Operational Maritime Law 1

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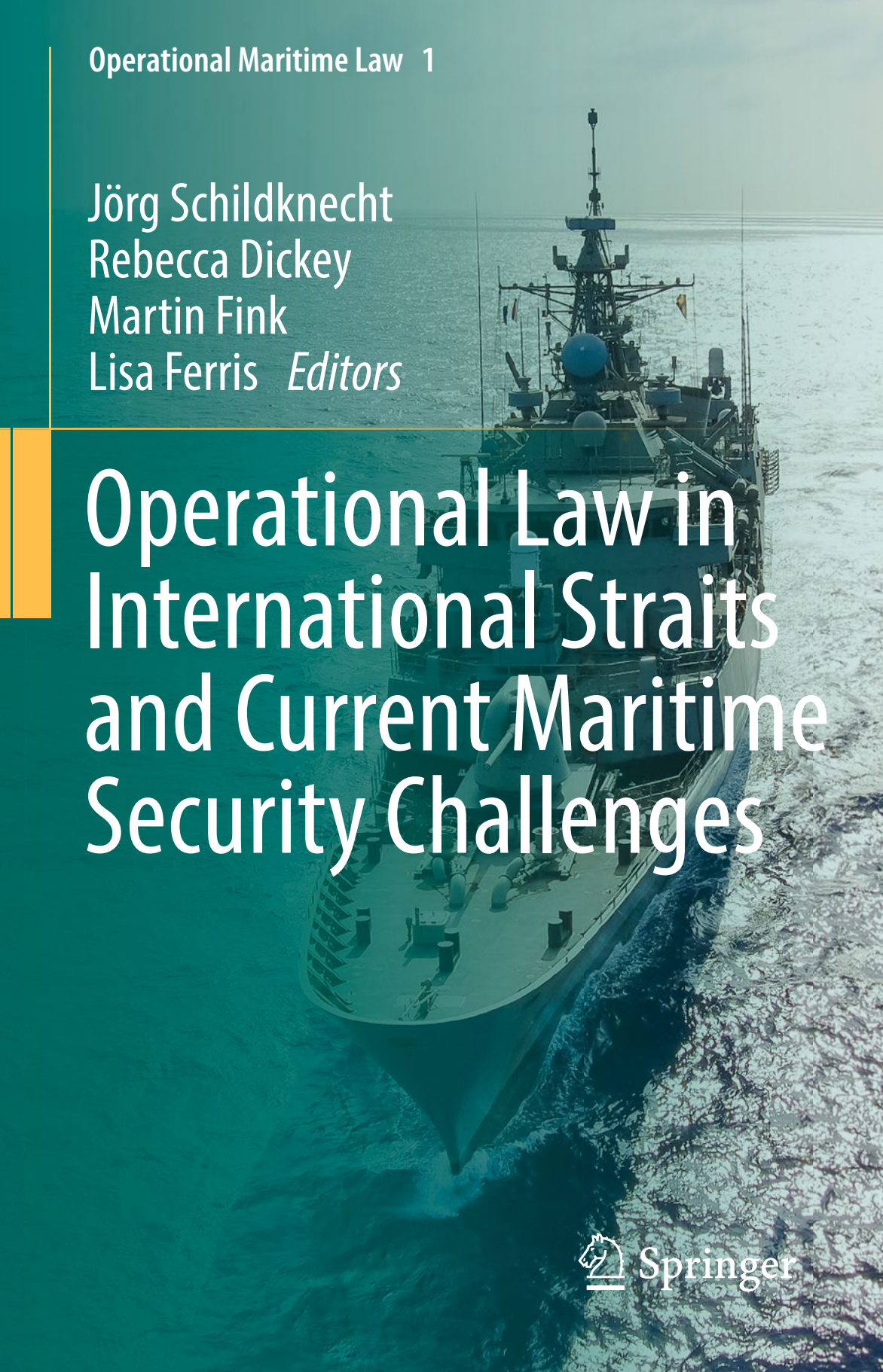
Operational Law in International Straits and Current Maritime Security Challenges



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Operational Maritime Law

Volume 1

The Operational Maritime Law Volumes, an independent series in the field of public international maritime law, bridges the gap between operators and legal practitioners in an effort to further legal understanding and international cooperation for a better, safer, maritime domain. At first glance international law provides a well-defined framework for military action. However, it is all too evident from day-to-day practice in any operation that application is a nontrivial task. It is rather the key challenge, governed by each particular situation as well as individual legal interpretations. As modern threats become more complex and naval assets increasingly protect and defend against threats from both State and non-State actors, it intrinsically becomes more evident that further study and review of current maritime law is necessary. Bearing in mind that all naval operations are bound by international law, having knowledge of the legal boundaries of military operations and responses is paramount. The Operational Maritime Law Volumes are independently peer-reviewed by international reviewers and contain contributions on topics addressing all aspects of operational maritime law inside and outside armed conflict. The aim is to provide a forum for military and legal experts to publish new research advancing legal discourse, as well as analysis of current issues, in order to create a comprehensive compilation of articles, reports, findings, and documents. The volumes contain contributions from international experts as authors, ranging from international law professors and adjunct professors; university researchers; to operational law practitioners, who provide robust analyses, insights, and offer new conclusions on topics that are directly relevant for navy operations that are carried out in the 21st Century. The organizing principles of the series are two-fold. First, to examine so far unsolved legal questions in an effort to provide guidelines for the conduct of maritime operations. Second, the volume creates a reference book for general education on the law of naval operations as well as a comprehensive source for operational handbooks and military planning. The full range of analysis of operational maritime law is one of this series' strengths. The approach in dealing with multiple legal issues across the domains of command and control, civil military cooperation, operational necessities and legal restraints, framed in a clear and consistent principal-agent analysis, and written by scholars across multiple disciplines, demonstrates how military operations at sea can legally be executed. The series is focused on the operational and tactical level making it distinctly a unique work in the market.

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Contents

Introduction: Challenges in Operational Maritime Law

Martin Fink, Rebecca Dickey, Jörg Schildknecht, and Lisa Ferris

Abstract

This book is the first volume of the Operational Maritime Law series. The series provides a platform for practitioners and scholars with specific interest in current operational maritime law issues, to publish research advancing legal discourse, as well as analysing current issues. The theme of the first volume is *Operational Law in International Straits and Current Maritime Security Challenges.* This volume is broken down into three parts. Part I explores international straits in an operational law context, Part II discusses current subjects on maritime security and maritime safety and Part III offers some thoughts on the law of armed conflict at sea. This introduction highlights today's maritime challenges in naval operations and provides an explanation of the relevance of each section of the publication. In regard to operational maritime law, three strands, in particular, stand out: maritime security, focus on persons and non-international armed conflict. Furthermore, in terms of positioning the law applicable for naval operations within the context of international law, it is argued that this area may be seen as a sub-regime of the international law of military operations.

