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”Damn the Torpedoes!”: International Standards Regarding the Use of Automatic Submarine Mines

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Abstract

This Note synthesizes a customary international standard of usage for automatic submarine mines, taking into account existing international agreements and recent history. It then details the questionable nature of recent mine use in Nicaragua and the Red Sea, as judged against the synthesized standard, and the differing positions on acceptable standards of mine use asserted by the United States.

"DAMN THE TORPEDOES!": INTERNATIONAL
STANDARDS REGARDING THE USE OF
AUTOMATIC SUBMARINE MINES

INTRODUCTION

Automatic submarine contact mines¹ are weapons traditionally employed by nations at war. As such, they are regulated by various international conventions.² However, the re-

1. Automatic submarine mines first came into use during the United States Civil War, when floating explosive devices were used to defend Confederate ports from blockade by Union ships. See W. MALLISON, *INTERNATIONAL LAW STUDIES 1966: STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS* 158 (1968). They gained notoriety in the Russo-Japanese War, when innocent commerce suffered great losses from mines that remained dangerous long after the blockade of Port Arthur, in 1904. See 2 L. OPPENHEIM, *INTERNATIONAL LAW* § 182a (H. Lauterpacht 7th ed. 1954); see also *infra* note 37 (discussing Chinese losses). Generally, these mines required contact to detonate, and came in both floating and anchored varieties. L. OPPENHEIM, *supra*, § 182a. The primary use of floating mines occurred in belligerent actions on the high seas in that anchored mines were most frequently used in the territorial waters of belligerents to help effect a blockade. See *infra* notes 98-101 and accompanying text.

In the World Wars, the mines used no longer required contact to detonate them. Instead, vibration-sensitive and magnetically detonated mines became the norm. See 2 L. OPPENHEIM, *supra*, § 182a. Mines could be laid by ships, by submarines through their torpedo tubes, or from airplanes by parachute, as well. *Id.* During the Wars, mines of all varieties were used on the high seas to close large areas to enemy and neutral passage alike. *Id.*

Today, all of these kinds of mines remain in use. See *How to Block a Harbor*, *Time*, Apr. 23, 1984, at 20. New kinds of mines have been developed which can differentiate between minesweeping attempts and the passage of more substantial targets. See D. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 92, 96 (1975). Also, mines may be programmed to progress under their own propulsion at low speeds to predetermined areas at some distance from where they are first laid. *Id.* at 96. This last kind of mine lies beyond the scope of this Note for the reason that it is essentially a slow moving torpedo, rather than a mine. In particular, it is designed to perform a function that could arguably be considered illegal today if it were considered to be a mine, i.e. it is programmed to wander in a manner prejudicial to peaceful shipping. For these reasons, it lies outside the scope of the standards discussed *infra*.

2. The international convention directly applicable to the use of automatic submarine mines is the Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541, 205 Parry's T.S. 331 (1907) [hereinafter cited as Hague Convention]; see *infra* notes 55-61 (full text of articles 1-6). The United Nations Charter governs the use of force in international relations. See U.N. CHARTER arts. 2(4), 51 & preface. Its effect on contemporary standards of mines use is discussed *infra* notes 122-29 and accompanying text. Lastly, the holding of the International Court of Justice in *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9), delineates a peacetime standard for mine use. This standard is discussed *infra* notes 129-46 and accompanying text.

cent belligerent³ use of mines by insurgents⁴ and terrorists⁵ not party to these international agreements raises questions about the legality of mines and the appropriate manner of their use. Recent events have brought to light the continuing danger of unrestrained use of mines to a neutral state's⁶ shipping.⁷ Such use is a deadly force beyond the control of the belligerent parties in that mines may wander both spatially and temporally from the zone of hostilities.⁸ In so doing, they pose a threat to neutral parties, who may be attacked without warning or cause.⁹ The way to protect neutral shipping is through a convention creating a standard of mine use. A standard will permit neutrals to formulate expectations as to when the broad

3. Belligerents are opposing parties to an armed contention between states. See 2 L. OPPENHEIM, *supra* note 1, §§ 53-56. Such an armed contention, otherwise known as war, is characterized by violent and other measures by the belligerents designed to overthrow one another and impose such conditions of peace as the victor may please. *Id.* § 54.

4. Insurgents are parties to an armed internal conflict with a sovereign authority, who attempt by violent and other means to secure control of the territory of the sovereign state, with the goal of exercising governmental control over the populace. See 1 L. OPPENHEIM, *supra* note 1, § 75a. Once an insurgency enjoys partial success, third parties may recognize the parties as belligerents, invoking the laws of war proper. *Id.*; see *infra* note 21 (discussing the laws of war). Until that time, third parties may, without making a formal pronouncement and without conceding to the rebellious forces belligerent rights affecting foreign nationals, refrain from treating them as law-breakers. See 1 L. OPPENHEIM, *supra* note 1, § 75a. This is true as long as they do not arrogate to themselves the right to interfere with foreign subjects outside the territory occupied by them. *Id.*

5. Terrorists are extremist individuals or groups who employ violence to achieve essentially political goals. See Jenkins, *International Terrorism: A New Mode of Conflict*, in INTERNATIONAL TERRORISM AND WORLD SECURITY 13, 13 (1975). Terrorists engage in acts which in themselves may be classic forms of criminal conduct, but which are executed "with the deliberate intention of causing panic, disorder and terror within an organized society, in order to destroy social discipline, paralyse the forces of reaction of a society, and increase the misery and suffering of the community." *Id.* (footnote omitted).

6. Neutral states have been defined as:

Such States as do not take part in a war between other States are neutrals. . . . Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial States and the belligerents. Whether or not a third State will adopt an attitude of impartiality at the outbreak of a war is . . . a matter . . . for international politics.

2 L. OPPENHEIM, *supra* note 1, § 293 (footnote omitted).

7. These recent events are detailed *infra* notes 11-19 and accompanying text, and are analyzed *infra* notes 177-208 and accompanying text.

8. See *infra* note 37 and accompanying text.

9. *Id.*

right to trade on the seas may be infringed by the limited right to war on the seas.¹⁰ Through knowledge of the norms of mine use and knowledge of the actual employment and placement of mines, the neutral may then tend to its own best interest.

In 1984, it became apparent that automatic submarine contact mines posed a problem of global concern. Use of mines by insurgents in Nicaragua became news in February.¹¹ By April, when the mining ended and the harbors were swept,¹² twelve vessels from the Soviet Union and five other nations had been damaged.¹³ In July, mysterious explosions caused damage to vessels traversing the Red Sea and Gulf of

10. See Hague Convention, *supra* note 2, preface.

11. On February 25, 1984, two Nicaraguan fishing boats struck mines and sank near Bluefields, the largest town on Nicaragua's Atlantic coast. See Kinzer, *Nicaragua, Citing Raids, Says Rebels Have New Skills*, N.Y. Times, Mar. 7, 1984, at A3, col. 4. Two crewmen were lost and seven injured. *Id.* Two other vessels were reported damaged in the incident. *Id.*

12. Mines are generally removed after hostilities have ended, either by the power that laid them, on the high seas, or by the country in whose territorial waters they lay. See Hague Convention, *supra* note 2, art. 5; *infra* note 59 (for text of article 5). This function is generally performed by specially equipped ships that search areas known to be mined, locate the mines, and detonate them by various means. See, e.g., I. CHUNG, LEGAL PROBLEMS INVOLVED IN THE CORFU CHANNEL INCIDENT 26 (1959). The United States now employs helicopters for this task. See Biddle, *U.S. Weighs Move to Help Egypt Rid Red Sea of Mines*, N.Y. Times, Aug. 5, 1984, at A1, col. 6.

