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Legal Aspects of Contemporary Naval
Mine Warfare

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I. INTRODUCTION

Naval Mine warfare is an area of military expertise that has

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The views expressed in this Article are those of the authors and do not necessarily reflect those of the Royal Australian Navy, the Australian Department of Defense, or the Australian Government.

truly come into its own this century.¹ Military planners herald the naval mine as an extremely effective, yet unglamorous option in the national weapons arsenal. A silent, passive, and pernicious weapon, the naval mine, with its multiplier effect, has influenced the strategic outcomes of conflict this century.² It is described as both an "immoral weapon"³ and one that is an "inseparable element of naval power."⁴ Significantly, the recent international efforts to ban landmines have not included naval mines. Accordingly, it is timely to consider the rules regulating the deployment of naval mines because these weapons remain a very important aspect of the catalogue of weapons available to most States.

Given the recognized significance of the use of the naval mine, it is somewhat curious that the only specific treaty attempting to regulate this area of warfare is the Convention (VIII) of 1907 Relative to the Laying of Automatic Submarine Mines (Hague Convention).⁵ The Hague Convention is regarded as a poor compromise, and is variously described as an "emasculated" and "worthless"⁶ treaty that was the product of diametrically opposed views of the participants to the Second Hague Peace Conference.⁷ The history of the negotiations leading to the Hague Convention reflect the acknowledged value of the weapon itself. After the turn of the century, the naval mine was recognized as a relatively cheap weapon that directly threatened the naval superiority of established powers. This truism continues to apply today, and was particularly evident during the recent naval operations in the Persian Gulf.⁸

1. See Thomas A. Clingan, Jr., *Submarine Mines in International Law*, in THE LAW OF NAVAL OPERATIONS 351 (Int'l Law Studies, vol. 64, Horace B. Robertson, Jr. ed., 1991).

2. See generally Ernest Fortin, *Those Damn Mines*, U.S. NAVAL INST. PROC., July 1992, at 30.

3. Alan Hinge, *Australia's Use of the Seamine in the 1990s*, 10 J. AUSTRAL. NAVAL INST. 47, 47 (1984).

4. John F. Tarpey, *A Minestruck Navy Forgets Its History*, U.S. NAVAL INST. PROC., Feb. 1988, at 44, 46.

5. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 U.S.T. 541 [hereinafter Hague Convention VIII].

6. See HOWARD S. LEVIE, *MINE WARFARE AT SEA* 53 (1992).

7. See DOCUMENTS ON THE LAWS OF WAR 3 (Adam Roberts & Richard Guerlff eds., 2d ed. 1989).

8. See generally J. M. Martin, *We Still Haven't Learned*, U.S. NAVAL INST. PROC.,

Notwithstanding the criticism surrounding the Hague Convention, its substantive provisions consistently impact the planning of naval operations. The first part of this Article briefly outlines the military background leading to the Hague Convention's drafting, and analyzes the Convention's substantive provisions. These provisions, while greatly influenced by the political compromises of the Second Hague Peace Conference, disclose certain universal principles that continue to apply to the regulation of this area of naval warfare. This Article demonstrates, however, that the technical development of naval mines throughout this century far exceeds what the Hague Convention's drafters initially contemplated.

Given these technical developments, in conjunction with this century's profound changes to the legal regulation of conflict, a residual question remains concerning the Hague Convention's application to contemporary military/naval operations. The Convention is premised on the existence of a state-of-war, as a legal concept. As a result of legal developments this century, however, not least of which was the emergence of the United Nations Charter system, this premise has been abolished.

Part II of this Article examines the Hague Convention's application within a contemporary legal framework. The Convention continues to affect the regulation of naval mine warfare and the planning of contemporary operations, both within times of armed conflict and otherwise. This Article demonstrates that the principles underpinning the Hague Convention are recognized by the International Court of Justice (ICJ), which has accorded substantive effect to these principles. Indeed, the Court has made some insightful conclusions as to the nature of the Convention's underlying legal principles. Specifically, the Court concluded that principles of "humanity" serve to impose obligations on States that employ and encounter naval mines, notwithstanding the absence of a *de jure* application of the Hague Convention itself.⁹ This Article analyzes the implications of the ICJ decisions and their relation to customary international law.

July 1991, at 64.

9. See *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 4, 22 (Dec. 5) [hereinafter *Corfu Channel*].

The final part of this Article focuses specifically on the current state of customary international law regulating naval mine warfare. The analysis relies heavily on the recent conclusions reached by a panel of international scholars, which are reproduced in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Manual)*.¹⁰ This publication was authored by a group of distinguished naval operators and legal experts who sought to codify the disparate elements of the laws of naval warfare, including, in particular, the issue of naval mine warfare. This Article contends that, in addition to the laws deriving from the Hague Convention, the emergence of general principles of the *jus in bello*,¹¹ as manifested in the 1949 Geneva Conventions and the 1977 Additional Protocols, also significantly affects the manner in which naval mine warfare is undertaken.

This Article concludes that, far from being a worthless failure, the Hague Convention provides a substantial and lingering influence on the laws regulating naval mine warfare. Judicial recognition of the Convention's underlying principles has merged with the Convention's relative paucity of substantive regulation. Recognizing the terribly effective impact of naval mines, such principles relate to the protection of innocent shipping. Consistent with these principles, States are absolutely obligated to control these weapons, that generally cannot distinguish between lawful and unlawful targets.¹²

10. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* (Louise Doswald-Beck ed., 1995) [hereinafter *SAN REMO MANUAL*].

11. The term, "*jus in bello*," also termed, "*jus belli*," means: "The law of war [or armed conflict]. The law of nations as applied to a state of war [or armed conflict], defining in particular the rights and duties of the belligerent powers themselves, and of neutral nations. That which may be done without injustice with regard to an enemy." BLACK'S LAW DICTIONARY 771 (5th ed. 1979). This term is distinguishable from the term, "*jus ad bellum*," also termed, "*jus bellum dicendi*," which means: "The right of proclaiming war [or armed conflict]." *Id.*

12. See generally Clingan, *supra* note 1, at 354.

II. THE DEVELOPMENT OF NAVAL MINE WARFARE AND THE SUBSTANTIVE TERMS OF THE HAGUE CONVENTION

A. Background to the Hague Convention

During the American Civil War (1860–1865), the use of naval mines demonstrated the weapon's early effectiveness in addressing the naval superiority of an adversary in modern conflict. Termed "torpedoes" at the time, Confederate forces inflicted greater damage on Union naval forces with the use of these weapons instead of gunfire.¹³ Indeed, the American Civil War was the occasion for Admiral Farragut's famous and frequently quoted line, "Damn the torpedoes, Captain Drayton, go ahead."¹⁴

It was in the course of the Russo-Japanese War (1904–1905), however, that the unrestricted use of naval mines reached its apogee. During that conflict, both forces laid thousands of mines, principally around the Eastern Russian ports, Vladivostok and Port Arthur.¹⁵ In all, the use of naval mines was extremely effective as a direct weapon of warfare accounting for "[two] battleships, [four] cruisers, [three] destroyers and a minelayer from the Japanese Fleet and one battleship, one cruiser, [two] destroyers and [two] gunboats from the Russian Fleet."¹⁶ More significantly, the strategic value of mine-laying was realized during this conflict. Naval mines were recognized as effective weapons, particularly in their ability to deny an adversary's access to sea lanes. The very unrestricted use of naval mines in this conflict, however, was the impetus for developing some form of regulation. For a prolonged period of time following that conflict, the "coasts of Japan, China and Russia were polluted by mines that had broken adrift or had been laid and not swept."¹⁷ This pollution caused considerable danger to commercial maritime activity and resulted in the tragic loss of lives. The following statement by the Chinese Government accurately summarized the alarming need to

13. Confederate mines sank twenty-seven Union ships; in comparison, gunfire only sank nine ships. See LEVIE, *supra* note 6, at 13.