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1 Introduction

What are today's legal challenges for States and their defence forces in the maritime domain? How do naval operations adapt to modern conflict to confront the changing nature of legal challenges while operating at sea? These questions are central to this, first-in-a-series, publication on operational maritime law. It provides a platform for practitioners and scholars with specific expertise in current operational maritime law to publish research advancing legal discourse, as well as analysing current issues on these matters. The initiative of this series is driven by the Centre of Excellence for Operations in Confined and Shallow Waters (COE CSW) in Kiel, Germany.[1] It is born out of an understanding that the combination of broad tasking and an array of growing mission sets for naval assets today and the increasing complexity of international law at sea create a necessity to further study current international law applicable to the maritime domain. The first volume's theme is *Operational Law in International Straits and Current Maritime Security Challenges.* To present this first volume, some introductory remarks are made here with regard to today's legal challenges in the maritime dimension.

2 Today's Maritime Challenges

There is little debate over the existence and relevance of the maritime domain in modern conflict. But what does 'modern conflict' actually mean in a maritime context? Perhaps one important overarching evolution in conflict from the last two decades has been the gradual decline of the 'statist approach'. The rise of non-State actors and non-international armed conflict developed as one of the main challenges inherent to today's conflict. An abundance of legal questions also emerged from this evolution. These questions spring from issues that originate from trying to fit or adapt the *ius ad bellum* and *ius in bello* to this changing situation and have also included debates from other sources of international law, such as human rights law. The maritime domain did not lag in this evolution of the decline of the statist approach. Although the legal debates, arguably, have not been as vigorous as in the land dimension, it has not felt the changing face of conflict any less. The recent focus within the maritime dimension may, arguably, be captured in three distinct themes: the rise of the importance of the concept of maritime security, the focus on persons during naval operations and the participation of naval forces in non-international armed conflict (NIAC). These three themes can be discussed as separate issues but are clearly related to each other.

[1] See the website of the CEO CSW at: http://www.coecsw.org/.

2.1 Maritime Security

States analyse the maritime dimension in terms of possible threats that may come from or arise from the sea and aim to enhance security against those threats. Maritime security is the enhancement of a State's security interests in the maritime dimension. Interestingly, the concept of maritime security takes on a broad understanding, and it can be perceived that the sharp classic divide between war and peace has completely melted away. Threats to a State in the maritime dimension can exist at all levels and types of conflict. The scope of the threat is broad and is difficult to concretely define. More often maritime security is defined as a set of pressing security issues, which may include topics such as illegal fisheries, security and safety in ports and on board vessels, piracy, boat refugees, terrorism at sea and weapons of mass destruction at sea.

Today, States generally accept that naval forces play a role in enhancing maritime security. The military and the more traditional military security issues are, however, not central to maritime security. The military is one of the many different instruments to help enhance maritime security. Still, what is interesting to note is that organisations such as NATO and the EU have through their recent maritime strategies bound themselves to this idea of a role for naval forces in maritime security.[2] NATO, as a classic collective defence organisation, assumed a role in counter-piracy operations, became active in the Aegean Sea in relation to refugees, and recently changed its Article-V Operation *Active Endeavour* into Operation *Sea Guardian,* which aims to build on maritime situational awareness, counter-terrorism and support to capacity building.[3] Oliver Clark, in his chapter on piracy, is exposing some legal challenges that arise from the involvement of traditional naval forces in maritime security operations in the context of piracy. Jouko Lehti's contribution explains the EU's legal ventures into helping boat refugees and battling refugee smuggling and trafficking operations.

What also emerged in this context is the issue of private military companies (PMCs) at sea to protect merchant vessels and maritime trade. After we have seen much (legal) discussion in the land dimension with regard to PMCs in Iraq and Afghanistan, the piracy threat that emerged in the last 10 years in and around the Indian Ocean has fired this practice also in the maritime dimension, with accompanying legal debates. Are they a welcome alternative for sea-trade protection by naval forces? Should they exist next to, or instead of the military? And how will they meet the legal thresholds for using force? In this volume, Ian Ralby discusses some of these challenges of regulating the use of PMCs.

Apart from operational level consequences and legal challenges that focus on the importance of enhancing maritime security, on a strategic-political level maritime security arguably advances a different point of departure than the classic 'Grotian'

[2]NATO has adopted its Alliance Maritime Strategy (AMS) in 2011. The EU adopted its EU-Maritime Security Strategy (EUMSS) in 2015.

[3]NATO (2016).

view of the freedom of the seas. In order to enhance security at sea and act in a timely manner against threats, one must understand the maritime environment, gain a sufficient level of awareness of the operating environment and reach a certain level of control. Often used terms like 'policing the seas' and the general acceptance of so-called 'maritime security operations' may have, arguably, caused a silent evolution in which the strategic-political thinking has changed from freedom of the seas to controlling the seas. The question is whether this way of thinking is also trickling through legal concepts and thinking or whether the legal fundamental point of departure of the freedom of the seas still stands.

2.2 Persons

The importance of enhancing maritime security has also brought about a focus on persons. Traditional naval warfare and naval operations conducted within the UN collective security system, such as maritime embargo operations, always had a primary focus on goods and vessels. Today's challenge for naval forces in the maritime dimension is mainly focused on human beings. Warships are tasked to confront pirates, boat refugees, slave and drug traffickers, mercenaries and terrorists. Naval operations moved from its traditional goods/vessel focus to person-focused operations.

This focus also provides a new dimension to legal challenges at sea. To name two of these challenges in particular, firstly, in the past decade, the application of human rights law in the maritime environment has emerged as an important and well-discussed legal issue.[4] It ranges from issues with regard to fundamental human rights in relation to piracy and arresting persons for drug trafficking, such as fair trial and detention rights, to *non-refoulement* in the context of boat refugees. Some of these legal challenges that apply human rights law in the maritime dimension have reached the European Court of Human Rights (ECtHR). In this context of applying human rights law at sea, the challenges between the interrelationship of human rights law and the international law of the sea are on different subjects not yet crystallised. Rick Button, for instance, highlights the challenges of the difference between search and rescue (SAR) and law enforcement operations. The same question examining the interrelationship that exists may be present between the provisions on the rescue of persons in the law of naval warfare, the law of the sea and human rights law.