13. See Kinzer, *Nicaraguan Says No Mines Are Left in Nation's Ports*, N.Y. Times, Apr. 13, 1984, at A1, col. 1; see also Taubman, *Mine Fields: President's 'Secret War' in Nicaragua Backfires*, N.Y. Times, Apr. 15, 1984, § 4, at 1, col. 1. On March 1, 1984, the Democratic Revolutionary Alliance, a Nicaraguan insurgent group based in neighboring Costa Rica, declared that it had mined Corinto, Nicaragua's largest Pacific port, and El Bluff, a port on the Atlantic coast. See Kinzer, *Nicaraguan Port Thought to Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3. The group stated that their purpose in mining the harbors was to prevent the arrival of military supplies from the Soviet bloc. *Id.* The group further declared: "The coasts of Nicaragua are a war zone, and therefore we are not responsible for loss of civilian lives in this zone." *Id.* (quoting a Democratic Revolutionary Alliance release).

On March 3, 1984, a large Dutch dredging vessel sustained an estimated U.S.\$1 million in damage when it struck a mine off Corinto. See Kinzer, *Nicaraguan Port Thought to Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3; *Nicaragua Reports Freighter Damaged by Mine Is Sinking*, N.Y. Times, Mar. 9, 1984, at A4, col. 4. A report prepared by the Dutch Navy concluded that the explosion which damaged the *Geopotes VI* was caused by a mine activated by the sound or vibration of the passing dredger. See Kinzer, *Nicaraguan Port Thought to Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3. The report stated that this type of mine is usually not anchored to the seabed. *Id.* An average specimen of this kind of mine is six feet long and carries about 220 pounds of explosive. *Id.*

On March 7, 1984, the *Los Caribes*, a Panamanian freighter, struck a mine near

Suez.¹⁴ By the time the United States withdrew from international minesweeping efforts in September, eighteen ships had been damaged.¹⁵ In the Nicaraguan incidents there was loss of life, as well as property damage.¹⁶ Anti-Sandinista rebels have

Corinto. See *Nicaragua Reports Freighter Damaged by Mine Is Sinking*, N.Y. Times, Mar. 9, 1984, at A4, col. 4. The freighter carried medicine bound for Nicaragua. *Id.*

On March 20, 1984, a Soviet freighter struck a mine upon entering Porto Sandino, injuring five seamen. See *Soviet Tanker Damaged by Mine Laid by Rebels in Nicaraguan Port*, N.Y. Times, Mar. 21, 1984, at A4, col. 3. March 29, 1984 saw two Nicaraguan cargo boats, the *San Albano* and the *Aracely Peres*, join the list of vessels to strike mines while entering the harbor at Corinto. See *Two Nicaraguan Ships Strike Mines Near Port*, N.Y. Times, Mar. 30, 1984, at A4, col. 6. Both vessels were owned by Alinsa, a Nicaraguan company. *Id.*

On April 8, 1984, Reagan Administration officials revealed that not only were American money and technology behind the use of mines by Nicaraguan rebels, but that non-American, non-Nicaraguan employees of the Central Intelligence Agency (CIA) actually entered Nicaraguan territorial waters and laid the mines for the insurgents. See Taubman, *Americans On Ship Said to Supervise Nicaragua Mining*, N.Y. Times, Apr. 8, 1984, at A1, col. 6; *infra* note 182 and accompanying text (discussing the naval capabilities of Nicaraguan rebels). The CIA then coordinated the distribution of credit for the minings between the various insurgent groups with which they dealt. See *C.I.A. Threats Said to Influence Rebels*, N.Y. Times, Apr. 22, 1984, at A10, col. 1. The CIA reported to the press that American citizens who were involved in the mining operations did not enter Nicaraguan territorial waters. See Taubman, *Americans on Ship Said to Supervise Nicaragua Mining*, N.Y. Times, Apr. 8, 1984, at A1, col. 6. Administration officials later reported that the mines were handmade in Honduras by CIA technicians, and further elaborated that the mines were sophisticated devices intended to damage ships but not sink them, so that any Soviet bloc boat loaded with explosives would stay well clear of the harbors. See Kinzer, *Mining to Continue, Rebel Chief Says*, N.Y. Times, Apr. 12, 1984, at A10, col. 1.

Reagan Administration officials said that three kinds of mines were used: direct contact detonated, sound wave sensitive, and water pressure detonated. See Taubman, *Americans on Ship Said to Supervise Nicaragua Mining*, N.Y. Times, Apr. 8, 1984, at A1, col. 6, at A12, col. 3. They also stressed that the mines were programmed to become harmless within a few months. *Id.*

On April 12, 1984, the Nicaraguan Chief of Staff, Joaquin Cuadra Lacayo, said he believed that Nicaraguan Government efforts had successfully cleared the country's harbors of all mines. See Kinzer, *Nicaraguan Says No Mines Are Left in Nation's Ports*, N.Y. Times, Apr. 13, 1984, at A1, col. 1. At the time of this statement, a dozen vessels in all had struck mines since February. *Id.* These ships hailed from diverse nations, including Japan, the Netherlands, and the Soviet Union. *Id.* Captain Mario Alemàn of the Sandinista Navy announced at the same time that government soldiers had touched off at least 29 mines while sweeping the harbor at Corinto. *Id.* at A5, col. 1.

14. See Miller, *'Minelike' Object Off Egypt Is Linked to Russians*, N.Y. Times, Sept. 25, 1984, at A13, col. 1.

15. *Id.*

16. Two Nicaraguans were lost in the incidents of February 25, 1984, off Bluefields. See Kinzer, *Nicaragua, Citing Raids, Says Rebels Have New Skills*, N.Y. Times, Mar. 7, 1984, at A3, col. 2.

claimed responsibility for the mining of Nicaraguan harbors¹⁷ and the United States Government has also acknowledged a role in the laying of the mines.¹⁸ To date no person or group has claimed responsibility for the Middle Eastern incidents.¹⁹

The Second Hague Peace Conference of 1907 includes the Convention Relative to the Laying of Automatic Submarine Contact Mines²⁰ (Hague Convention). This Convention is part of the international body of law popularly known as the law of war, intended to limit the damage caused by war.²¹ While some of the laws of war seek to impose limits on belligerents

17. See Kinzer, *Nicaraguan Port Thought To Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3.

18. REPORT OF THE SELECT SENATE COMM. ON INTELLIGENCE, S. REP. NO. 665, 98th Cong., 2d Sess. 7 (1984). The report to Congress stated: "[W]ithout notifying the [Select] Committee . . . major changes were made in the conduct of this program, including the mining of Nicaragua's harbors. The Committee was not informed of these actions until after they were substantially accomplished. Only upon subsequent inquiries was the nature of U.S. involvement ascertained." *Id.*

19. The New York Times reported this fact on September 25, 1984. See Miller, *'Minelike' Object Off Egypt Is Linked to Russians*, N.Y. Times, Sept. 25, 1984, at A13, col. 1. No further developments have arisen.

20. Hague Convention, *supra* note 2.

21. The Convention is discussed in 2 L. OPPENHEIM, *supra* note 1, § 182a (the second volume is devoted to Disputes, War and Neutrality). The laws of war, governing the relationships between belligerents *inter se*, and between belligerents and neutrals, trace their origins to the late middle ages. *Id.* § 67. Usages and customs of war became widespread following the Napoleonic Wars, though codification in the form of international agreements did not begin to take place until the Declaration of Paris of 1856. *Id.* § 68. The four rules of the Declaration are listed *infra* note 36. The Geneva Conventions of 1864 and 1906 regarding land warfare, and the Hague Conventions of 1899 and 1907, together with the Declaration of Paris, form the foundation of the modern laws of war. 2 L. OPPENHEIM, *supra* note 1, § 68.