14. Fortin, *supra* note 2, at 30.

15. See generally, Clingan, *supra* note 1, at 351.

16. R. H. Crane, *Mine Warfare - History and Development*, 10 J. AUSTL. NAVAL INST. 31, 37 (1984).

17. *Id.*

regulate naval mine warfare:

The Chinese Government is even today under the necessity of equipping the vessels in its coastwide trade with special instruments to pick up and destroy the floating mines which encumber not only the high sea but also its territorial waters. In spite of every precaution being taken, a very considerable number of coasting trade boats, fishing boats, junks and sampans have sunk as a consequence of collisions with these automatic submarine contact mines, and these vessels have been utterly lost with their cargoes without the details of the disasters reaching the western world. It is calculated that from five to six hundred of our countrymen in pursuit of their peaceful occupations have met a cruel death through these dangerous engines.¹⁸

These problems, which led to the drafting of the Hague Convention, disclose the irreconcilable differences¹⁹ between the dominant naval powers, such as Great Britain, and the emerging naval powers, such as Germany. Notwithstanding the obvious humanitarian impulse to protect the safety of vessels from third-party States, Germany was not inclined to squander, through legal regulation, the naval mine's tactical and strategic usefulness. Like Germany, Britain's motivation to regulate the use of mines was not altruistic. Britain recognized that the naval mine more than adequately redressed superior naval dominance and acted as a force-leveler. In its zealous efforts to "outlaw" naval mines, Britain was motivated by its desire to retain naval dominance. Indeed, as author Daniel Patrick O'Connell wrote, "the Convention embodies a compromise between the British policy in 1907 of opposing the use of unanchored mines and minefields laid for the purpose of economic blockade and the German policy of using mines for the purpose of hampering pursuit and instituting such a blockade."²⁰

The compromised language that was ultimately incorporated in the Hague Convention reflects the conflicting motivations of Great Britain and Germany. It is ironic, therefore, that the

18. LEVIE, *supra* note 6, at 29.

19. *See id.* at 25.

20. 2 DANIEL PATRICK O'CONNELL, INTERNATIONAL LAW OF THE SEA 1138 (Ivan Anthony Shearer ed. 1984).

humanitarian motivations, as reflected in the Chinese Government's statements, have become, from a legal perspective, the Hague Convention's dominant and lingering legacy.

B. The Substantive Provisions of the Hague Convention

Although the Hague Convention is comprised of thirteen Articles, only Articles 1 through 5 address the regulation of naval mine warfare. This Article's analysis of the Convention is therefore limited to these provisions. Article 1 of the Hague Convention states that it is forbidden:

(a) to lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them; (b) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; [or] (c) to use torpedoes which do not become harmless when they have missed their mark.²¹

The subject matter of Article 1 is the "automatic contact mine," which was, at the time, one of only two types of naval mine in operation. The other, the "Colt's mine," was activated by an electric cable, and thus was susceptible to manual control. The "automatic contact mine," however, was activated by the mine's physical contact with the intended target. The purpose of Article 1 is to ameliorate the deadly and non-discriminatory effects of "automatic contact mines" once they escape "control." The Article reflects the currently understood "principle of distinction," which states that a distinction must be drawn between legitimate military objectives and civilian objects and the civilian population when conducting military/naval operations, and permitting only military objectives to be the subject of attack.²² While this principle is now expressly contained within Article 48 of Additional Protocol I to the 1949 Geneva Conventions (Geneva

21. Hague Convention VIII, art. 1.

22. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 48, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I] (discussing the distinction between "military objectives" and "civilian objects," which the author of the Article refers to as the "principle of distinction").

Protocol I),²³ it was something of a novelty at the time of the Second Hague Peace Conference. The purpose of Article 48, in its protection of neutral shipping (and indeed even that of the belligerents'²⁴ own vessels), was premised on the concept of mutual interest.²⁵ The destruction of innocent neutral shipping afforded no military advantage to belligerents. Moreover, the effects of the drifting, uncontrolled naval mines following the Russo-Japanese War was still a very pressing topic of concern.

The application of Article 1 to modern warfare remains slightly contentious. Technology has far surpassed the two variants of naval mine available at the time of the Convention's drafting. A large variety of "influence" mines now exist that are not activated by direct contact, but may be activated by a number of other factors, including pressure, acoustics, magnetic and other influence triggers.²⁶ A description of the types of naval mines now available is limited only by the imagination of the designers as to the types of triggering mechanisms that might be employed.²⁷ Hence, current types of naval mines include: aerial bombs, which have had their triggering mechanisms replaced with mine sensors; buoyant rockets, which are tethered to sinkers; homing torpedoes, which are activated upon receipt of suitable target signatures; non-homing torpedoes, which are submarine-launched and rest on the sea floor; and missiles, which are released from underwater "cocoon" upon receipt of suitable target signals.²⁸ As a consequence of these variants, a workable generic definition of the term "naval mine" is any "underwater explosive device that waits

23. *Id.*

24. The term, "belligerent," as used herein, "designates either of two nations [that] are actually in a state of war with each other, as well as their allies actively [cooperating], as distinguished from a nation [that] takes no part in the war and maintains a strict indifference as between the contending parties, called a 'neutral.'" BLACK'S LAW DICTIONARY, *supra* note 11, at 141.

25. *See id.* ("In order to ensure respect for and protection of the civilian population and civilian objects . . .").

26. *See* U.S. DEPARTMENT OF NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M) 9-2, para. 9.2.1 (1995) [hereinafter COMMANDER'S HANDBOOK].

27. *See generally* Hector J. Donahue, *Minesweeping + Mine Hunting = Success*, U.S. NAVAL INST. PROC., March 1998, at 52.

28. *See* Mike Turner, *Several Aspects of Sea Mines*, 10 J. AUSTL. NAVAL INST. 59, 59 (1984).

to sink or damage targets or deter them from entering an area.”²⁹

Given the broad definition of the term “naval mine,” the issue remains as to whether the purview of Article 1 encompasses modern naval mines. If it does not, the Article is otiose. The reasoning that supports the proposition that the Article does not have this reach partially relies on an invocation of the *expressio unius est exclusio alterius* maxim of interpretation.³⁰ Such reasoning, however, plainly defeats the purpose of the Article and must be considered fanciful and inconsistent with State practice. Certainly, the better view,³¹ proffers that Article 1 applies to current naval mine types. This reasoning allowed the Second Hague Peace Conference to be concerned, not with the discriminatory status of automatic contact mines themselves, but rather, with the indiscriminate way in which such mines could be used.³² Moreover, such an interpretation is consistent with the general requirement that States refrain from acts that would defeat the object and purpose of a treaty.³³

Article 2 states that it is forbidden “to lay automatic contact mines off the coast and ports of the enemy, with the sole object of interrupting commercial shipping.”³⁴ In the course of the debates leading to the adoption of Article 2, Britain initially proposed a more comprehensive provision that outlawed the use of naval mines to establish or enforce commercial blockades.³⁵ Such a proposal would ensure that Britain, with its naval dominance,

29. Alan Hinge, *Mine Warfare and Mine Countermeasures*, in OPERATIONAL AND TECHNOLOGICAL DEVELOPMENTS IN MARITIME WARFARE: IMPLICATIONS FOR THE WESTERN PACIFIC 63 (Dick Sherwood ed., 1994).

30. *Expressio unius est exclusio alterius* is a “maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.” BLACK’S LAW DICTIONARY, *supra* note 11, at 521.

31. See A. G. Y. Thorpe, *Mine Warfare at Sea - Some Legal Aspects for the Future*, 18 OCEAN DEV. & INT’L L. 255, 259 (1987) (referring to the view advanced by Professor O’Connell that “general considerations tend towards extending the principles of the Hague Convention to cover all types of mine, whether or not moored. . .”).

32. See NETHERLANDS MINISTRY OF DEFENSE, G.J.F. VAN HEGELSOM, METHODS AND MEANS OF COMBAT IN NAVAL WARFARE 18-19 (1988) (Introductory Report to the Madrid Programme of Work by the Netherlands Ministry of Defense) (unpublished report, on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

33. See generally Vienna Convention on the Law of Treaties, May 23, 1969, art. 8, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

34. Hague Convention VIII, art. 2.

35. See LEVIE, *supra* note 6, at 32.

would enjoy an advantage in satisfying the criterion of ensuring a blockade was "effective," as required under classic prescriptions, and thus maximizing the legal rights that subsequently accrued. This proposition was not accepted, and thus the effectiveness of the Article, with its "sole object" test, effectively rendered the operative provisions of Article 2 redundant.³⁶ Indeed, this addition of the "sole object" test has been described as the "yawning loophole"³⁷ that does not require great ingenuity to circumvent.

Article 2, in its literal terms, is also somewhat anachronistic in its generic reference to "commercial shipping" and assumption that all non-military shipping is therefore immune from attack. The customary law of naval warfare now permits the targeting of neutral commercial shipping in circumstances where such shipping makes an effective contribution to the enemy's military action.³⁸

With its reference to mines "off the coast," Article 2 has some continuing application to the geographic limitations on the placement of naval mines. It is the only Article in the Hague Convention that makes such geographic references and it suggests that a degree of proximity is necessary to justify the laying of mines. As outlined below, issues regarding naval mines in international waters are relevant in contemporary debates. Article 3 states that:

When anchored contact mines are employed, every possible precaution must be taken for the security of peaceful shipping. The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the governments through the diplomatic channel.³⁹

36. See Hague Convention VIII, art. 2.

37. Clingan, *supra* note 1, at 354.

38. See generally W. J. Fenrick, *Military Objectives in the Law of Naval Warfare* 58-62 (1988) (unpublished Report to the Madrid Programme of Work, on file with author). See also COMMANDER'S HANDBOOK, *supra* note 26, at 7-6, para. 7.5.1 ("neutral merchant vessels . . . acquire enemy character and may be treated by a belligerent as enemy warships . . . when . . . acting in any capacity as a naval or military auxiliary to the enemy's forces.").