The second example of a legal challenge that can be mentioned here is the so-called 'legal finish' during naval operations. Interestingly, this issue of the legal finish appeals back to the way traditional, but unused, prize law is organised, namely in a 'wet' dimension and a 'dry' dimension. The wet dimension is the actual action and legal issues at sea in which a good, a vessel or—today—a person is captured. The dry dimension is the subsequent actions that need to be considered in the aftermath of the action. The smooth connection between both dimensions is challenging in itself. Transferring the person to a State or to another State that is willing

[4]See e.g. Treves (2010), Guilfoyle (2010) and Papastavridis (2013).

to start legal procedures and ensuring that sufficient evidence is produced that holds in a court of law are examples of this. Apart from the non-use of prize law, during the '1990s of the former century, maritime embargo operations that had been the primary focus in naval operations arguably pushed the notion of a dry dimension in naval operations further to the background. Today, however, law enforcement types of operations that naval forces are confronted with have renewed the understanding that efforts must be put also into the dry dimension and that a successful 'legal finish' to what happens at sea urges for a whole government approach.

2.3 Non-international Armed Conflict

If conflict rises to the level of an armed conflict, then current conflicts can often be characterised as non-international. Fighting against non-State actors has given States a plethora of legal issues to debate, ranging from detention issues to an expanding set of conflict types beyond international and non-international, to complex issues on the legal boundaries of the battlefield. Obviously, these debates also have an impact in the maritime dimension. At the same time, recent years have seen armed conflicts erupt in coastal States in which naval forces were part of the military campaign. Examples are Libya, Yemen, Iraq Gaza and Lebanon. These conflicts confronted maritime lawyers with interesting legal questions, such as whether the law of naval warfare, and the law of blockade in particular, actually applies to conflicts in the Gaza or off the coast of Yemen. How must the right of belligerent visit and search be understood in the fight against non-State actors? What are the legal possibilities to detain persons on a foreign-flagged vessel from a State that has nothing to do with the underlying conflict? These are all questions that surface when having to deal with non-State actors during a non-international armed conflict at sea.

3 Traditional Conflict Is Not a Thing of the Past

Having noted above the focus in the maritime dimension during the last 15 years through three strands that have emerged as a consequence of the decline of the statist approach, it is something completely different to state that traditional international armed conflict is a thing of the past. The current situation is, in fact, quite the contrary. Much on the foreground, for instance, is the tension between States in the South China Sea, which is an issue that cannot be forgotten in this context. David Letts, in his chapter, searches for options on how to scale down tensions between States. Re-emerging tensions between Russia and other States may also develop beyond the cyber-dimension or a situation where Russia's military involvement is kept in the grey zone of conflict. What must, therefore, be underlined is that the above-mentioned strands have resulted in a certain focus, rather than concluding that

other types of warfare belong to history. The challenge for naval operators (and the military as a whole) is that they have to deal with the complete spectrum of conflict and crises from peacetime crises to 'grey-on-grey' war fighting and from law enforcement operations to restoring international peace. It merits, therefore, also to keep in mind that certain aspects of international law may have been snowed under but still exist, like the forgotten basics of prize law, to which Marcel Schulz devotes a chapter. This volume also includes multiple authors' analyses on the use of international straits and maritime areas. Another forward-leaning analysis in this context is Tassilo Singer's chapter on the legal possibilities of occupational law applied at sea.

4 Operational Maritime Law

One can take different approaches to study the relationship between international law and the maritime dimension. Broadly seen, there are two approaches that have emerged. The first is the increasingly generally accepted approach to centralise military operations and consider what aspects of international law apply and how they interrelate to each other during military operations. This approach, usually termed the *International Law of Military Operations*, has become a well-accepted approach and term. The term underlines the influence of and the interrelationship between various branches of international law that regulate military operations.[5] The maritime dimension is an essential aspect of military operations with particular legal challenges of its own. Similar to international law of military operations, the law that applies to maritime operations consists of various branches of international law. Arguably, the particularities and challenges of the maritime dimension and applicable laws make *Operational Maritime Law* a specific sub-discipline of its own within the general international law of military operations.[6]

The second is the approach that centralises around the term of maritime security, which logically flows from the focus on the strands mentioned above and is reflected in a legal sub-discipline that is termed *Maritime Security Law*. Although these terms may overlap in terms of content, the difference between operational maritime law and maritime security law lies with the view that the first focuses on security and military operations, and the second contains a broader scope of issues in which the military may play a role within security and safety challenges in the maritime dimension. In the latter, for instance, port security measures, merchant vessel safety measures and maritime environmental issues belong to this broader legal discipline. *Maritime Security Law*, therefore, includes both security and safety issues that emerge out of the maritime community as a whole. There is merit in combining security and safety, as Kraska and Pedrozo mention, 'In many respects the fusion of

[5] Gill and Fleck (2015), p. 5.

[6] Arguably the term operational maritime law encompasses a broader term than the law of naval operations, because the 'naval' emphases the military, where maritime includes all maritime activities of a State.

maritime security and maritime safety is unavoidable. The legal regimes that regulate each activity are less distinct today than in the past and now share common and mutually reinforcing objectives.'[7] However, as this series is primarily aiming to unlock the current legal challenges that are connected to the use of naval assets, the term *Operational Maritime Law* will be used as the more on point approach and term for this particular purpose.

This introduction has touched upon only a few challenges that are emerging in the maritime dimension and has not even scratched the surface of the legal issues that come with these challenges. For sure, scholars and practitioners will have many more analyses, findings and debates on their minds that need sharing and a platform in order to enhance our understanding of international law in the maritime dimension. Let this be your invitation.

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[7]Kraska and Pedrozo (2013), p. 5.

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Part I

International Straits

Minelaying and the Impediment of Passage Rights

Wolff Heintschel von Heinegg

Abstract

Naval mines are considered to pose a serious threat to international shipping. This certainly holds true for free-floating submarine contact mines but not necessarily for modern naval mines that are highly discriminating weapons. Be that as it may, the mere fact that naval mines have been laid in a given sea area will impede upon freedom of navigation. The only international treaty dealing with naval mines is the 1907 Hague Convention VIII, whose scope is limited to automatic submarine contact mines and which was concluded at a time when the breadth of the territorial sea did not exceed 3 nautical miles and other concepts, such as the EEZ, were unknown. The first part of the present chapter deals with the question whether and to what extent belligerents are entitled to lay mines in international straits overlapped by their territorial sea, their archipelagic waters, or in the high seas. The second part deals with the legality of naval minelaying in times of peace, which is to be determined in the light of the Corfu Channel judgment, the international law of the sea, and the positions taken by States in military manuals.