The rationale behind the laws of war is tripartite. *Id.* § 67. Initially, a belligerent is justified in applying any amount and any kind of force which is necessary for the realization of the purpose of war, the overpowering of the opponent. *Id.* In restriction, the principle of humanity postulates that all such kinds and degrees of violence not necessary for the overpowering of the opponent should not be permitted. *Id.* Finally, there is chivalry, which emerged from the Middle Ages and developed into modern notions of fair play and proportionality of aggression and response. *Id.*

For an excellent historical summary of the codification of the laws of war, and current issues in the area, see generally LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 4-34 (P. Trooboff ed. 1975). Following World War II, the founding of the United Nations added a dimension to the legal regulation of war. THE LAW OF ARMED CONFLICTS IV (Carnegie Endowment for International Peace ed. 1971). By adherence to U.N. CHARTER art. 2, para. 4, signatories renounced the use of force in international relations. While this effectively outlawed war, except in reprisal, discussed *infra* note 77, war did not cease among nations, and the need for humanizing laws remains. THE LAW OF ARMED CONFLICTS, *supra*, at iv. The existence of rules of war in no way legitimizes the conflict made illegal by the UN Charter. On

regarding one another, the Hague Convention is directed toward the protection of neutrals.²² The widespread adoption of the Hague Convention²³ created a standard for customary international law much like that later fostered by the Charter of the United Nations.²⁴

Although compliance with the standards of the Hague Convention has been irregular,²⁵ the existence of a customary

the contrary, the law of war may be "all that stands between the minimum standards of civilization and unbridled barbarity." *Id.*

22. See Hague Convention, *supra* note 2, preface; *infra* notes 63-64 and accompanying text (quoting from the preface).

23. The original signatories are the United States of America, Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, Columbia, Cuba, Denmark, Dominican Republic, Ecuador, France, Great Britain, Germany, Greece, Guatemala, Haiti, Italy, Japan, Luxemburg, Mexico, Norway, Panama, Paraguay, Netherlands, Peru, Persia (now Iran, and not currently a responsible international actor), Romania, Salvador, Serbia (which has since become a part of Yugoslavia), Siam (now Thailand), Switzerland, Ottoman Empire (now Turkey), Uruguay, and Venezuela. See Hague Convention, *supra* note 2, preface. Later signatories include: India, Russia, China, Sweden, Portugal, and Nicaragua. Annex to the United Kingdom Memorial, (U.K. v. Alb.), 1949 I.C.J. Pleadings 400 (signatories of the Hague Convention at the time of Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9)).

24. See R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 2 (1963); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 240-45 (1961). One author explains the reasons why the United Nations is an appropriate body to look to for developments in international law as follows:

[I]nternational custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts; and the number of occasions on which states see fit to act collectively has been greatly increased by the activities of international organizations. Collective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the United Nations—and especially its accelerated trend towards universality of membership since 1955—now provides a very clear, very concentrated, focal point for state practice.

R. HIGGINS, *supra*, at 2 (footnotes omitted).

25. The initial offender was Germany, which completely ignored the provisions of the Convention in both World Wars. 2 L. OPPENHEIM, *supra* note 1, § 182a: see also THE INTERNATIONAL LAW OF THE SEA §§ 562-68 (C. Colombos 5th ed. 1962). This infringement constituted only a small portion of a much larger pattern of illegality in the waging of war. See generally 3 L. OPPENHEIM, *supra* note 1, § 319a. Germany was not the only country to ignore or bend the provisions of the Convention. *Id.* § 182a. For further discussion, see *infra* notes 83-100 and accompanying text.

standard of mine use is not precluded.²⁶ An examination of the considerations that prompted the Hague Convention and an examination of the actual usage of mines by the major powers in the years since 1907 yields a consistent series of norms beyond which states do not go.²⁷ Application of this customary standard to the recent use of mines in Nicaragua and the Red Sea reveals a notable lack of consideration for the safety of peaceful shipping as well as a violation of the customary international standard.²⁸ Liability for the damage caused by misuse of mines remains unassigned and unclear due to a present insufficiency of facts.²⁹ Nevertheless, there are inconsistencies in the expressed policies of the United States concerning the use of automatic submarine mines, specifically, the irreconcilable nature of the United States' condemnation of the Red Sea mining coeval with its approval of similar activity in Nicaragua.³⁰

This Note synthesizes a customary international standard of usage for automatic submarine mines, taking into account existing international agreements³¹ and recent history.³² It then details the questionable nature of recent mine use in Nicaragua and the Red Sea, as judged against the synthesized standard,³³ and the differing positions on acceptable standards of mine use asserted by the United States.³⁴

26. See *THE INTERNATIONAL LAW OF THE SEA* *supra* note 25, § 2. The importance of a customary standard is explained as follows:

Custom is the most important source of the international law of the sea and usages of the great maritime States must therefore always exercise a weighty influence on its development. There is good justification for such a claim on the ground that the Powers most concerned with a subject are able to understand it best. The value of custom as a source of international law was emphasised by Chief Justice Marshall of the United States Supreme Court . . . : "The usage of nations becomes law and that which is an established rule of practice is a rule of law."

Id. (footnotes omitted) (quoting *United States v. Percheman*, 32 U.S.(7 Pet.) 51 (1833)).

27. See *infra* notes 35-176 and accompanying text.

28. See *infra* notes 177-208 and accompanying text.

29. See Miller, 'Minelike' Object Off Egypt Linked to Russians, *N.Y. Times*, Sept. 25, 1984, at A13, col. 1. No new development has arisen.

30. See *infra* notes 201-08 and accompanying text.

31. See *supra* note 2 (listing the existing international agreements relevant to the regulation of lawful mine use).

32. See *infra* notes 35-146 and accompanying text.

33. See *infra* notes 177-200 and accompanying text.

34. See *infra* notes 201-08 and accompanying text.

I. PURPOSES AND PROPOSALS OF THE SECOND HAGUE PEACE CONFERENCE

The Second Hague Peace Conference of 1907³⁵ considered the expansion of then existing international rules dating from the Declaration of Paris of 1856,³⁶ as well as the formulation of new rules concerning the legality and appropriate use

35. Hague Convention, *supra* note 2. The First Peace Conference at the Hague, in 1899, was convened at the behest of Czar Nicholas II of Russia and was motivated by a desire to limit the current arms race among European powers. Rescript of the Russian Emperor (August 24, 1898) (handed to diplomatic representatives by Count Mourvieff, Russian Foreign Minister, at the weekly reception in the Foreign Office, St. Petersburg, Aug. 24, 1898), *reprinted in* 2 J. SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 1-2 (1909). His invitation stated, in part:

The economic crises, due in great part to the system of armaments *à l'outrance*, and the continual danger which lies in this massing of war material, are transforming the armed peace of our day into a crushing burden, which the peoples have more and more difficulty in bearing. It appears evident, then, that if this state of things were prolonged, it would inevitably lead to the very cataclysm which it is desired to avert, and the horrors of which make every thinking man shudder in advance.

To put an end to these incessant armaments and to seek the means of warding off the calamities which are threatening the whole world—such is the supreme duty which is today imposed on all States.

Id. at 2. However, the Conference was more successful for advances it made in codifying international law and in restricting certain kinds of weapons, than in reducing the rate of increase of military forces. *See* C. DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE 25-27 (1975). *See generally* W. HULL, THE TWO HAGUE CONFERENCES 68-69 (1908). The Second Peace Conference was much more widely attended than the First, as it included Central and South American countries not invited to the Conference of 1899. *See* 1 J. SCOTT, *supra*, at 155. While Russia still chaired the Conference, its role was not the leading one it had played previously. *Id.* at 161. The principal lasting effects of the Second Conference are its provisions for the laws of naval warfare. W. HULL, *supra*, at 479-80. M. Nelidow, president of the Second Conference, declared in his final address to the Conference that praise or criticism of the Conference would be equivalent to praise or criticism of the code of maritime law which it adopted—even more so than its accomplishments in the area of arbitration. *Id.*

36. Declaration Respecting Maritime Law between Austria, France, Great Britain, Prussia, Russia, Sardinia & Turkey, Apr. 16, 1856, 115 Parry's T.S. 1 (1856). The Declaration has been summarized as follows:

The Declaration of Paris of April 16, 1856, respect[ed] warfare on the sea. It abolished privateering, recognized the principles that the neutral flag protects non-contraband enemy goods, and that non-contraband neutral goods under an enemy flag cannot be seized, and enacted the rule that a blockade in order to be binding must be effective. The Declaration was signed by seven States, but almost all other maritime Powers acceded in course of time.