39. Hague Convention VIII, art 3.

A significant aspect of Article 3 is its reference to “peaceful shipping.”⁴⁰ The emphasis here accords with contemporary developments in the law of naval warfare, in that neutral vessels not engaged in belligerent activity are accorded immunity from attack or capture. Notwithstanding this deference to peaceful shipping, Article 3’s apparent obligation to “render these mines harmless within a limited time . . .”⁴¹ is curious. If a “limited time” is not equated with the cessation of hostilities, then such a proposition is not consistent with subsequent State practice, particularly U.S. actions during the Vietnam conflict.⁴² Thus, this provision has been overtaken by developments in State practice. The provision also misconceives the significant role that the minefields play in denying access to sea lanes. A naval minefield has “completely succeeded in its mission if the opponent refuses to challenge it”⁴³ In this regard, the requirement to provide “notice,” as the provision mandates, readily serves strategic purposes in its own right. Indeed, the emphasis on proper notification of minefields, which are otherwise under control, has become a preeminent legal obligation, as recognized by the ICJ and reflected in contemporary customary law.⁴⁴

Notwithstanding the recognition of early principles of notice in Article 3, the caveat that some of these obligations are dependent on “military exigencies,” necessarily undermines the efficacy of the provision. Such an emphasis is not permissible today under the contemporary *jus in bello*.⁴⁵ The concept of “military necessity” is now only one element of the “proportionality” equation mandated by Articles 51 and 57 of the Geneva Protocol I.⁴⁶ As such, the terms of Article 3 and the qualification on the obligation concerning “military exigencies” is now completely spent. Article 4 provides:

40. *Id.*

41. *Id.*

42. See generally, SAN REMO MANUAL, *supra* note 10, at 172 n.138.

43. ALAN HINGE, MINE WARFARE IN AUSTRALIA’S FIRST LINE OF DEFENCE 9 (Canberra Papers on Strategy and Defence No. 86, 1992).

44. See SAN REMO MANUAL, *supra* note 10, at 172 (noting that the notion has “evolved into a customary law obligation.”).

45. For an explanation of the term, “*jus in bello*,” see *supra* note 11.

46. Geneva Protocol I, art. 51, para. 5(b), art. 57 (this concept also constitutes an independent principle of customary international law).

Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents. The neutral Power must inform ship owners, by notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.⁴⁷

Article 4, while ostensibly repeating the terms of Article 3, is significant in its recognition of neutral States' rights to deny adversaries' access to sea lanes. While classic legal prescription requires that such rights be forcibly protected,⁴⁸ it is relevantly acknowledged that neutral security interests may deny access to sea lanes "off their coasts" (i.e., within their territorial seas/archipelagic waters).⁴⁹ This presumably applies not just to belligerents, but also to other third parties. Such security rights today, however, may be enforced only in accordance with Article 25 of the 1982 U.N. Convention on the Law of the Sea (COLS),⁵⁰ which permits a coastal State to suspend even innocent passage in a non-discriminatory basis where such suspension is essential for the protection of its security. Article 5 states:

At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines. As regards [sic] anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.⁵¹

47. Hague Convention VIII, art 4.

48. See DEPARTMENT OF THE U.S. NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS NWP 9 (Rev. A) 7-3 (Annot. Supp. 1989); see generally also Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, art. 26 (Article 26 states, "The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.").

49. Hague Convention VIII, art 4.

50. U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/Conf.62/122 [hereinafter Convention on the Law of the Sea].

51. Hague Convention VIII, art 5.

Despite the internal inconsistencies relating to the principal responsibility for the removal of mines,⁵² the import of Article 5 is clear. Article 5 recognizes this passive weapon system's continuing danger and, consequently, it directly imposes an ongoing obligation on the parties to a conflict to remove naval mines at the cessation of hostilities. Article 5 is also significant in its implicit recognition of the extent of belligerent rights created. While a state-of-war allows for the legitimate deployment of mines, the ending of such a state-of-war imposes quite exacting obligations concerning the removal of naval mines. Thus, by implication, "war" seems to be the authority for the deployment of mines. As discussed, current prescriptions would allow for the use of naval mines notwithstanding the absence of a state-of-war. This has resulted, however, in the emergence of particularly acute commensurate obligations concerning the control of such mines.

C. The Character of the Hague Convention

As qualified and diffuse as it is, the Hague Convention remains a significant influence in the regulation of naval warfare. While necessarily a product of significant compromise, the Convention was somewhat prophetic in its early recognition of the need to distinguish between combatants and non-combatants and its imposition of ongoing obligations on belligerent parties to better protect peaceful shipping and secure freedom of navigation. More particularly, the Convention remains an early testament to the now universally accepted principle that the rights of the parties to an armed conflict to choose methods or means of warfare are not unlimited.⁵³ As outlined in the following two parts of this Article, the Convention, or more particularly the humanitarian impulses that ostensibly underpin its provisions, are heralded by the ICJ. Such principles have become the basis of positive obligations upon States. Moreover, many of the provisions in the Convention have crystallized into customary international law. In this regard, the Convention transcends its apparent limitations and continues to influence the contours of law in this area.

52. See LEVIE *supra* note 6, at 51.

53. This is a fundamental international law principle and is reflected in the Geneva Protocol I, art. 35.

III. THE APPLICATION OF THE HAGUE CONVENTION TO CONTEMPORARY CONFLICT

The Hague Convention was negotiated in accordance with the prevailing law, which applied at the turn of the century to regulate the *jus ad bellum*.⁵⁴ At that time, the law made a sharp distinction between the "law of war" and the "law of peace." Accordingly, military actions that were not permissible due to a prevailing peace, could be rendered lawful by a declaration of war.⁵⁵ This is an extremely efficient, if not morally acceptable, appraisal of international relations. The Hague Convention recognized that these belligerent rights accrued as a result of actually declaring a state-of-war. Indeed, the continued deployment of naval mines and failure to recover existing mines outside of this legal state-of-war appears to be manifestly unlawful.

The emergence, however, of the increasing legal proscription of war, first through the League of Nations Covenant⁵⁶ and the Pact of Paris,⁵⁷ and then through the United Nations Charter system,⁵⁸ calls into question the continued validity of rights and obligations owed under the Hague Convention.⁵⁹ One interpretation of this contemporary legal state is to determine that "belligerent rights," as such, have fallen into desuetude; thus, there is no continuing validity to the Hague Convention's content. The other, more attractive view, acknowledges that the Hague Convention's substantive content continues to apply, but only to the extent that such content is consistent with the contemporary *jus ad bellum* (particularly in relation to the criteria of necessity and proportionality) and otherwise conforms to the current general principles relating to the *jus in bello*.⁶⁰ This view avoids a

54. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 16-17 (1993).

55. See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L. Q. 283, 284 (1987).

56. See generally LEAGUE OF NATIONS COVENANT arts. 10-16; see also Greenwood, *supra* note 55, at 284 n.8 (and accompanying text).

57. See generally Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 94 L.N.T.S. 57, see also Greenwood, *supra* note 55, at 284 n.8 (and accompanying text).

58. See generally U.N. CHARTER art. 2, para. 4.

59. See Natalino Ronzitti, *The Right of Self-Defense and the Law of Naval Warfare*, 14 SYRACUSE J. INT'L L. & COM. 571, 571-572 (1988).

60. See Clingan, *supra* note 1, at 352.

legal vacuum and must therefore be preferred. Indeed, as late as the 1970s, countries were still succeeding to the Hague Convention.⁶¹ Such actions indicate a recognition that the Hague Convention continues to have *de jure* significance. It is evident that State practice and judicial comment concerning the Hague Convention have accepted the Convention's continued vitality. The Hague Convention, however, now applies in a modified form, and is very much subject to additional constraints imposed by the *jus ad bellum*.

A. *The Jus ad Bellum and its Effect on the Hague Convention*

Contemporary regulation of the right to resort to force is contained within the United Nations Charter and supporting international customary law. The cardinal principle relating to this issue is reflected in Article 2 of the United Nations Charter,⁶² which states that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."⁶³

This provision is, however, subject to exception, namely, the right of national self-defense, as set forth in Article 51 of the U.N. Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .⁶⁴

B. *Self-Defense and the Law of Naval Warfare*

The contours of the right of national self-defense have been judicially considered by the ICJ in *Nicaragua*⁶⁵ and the Court has determined that application of force under the aegis of national self-defense must, under customary international law, be

61. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 7, at 90.