1 Introduction

Naval mines are an extreme threat to innocent shipping. Indeed, not just during armed conflicts but also in times of peace (e.g., in the Red Sea in 1984) that international shipping has suffered considerable losses by hitting naval mines, whose presence had

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not been notified or which were "free-floating" mines. In view of the importance of the freedom of navigation to the world economy and international security, the naval mine threat the "hidden menace"[1] seems to be intolerable. Therefore, the question arises whether international law principles and rules provide effective protection of international shipping by prohibiting or restricting the use of these means of warfare.

It must not be forgotten, however, that today's naval mines, which can be programmed to hit only certain categories of ships or, if sufficient data are available, even an individual ship, are highly discriminating weapons.[2] The use of unanchored automatic submarine contact mines that do not become harmless within 1 h after they have been laid, and anchored contact mines that do not become harmless as soon as they have broken loose, is prohibited. However, even then, such mines do not necessarily pose an indiscriminate danger to innocent shipping because the "bow wave brushes the mine clear of the ship."[3] Still, the fact that naval mines have been laid in a given sea area or even reasonable grounds for suspicion that they may be present will always have an impact on innocent shipping. Such shipping will either refrain from using the area or proceed with utmost caution, thus extending the duration of the voyage. Because minesweeping and countermine operations are a very challenging, costly, and time-consuming task, even the availability of the necessary assets to undertake those operations does not mean that the mine threat can be quickly and effectively eliminated.

This article focuses on two questions. The first concerns the exercise of the belligerent right of minelaying and its impact on the freedom of navigation enjoyed by innocent, in particular neutral, shipping. In this context, a brief discussion of the term "passage rights" is necessary. In the contemporary international law of the sea, the term is usually used for the rights of innocent passage, transit passage, and archipelagic sea-lane passage. During international armed conflicts, the belligerents will often not limit their operations to their national waters but employ methods and means of naval warfare, including naval mines, in high seas areas. Therefore, the term "passage rights" is understood here in a broad sense, not including just those rights but also including the freedom of navigation in sea areas beyond the outer limits of the territorial sea. The starting point will be 1907 Hague Convention VIII.[4] In a second step, the subsequent practice of States will be analyzed with a view to establishing the contemporary law on belligerent minelaying in the light of passage rights/freedom of navigation. The law of neutrality, in particular the right of neutral States to lay mines in their national waters, will be dealt with only marginally.

The second question concerns the laying of naval mines in times of peace. Operations to lay mines are not easy but rather are a time-consuming task unless

[1] This quote is borrowed from Griffith (1981).

[2] For a short overview of the technology currently in use, *see* Levie (1992), pp. 97–115. For further details, *see* Fuller and Ewing (2013), p. 115. *See also* Rios (2005), pp. 11–15.

[3] Levie (1992), p. 141, quoting a Report of Experts submitted to the International Court of Justice (ICJ) in the *Corfu Channel* case. *See also* Cowie (1949), pp. 188–189.

[4] 1907 Hague Convention VIII, 36 Stat. 2332, T.S. No. 541. Although the Convention is limited to automatic contact mines, there is wide agreement that it is applicable to modern naval mines that are based on a different technology. *See* Heintschel von Heinegg (1994).

they are intended to hit vessels indiscriminately. A State may therefore plan to lay mines well before the outbreak of an international armed conflict in order to be prepared to counter a threat. Moreover, it may wish to pursue its national security goals by denying others the use of its territorial sea, including that overlapped by international straits, and its archipelagic waters, including those within archipelagic sea lanes. Seemingly, such minelaying might be considered as clearly illegal because of the international law of the sea, which, certainly during times of peace, guarantees freedom of navigation not only in high seas areas but also in the territorial sea, international straits, and archipelagic waters while recognizing that these sea areas are subject to the territorial sovereignty of the coastal or archipelagic State. A closer examination shows that international law provides no absolute prohibition on minelaying during peacetime.

2 The Law of International Armed Conflict on Naval Mines and Passage Rights

2.1 The 1907 Hague Convention VIII and the Freedom of Navigation

One of the most difficult and contentious issues faced by the 1907 Hague Peace Conference was the regulation of mine warfare at sea. In view of the experience of the Russo–Japanese War (1904–1905),[5] the delegates were prepared to assure "to pacific commerce an effectual protection"[6] against the effects of naval mines both during and in the aftermath of an international armed conflict.[7] There was, however, no agreement as to how such protection should be accomplished.

Some delegations proposed far-reaching restrictions that would have resulted in an almost absolute prohibition on minelaying in high seas areas to safeguard the freedom of navigation of innocent, in particular neutral, shipping.[8] While some of those proposals were too ambitious to have a realistic chance of being accepted by a

[5]The Russo-Japanese War was the first international armed conflict during which naval mines were used extensively and which had long-lasting detrimental effects on shipping after the end of hostilities. *See* Lauterpacht H (ed) Oppenheim L (1952), p. 471; Hoffmann (1977), p. 145; Colombos (1968), p. 531 and Castrén (1954), p. 275.

[6]1907 Hague Proceedings Vol. III, p. 3:399.

[7]For the various proposals, see id., Annexes 9–37, at 662–682. Worth mentioning is the British proposal (Annex 9) according to which the use of automatic contact mines would have been limited to the territorial seas of the belligerents. Only when laid off military ports could the distance be extended to 10 nautical miles.