2 L. OPPENHEIM, *supra* note 1, § 68; *see* C. DAVIS, *supra* note 35, at 11-12.

of automatic submarine contact mines.³⁷ Behind the proposals of the Conference stood the politics of force. Countries with small navies wanted liberal rules regarding mines, because cheap and easily deployed mines distinctly favor a country with a small navy over a country with a large navy.³⁸ Mines allow the protection of long stretches of coastline with few ships and they also enable a small fleet to hold a large fleet at bay.³⁹ A country with a large navy and merchant fleet could not use mines effectively for defense, because they would hamper the movement of ships in and out of harbors,⁴⁰ and pose a constant threat to maritime traffic of any significant volume in times of heavy weather.⁴¹ Great Britain, in particular, suffered these disadvantages. It had many ports, a proportionately greater amount of coastline to defend, and the largest merchant fleet in the world.⁴²

Whether motivated by idealism or pragmatism, Great Britain took the initiative with the following proposals: 1) that unanchored mines be prohibited altogether; 2) that anchored

37. See 2 L. OPPENHEIM, *supra* note 1, §§ 67-68. These mines had not been a concern at the Conference of 1899, but had risen to notoriety in the 1904 blockade of Port Arthur, during the Russo-Japanese War, when unrestrained mine use had led to enormous civilian casualties. *Id.* § 182a. The Chinese government was obliged to supply its coastal ships with equipment to sweep and destroy mines left drifting even more than one year after that conflict had ended. 1 J. SCOTT, *supra* note 35, at 576 (quoting the Declaration of the Chinese Delegation, 3 LA DEUXIEME CONFERENCE INTERNATIONALE DE LA PAIX 663 (1907)). The Chinese delegation informed a shocked Conference that some 500-600 Chinese subjects had perished, unreported by the world press, in the pursuit of their livelihoods as fishermen and coastal traders. *Id.* This prompted Britain's delegate, Captain C. L. Ottley, to his own famous remark: That if the mines the Chinese complained of floated off Dover or Gibraltar "a series of catastrophes would have occurred that would have riveted the attention of the civilized world to the question [of mine safety]." C. DAVIS, *supra* note 35, at 245 (quoting 3 LA DEUXIEME CONFERENCE INTERNATIONALE DE LA PAIX 523-24 (1907)).

Because the demonstrated destruction caused by unrestricted mine warfare was of great concern at the Conference, M. Francis Hagerup, the delegate of Norway and president of the first subcommission of the III Commission, was prompted to say that while drawing up an acceptable convention regarding mines was undoubtedly the most technically difficult task facing the Conference, it might well prove of greatest value to humanity and peace. W. HULL, *supra* note 35, at 93.

38. See 1 J. SCOTT, *supra* note 35, at 579-80. See generally W. HULL, *supra* note 35, at 96.

39. Such was the observation of Commander Burlamaqui de Moura, of Brazil. C. DAVIS, *supra* note 35, at 246; see 1 J. SCOTT, *supra* note 35, at 579-80.

40. See 1 J. SCOTT, *supra* note 35, at 579-80.

41. *Id.*

42. *Id.*

mines be manufactured so as to become harmless when free of their tethers; 3) that mine use to impose commercial blockades⁴³ be prohibited; and 4) that mine use anywhere but within the territorial waters⁴⁴ of the belligerents be prohibited except within a ten-mile zone in front of naval forts.⁴⁵ The British proposal was so restrictive that other delegates offered liberalizing amendments including proposals that belligerents should have the right to use short-lived unanchored mines;⁴⁶ that bel-

43. A blockade may be explained as:

[T]he interception by sea of the approaches to the coasts or ports of an enemy with the purpose of cutting off all his overseas communications. Its object is not only to stop the importation of supplies but to prevent export as well.

. . . .

[O]nce a blockade of any portion of the enemy's coast, or of any of his ports, has been declared, all merchant ships and cargoes, of whatever description and of whatever nationality they may be, which are attempting to enter or leave the blockaded area, are subject to confiscation. The nature of the cargo on board such ships is irrelevant; it is solely the fact that the ship is endeavoring to enter or leave a blockaded port or coast that is material.

Access to the blockaded area is prohibited to all warships and merchant vessels. As a matter of international courtesy, however, this strict belligerent right is waived in the case of neutral warships. It is also generally waived, on humanitarian grounds, in favour of neutral merchantmen which find themselves in distress or are engaged in some philanthropic mission.

THE INTERNATIONAL LAW OF THE SEA, *supra* note 25, § 813 (footnote omitted).

44. Territorial waters may be defined as:

[T]hat part of the sea which extends from a line running parallel to the shore to a specified distance therefrom, commonly fixed by the majority of maritime States at three miles measured from low-water mark. All waters outside territorial waters are to be considered as forming part of the high sea. . . . This mile is the same as the geographic mile of 60 to a degree of latitude and is equivalent to 1853 metres.

Id. § 97. Nicaragua claims territorial waters fixed at 12 miles measured from the low-water mark. See Taubman, *Americans on Ship Said to Supervise Nicaragua Mining*, N.Y. Times, Apr. 8, 1984, at A1, col. 6.

45. See THE INTERNATIONAL LAW OF THE SEA, *supra* note 25, § 562; see also W. HULL, *supra* note 35, at 94; 2 L. OPPENHEIM, *supra* note 1, § 182a. The Chinese, whose problems had already been made known to the committee, were the only delegation to support the British proposal wholly, citing a "large humanity." W. HULL, *supra* note 35, at 94.

46. See 2 L. OPPENHEIM, *supra* note 1, § 182a. The British proposal was too restrictive to other delegations who felt that floating mines had legitimate uses in battle. One such legitimate use is against a pursuing ship. *Id.* Italy championed this view; Germany concurred. See also 1 J. SCOTT, *supra* note 35, at 581. In order to preserve these benefits of floating mine use, while still protecting neutral shipping, Italy and Japan both suggested that a belligerent should have the right to use floating mines which become harmless "within one hour after they are launched," or "after a duration of submersion restricted in such a way as to present no danger to neutral

ligerents should have the right to use mines in the theatre of war;⁴⁷ and that neutrals should be accorded the use of mines in defense of neutrality.⁴⁸

To aid in analyzing the development of a standard of mine use, it is helpful to define the variables important in the employment of mines. Mine use can be broken down into a series of issues which determine when, why, how, and where mines are used.⁴⁹ These variables are:

- 1) Whether mine use occurs during war or during peace;
- 2) Whether mines are employed for belligerent purposes or for neutral purposes;
- 3) Whether mines are either anchored or unanchored, whether mines have some kind of time limitation, and whether the use of mines is accompanied by notification to neutrals;
- 4) Whether mine use occurs within the territorial waters of a country, or on the high seas.

II. PROVISIONS OF CONVENTION VIII OF THE SECOND PEACE CONFERENCE

In the long process of reaching a compromise, and arriving at a series of principles to place before the Conference, the following points of agreement became evident: 1) All mines should contain some timing mechanism limiting their deadliness;⁵⁰ 2) A fundamental distinction needed to be recognized between anchored and unanchored or floating mines;⁵¹ and 3) The localities in which the mines might legitimately be used should be defined.⁵² No compromise between major and mi-

vessels outside the immediate sphere of hostilities." See W. HULL, *supra* note 35, at 95; see also C. DAVIS, *supra* note 35, at 245.

