoye morye*) or semi-enclosed sea (*poluzamknutoye morye*).

57. Other maritime areas include the territorial sea and the exclusive economic zone.

58. The interest which the international community of nations has in rules which impose a minimum of restrictions on sea lane communication is simply too great. From time to time other countries, such as Iran with respect to the Persian Gulf, have expressed a desire to establish a special regime for the semi-enclosed sea in which they have a vital national interest. See C. MACDONALD, *IRAN, SAUDI ARABIA AND THE LAW OF THE SEA* 184 (1980); Alexander, *Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas*, 2 OCEAN DEV. & INT'L L. 151 (1974); The Third United Nations Conference on the Law of the Sea, Official Records, vol. II, 273-78 (statements by various national delegations on enclosed and semi-enclosed seas).

59. Hazard, *supra* note 6, at 1019.

60. This development has been closely monitored by Western observers. See Hopker, *Soviet Global Strategy: The Great Challenge to the West at Sea*, 101 U.S. NAVAL INST. PROC. 24 (Dec. 1975); *Naval Power in Soviet Policy*, (P. Murphy ed. 1978); McGwire, *The Rationale for the Development of Soviet Seapower*, 106 U.S. NAVAL INST. PROC. 155 (May 1980).

61. S.G. Gorshkov's writings, translations of which originally appeared in serial form in the U.S. NAVAL INST. PROC. (Jan.-Nov. 1974), also have been published elsewhere: S.G. GORSHKOV, *RED STAR RISING AT SEA* (1974); S.G. GORSHKOV *THE SEA POWER OF THE STATE* (1979).

control and naval presence missions on a global scale.⁶² When one considers the total maritime activity of the USSR (naval, merchant marine, fishing and scientific research fleets), the conclusion is inescapable that the Soviet Union is now a major maritime power and is likely to remain so for many years to come. Because of this, Soviet military strategists have undoubtedly shifted their perceptions of what their Navy should be doing. Rather than concentrate on defending the Soviet heartland by controlling the peripheral seas, Soviet strategists have now been able to assign offensive strike missions on the world's oceans to their far-flung operational naval units. The closed sea doctrine, born at a time when the Soviet Navy was largely a coastal defense force, may now appear overtaken by events.⁶³

Does it follow therefore that, the reason for the doctrine having ceased, the doctrine should itself cease (*cessante ratione legis, cessat ipsa lex*)? Not necessarily. The Soviet Union clearly needs an international Law of the Sea that harmonizes with its plans to expand and strengthen its naval operations on a global scale. But in seeking to expand support for client states and inhibit Free World military initiatives, it is not inconceivable that the Soviet Union, while claiming that it is only enjoying the rights which international law confers on it when it navigates naval vessels in the peripheral and semi-enclosed seas of other countries (Caribbean Sea; Persian Gulf), will nevertheless insist on denying that same right to foreign warships on its own peripheral and semi-enclosed seas.⁶⁴ If so, Western observers will see more of the doctrine of the closed sea as Soviet jurists invoke it in support of the foreign policy goals of the USSR.

62. Department of Defense, *Soviet Military Power 1984* 114-15 (1984); Department of Navy, *Understanding Soviet Naval Developments* 7-13 (1981).

63. Technology may also serve to influence Soviet strategic thinking on this matter. Keeping enemy warships off one's peripheral seas may be irrelevant in an era of intercontinental ballistic missiles.

64. KRUGER-SPRENGEL, *THE ROLE OF NATO IN THE USE OF THE SEA AND THE SEABED* 37-38 (1972).