62. U.N. CHARTER art. 2, para. 4.

63. *Id.*

64. U.N. CHARTER art. 51.

65. Military and Parliamentary Activities (*Nicar. v. U.S.*), June 27, 1986, 25 I.L.M. 1023 [hereinafter *Nicaragua* (merits)].

conditioned on the principles of necessity and proportionality.⁶⁶ These elements of the equation found their first expression in the celebrated 1842 *Caroline* exchange between Lord Asburton of the United Kingdom and Daniel Webster of the United States.⁶⁷ The debate determined that self-defense could be legally justified only in certain exacting circumstances.⁶⁸ Daniel Webster enunciated the time-honored test that required Britain to demonstrate:

a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for [Britain] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.⁶⁹

“The significance of the *Caroline* Formulation cannot be overstated. . . . [T]his formulation and its acceptance by the British authorities turned the concept of self-defense from a political excuse into a legal doctrine.”⁷⁰

It is within these criteria of necessity and proportionality that the traditional laws of naval warfare still apply.⁷¹ Hence, classic rules relating to the laying of naval mines, as outlined in the Hague Convention, must be justified not only in accordance with their tenor within the Convention but also in accordance with principles of necessity and proportionality. Author Christopher Greenwood endorses the views of commentators, such as Judge Ago, in concluding that the requirements of necessity and proportionality are satisfied only if a State “is unable to achieve the desired result by different conduct involving either no use of armed force at all

66. See generally *id.* at para. 249.

67. See 30 BRITISH AND FOREIGN STATE PAPERS (1841–1842) 1138 (1858).

68. See *id.*

69. *Id.*

70. Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 134 (1998); see also R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 92 (1938).

71. See generally Christopher Greenwood, *The Effects of the United Nations Charter on the Law of Naval Warfare* (1991) (unpublished report, on file with author and the *Loyola of Los Angeles International and Comparative Law Journal*).

or merely its use on a lesser scale.”⁷² Hence, rights recognized under the Hague Convention apply only in a graduated manner, depending on the specific circumstances. What is axiomatic, however, is the continuing application of the principle of distinction and the correlative obligation of notification, which are expressly contained in the operative provisions of the Hague Convention. The principle of distinction remains inviolable not only in terms of its own authority, as reflected in the Convention, but also as a result of the general principle of the law of armed conflict as it applies to naval warfare.

Translating the classic rights that exist within a state-of-war into a general formula of “self-defense” is a challenging exercise. Notwithstanding, at least British State practice has been consistent with this approach. The boarding of the British-registered *Barber Perseus* merchantman in 1986 by Iranian forces during the Iran-Iraq War was acknowledged by Britain as consistent with the right of “self-defense.”⁷³ The content of this somewhat amorphous right of “self-defense” was found in the classic rules of “visit and search.”⁷⁴ These rules, according to British statements, applied not according to their own force, but rather, as a manifestation of the right of self-defense as applicable in this particular context. In this regard, classic rules are applied to “flesh out” the very general principles of self-defense.⁷⁵

C. Proportionality

The application of the principle of proportionality, to determine the legitimacy of actions undertaken in accordance with classic prescriptions of the *jus in bello*, contains a certain elegance and efficacy. Thus, in the context of naval mine warfare, States avail themselves of the “right” to lay mines, but such actions must be strategically proportionate in terms of the right of self-defense.

As a general proposition, the application of force applied by a State runs on a continuum between mere law enforcement actions (i.e., against illegal fishing) through dedicated armed conflict. The

72. *Id.* at 17.

73. See Vaughan Lowe, *The Impact of the Law of the Sea on Naval Warfare*, 14 SYRACUSE J. INT’L L. & COM. 657, 679 (1988).

74. See COMMANDER’S HANDBOOK, *supra* note 26, at 7-6.

75. Greenwood, *supra* note 72, at 47.

degree of force and the nature of rights attracted under international law depend on where the authority for the action lies on the legal continuum. Greenwood maintains that the meaning of the proportionality requirement is that "the use of force must be proportionate to the purpose for which force is used in self-defence."⁷⁶ This allows a State sufficient justification to use that amount of force that is reasonably necessary to achieve its legitimate lawful objectives.⁷⁷ Accepting this paradigm, this rule applies not only to the application of force in "self-defense," but also to any other use of force legally justified.

Similarly, although the ICJ in *Nicaragua* maintained that force is justified for self-defense, it also allowed a State to resort to "proportionate countermeasures" in circumstances where the relevant gravity of "attack," or other use of force by an antagonist, was not sufficient to justify actions in self-defense.⁷⁸ While undoubtedly controversial, the notion that "proportionate countermeasures" can "themselves include an element of force" has been maintained by some commentators.⁷⁹ Indeed, this may be the better view of the Court's interpretation in *Nicaragua*. Accordingly, a State should be able to resort to force to give effect to such "countermeasures" and, in that regard, Greenwood's conception of proportionality would be equally applicable.⁸⁰ In the circumstances of unlawful mine-laying activity, which fundamentally violates rights of international maritime freedom and threatens peaceful shipping, proportionate countermeasures would surely be permissible. It is, however, the nature and quality of such proportionate countermeasures that would undoubtedly be contentious.

This criterion of proportionality, for example, was reflected in the actions of U.S. forces during the Vietnam conflict. The question of whether naval mines could be legitimately deployed against North Vietnamese ports was first considered in 1968. Such

76. *Id.* at 15.

77. *See id.* at 16.

78. *See Nicaragua* (merits), June 27, 1986, 25 I.L.M. at 1023, para. 249.

79. John Lawrence Hargrove, *The Nicaragua Judgement and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 138 (1987) (noting that, although the ICJ strongly suggested this notion, the Court ultimately found it unnecessary to decide the issue).

80. *See Greenwood, supra* note 72, at 47.

actions were not taken on the legal ground that the United States was not engaged in armed conflict with North Vietnam.⁸¹ Notwithstanding, four years later, U.S. military actions had sufficiently intensified against North Vietnam, and as a result, a decision was taken to comprehensively mine selected ports. Once the strategic decision was made, United States actions complied closely with the terms of the Hague Convention in providing three days notice before the arming of mines that were moored and not placed in international shipping lanes.⁸² In such circumstances, these actions were generally endorsed by the international community,⁸³ notwithstanding that sea-borne trade with North Vietnam was almost completely curtailed. This is a relevant example of the changing nature of proportionality. Military options that are available to a State, including in this instance, the use of naval mines, will be conditioned upon an assessment of the proportionate quality of the action. In this regard, the applicable provisions of the Hague Convention on naval mines would apply most completely when a State is engaged in significant armed conflict with an adversary. In such circumstances, old-style "belligerent rights" may be exercised to their fullest extent. This is relevant not only in relation to the rights *vis-a-vis* the two antagonists, but also with respect to the belligerents' capacity to affect third parties by restricting rights of international navigation.

This balance between freedom of navigation and self-defensive measures has long been a ubiquitous feature of the law of naval mine warfare.⁸⁴ Judicial comment by the ICJ in *Corfu Channel*⁸⁵ and *Nicaragua*,⁸⁶ generally favors freedom of navigation rights in circumstances that fall short of armed conflict. As a corollary, however, it is evident that even freedom of navigation rights may be supplanted in certain circumstances where the use of naval mines is considered essential for State security.

81. See Clingan, *supra* note 1, at 357 (determination by the Director of the International Law Division, U.S. Navy Office of the Judge Advocate General).

82. See Frank B. Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam*, 29 JAG J. 143, 148 (1977).

83. See Clingan, *supra* note 1, at 357-358.

84. See *id.* at 351.

85. See *Corfu Channel*, 1949 I.C.J. 4 (Dec. 5).

86. See *Nicaragua* (merits), June 27, 1986, 25 I.L.M. at 1023.

D. Corfu Channel

The ICJ's decision in *Corfu Channel* remains the seminal decision where the legal issues surrounding the deployment of naval mines was judicially reviewed. The Court made some extremely insightful observations that reflect the legitimacy of the deployment of naval mines in peacetime. Hence, a close examination of the issues of that case is warranted.