47. W. HULL, *supra* note 35, at 95. Admiral Siegal of Germany insisted that belligerents should not be restricted in use of mines to their own or each other's territorial waters, but rather should be permitted to use them in the "theater of war." *Id.* That is, "on the space of sea on which warlike operation is being carried out or has just been carried out or on which such operation may result from the presence or the approach of the armed forces of the two belligerents." *Id.*

48. See *id.* Both the Netherlands and Brazil held this view. See *id.*; see also C. DAVIS, *supra* note 35, at 246.

49. This formulation of the issues will serve as a convenient format for comparison of various standards of mine use in the remainder of this Note.

50. C. DAVIS, *supra* note 35, at 246.

51. See W. HULL, *supra* note 35, at 96.

52. *Id.* The first subcommission's report to the III Commission found:

As to cabled mines, it is necessary to restrict their use within certain places;

nor naval powers⁵³ could assure the complete protection and freedom of neutral shipping, but with the signing of the Hague Convention important and substantial steps were taken toward creating an analytical framework⁵⁴ within which the legality of mine use could be evaluated.

A. *The Compromise Articles*

Article 1 of the Hague Convention forbids the laying of unanchored mines without a one hour time limit, and the laying of anchored mines that do not become harmless when free of their anchorage.⁵⁵ Article 2 forbids the laying of mines off the coasts of the enemy for the sole purpose of intercepting commercial shipping.⁵⁶ Article 3 governs the use of anchored mines. It mandates that every precaution must be taken to protect neutral shipping, by requiring belligerents to render mines harmless within a reasonable time, and notify neutrals of the danger zones.⁵⁷ Article 4 indicates that neutral powers

but since this restriction can not be absolute, and since it can not preclude the possibility of placing them in places where peaceful navigation should be able to count on free access, it is necessary to restrict cabled mines also within a limit of time during which they may continue dangerous.

Id. (quoting the first subcommission's report to the III Commission).

53. The balance of naval strength in 1907 rested with Japan, France, the United Kingdom, and Russia, while the United States, Italy, Austria, and Germany held significant, but lesser naval power. See J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 604 n.9 (1959).

54. See *supra* note 49 and accompanying text.

55. Hague Convention, *supra* note 2, art. 1. Article 1 provides as follows:

It is forbidden:

1. 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;
2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;
3. To use torpedoes which do not become harmless when they have missed their mark.

Id.

56. *Id.* art. 2. Article 2 provides as follows: "It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping." *Id.*

57. *Id.* art. 3. Article 3 provides as follows:

When anchored automatic 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

who lay mines will be bound by the same rules as belligerents, and that notice must be given to mariners in advance.⁵⁸ Article 5 requires that powers remove their own mines after war, as well as all mines in their waters.⁵⁹ They must also notify other powers of the location of mines in their waters.⁶⁰ Article 6 required that powers conform any existing mines with articles 1 through 5.⁶¹ The remaining seven articles cover procedural aspects of the Convention.⁶²

B. *The Standard Proposed by the Convention*

The chief priority of the Hague Convention is the principle of the freedom of the seas as the common highway of all

notice addressed to ship owners, which must also be communicated to the governments through the diplomatic channel.

Id.

58. *Id.* art. 4. Article 4 provides as follows:

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 a 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.

Id.

59. *Id.* art. 5. Article 5 provides as follows:

At the close of the war, the contracting powers undertake to do their utmost to remove the mines which they had laid, each power removing its own mines.

As regards 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.

Id.

60. *Id.*

61. *Id.* art. 6. Article 6 provides as follows:

The contracting powers which do not at present own perfected mines of the pattern contemplated in the present convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

Id.

62. These procedural aspects include the following provisions: Convention applies only between Contracting Powers, and only if all belligerents are Contracting Powers, *id.* art. 7; procedure for ratification, *id.* art. 8; nonsignatory procedure to accede to the Convention, *id.* art. 9; date of effectiveness, *id.* art. 10; Convention to remain in force seven years, and beyond, unless denounced, *id.* art. 11; provision for re-opening of debate on mines, *id.* art. 12; provision for register, *id.* art. 13.

nations.⁶³ It assumes that banning the use of mines is “impossible,” but nevertheless finds it desirable to regulate their use “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.”⁶⁴

63. *Id.* preface.

64. *Id.* At the close of the Conference, Sir Ernest Satow, delegate of Great Britain to the Conference, considered the articles one small step but criticised them as being incomplete, and in so doing opened a classic exchange:

We declare, without hesitation, that the right of neutrals to security in navigating the high seas should take precedence of the transient right of belligerents to make use of them as the place of warlike operations.

. . . .
But the convention which has been adopted does not impose upon the belligerents a single restriction as to the placing of cabled mines wherever it may seem to him desirable, whether it be in his own territorial waters for purposes of defense, or in those of the enemy for purposes of attack, or, finally, in the high seas, thus necessarily causing great risks to neutral navigation in time of naval warfare and, indeed, the probability of disasters. . . . This Convention . . . can not be considered . . . a complete exposition of international law on the subject; and the legitimacy of such or such act can not be assumed simply because this convention has not prohibited it.

W. HULL, *supra* note 35, at 98-99 (emphasis added). In reply, Germany's Baron Marschall von Bieberstein stated:

That a belligerent who lays mines assumes a very heavy responsibility towards neutrals and towards peaceful shipping is a point on which we are all agreed. No one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character. But military acts are not solely governed by stipulations of international law. There are other facts. Conscience, good sense, and the sense of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it (*je le dis à haute voix*), will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognize the importance of the codification of rules to be followed in war. But it would be a great mistake to issue rules the strict observation of which might be rendered impossible by the law of facts. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view—is possible even in exceptional circumstances. Otherwise the respect for law would be lessened and its authority undermined. . . . As to the humanitarian sentiments of which the British delegate has spoken, I cannot admit that there is any country in the world which is superior to my country or my Government in the sentiment of humanity.

1 J. SCOTT, *supra* note 35, at 586-87 (footnote omitted).

Germany set aside completely the honor and conscience which Baron von Bieberstein so loudly proclaimed when, on February 4, 1915, it declared a “military area,” closing, by proclamation, the seas around the British Isles, (and later the Mediterranean), to all ships unwilling to face the prospect of unrestricted submarine war-

The articles that effectively protect neutral shipping during actual hostilities are the first, the third, and the fourth.⁶⁵ They create a standard for mine use that all later standards must reflect.⁶⁶ Article 2 does not share this distinction due to the near impossibility of proving a violation of this section.⁶⁷ Proving in court that a belligerent laid mines "solely" for purposes of a commercial blockade is so difficult a burden that it is hard to imagine that any country could successfully demand its enforcement.⁶⁸

The Hague Convention resulted in a standard for mine use in wartime. The use of mines is legal for belligerent purposes.⁶⁹ Unanchored mines must have a one hour time limit, but may be used anywhere.⁷⁰ Anchored mines must become harmless when free of anchorage.⁷¹ If unsupervised, notification of anchored mines must be given to neutrals.⁷² Anchored mines may be used anywhere, unless used solely to effect a commercial blockade.⁷³ The use of mines is also legal, during war, by neutrals, in defense of neutrality.⁷⁴ The same limits

fare and freely floating mines constructed without time limitations. See 2 L. OPPENHEIM, *supra* note 1, §§ 182a, 319a.

65. Hague Convention, *supra* note 2, arts. 1, 3-4. Note that these articles do not contemplate the use of mines during peacetime. Rather, they are laws of war. See *infra* notes 129-46 and accompanying text (by implication the International Court of Justice a fortiori indicated in *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22-23 (Judgment of Apr. 9) that the Hague Convention established a minimum standard for legality of mine use in peacetime).