[8]*Id*. It may be added that some of those proposals were far from altruistic or motivated by the wish to protect innocent shipping. In particular, States with large navies were afraid that the use of naval mines could jeopardize their naval supremacy. "Behind the proposals of the Conference stood the politics of force." Reed (1984), p. 294.

sufficient number of delegations,[9] there was a short period during which it seemed possible to arrive at a compromise between those who were in favor of limiting the use of naval mines to certain sea areas and those who wished to prevent such geographical limitations. The Committee of Examination, in its report to the Third Commission, proposed four draft articles defining the sea areas in which naval mines could be laid.[10] The committee was guided by the wish to protect as far as possible innocent shipping without unduly depriving belligerents of the use of an effective, inexpensive means of naval warfare.[11]

Eventually, the draft articles that dealt with the sea areas in which minelaying was to be limited did not obtain the necessary majority. The Third Commission in its Report to the Conference emphasized:

> By thus overturning, through the suppression of Articles 2 to 5, the decision which had seemed to obtain unanimous support in the committee and according to which a restriction as to area in the use of anchored mines ought to be expressly set forth in the regulations, there has been no intention to swerve from the conviction that a restriction as to area also is imposed upon the employment of such mines. The very weighty responsibility towards peaceful shipping assumed by the belligerent that lays mines beyond his coastal waters has been several times placed in evidence, and it has been unanimously recognized that only "absolute urgent military reasons" can justify such a usage with respect to anchored mines. "Conscience, good sense, and the sentiment of duty imposed by the principle of humanity" will be the surest guide for the conduct of mariners of all civilized nations; even without any written stipulation, there will surely not be lacking in the minds of all the knowledge that the

[9]For instance, the Colombian delegation proposed the following:

> The employment of anchored automatic mines is absolutely forbidden except as a means of defense. Belligerents may not employ such mines except for the protection of their own coasts and only within a distance of the greatest range of a cannon. In the case of arms of the sea or navigable channels leading exclusively to the shores of a single Power, that Power may bar the entrance for its own protection by laying automatic contact mines. Belligerents are absolutely forbidden to lay anchored automatic contact mines in the open sea or in the waters of the enemy.

1907 Hague Proceedings Vol. III, Annex 36, at 682.

[10]*Id*., Annex 31, at 677. Articles 2 to 5 would have limited the right to lay mines to the three-nautical mile territorial seas of the belligerents unless laid off military ports. In the latter case the distance would extend up to 10 nautical miles. There was, however, no absolute prohibition of employing naval mines in high seas areas. According to Article 5, the belligerents would have been entitled to lay automatic contact mines "within the sphere of their immediate activity," provided they became harmless "within 2 h at most after the person using them has abandoned them."

[11]On the other hand, we must take into account the incontestable fact that submarine mines are a means of warfare the absolute prohibition of which can neither be hoped for nor perhaps desired even in the interest of peace: they are, above all, a means of defense, not costly but very effective, extremely useful to protect extended coasts, and adapted to saving the considerable expense that the maintenance of great navies requires. . . . This means that automatic contact mines are an indispensable weapon. Now to ask an absolute prohibition of this weapon would consequently be demanding the impossible; it is necessary confine ourselves with regulating its use. 1907 Hague Proceedings Vol. III, p. 399.

> principle of the liberty of the seas, with the obligations that it carries for those who make use of this means of communication open to all peoples, is definitively dedicated to humanity.[12]

This statement probably correctly reflected the general attitude of the delegations present in The Hague. However, the 1907 Hague Convention VIII contains no specific provision that prohibits or considerably restricts the laying of mines in certain sea areas.[13] Therefore, the general view is that "Article 3 ... allows the implication that, within the terms of the Convention, belligerents may sew [sic] anchored automatic contact mines anywhere upon the high seas."[14] However, the preamble should be considered in a systematic interpretation of the operative provisions. The preamble indicates that the parties were "inspired by the principle of the freedom of sea routes, the common highway of all nations" and wished "to restrict and regulate [the] employment [of automatic submarine contact mines] in order to mitigate the severity of war and to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war." In view of this stated purpose, Article 3(1) can be interpreted as prohibiting vast minefields in high seas areas if they disproportionally interfere with freedom of navigation.[15] The preamble is, however, subsidiary to the operative provisions, in particular Articles 1 and 3(2). In those, peaceful shipping is protected only against anchored and unanchored mines that do not become harmless in accordance with Article 1 (1) and (2). And the State's obligation to render anchored mines harmless "should they cease to be under surveillance" is far from absolute in character; Article 3 qualifies the obligation by requiring only that they "undertake to do their utmost." The same holds true for the obligation to notify shipowners of danger zones, the requirement being subject to "military exigencies." Moreover, the preamble itself reveals that Hague Convention VIII does not provide "all the guarantees desirable." Therefore, and in view of the drafting history, the provisions of the Convention cannot be interpreted as limiting the right of belligerents to use naval mines to certain sea areas or as prohibiting their use if they unduly interfere with the freedom of navigation, in particular with certain passage rights.

During the 1907 deliberations, the Netherlands delegation exerted considerable effort to obtain agreement to a prohibition on the laying of mines in international straits. Originally, the Dutch delegation had proposed the following provision: "In all cases straits uniting two open seas cannot be barred."[16] Later, the Dutch delegation modified its proposal: "In any case, the communication between two open seas

[12] 1907 Hague Proceedings Vol. I, p. 282.

[13] Article 2 prohibits the laying of mines off the enemy's coats and ports only if it serves the "sole object of intercepting commercial shipping."

[14] Tucker (1955), p. 303.

[15] *See, e.g.*, Reed who maintains that 1907 Hague Convention VIII created a standard for the protection of neutral shipping that "should be interpreted from the viewpoint of a neutral shipper." Reed (1984), p. 301. However, he ignores the fact that the obligations of belligerents under Article 3 (2) of the Convention are subject to feasibility and military exigencies.

[16] 1907 Hague Proceedings Vol. III, Annex 12, p. 663.

cannot be barred entirely, and passage will be permitted only on conditions which are indicated by the competent authorities."[17] Those proposals were rejected because "the proposal of the Netherlands met objections drawn from rights of territorial sovereignty as well as from conventional stipulations existing on the subject of certain straits."[18]

It follows from the text and drafting history that those delegates who were opposed to an establishment of fixed limits within which mines could be employed and who advocated the right of belligerents to make use of anchored mines without restrictions as to place, even on the high seas, eventually prevailed. Accordingly, under the 1907 Convention, minelaying could impede the customary right of innocent passage, even if exercised in an international strait and on the freedom of navigation in high seas areas.[19]

Interestingly, the British delegate emphasized that "the right of the neutral to security of navigation on the high seas ought to come before the transitory right of the belligerent to employ these seas as a scene of operations of war," and he considered the Convention as constituting "only a partial and inadequate solution of the problem."[20] Since the Convention could not "be regarded as a complete exposition of the international law on this subject," it would "not be permissible to presume the legitimacy of an action for the mere reason that this Convention has not prohibited it."[21]

The German delegate responded by emphasizing that "a belligerent who lays mines assumes a heavy responsibility towards neutrals and to-wards peaceful shipping" and that "no one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character," but it would be a great mistake to issue rules the strict observance of which might be rendered impossible by the law of facts. It is of the first importance that the international maritime law "... contain only clauses the execution of which is possible from a military point of view and is possible even in exceptional circumstances. Otherwise, the respect for law would be lessened and its authority undermined."[22]

Despite the obvious disagreement regarding the right to use naval mines in high seas areas, seemingly both delegates agreed that the laying of mines that interfered with innocent, in particular neutral, shipping is subject to considerations of military necessity "of an absolutely urgent character." In other words, minelaying in high seas areas would, according to both delegates, clearly be unlawful if not justified by a

[17] *Id*., Annex 22, p. 671.