Corfu Channel involved an assessment of a number of transits undertaken by British warships in 1946 through the Corfu Channel (which runs along the coast of Albania and Greece). Against a background of some hostility, in 1946, Albanian shore batteries fired upon two passing British warships. As a result of these attacks, subsequent naval orders were issued directing that a battle group (comprised of four British warships) traverse the channel. In October 1946, these vessels were deployed in battle readiness, and in the course of the transit, two of the warships (H.M.S. Saumarez and H.M.S. Volage) struck mines, resulting in the death of a number of British sailors. The mines were of a German design and were ostensibly laid by persons unknown. The Court did, however, attribute knowledge of these mines to Albania.⁸⁷ A more sizeable British task force was dispatched a third time to transit the channel in accordance with "Operation Retail," which took place November 13, 1946.⁸⁸ The specific purpose of this third and final transit was to sweep the channel for mines, so as to gather evidence of Albanian malfeasance.⁸⁹ The mines that were used in the Corfu Channel were moored contact mines. Without direct evidence linking Albania to the deployment of such mines, the Court still concluded that the laying of the minefield "could not have been accomplished without the knowledge of the Albanian Government."⁹⁰ Then, in a remarkable statement, the Court found that Albania owed obligations to notify all ships in the channel about the presence of these mines and that Albania failed to meet such obligations in that:

Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain

87. See *Corfu Channel*, 1949 I.C.J. at 22.

88. See *id.* at 32-33.

89. See *id.* at 34.

90. *Id.* at 22.

general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.⁹¹

The significance of this prescription cannot be underestimated. The Court was prepared to find the existence of an obligation based on "elementary considerations of humanity," notwithstanding that the Hague Convention did not have *de jure* application to the matter at hand.⁹² As stated in *Nicaragua*, the Court in *Corfu Channel* regarded these "elementary considerations" as the principle that sustained the Hague Convention.⁹³ The Court refrained from elaborating on what the "elementary considerations of humanity" actually were, but the language seems to reflect something of the "right to life" notion that is now reflected in Article 6 of the International Covenant of Civil and Political Rights.⁹⁴ If this was the tendency of the Court in *Corfu Channel*, it was formally expressed in the subsequent *Nuclear Weapons* decision that the right to life, in particular, applied in armed conflict⁹⁵ (although qualified by the priority of international humanitarian law), and *a fortiori*, that such a right should apply in situations of non-armed conflict as well.

Equally significant is the Court's recognition of a right of "freedom of maritime communications."⁹⁶ In *Corfu Channel*, the Court recognized a right of non-suspensible innocent passage through the strait.⁹⁷ This right received preference over any right that Albania had to assert its sovereignty to deny passage through the strait. Given such an attitude, it is interesting that the Court

91. *Id.*

92. *See id.*, at 22.

93. *See Nicaragua* (merits), June 27, 1986, 25 I.L.M. at 1023, para. 215.

94. U.N. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

95. *See generally* Louise Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, ICRC INTERNATIONAL REVIEW OF THE RED CROSS NO. 316, at 35-55, (Jan. 1, 1997) (available at the ICRC website (visited Aug. 5, 1999) <<http://www.icrc.org/ihrceng.nsf>>).

96. *Corfu Channel*, 1949 I.C.J. at 22 (Dec. 5).

97. *Id.* at 55.

condemned the third British transit, which swept the strait for mines during "Operation Retail." If the right of freedom of maritime communication had any substance, then such self-help actions were surely justified. Nevertheless, the Court held that such actions were not justified, and indeed, concluded that the third transit constituted an unlawful intervention of Albanian sovereignty.⁹⁸ Such a determination is all the more surprising given the Court's attitude to the robust transit of the British task force during the second transit, where the Court held that even in such circumstances, the British task force was "affirming a right which had been unjustly denied."⁹⁹

With respect to the third transit, the ICJ's reasoning is not compelling. Commentators, such as Ian Brownlie, note that the Court's attitude regarding the third transit is inconsistent with the reasoning it employed when interpreting the second transit.¹⁰⁰

Arguably, the Court's attitude toward the third transit was heavily influenced by the British pleadings in *Corfu Channel*. There, the British Government seemed to concede that mine-sweeping activities did constitute an intervention, but were excusable in these particular circumstances.¹⁰¹ Given such a submission, it is not altogether surprising that the Court refrained from establishing a new exception to the principle of non-intervention. The point received a degree of clarification some forty years later, in the ICJ's *Nicaragua* decision, which in effect, "overruled" this aspect of the *Corfu Channel* decision.

*E. Nicaragua*¹⁰²

The facts of *Nicaragua* involve the U.S. Government's support of the "Contra Rebels" in the early 1980s. The case also concerned counter-allegations by the U.S. Government regarding

98. *See id.* at 35.

99. *Id.* at 30.

100. *See generally* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 287 (1963).

101. *See Corfu Channel*, 1949 I.C.J. at 33-35.

102. For a general discussion of *Nicaragua* in the context of military and maritime affairs see, Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126 (1998); Dale Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283 (1999).

the Nicaraguan Government support of rebel elements in neighboring Honduras, El Salvador, and Costa Rica during this same time period. In addition to these general questions concerning the support of military activities, the Court specifically determined that the United States was responsible for the mining of Nicaraguan ports, which had been covertly undertaken by United States agents and without notification or warning to the international shipping community.¹⁰³

The Court condemned the mining and determined, again, that such actions violated international humanitarian principles.¹⁰⁴ In particular, the Court referred to the provisions of Articles 3 and 4 of the Hague Convention and opined that the requirement to provide notification to peaceful shipping was paramount to determining the legitimacy of mining actions.¹⁰⁵ The Court couched its opinion expressly in terms of international humanitarian law "underlying the specific provisions of Convention VIII of 1907"¹⁰⁶ and subsequently cited, with approval, the relevant passage from *Corfu Channel* quoted above.¹⁰⁷ Importantly, on this point, even the dissenting Judge Schwebel found a rare consensus with the majority determination.¹⁰⁸

The views of the Court on the lawfulness of the mine-laying activities, however, are somewhat ambiguous. The majority opinion generally held that the laying of mines by one State in another State's internal waters or territorial sea in peacetime is an "unlawful act."¹⁰⁹ While this is undoubtedly true, it begs the question as to what constitutes "peacetime." Judge Schwebel, in his dissent, seems to accept that United States actions in the case were premised on the right of self-defense and therefore, justified the "blockade-like measures" (i.e., laying mines), although he points out that the failure to provide notice affected the legitimacy

103. See Clingan *supra* note 1, at 358.

104. See Nicaragua (merits), June 27, 1986, 25 I.L.M. at 1023, para. 215.

105. See *id.*

106. *Id.*

107. For the relevant passage from *Corfu Channel*, see *supra* note 91 and accompanying text.

108. See Military and Parliamentary Activities (Nicar. v. U.S.), June 27, 1986, 25 I.L.M. 1146, paras. 238-239 (Schwebel, J., dissenting) [hereinafter Nicaragua (Schwebel dissent)].

109. Nicaragua (merits), June 27, 1986, 25 I.L.M. at 1023, para. 215.

of the United States' actions.¹¹⁰

The significance of *Corfu Channel* and *Nicaragua* lie in their identification of the principle underpinning the Hague Convention. The ICJ cites "elementary considerations of humanity" as the substantive basis for its imposition of obligations on the mine-laying (or tolerating) States.¹¹¹ Such considerations are not actually elaborated in the cases, but do seem to reflect the principle of distinction and the principles of human rights law. The requirement of notice remains critical in this legal legitimacy equation and must be satisfied before any assessment of mine-laying under the principles of self-defense can be contemplated.

F. Article 51 of the U.N. Charter and Proportionate Countermeasures

Given the capacity of the ICJ to identify active obligations deriving from the principles underpinning the Hague Convention, it is unfortunate that the Court, in each of the above two instances, did not fully determine the rights that affected States to counter unlawful mine-laying activity.

In *Nicaragua*, the Court recognized that when one State violates general maritime freedoms, another State may embark on "proportionate countermeasures" to redress the violation.¹¹² The concept of proportionate countermeasures was, unfortunately, not comprehensively defined by the Court. What is significant about the Court's reasoning, however, is that it provides States with an opportunity to utilize proportionate countermeasures in a number of circumstances where an "armed attack," as defined under Article 51 of the United Nations Charter,¹¹³ is not necessarily established. Hence, the Court seemed to indicate that an element of force could accompany such countermeasures.

The Court recognized that proportionate countermeasures could be utilized to ensure freedom of "maritime communications and maritime commerce."¹¹⁴ This conclusion was based on the

110. See *Nicaragua* (Schwebel dissent), 25 I.L.M. at 1146, para. 238.

111. *Nicaragua* (merits), June 27, 1986, 25 I.L.M. at 1023, para. 215.

112. See generally *id.* at para. 214; see also generally R. St. J. McDonald, *The Nicaragua Case: New Answers to Old Questions*, 24 CAN. Y.B. INT'L L. 127, 136 (1986).

113. See U.N. CHARTER art. 51.

114. *Nicaragua* (merits), 25 I.L.M. at 1023, para. 214.