66. To the extent that the articles of the Hague Convention make provisions respecting the basic variables of mine use, any later standard for mine use will either conform to the Hague standard, or it will not; in either case, the later standard may be said to reflect the Hague standard. See *infra* note 49 and accompanying text (defining the basic variables of mine use).

67. See W. MALLISON, *supra* note 1, at 159; see also 2 L. OPPENHEIM, *supra* note 1, § 182a.

68. See 2 L. OPPENHEIM, *supra* note 1, § 182a.

69. See Hague Convention, *supra* note 2, preface.

70. *Id.* art. 1. For the text of article 1, see *supra* note 55.

71. Hague Convention, *supra* note 2, art. 1.

72. See *id.* art. 3. For the text of article 3, see *supra* note 57.

73. See Hague Convention, *supra* note 2, art. 2. For the text of article 2, see *supra* note 56. This prohibition against using mines solely to impose a commercial blockade does apply to floating mines, as well. Hague Convention, *supra* note 2, art. 2. However, the primary uses of floating mines are defensive, making them an unlikely choice for blockade purposes. See C. DAVIS, *supra* note 35, at 245-46; 2 L. OPPENHEIM, *supra* note 1, § 182a.

74. See Hague Convention, *supra* note 2, art. 4. For the text of article 4, see *supra* note 58.

imposed on belligerents also apply to neutrals who use mines,⁷⁵ with the added requirement that neutrals must give notification of mine use and location in advance.⁷⁶ It is unlikely that neutral powers will ever have reason to use anchored mines beyond their territorial waters because any such use would no longer be in defense of neutrality.⁷⁷

Since the standard exists for the protection of neutral shipping,⁷⁸ the elements of the standard should be interpreted from the viewpoint of a neutral shipper. All obligations arising under the standard fall on the belligerent, or neutral, who chooses to employ mines.⁷⁹ It follows that the neutral shipper's only duty is to take notice of mine use when notice is given.

III. EVOLVING STANDARD OF MINE USE

In the years that followed 1907, both state practices and technological advances modified the Hague standard.

A. State Practices in the Wars

Automatic submarine contact mines were used widely in both World Wars, by all naval belligerents.⁸⁰ Both the extent and character of mine use were beyond anything contemplated by the drafters of the Hague Convention.⁸¹ These developments impinged upon and changed the character of neutrality.

In World War I, mines were used to close large areas of the oceans to unauthorized passage by any ship.⁸² This was initially a British response to the German strategic decision to

75. See Hague Convention, *supra* note 2, art. 4.

76. See *id.*

77. See 2 L. OPPENHEIM, *supra* note 1, §§ 313, 316, 319, 319a. However, neutrals may use any lawful means at their disposal, including unanchored mines, to discourage violation of their neutrality. This is essential to maintaining neutrality, because if one belligerent violates a neutral's rights in a manner disadvantageous to the other belligerent, that belligerent may also be expected to violate the same neutral's rights, in the form of a reprisal. *Id.*; see also *infra* note 95 (discussing the rights of neutrals in respect to war zones).

78. See Hague Convention, *supra* note 2, preface.

79. See *id.* arts. 1-6.

80. See 2 L. OPPENHEIM, *supra* note 1, § 319a.

81. See *infra* notes 98-101 and accompanying text.

82. See 2 L. OPPENHEIM, *supra* note 1, § 182a; see also W. MALLISON, *supra* note 1, at 159 (discussing the use of mines in the World Wars).

engage in unrestricted submarine warfare.⁸³ Much later in the War, the Allied powers laid a mine barrage between the Orkney Islands and the Norwegian coast.⁸⁴ This closed passage across 250 miles of ocean.⁸⁵ The barrage took 70 thousand mines to complete, of which 57 thousand were United States Government property.⁸⁶ Any ship which failed to stop in at an Allied port and submit to a contraband search while there, entered the minefields at its own risk, without benefit of an escort or safe route from the Allies.⁸⁷

During World War II, the use of mines was even more extensive.⁸⁸ The Germans continued to use mines in violation of

83. See *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 25, §§ 559-60, 567; 2 L. OPPENHEIM, *supra* note 1, § 319a.

84. The United States note to Norway of August 27, 1918 described the mine barrage:

The Government of the United States is also advised that the Norwegian Government has been informed that the Governments of the United States and Great Britain are engaged in laying a barrage across that portion of the North Sea lying between Scotland and Norway, which when completed will effectively prevent the passage of enemy submarines to and from the Atlantic Ocean by the northern route through the North Sea provided that they are not permitted illegal passage through the territorial waters of Norway.

W. MALLISON, *supra* note 1, at 68 n.62 (quoting (1918) FOREIGN REL. U.S. SUPP. NO. 1, vol. 2, 1782-83 (1933)).

85. See C. DAVIS, *supra* note 35, at 345.

86. See W. MALLISON, *supra* note 1, at 68 n.62.

87. J. COOGAN, *THE END OF NEUTRALITY* 212-14 (1981); see *infra* note 93 (discussing Allied practices during the Wars).

88. See 2 L. OPPENHEIM, *supra* note 1, § 319a. Coastal commerce was too important to the British to simply close off their territorial waters with mines, and all ships were vulnerable to submarine attack. *Id.* The solution was to mine extensively outside the territorial waters, leaving a narrow protected band of open water around the Isles. *Id.* n.1.

On April 12, 1940, after the invasion of Denmark and Norway by Germany, the Admiralty announced that mines had been laid over a large area in the Skagerrak (in which a channel twenty miles wide was left open) and the Kattegat, and in the North Sea from a point near the Dutch coast to the Norwegian coast. On April 14 a further minefield was announced to have been laid in the whole of the Kattegat and in the Southern Baltic so as to cover the whole of the German Baltic coast up to Swedish territorial waters. Germany also laid mines in some of these areas. *These developments tended in the direction of a successful assertion of the right of the belligerent to lay mine-fields on the high seas irrespective of reprisals but subject to the duty to ensure the relative safety of neutral traffic. . . .* [T]he British declaration . . . was the result of the view that these areas were the actual theatre of war operations. On the other hand, it would appear that the primary purpose of war zones as declared by Germany was the destruction of commercial shipping.

Id. For a dissenting view concerning the italicized assertion, see R. TUCKER, *THE LAW*

the Hague standard, first by constructing unanchored mines without the required one hour time limitation,⁸⁹ and then by seeding international waters with vast numbers of mines dropped from airplanes.⁹⁰ The Allied response was predictable; they created defensive zones, and laid their own extensive minefields.⁹¹

More significant than the extent to which mines were used in the wars was the character of mine use. Characteristically, mines were used to define and establish war zones, which were of questionable legality, especially as to neutrals.⁹² In 1915 and 1917, Germany declared "military areas," closing, by proclamation, the seas around the British Isles, and the Mediterranean, to all ships unwilling to face the prospect of unrestricted submarine warfare and freely floating mines constructed without time limitations.⁹³

OF WAR AND NEUTRALITY AT SEA 296-305 (1955). Tucker considers the measures taken in the declaration of war zones too controversial to achieve the international legal status of customary law. *See id.*

89. As is required by the Hague Convention, *supra* note 2, art. 1.

90. *See* THE INTERNATIONAL LAW OF THE SEA, *supra* note 25, § 567.

91. *See supra* note 87. The World War I practice of requiring neutrals to stop into Allied ports to secure a safe route or escort was also revived. 2 L. OPPENHEIM, *supra* note 1, § 390c.

92. *See* 2 L. OPPENHEIM, *supra* note 1, §§ 313, 316, 319, 319a; *infra* note 95 (discussing the legality of the war zone).