[18] *Id.*, p. 408.

[19] For further discussion of the Convention, see Haines (2014).

[20] Statement by Sir Ernest Satow, Delegate of Great Britain, at the Eighth Plenary Meeting (Oct. 9, 1907). 1907 Hague Proceedings Vol. I, p. 275.

[21] *Id*.

[22] Statement by Baron Marschall von Bieberstein, Delegate of Germany. *Id*. p. 275, 76. He added that "military acts are not solely governed by stipulations of international law. There are other factors: Conscience, good sense, and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors and will constitute the most effective guaranty against abuses."

significant military advantage.[23] Unfortunately, the words of the German delegate were vitiated by the German practice of the First and Second World Wars.

2.2 Subsequent Practice and Developments

2.2.1 The Two World Wars

The belligerents of the two world wars resorted to a practice of almost unrestricted mine warfare at sea.[24] The disregard of the 1907 Hague Convention VIII and the legitimate interests of neutral shipping was partially justified as a reprisal to allegedly prior unlawful conduct by the enemy.[25] Therefore, the practice does not establish that the Convention had fallen into desuetude.[26] Rather, it proves that the belligerents accepted the obligation to issue appropriate warnings and to provide notifications of danger areas.[27] Moreover, the practice of the Second World War, at least in its beginning, seems to support the view that, despite the lack of geographical limitations on the use of naval mines in the Convention, belligerents were prepared to either refrain from mining international straits or, if they had mined such straits, provide for piloting services in order to ensure a safe passage.[28] That practice conformed to the second Dutch proposal at the 1907 Hague Conference under which international straits could be mined if provision is made for safe passage.[29]

2.2.2 Post-1945 Mining During International Armed Conflicts

In the post-Second World War era, naval mines have been employed in several instances. The first was the mining of the Corfu Channel in 1946. Because Great Britain and Albania were not parties to an international armed conflict, we will return to it, and the International Court of Justice judgment that addressed it, later.[30]

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[23] *But see* Tucker (1955), p. 303, who states that "it is only mine laying of an openly indiscriminate character that is prohibited i.e., mines sewn [sic] without regard to any definite military operation save that of endangering all peaceful shipping, and without any reasonable assurance of control or surveillance."

[24] *See* Lauterpacht H (ed) Oppenheim L (1952), p. 473; Colombos (1968), pp. 533–534; Castrén (1954), p. 277; Tucker (1955), p. 303–305; Levie (1992), pp. 65–89 and Cowie (1949), pp. 43–87, 119–165.

[25] Mallison (1968), p. 68.

[26] For the contrary view, *see* Baxter (1970), p. 97.

[27] Levie (1992), pp. 78–83. *See also* Reed (1984), p. 306 (who maintains that the practice of the two world wars has contributed to a customary rule according to which minefields in high seas areas must always be notified).

[28] On April 9, 1940 the German government provided notification of a "mine warning area" in the Skagerrak between Lindesnes, Lodbjerg and Flekkeröy, Sandnäs Hage; on September 3, 1939 regarding the Southern entrance of the Sound and the Great Belt; and on April 29, 1940 regarding the Kattegat. The British government allowed passage through the Strait of Dover and the Firth of Forth.

[29] *Supra* note 17 and accompanying text.

[30] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

Similarly, the mining of the Red Sea in 1984[31] is not relevant to this analysis as it did not occur during an armed conflict.

Since the armed conflicts during which naval mines were used have been addressed extensively elsewhere,[32] it suffices here to highlight only those aspects of the conflicts relevant to the examination of the relationship between the belligerent right to employ naval mines and the passage rights of innocent neutral shipping. Hence, the Korean War (1950–1953)[33] need not be addressed because the mines laid off Wonsan to prevent an amphibious landing operation resulted in no lasting impediment to passage rights. The same holds true for the mining in 1972 of three North Vietnamese ports during the Vietnam War[34] (although it is worth mentioning that neutral ships were given a period of grace to leave[35]) and of the approaches to Port Stanley during the Falklands/Malvinas conflict (1982).[36] During the 2011 conflict in Libya, Quaddafi's forces laid mines off the port of Misurata, probably in order to prevent food and other supplies from reaching the city.[37] This conduct was considered unlawful, not because of its impact on the freedom of navigation but because of its disregard for humanitarian considerations and for UN Security Council Resolution 1973, which obliged Libyan authorities to "ensure the rapid and unimpeded pas-sage of humanitarian assistance."[38]

The mining of the Suez Canal during the Arab–Israeli Wars (1967 and 1973) also need not be considered here because the Suez Canal is subject to a special treaty regime[39] and its passage is not governed by the law of the sea. However, the 1973 conflict is notable in that both the Gulf of Suez and the Gulf of Aqaba were closed by minefields.[40] Interestingly, their closure attracted considerably less attention than did the closure of the Suez Canal.

The use of naval mines during the 1971 India–Pakistan conflict still remains widely unnoticed even though at least five neutral merchant vessels were sunk by mines.[41] The mining of the Bay of Bengal by India and of the delta of the Ganges River by Pakistan did not extend beyond the territorial seas of the belligerents and had no broader impact on passage rights or on the freedom of navigation.

[31] *See* Truver (1985), pp. 115–117.

[32] *See* authorities cited *infra* notes 33–48.

[33] *See* Cagle and Manson (1957), pp. 121–122.

[34] *See* Levie (1992), pp. 144–157 and Swayze (1977).

[35] Mallison and Mallison (1976), p. 102.

[36] *See* Levie (1992), p. 159 and Fenrick (1985).

[37] *See* Heintschel von Heinegg (2012), pp. 211, 217.

[38] S.C. Res. 1973, 6, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

[39] Convention Respecting the Free Navigation of the Suez Maritime Canal, Gr. Brit.-Ger.-Austria-Hung.-Spain-Fr.-It.-Neth.-Russ.-Turk., Oct. 29, 1888, *reprinted in* (1909) AJIL Supplement 3:123.

[40] *See* Levie (1992), pp. 157–158.