Court's reading of the COLS,¹¹⁵ particularly in the context of naval mines blocking international sea lanes,¹¹⁶ and its enunciation of the principle that, under the COLS, "a State which enjoys a right of access to ports for its ships also enjoys *all the freedom* necessary for maritime navigation."¹¹⁷

Arguably, minesweeping activities in international straits/archipelagic sea lanes or upon international waters are permissible. As for territorial waters, in the absence of a suspension of innocent passage, pursuant to Article 25 of the COLS, consistent with the reasoning of the Court as to the rights of freedom of maritime commerce, and in conjunction with the right to undertake proportionate countermeasures, arguably, minesweeping of mines already placed within such waters must be permissible. More problematic is the question of the use of force employed to counter unlawful mine-laying activity. State practice, as evidenced by U.S. actions in the Persian Gulf during the Iran-Iraq War, however, illustrate U.S. attitudes concerning the legitimacy of force in such circumstances.

The United States' actions during the Iran-Iraq Tanker War seem to support the proposition that force may be employed in circumstances where the Hague Convention, or the principles underpinning the Convention, are violated. In the course of the Tanker War, the United States contended that Iran was, most likely, responsible for the deployment of large numbers of unanchored contact mines in the Persian Gulf.¹¹⁸ Such drifting mines caused considerable damage to neutral shipping, including commercial ships flying under the U.S. flag. As a result of such activities, United States Army helicopters, in September 1987, identified an Iranian vessel (the Iran Ajr) laying mines in international shipping lanes.¹¹⁹ The Iranian vessel was strafed and captured; the United States Government justified its actions as

115. See *id.* at paras. 212, 214 (reference to the Convention on the Law of the Sea, art. 18, para. 1(b)).

116. See *Nicaragua (merits)*, 25 I.L.M. at 1023, para. 214.

117. *Id.* (emphasis added).

118. See Myron H. Nordquist & Margaret G. Wachenfeld, *Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf*, 31 GERMAN Y.B. INT'L L. 138, 161 (1988).

119. See David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 VA. J. INT'L L. 545, 555 (1991).

national self-defense under Article 51 of the U.N. Charter.¹²⁰ Significantly, U.S. actions were further justified as consistent with obligations to ensure "world public order and the safety of international maritime commerce."¹²¹ This justification partially echoes the notion of universal jurisdiction crimes and parallels the ICJ's reasoning in *Corfu Channel* and *Nicaragua*. While the deployment of unanchored mines is probably not yet a crime of universal jurisdiction, the language that the ICJ used in *Corfu Channel*, and more particularly, in *Nicaragua*, defining such actions as violations of "elementary considerations of humanity," certainly has that character.

Subsequent actions by Iranian forces in the (alleged) continued mine-laying operations and specific missile attacks on tankers led to the United States' forceful response by way of its attack on Iran's *Resalat* and *Rashadat* platforms in the central Persian Gulf.¹²² The justification for these attacks was national self-defense. The United States maintained that the platforms were used as a base for Iranian mining activities and other attacks. United States forces made subsequent attacks on oil platforms in the Salman oil field located within the Iranian exclusive economic zone and continental shelf maritime zone.¹²³ Now subject to pending judicial determination by the ICJ, the *Oil Platforms* decision promises to provide valuable judicial analysis of the content of the right of self-defense, particularly in relation to the issue of unlawfully sowing naval mines within international shipping routes.

G. Summary

There are compelling arguments in favor of recognizing the application of the Hague Convention provisions to contemporary naval mine warfare practices. Notwithstanding the legal abolition of the state-of-war, the emergence of the right of "self-defense," pursuant to Article 51 of the U.N. Charter and supporting

120. See U.N. CHARTER art. 51.

121. Nordquist & Wachenfeld, *supra* note 118, at 161 (citing *Caught in the Act*, TIME, Oct., 1987, at 22-24).

122. See *Oil Platforms*, (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12).

123. See *id.* at 807 (the U.S. attacked the oil platforms on October 19, 1987 and April 18, 1988).

customary international law, necessitates the application of the rules of the *jus in bello* to continuing armed conflict.

Both State practice and judicial opinion are vigilant in observing and subsequently criticizing the deployment of naval mines in situations that constitute less than "armed conflicts." This is premised on recognition of the rights to navigational freedom, which have gained considerable legal ascendancy this century, as well as the acknowledgment of elementary considerations, of humanity as highlighted in *Corfu Channel* and *Nicaragua*. Such elementary considerations appear to derive their authority from human rights obligations and reflect one of the most fundamental principles of the *jus in bello*, namely, the principle of distinction.

A mine-laying State may partially overcome these objections by providing sufficient notification of the existence of a minefield. Given the nature of this weapons system, it is not surprising that notification has this somewhat palliative quality. On the whole, naval mines are passive weapons that wait for an enemy to approach. Technological developments aside, the majority of naval mines are still incapable of distinguishing between legitimate targets and protected entities. In such circumstances, the provision of notice and warning can be seen as a fundamental requirement to ensure that the principle of distinction is observed.

In the absence of such notice, particularly in circumstances where rights of self-defense (or other legal justification) cannot be established, international opinion and judicial assessment are quick to condemn such mine-laying activity. The ICJ's determination in *Nicaragua*, that proportionate countermeasures are available to a State to ensure freedom of navigational rights, allows for mine-sweeping activities in such circumstances. Whether the application of extended force in attacking the mine-laying State qualifies as a legitimate proportionate countermeasure is more problematic. Certainly, forceful United States Navy actions during the Iran-Iraq War were justified under Article 51, but they actions also reflected the "crimes of humanity" character of the mine-laying actions. Whether proportionate countermeasures can be invoked to justify such forceful actions or whether reliance needs to be included in Article 51 (in terms of national or collective self-defense), there seems to persuasive logic supporting such actions, at least in circumstances where the

elementary considerations of humanity that underpin the Hague Convention, are wantonly violated.

IV. RULES OF CUSTOMARY LAW

The law relating to naval mine warfare has a particularly rich pedigree. The challenge in planning contemporary naval operations, is to translate the relevant provisions of the Hague Convention and related judicial assessments into workable and meaningful rules. Customary international law applies to "fill gaps" and provide a reliable basis for such planning. Until recently, it was difficult to properly discern the nature of applicable customary rules, especially because no authoritative statement or analysis had been undertaken on the customary law of naval warfare since World War I.¹²⁴ As a result of this conundrum, in June 1994, a group of legal scholars and naval "operators" compiled a manual on the law of naval warfare.¹²⁵ Known generally as the *San Remo Manual*, this compilation contains some very incisive conclusions on the state of the law relating to naval mine warfare and its commentary is a useful guide in identifying relevant principles from disparate sources.¹²⁶ Naturally enough, the *San Remo Manual's* provisions dealing with naval mine warfare draw heavily on the Hague Convention and combine the Convention's provisions with conclusions based on observations of specific State practice and associated *opinio juris* and more general principles, such as those found in the Geneva Protocols.¹²⁷ Given this authority, the final part of this Article reviews and analyzes the *San Remo Manual's* rules regarding customary international law, as they apply to contemporary naval mine warfare.

124. See generally OXFORD MANUAL OF THE LAWS OF NAVAL WAR (1913) available at (visited Aug. 4, 1999) <<http://www1.umn.edu/humanrts/instatee/1913a.htm>> (constituting the most authoritative source of customary international law at the time).

125. See generally SAN REMO MANUAL, *supra* note 10.

126. See generally *id.*

127. See, e.g., Geneva Protocol I.

*A. Mines May Only be Used for Legitimate Military Purposes, Including the Denial of an Enemy's Access to Sea Areas*¹²⁸

This first rule highlights the principle of distinction as it is understood under contemporary prescriptions. The use of the term "military purposes" paraphrases the general reference in Article 48 of the Geneva Protocol I¹²⁹ to those "objectives" that may be made the subject of an attack.¹³⁰ Within contemporary naval mine warfare, this rule encompasses a considerable number of vessels. Vessels that are considered legitimate "objectives" are, *inter alia*, enemy warships and their auxiliaries, enemy merchant ships that engage in belligerent acts or otherwise effectively contribute to military action, and neutral merchant ships engaging in activities that support enemy military action.

Additionally, this rule anticipates no geographic limitation on the sowing of mines.¹³¹ Indeed, the *San Remo Manual's* commentary on this rule identifies the military planning doctrine, which allows the use of a defensive minefield (used to deny access to the territory of a belligerent), a protective minefield (used to protect shipping routes, thus denying enemy submarines or surface craft the use of certain waterways outside coastal waters), or an offensive minefield (mining waters under the enemy's control).¹³²

An express right to sow mines within international waters is a "progressive" step in the interpretation of the international law. Notwithstanding this, a number of subsequent rules substantially qualify this general proposition by referring to obligations to respect navigational rights.¹³³ In fact, these subsequent rules impose positive obligations on mine-laying States to protect "peaceful shipping." These obligations extend beyond the provision of simple notification and serve to severely circumscribe the right to lay mines in international waters.