93. R. TUCKER, *supra* note 88, at 296-300; *see* 2 L. OPPENHEIM, *supra* note 1, § 319a. The exact order of events is not so condensed: Great Britain protested on August 23, 1914, that the Germans were continuing their practice of scattering mines indiscriminately in ordinary trade routes. Great Britain contended that "[t]hese mines do not become harmless after a certain number of hours; they are not laid in connection with any definite military scheme . . . but appear to be scattered on the chance of touching individual British war or merchant vessels." *Id.* §§ 182a n.1, 319a (quoting an announcement of the British Admiralty, Aug. 23, 1914).

On November 3, 1914, Great Britain declared the North Sea to be a defensive zone. *See id.* § 319a. On February 4, 1915, Germany declared the territorial waters and seas around the British Isles to be a "military area." *Id.* Only later in the war, on January 31, 1917, did Germany extend the proclamation to include the waters around France, Italy, Greece, Asia Minor, and North Africa. *Id.* While both sides declared their zones "in retaliation" for each other's conduct, it has been widely noted that the German zone paid no heed to the interests of neutrals, while the Allied zones were characterized by lip service, at the least, to neutral interests. *Id.* The Allied zones, for example, had lanes through which safe passage could be granted. This did, of course, necessitate a stop into an Allied port, and could result in the confiscation of contraband cargoes destined for German ports. *See* J. COOGAN, *supra* note 87, at 212-14.

The Declaration of London was the product of a conference in 1908, which was never ratified, but which attempted to define the rights and obligations of neutrals,

Great Britain was quick to condemn the German war zone, and responded with the creation of a series of defensive zones of its own.⁹⁴ With respect to neutrals, the Allied war zone was no more legal than the German war zone.⁹⁵ The Allied powers

and codify what was thought to be existing international law. See 2 L. OPPENHEIM, *supra* note 1, § 292. It comprised rules respecting blockade, contraband, unneutral service, destruction of neutral prizes, transfer to neutral flag, enemy character, convoy, resistance to search, and compensation. *Id.* Though it was unratified, the Declaration was observed, in steadily decreasing measure by both sides, until 1916. *Id.*

The Declaration of London was interpreted by the Allied powers to mean that the destruction of neutral vessels was illegal, while the Germans found justification for their tactic in the article which said a neutral prize could be destroyed if observance of the rule involved danger to a warship or success of operations. C. DAVIS, *supra* note 35, at 344.

However, the United States did not subscribe to the German view, illegal submarine warfare by Germany being the usual reason offered for the American entry into the war. *Id.* at 345. The American note to Germany of February 10, 1915, indicated early a strong American antipathy to the newly declared German military zone:

If the commanders of German vessels of war should act upon the presumption that the flag of the United States was not being used in good faith and should destroy on the high seas an American vessel or the lives of American citizens, it would be difficult for the Government of the United States to view the act in any other light than as an indefensible violation of neutral rights which it would be very hard indeed to reconcile with the friendly relations now so happily subsisting between the two governments.

If such deplorable situation should arise, the Imperial German Government can readily appreciate that the Government of the United States would be constrained to hold the Imperial German Government to a strict accountability for such acts of their naval authorities and to take any steps it might be necessary to take to safeguard American lives and property and to secure to American citizens the full enjoyment of their acknowledged rights on the high seas.

J. COOGAN, *supra* note 87, at 221.

94. See 2 L. OPPENHEIM, *supra* note 1, §§ 182a, 319a; *supra* note 93 (discussing the creation of Allied defensive zones).

95. See 2 L. OPPENHEIM, *supra* note 1, § 319a; see also J. COOGAN, *supra* note 87, at 224-25. Much has been written on the subject of the legality of war zones. The authorities cited *supra* note 93 concur that war zones are legal between belligerents, but vary on the question as to neutrals. The question is one of reprisal. In closing large portions of the open ocean, belligerents place the hostile right before the right to freedom of the seas. This can be justified if it is a reprisal. For example, if a neutral nation does not possess the naval strength to prevent the ships of one belligerent from passing through its waters, it has failed to defend its neutrality in a manner detrimental to the other belligerent. In that situation, the "wronged" belligerent is justified in passing through those same waters for purposes that are essentially defensive. This would constitute a legal reprisal. See 2 L. OPPENHEIM, *supra* note 1, §§ 313, 316, 319, 319a. This rationale would excuse British mine laying before the United States' entry into the war, i.e., since the United States did not take steps to defend itself from "illegal" German submarine warfare, to the detriment of the British, Britain was compelled to close the seas. See J. COOGAN, *supra* note 87, at 222-23.

proclaimed that the declaration of defensive zones was justified by illegal acts of the enemy, and was thus a legal reprisal.⁹⁶ This had the local effect within a defensive zone of elevating the right of the belligerent to war on the seas above the right to freedom of the seas for purposes of trade.⁹⁷

The use of the war zone to effect a blockade had a lasting impact on standards of mine use. While the Hague Conference did not prohibit the placement of anchored mines on the high seas, their use had been primarily to effect a close blockade.⁹⁸ This is not to say that the use of anchored mines was not contemplated at all on the high seas, but at the time of the Conference, anchored mines were much more likely to be found in the territorial waters of belligerents.⁹⁹ The "blockade" of the Germans in World War I was something entirely new, going by a familiar name.¹⁰⁰ Rather than seeking to close an enemy port to all ships, the World War I blockade sought to close the high seas to all enemy ships and, indeed, all commercial vessels having intercourse with the enemy.¹⁰¹ In this manner it became accepted practice to use anchored contact mines as an instrument of warfare on the high seas.¹⁰²

Waging war on this scale changed international law; the very scope of the conflict upset traditional notions of neutrality.¹⁰³ Whether or not merchantmen had been fitted for war, they had become part of a larger intelligence network, and

96. See 2 L. OPPENHEIM, *supra* note 1, § 182a; see also W. MALLISON, *supra* note 1, at 68 n.62.

97. J. COOGAN, *supra* note 87, at 214. The author explains that:

By sowing mines in international waters, Britain deliberately replaced the belligerent right of visit and search in the North Sea with a new rule: explode and sink. This action, which threatened to send American ships, seamen, and cargoes to the bottom simply for exercising their basic right to sail the high seas, was a direct contradiction of the principle of freedom of the seas.

Id.

98. See *supra* note 43. The blockade of Port Arthur in the Russo-Japanese War is a typical example. 2 L. OPPENHEIM, *supra* note 1, § 182a.

99. See R. TUCKER, *supra* note 88, at 283-91.

100. See J. COOGAN, *supra* note 87, at 155-56.

101. See *id.* at 158-64. This growth of the concept of blockade reflected the growing importance of economic warfare; the related concept of contraband underwent similar development. R. TUCKER, *supra* note 88, at 266 n.6.

102. See 2 L. OPPENHEIM, *supra* note 1, § 319a.

103. See R. TUCKER, *supra* note 88, at 50, 68; see also W. MALLISON, *supra* note 1, at 129-30 (discussing the change in neutrals' rights).

posed a threat to German submarines.¹⁰⁴ Germany could not tolerate any presence on the seas not clearly allied with its cause. However, German submarines were not constructed with the taking of prizes in mind, and so it became the German policy to destroy ostensibly neutral vessels.¹⁰⁵

The war zone concept thoroughly impeaches the traditional neutral status of innocent commerce by having the local effect of elevating the right to war above the right to freedom of the seas.¹⁰⁶ There may, in fact, be no such thing as neutral shipping left to protect.¹⁰⁷ To that extent, the declaration of a war zone plainly runs contrary to the priorities of the Hague Convention.¹⁰⁸ However, the declaration of a war zone is consistent with the Hague standard to the extent that it serves to notify neutral shipping of the existence and approximate location of mines. In this respect, the war zone is in keeping with article 3 of the Hague Convention.¹⁰⁹

State practices in the two World Wars resulted in the de facto amendment of the 1907 standard.¹¹⁰ In modification of the previous requirements, the use of anchored mines in a war zone required notification to neutrals.¹¹¹ Additionally, the unsupervised use of anchored mines on the high seas without the declaration of a war zone could no longer be considered legal.¹¹²

B. *The Effect of Technological Advances on the Standard*

The mines used in the World Wars were not the same as those used in the Russo-Japanese War and therefore, were not

104. R. TUCKER, *supra* note 88, at 68 n.50.

105. See C. DAVIS, *supra* note 35, at 344.

106. J. COOGAN, *supra* note 87, at 213-14.

107. R. TUCKER, *supra* note 88, at 68-69.

108. See Hague Convention, *supra* note 2, preface; *supra* notes 63-64 and accompanying text (quoting from the preface).