[41] *See* Rohwer (1974), pp. 24–26.

The India–Pakistan conflict and the use of naval mines against Nicaraguan ports in 1984[42] support the position that the laying of mines in the enemy's territorial sea and internal waters is permissible under the law of armed conflict. As has been rightly stated by Judge Schwebel in his dissent to the Nicaragua judgment, a "belligerent is entitled . . . to take reasonable measures (a fortiori, within the internal waters of the opposing belligerent) to restrict shipping, including third flag shipping, from using the ports of its opponent. Thus the use of mines in hostilities is not of itself unlawful."[43] Judge Schwebel also emphasized, however, that as against third States whose shipping was damaged or whose nationals were injured by mines laid by or on behalf of the United States, the international responsibility of the United States may arise. Third States were and are entitled to carry on commerce with Nicaragua, and their ships are entitled to make use of Nicaraguan ports. If the United States were to be justified in taking blockade-like measures against Nicaraguan ports, as by mining, it could only be so if its mining . . . were publically and officially announced by it and if international shipping was duly warned by it about the fact that mines would be or had been laid in specified waters.[44]

The use of naval mines during the Iran–Iraq War (1980–1988)[45] is the most important post-Second World War armed conflict in which the question of the legality of belligerent interference with the freedom of navigation of neutral shipping has arisen. In response to the laying of naval mines in the Persian Gulf, the international community made use of a variety of measures to enforce the right of freedom of navigation, ranging from convoying their merchant vessels[46] and mine-sweeping operations[47] to the use of force against Iranian vessels that had been caught laying unanchored mines and two oil platforms that had been used as bases for operations.[48] These enforcement measures were considered lawful as either self-defense actions or countermeasures in response to the illegal use by Iran of unanchored mines and of nonnotified anchored mines. It may be concluded, therefore, that had Iran refrained from the use of unanchored mines and had it properly provided notification of the minefields, the international community's response to the mining activities would not have been based on the illegality of the Iranian

[42]For the facts established by the ICJ, see Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 76–80 (June 27) [hereinafter *Nicaragua*]. *See also* Levie (1992), pp. 162–166.

[43]*Nicaragua*, *supra* note 42, 236 (Schwebel J dissenting opinion).

[44]*Id*., 238.

[45]For a comprehensive analytical assessment of the legal issues of the Iran-Iraq War, see the contributions in de Guttry and Ronzitti (1993). The Iran-Iraq War (1980–1988) and the Law of Naval Warfare. Cambridge University Press, Cambridge; Dekker and Post (1992). The Gulf War of 1980–1988. Kluwer Academic Publishers, Dordrecht.

[46]Nordquist and Wachenfeld (1988).

[47]Ronzitti (1987).

[48]For the facts established by the ICJ, see Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 23–25 (Nov. 6). *See also* Levie (1992), pp. 166–70.

conduct. Thus, the international community's rationale for the actions taken does not support a conclusion that the mining of the Persian Gulf was unlawful per se.

An important facet of the Iran–Iraq conflict concerns the status of the Strait of Hormuz and the question of whether during an international armed conflict mines may be laid in international straits. In October 1982, the Iranian government, in a letter to the UN Security Council, declared:

> As certain rumours have been spread concerning the Straits of Hormuz, which might disturb international navigation in that area, the Ministry of Foreign Affairs of the Islamic Republic of Iran reaffirms that Iran is committed to keeping the Straits open to navigation and will not spare any effort for the purpose of achieving this end.[49]

This statement is remarkable in that Iran has consistently taken the position that the regime of transit passage set forth in Article 38 of the 1982 United Nations Convention on the Law of the Sea[50] does not apply to the Strait of Hormuz because Iran has merely signed, not ratified, the Convention.[51] At the same time, the

[49]U.N. Security Council, Charge D'Affaires of the Permanent Mission of Iran, Letter dated Oct. 21, 1980 from the Charge D'Affaires of the Permanent Mission of Iran to the United Nations to the Secretary General. U.N. Doc. S/14226 (Oct. 22, 1980).

[50]United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N.T.S. 1833:397 [hereinafter UNCLOS]. The Convention entered into force on November 16, 1994. As of November 12, 2014, 166 States, including the Holy See, are parties to it.

[51]Upon signature, Iran made the following declaration:

> Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties, that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.
>
> The above considerations pertain specifically (but not exclusively) to the following:
>
> The right of Transit passage through straits used for international navigation (Part III, Section 2, article 38).

Declarations and Statements, Oceans & Law of the Sea. http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (than follow Iran hyperlink). Accessed 8 June 2017.

It should also be noted that Oman, which borders the Strait of Hormuz as well, neither explicitly accepts nor rejects the applicability of the transit passage regime. Upon signature, Oman declared:

> It is the understanding of the Government of the Sultanate of Oman that the application of the provisions of articles 19, 25, 34, 38 and 45 of the Convention does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interest of peace and security.

Id. (then follow Oman upon signature hyperlink).

Upon ratification on August 17, 1989, Oman declared that the

> Sultanate of Oman exercises full sovereignty over its territorial sea, the space above the territorial sea and its bed and subsoil, pursuant to the relevant laws and regulations of the Sultanate and in conformity with the provisions of this Convention concerning the principle of innocent passage.

Id. (then follow Oman upon ratification/accession hyperlink).

statement does not necessarily establish that Iran will not take belligerent (or peacetime) measures that would prevent or impede passage through the Strait of Hormuz and, thus, Iran's acceptance of a legal obligation to refrain from such actions.

2.2.3 Some Preliminary Conclusions

Subject to further matters that will be considered in the following section, the 1907 Hague Convention VIII and State practice seem to indicate that during an international armed conflict, the belligerents are entitled to lay naval mines in all sea areas beyond the national waters (i.e., internal waters, territorial sea, and archipelagic waters) of neutral States. Accordingly, there is no prohibition on impeding innocent passage in the territorial seas of the belligerents as long as the closure has been properly notified in advance.

While there is no State practice involving archipelagic States, it is safe to conclude that the same holds true for those parts of belligerent archipelagic waters in which only the right of innocent passage (as distinct from the right of archipelagic sea-lane passage) applies.[52]

International straits overlapped by the territorial seas of the belligerents are not absolutely excluded from mining. Hence, naval mines may be laid in belligerent international straits as long as the belligerent has given prior notice and ensures a means of safe passage, e.g., by providing piloting services or by temporarily disarming the mines. It remains to be seen whether the provisions of UNCLOS Article 38 on transit passage have contributed to an extended protection of such straits.