Finally, this rule's express recognition the role of naval mines in denying access to sea areas supersedes the provision in Article 3 of the Hague Convention, which would require mines to be

128. See SAN REMO MANUAL, *supra* note 10, at 169.

129. See Geneva Protocol I, art 48, 1125 U.N.T.S. 3.

130. See SAN REMO MANUAL, *supra* note 10, at 169.

131. See Geneva Protocol I, art 49, para. 2, 1125 U.N.T.S. 3.

132. See SAN REMO MANUAL, *supra* note 10, at 169-170.

133. See, e.g., *infra* Parts IV.F-J.

rendered “harmless within a limited time.”¹³⁴ Imposing such a legal obligation, as does the Hague Convention, severely undermines the significant strategic role that mine fields play in contemporary naval warfare; thus, the provision’s “repeal,” within this customary rule, necessarily reflects strategic realities. Indeed, in this regard, the declaration of a false minefield is not considered perfidious conduct, provided that the safety of peaceful shipping is not subsequently jeopardized.¹³⁵

*B. Parties to a Conflict Shall Not Lay Mines Unless Effective Neutralization Occurs When the Mines Become Detached or Control Over Them is Otherwise Lost*¹³⁶

This rule closely resembles the terms of Article 1 of the Hague Convention,¹³⁷ and again, is directed towards ensuring respect for the principle of distinction. The *San Remo Manual*’s commentary highlights the expansive reach of the substantive obligations of customary law concerning monitoring mines in circumstances where control over such mines is otherwise lost.¹³⁸ This rule applies, not only to drifting mines, but also to other mines, such as bottom-dwelling mines that have been left unattended for significant periods of time.¹³⁹ This rule is compelling because, in addition to the notice obligation, it imposes an obligation to constantly monitor naval mines. The imposition of such an obligation echoes the ICJ’s decision in *Corfu Channel*, which attributed knowledge, and therefore international responsibility, to Albania¹⁴⁰ despite the lack of any direct evidence linking the presence of mines in the Corfu Channel to Albanian malfeasance.

134. Hague Convention VIII, art. 3.

135. See SAN REMO MANUAL, *supra* note 10, at 169–170.

136. See *id.* at 171.

137. See Hague Convention VIII, art. 1.

138. See *id.*

139. See *id.*

140. See *Corfu Channel*, 1949 I.C.J. 4 at 22 (Dec. 5).

*C. It is Forbidden to Use Free-Floating Mines Unless They are Directed Against a Military Objective and the Mines Become Harmless Within an Hour After Control Over Them is Lost*¹⁴¹

This rule, in many respects, reiterates the distinction emphasized in the two above-referenced customary rules.¹⁴² Interestingly, per the *San Remo Manual* commentary, free-floating mines may have a degree of military utility.¹⁴³ The commentary anticipates that such mines might be deployed as a matter of tactical necessity in circumstances where such mines could be dropped to foil the immediate pursuit of opposing hostile forces.¹⁴⁴

There is a fundamental inconsistency with this proposition. A free-floating mine represents one of the more self-evident violations of the principle of distinction. The *San Remo Manual* commentary, in accepting the “military necessity” of such an act, necessarily concludes that any “collateral” damage that occurs, even to protected vessels, is acceptable;¹⁴⁵ this reasoning is not supportable. While the rights of naval/military forces to defend themselves under the aegis of unit self-defense are established,¹⁴⁶ such actions do not justify violating the most fundamental principles of the *jus in bello*. In this regard, however, it is pertinent to note that countries such as Australia have made declarations upon ratification of the Geneva Protocol I, stipulating that “military advantage,” as defined by Articles 51 and 57 of the Protocol,¹⁴⁷ encompasses the “security of the attacking forces.”¹⁴⁸ This could, indeed, give more weight to military necessity (in terms of protecting members of a State’s military forces) in the proportionality equation. Even this provision, however, cannot allow fundamental violation of the rules designed to ensure the protected status of a particular vessel. Indeed, such proscription is so entrenched in the law of armed conflict that even the rule’s “one-hour” caveat cannot support any apparent modification of

141. See SAN REMO MANUAL, *supra* note 10, at 171.

142. See *supra* Parts IV.A–B.

143. See *id.*

144. See *id.*

145. See *id.*

146. See generally Stephens, *supra* note 70.

147. See Geneva Protocol I, arts. 51, 57.

148. AIR POWER STUDIES CENTRE, OPERATIONS LAW FOR RAAF COMMANDER’S DI(AF) AAP 1003 6–7 (1994).

the rule. Could it be any less egregious of a violation of the *jus in bello* if a floating mine deployed by pursued forces struck a passing hospital ship within the one-hour grace period than if the mine struck the ship outside this time frame?

*D. International Shipping Must be Notified of the Laying of Armed Mines or the Arming of Pre-laid Mines Unless the Mines Can Only Detonate Against Vessels that are Military Objectives*¹⁴⁹

The provision for giving notice finds its first expression in this rule. Assuming that notice procedures are met, as mandated by the ICJ,¹⁵⁰ the question of correlative third-party rights arises. What obligations are imposed on third parties when they subsequently enter such minefields? Can such notification principles, faithfully complied with by belligerents, undermine a third party's freedom of maritime navigation rights? There are occasions when such maritime rights may be supplanted by the right of self-defense.¹⁵¹ Accordingly, the mine-laying State providing notice does not breach international obligations if a third-party State's forces enter such a minefield, provided that the minefield was otherwise lawfully created.

This rule is more demanding than Article 3 of the Hague Convention, which simply requires notice only when "military exigencies" permitted.¹⁵² The provision of "notice," which is a general duty that applies in both peace and wartime, is reflective of the nature of this weapons system and conforms with strategic goals by enhancing the naval mine's role in denying sea access.

An interesting aspect of this rule concerns its application to anti-submarine warfare. Given that there are so few commercial submarines, it is arguable that a submerged minefield, which only operates against hostile submarine threats, is an example of a minefield that targets only legitimate military objects, and to which notice provisions arguably do not apply. Notwithstanding this theoretical possibility, prudence nonetheless dictates that general warning and notification should be provided.

149. See SAN REMO MANUAL, *supra* note 10, at 172.

150. See Nicaragua (merits), June 27, 1986, 25 I.L.M. at 1023, para. 215.

151. See discussion, *supra* Part II.

152. See Hague Convention VIII, art. 3.

*E. Belligerents Shall Record the Locations Where They Have Laid Mines*¹⁵³

This rule is a necessary consequence of the obligation to notify the international community about the laying of armed mines. It is also an incident of the rule requiring that States maintain control over mines. The rule does not limit the types of mines that must be recorded nor does it stipulate whether or not the mines must be armed. According to the *San Remo Manual's* commentary however, the rule does not require such records be made public unless there is a danger to neutral shipping.¹⁵⁴

*F. Mining Operations in the Internal Waters, Territorial Sea or Archipelagic Waters of a Belligerent State Should Provide, When Mining is First Executed, for the Free Exit of Neutral States' Shipping*¹⁵⁵

This rule does not derive from the Hague Convention, but rather is an implication of the general principle of distinction. The *San Remo Manual's* commentary states that this rule is reflective of international practice, as evidenced by U.S. actions in the mining of Haiphong Harbor during the Vietnam conflict.¹⁵⁶

This rule is interesting because of its reference to territorial seas or archipelagic waters. Assuming that mining operations are a justified act of national self-defense, the rule allows for the proscription of innocent passage through territorial or archipelagic waters. This contentious issue raises questions as to the extent to which belligerent operations allow for the amelioration of long-standing third-party navigational rights. As evidenced by the mining of various Vietnamese ports during the Vietnam War, it seems that such a proscription is acceptable.¹⁵⁷

153. See SAN REMO MANUAL, *supra* note 10, at 172.

154. See *id.*

155. See *id.*

156. See *id.*

157. See Swayze, *supra* note 82, at 148.

*G. The Mining of Neutral Waters by a Belligerent is Prohibited*¹⁵⁸

Article 2 of the United Nations Charter prohibits the use or threat of force in the conduct of international relations.¹⁵⁹ This principle is regarded as having a status of *jus cogens*.¹⁶⁰ Interestingly, the *San Remo Manual* defines neutral waters as only a State's internal waters, territorial sea, or its archipelagic waters.¹⁶¹ The definition does not include archipelagic sea lanes or those international straits that are regarded as having a legal character that is *sui generis*¹⁶² and are thus outside the prohibition. Beyond the prohibition in Article 2 of the U.N. Charter, it is also arguable that laying mines within a neutral State's waters constitutes an "armed attack" for the purposes of Article 51 of the U.N. Charter.¹⁶³ Additionally, such actions may constitute a "blockade" (depending on the circumstances) under Article 3(c) of the 1974 General Assembly Resolution on the Definition of Aggression¹⁶⁴ and therefore may be deemed "acts of aggression."