Minelaying in high seas areas (i.e., sea areas beyond the outer limit of the territorial sea) is not prohibited, again as long as the belligerent has notified the minefield in a timely and appropriate manner.[53] However, in view of the continuing right of neutral shipping to use the high seas for legitimate purposes, the legality of any employment of naval mines depends upon its justification by military necessity considerations. The laying of extensive minefields or their maintenance over a long period of time will not be in compliance with the law of naval warfare if there is no legitimate military necessity that justifies depriving neutral shipping of the freedom of navigation given its importance to international trade and the world economy.

Finally, and for the sake of completeness, it should be added that neutral States are entitled to lay mines off their coasts to defend their national waters and territories against belligerent interference.[54] Such mining must be limited to the territorial sea and may not extend to international straits or archipelagic sea lanes unless it does not suspend, hamper, or otherwise impede the rights of transit passage or archipelagic

[52] *See* UNCLOS, *supra* note 50, art. 52.

[53] For a similar assessment of the prior notification requirement, *see* Reed (1984), pp. 306–307 (who rightly maintains that during the two world wars all "war zones," including those enforced by the use of naval mines, had been notified by the belligerents.).

[54] 1907 Hague Convention VIII, *supra* note 4, art. 4.

sea-lane passage.[55] Notification of the laying of armed mines and the arming of prelaid mines in neutral national waters is required.

2.3 Belligerent Minelaying and Passage Rights: Contemporary Law

The 1907 Hague Convention VIII does not provide a comprehensive legal framework on minelaying during an international armed conflict since its scope of applicability *ratione materiae* is limited to "automatic submarine contact mines." Although it is possible to deduce from the Convention a number of principles that also apply to modern naval mines,[56] an identification of contemporary international law is not limited to a dynamic interpretation of the Convention. Rather, it is indispensable to also consider those publications that shed light on what States are willing to accept as the current state of the law applicable to minelaying during international armed conflicts. These include the San Remo Manual,[57] as well as the military manuals of the U.S. Navy,[58] Canada,[59] the United Kingdom,[60] and Germany.[61] While the manuals selected for examination is rather limited, there are two reasons why they may still serve as reference points. First, the U.S. Navy manual (NWP, 1-14) has been adopted by a number of other States, which consider its provisions to correctly reflect the current state of the law. Second, these manuals are the most current statements on the international law applicable to mine warfare.

2.3.1 Access to and from Neutral Waters

In accordance with the law of maritime neutrality prohibiting the conduct of hostilities in neutral waters, there is a clear prohibition on laying naval mines in waters subject to national sovereignty, i.e., the internal waters, territorial sea, and archipelagic waters of neutral States.[62] Although it is lawful to conduct hostilities, including minelaying, in the sea areas beyond the outer limits of the territorial sea, that is, in neutral exclusive economic zones (EEZ) and the high seas, access to and exit from neutral waters may not be barred. As stated in three of the manuals, mining of those sea areas "shall not have the practical effect of preventing passage between neutral waters and international waters."[63] Accordingly, the belligerent that lays

[55] SRM (1995), p. 29.

[56] *See* Heintschel von Heinegg (1994), pp. 59–70.

[57] SRM (1995), *supra* note 55. *See also* the related Explanation, which provides additional detail concerning each of the *Manual's* basic rules.

[58] NWP 1-14M (2007).

[59] Canadian Manual (2001).

[60] UK Manual (2004).

[61] German Manual (2013).

[62] SRM (1995), pp. 15, 16, 86; NWP 1-14M (2007), 7.3, 9.2.3; Canadian Manual (2001), 805, 806; UK Manual (2004), 13.8, 13.9, 13.58 and German Manual (2013), 1205, 1214, 1216.

[63] SRM (1995), p. 87; Canadian Manual (2001), 839 and UK Manual (2004), 13.59.

mines off a neutral's coast is obliged to provide for safe routes through the minefield, e.g., by leaving open convenient channels or by providing piloting services. It must be emphasized, however, that the laying of mines in close proximity to a neutral territorial sea will be lawful only in exceptional circumstances, for example, in a confined sea area that is used by the enemy.

2.3.2 Belligerent National Waters and the Right of Innocent Passage

According to all the manuals, belligerent national waters, which are its internal waters, archipelagic waters, and territorial sea, are "areas of naval war-fare."[64] Hence, there is no prohibition on mining a State's own or enemy national waters. This right was acknowledged at the 1907 Hague Peace Conference. The impact of mining these waters on the right of innocent passage is a deplorable but necessary consequence of an international armed conflict. Neutral shipping's only protection is to avoid belligerent national waters. It may be added that UNCLOS Article 25(3) provides that in times of peace, States are entitled to suspend innocent passage "if such suspension is essential for its security." This right, which only the coastal State concerned may exercise, is limited to specified areas of the territorial sea. During an international armed conflict, it is modified by the law of naval warfare that supersedes the peacetime rules of the law of the sea. However, the minelaying State is obliged, "when the mining is first executed," to provide "for free exit of shipping of neutral States."[65] This, by necessity, implies that there is an obligation on the minelaying State to notify "the laying of armed mines or the arming of pre-laid mines, unless the mines can only detonate against vessels which are military objectives."[66] Hence, the presence of highly sophisticated and discriminating modern mines need not be notified because, by their design, they do not pose a risk to innocent shipping and thus do not impede the exercise of the right of innocent passage.

[64]SRM (1995), *supra* note 55, 10; Canadian Manual (2001), *supra* note 59, 703(1); UK Manual (2004), *supra* note 60, 13.6; German Manual (2013), *supra* note 61, 1011.

[65]SRM (1995), *supra* note 55, 85; Canadian Manual (2001), *supra* note 59, 836 and UK Manual (2004), *supra* note 60, 13.57.

[66]SRM (1995), *supra* note 55, 83; Canadian Manual (2001), *supra* note 59, 838 and UK Manual (2004), *supra* note 60, 13.55. According to NWP 1-14M (2007), 9.2.3, international notification must be made only, "as soon as military exigencies permit." It is unclear whether the United States believes the safety of neutral shipping is subsidiary to considerations of military necessity. However, a minefield most often serves the purpose of "modifying geography" and of preventing other vessels from using a certain area of the seas. This can be accomplished only, if the respective minefield is notified in advance. The German Manual does not expressly mention notification. However, according to paragraph 1046, any minelaying is subject to the principles of effective surveillance, risk control and warning. The latter implies an obligation to notify the laying of armed mines or the arming of prelaid mines.