Given the general prohibition against mining neutral waters, it would be an escalatory step to mine another State's archipelagic sea lanes, or straits, even though such actions would appear lawful. The conduct of belligerent vessels or aircraft laying such mines would not be consistent with transit (or archipelagic sea lanes) passage, which, pursuant to Article 39 of the COLS, mandates that transiting vessels (or aircraft) undertaking transit passage will "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait"¹⁶⁵ Mining these waters may have strategic value.

158. See SAN REMO MANUAL *supra* note 10, at 173.

159. See U.N. CHARTER art. 2, para. 4.

160. See Nicaragua (merits), June 27, 1986, 25 I.L.M. at 1023, para. 190. The term, "*jus cogens*," means a "mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACK'S LAW DICTIONARY 356 (Pocket ed. 1996).

161. See SAN REMO MANUAL, *supra* note 10, at 172.

162. The term, "*sui generis*," means "[o]f its own kind or class; i.e., the *only one* of its own kind; peculiar." BLACK'S LAW DICTIONARY, *supra* note 11, at 1286 (emphasis retained from original).

163. See U.N. CHARTER art. 51.

164. See G.A. Res. 3314, U.N. GAOR 29th Sess., Annex 7.5, art. 3(c) (the definition of "aggression" includes "the blockade of the ports or coasts of a State by the armed forces of another State").

165. Convention on the Law of the Sea, art. 39, para. 1(b).

However, there is a substantial likelihood that this mining will escalate tensions and incur additional duties to ensure the safety of neutral shipping, which is likely to outweigh the military utility of such an operation.

*H. Mining Shall Not Have the Practical Effect of Preventing Passage between Neutral Waters and International Waters*¹⁶⁶

While this rule is a necessary consequence of the aforementioned rule, it is nevertheless significant because of its reference to international waters. It reflects the law's continuing ambiguity with respect to the legitimacy of mining international waters. Again, this rule does not establish a general prohibition, but nevertheless regulates such actions to ensure freedom of navigation rights.

*I. Mine-laying States Shall Pay Due Regard to the Legitimate Uses of the High Seas by Providing Safe Alternate Routes for Neutral States' Shipping*¹⁶⁷

This rule specifically allows for the maintenance of traditional high seas' freedoms and provides yet another qualification on the right to lay mines in international waters. This rule is significant in that it does not require the provision of safe alternate routes of "similar convenience," which is the terminology used in the COLS.¹⁶⁸ This omission suggests that such safe alternate routes need not take into account commercial or navigational priorities, and hence, allows a belligerent considerable leeway in complying with this general rule. The *San Remo Manual's* commentary suggests that these obligations arise when safe transit is at issue.¹⁶⁹ Thus, providing alternate routes is not the only method of complying with this rule.¹⁷⁰ For example, escorting neutral vessels through a minefield, rather than providing alternate routes, would be another method of compliance.¹⁷¹ Use of such a method is, however, undoubtedly subject to the tactical and geographical

166. See SAN REMO MANUAL *supra* note 10, at 173.

167. See *id.*

168. See, e.g., Convention on the Law of the Sea, art. 53, para. 4, art. 38, para. 1.

169. See SAN REMO MANUAL, *supra* note 10, at 173.

170. See *id.*

171. See *id.*

realities impacting the military utility of such an undertaking.

*J. Transit Passage Through International Straits and Passage Through Waters Subject to the Right of Archipelagic Sea Lanes Passage Shall Not Be Impeded Unless Safe and Convenient Alternate Routes are Provided*¹⁷²

This rule reflects the current legal status of international straits and archipelagic sea lanes, as established in the COLS.¹⁷³ Accordingly, rights of transit passage and archipelagic sea lane passage to third parties cannot be suspended under any circumstances. It is curious, however, that although the *San Remo Manual's* commentary on the rule recognizes the new legal status of these waterways, it nevertheless concludes that it is not unlawful, per se, to lay mines in these areas.¹⁷⁴ Such actions impose extremely high, ongoing obligations on mine-laying States to ensure safe and convenient alternate routes. Pursuant to the *jus in bello*, such actions must be specifically justified by the proportionality principles.

*K. Neutral States do Not Act Inconsistent with the Laws of Neutrality by Clearing Mines Laid in Violation of International Law*¹⁷⁵

This rule is significant because it recognizes the correlative "self-help" rights to ensure that the *jus in bello* retains its integrity. This rule conflicts with the ICJ's assessment of the rights available during the third-party transit in *Corfu Channel*.¹⁷⁶ This rule, however, is reflective of the Court's subsequent tacit recognition in *Nicaragua*, of the right to undertake proportionate countermeasures to remove unlawfully-laid mines.¹⁷⁷ In this regard, *Nicaragua* is preferred over *Corfu Channel*; mine-sweeping may undoubtedly be undertaken when the elements of necessity and proportionality are established.

172. See *id.* at 174.

173. See generally Convention on the Law of the Sea, art. 53.

174. See SAN REMO MANUAL, *supra* note 10, at 174.

175. See *id.* at 176.

176. See discussion, *supra* Part III.D.

177. See *Nicaragua* (merits), June 27, 1986, 25 I.L.M. at 1023, para. 249.

L. Remaining Rules

The remaining rules in the *San Remo Manual*¹⁷⁸ relate to the obligations to remove naval mines or render them harmless, and to share technical information relevant to the removal of such mines following the cessation of hostilities. These provisions reflect the terms of Article 5 of the Hague Convention concerning the removal of mines following the conclusion of war.¹⁷⁹ The *San Remo Manual's* rules, however, are concerned only with the removal of mines when practically possible and, in that respect, adopt terminology that reflects the Geneva Conventions' concern, namely, the practical reality of ending hostilities.¹⁸⁰

M. Summary

The contours of the customary law of naval warfare, as expounded in the *San Remo Manual*, draw heavily on the Hague Convention's provisions. This reliance testifies to the cogency of the provisions and recognizes the importance of the Convention's underlying principles. Importantly, the *San Remo Manual* recognizes the application of the Hague Convention to the post-Charter environment and incorporates developments relating to the COLS and State practice ensuring the respect for navigational freedoms and the undertaking of self-defensive actions. Although the *San Remo Manual's* rules reflect the law's ambivalent attitude regarding the mining of international waters, the rules continue to allow for the possibility of mine-laying action and provide a number of qualifications to ensure the integrity of humanitarian law principles and protect freedom of maritime commerce and navigation. In essence, the *San Remo Manual* is an accurate fusion of treaty law and judicial observations that makes a balanced assessment of the nature of State practice.

V. CONCLUSION

As a matter of historical fact, the Hague Convention is the principal treaty regulating the law of naval warfare today.¹⁸¹ The

178. See SAN REMO MANUAL, *supra* note 10, at 174-175.

179. See Hague Convention VIII, art. 5.

180. See SAN REMO MANUAL, *supra* note 10, at 174.

181. See Clingan, *supra* note 1, at 351.

Convention was drafted in an era where belligerent rights received considerable deference in the legal landscape and, in this regard, was very much an exercise of political realism. Nevertheless, the humanitarian impulse, which was prevalent in the negotiations and in the terms of the Convention, has become preeminent in the modern determination of rights and obligations in this area.

Although some aspects of the Hague Convention are undoubtedly obsolete today, judicial bodies champion the principles underpinning the Convention and States invoke the Convention's terms to justify their actions. Moreover, the Convention's "humanitarian impulses" found legal expression in the Additional Geneva Protocols of 1977.¹⁸²

The law relating to naval mine warfare, as manifested in the Hague Convention's terms and subsequently-developed customary international law, is a body of law that possesses a particular efficacy. As outlined in the *San Remo Manual*, this area of regulation is primarily concerned with balancing rights. Such balancing relates, generally, to the theoretical interaction of the *jus ad bellum* and *jus in bello*, and, more specifically, to the issues of freedom of navigation and self-defensive actions.¹⁸³

This Article emphasizes that the law of naval mine warfare is a dynamic area of law that is in flux. States and military planners, however, genuinely accept the cogency of the rules as thus far developed. Indeed, the rules retain an indigenous logic and elegant simplicity, notwithstanding the considerable theoretical discourse on the contours of the law by the ICJ and numerous commentators. The *San Remo Manual* has, undoubtedly, facilitated consideration of the underlying principles of the law of naval mine warfare. Perhaps the most compelling endorsement of the *San Remo Manual* is the faithful incorporation of its terms in many military manuals and military planners' ready acceptance of its principles as "common sense;"¹⁸⁴ thus realizing the ambitious aim of the *San Remo Manual's* drafters.

182. See generally Geneva Protocol I.

183. See *supra* Parts III.A-G.

184. Author's personal observation.