109. Hague Convention, *supra* note 2, art. 3; see *supra* note 57 (quoting the provisions of article 3).

110. See *supra* notes 80-112 and accompanying text (discussing the 1907 standard).

111. Hague Convention, *supra* note 2, art. 3; see *supra* note 57 (quoting the provisions of article 3).

112. Hague Convention, *supra* note 2, art. 3. Since the war zone has become the customary notification to neutrals, no power failing to declare a war zone could claim to have taken "every possible precaution" for the protection of neutrals, as is called for in the Hague Convention. *Id.*

the exact instruments contemplated by the Hague Conference.¹¹³ While the technological advancement of mines raised questions as to the applicability of the Hague standard, it is generally accepted that use of the modern mines may still be adequately regulated to effect the desired safety of neutral shipping.¹¹⁴ While the neutral shipper's enjoyment of freedom of the seas during wartime has suffered, one firm requirement remains out of wartime practice, i.e. the best safeguard of neutral shipping is still prompt notification of mine use and location.¹¹⁵ Notification is the essential criterion of legality, the absence of which renders the use of anchored mines on the high seas illegal.¹¹⁶ Without notification, no power can claim that "every possible precaution" had been taken to ensure the safety of neutral shipping.¹¹⁷

A customary law test has been proposed to determine the

113. See W. MALLISON, *supra* note 1, at 160. Contact with mines was no longer necessary to detonate them. *Id.*; see *supra* note 1 (discussing technological advances in mines). Some mines used magnetic sensitivity to detect passing ships; others, called acoustic mines, used sensitivity to vibration. W. MALLISON, *supra* note 1, at 160. Modern mines are called smart mines, or influence mines, because they can differentiate between minesweeping attempts and the passage of more substantial vessels. D. O'CONNELL, *supra* note 1, at 92, 96. Smart mines are also frequently programmed to ignore the first or second acceptable targets to increase the chances of exploding in the midst of a convoy, thereby causing greater destruction and trapping the lead vessels further into the mine field. See *id.*

114. See W. MALLISON, *supra* note 1, at 160. In light of significant technological advances, the doctrine of *rebus sic stantibus* might provide a legal defense against claims of violations of the Hague Convention. One author feels that such a defense would be unlikely to succeed:

It is generally accepted that the obligations of a treaty terminate if a change occurs in the circumstances existing at the time of its conclusion—circumstances the continuation of which is to be deemed a condition of the continuing validity of the treaty. . . . Certainly it is clearly established that one party to a treaty may not terminate its obligations unilaterally solely on the ground that it believes the doctrine *rebus sic stantibus* to be applicable to the situation; it is necessary first to have confirmation of its applicability by some impartial tribunal.

In actual practice, no international tribunal of high standing has ever released a party from its treaty duties on grounds only of *rebus sic stantibus*

R. HIGGINS, *supra* note 24, at 344; see M. KAPLAN & N. KATZENBACH, *supra* note 24, at 245.

115. See 2 L. OPPENHEIM, *supra* note 1, § 319a.

116. See Hague Convention, *supra* note 2, art. 3.

117. See *id.*; *supra* note 112 (discussing the war zone as customary notification under Hague Convention); see also 2 L. OPPENHEIM, *supra* note 1, § 319a.

legality of weaponry in both general and limited wars.¹¹⁸ The test involves "a determination of the reasonable proportionality between the military efficiency of the weapon and the ancillary destruction of values caused by its use."¹¹⁹ This test explains in part why the modern mines remain legal: Increased destructiveness does not result in a disproportionately greater destruction of values.¹²⁰ The test also accounts for the illegality of unrestricted mine use.¹²¹

IV. THE CORFU CHANNEL CASE

Following the World Wars came a period of renewed internationalism, and with the foundation of the United Nations, a major change in international relations.¹²² In the previous century, the balance of power between major powers existed because of alliances and the threat of shifting from one alliance to another.¹²³ The United Nations Charter directs that member states shall not use force in international relations.¹²⁴ The Security Council exists to direct international peace-keeping forces, and enforce the Charter of the United Nations.¹²⁵ The International Court of Justice (Court), as the judicial organ of the United Nations, exists to facilitate the peaceful resolution of conflicts and disputes between powers.¹²⁶ To ensure that

118. W. MALLISON, *supra* note 1, at 182.

119. *Id.*

120. *See generally id.* The value destroyed by unrestricted mines use are those of freedom of navigation and freedom from attack without warning, and neutral status, in general. 2 L. OPPENHEIM, *supra* note 1, § 182a. In addition, unrestricted mine use is not necessarily more militarily efficient than restricted mine use. *See* W. MALLISON, *supra* note 1, at 160. For example, long-lived floating mines may survive long after the close of hostilities and appear in places distant from their original locations, posing a hazard to the mine laying power's own military and merchant fleets. *See* W. HULL, *supra* note 35, at 94.

121. *See* W. MALLISON, *supra* note 1, at 160.

122. M. KAPLAN & N. KATZENBACH, *supra* note 24, at 46-47.

123. *Id.* at 30-55.

124. *See* U.N. CHARTER preface.

125. *See id.* arts. 23-51.

126. *See id.* arts. 92-96. The advent of the United Nations and the International Court of Justice in 1946 ended the 22 year history of the Permanent Court of International Justice. INTERNATIONAL COURT OF JUSTICE OPINION BRIEFS v (Section of International Law, American Bar Assoc. ed. 1978). Access to the Court is available to all members of the United Nations, signatories of the Statute of the International Court, and nonmember, nonsignatory states that have the recommendation of the United Nations Security Council. *Id.* In addition to hearing contentious cases, the

these functions are resorted to in times of difference, the member states renounce the use of force in international relations.¹²⁷

The rationale for the continued use of force in international relations is familiar: The use of force is justified, at least in self-defense, by the continuing illegal conduct of international actors.¹²⁸ Despite the continued use of force in international relations, the United Nations system of dispute resolution has had the opportunity to adjudicate several cases. One such is the *Corfu Channel* case.¹²⁹

International claims and counterclaims arose out of an incident on October 22, 1946, in which two British destroyers struck mines in the North Corfu Channel, in Albanian territorial waters.¹³⁰ The United Kingdom held Albania responsible

Court is also empowered to render advisory opinions on questions submitted to it by organs of the United Nations. *Id.* at vi.

The Court consists of fifteen members elected for nine-year terms by the General Assembly and Security Council, each proceeding independently, from a list of nominees provided by the Secretary-General of the United Nations. Although judges are elected without regard to nationality, the Court itself must be representative of the main forms of civilization and the principal legal systems of the world. In addition, a party may designate an ad hoc judge to participate in a case with the same authority as the regular judges if none of the members of the Court are of its nationality.

Id.

127. See U. N. CHARTER arts. 2, para 4, art. 51.

128. See M. KAPLAN & N. KATZENBACH, *supra* note 24, at 214. In her address to the joint luncheon of the American Society of International Law and the Section of International Law and Practice of the American Bar Association on April 12, 1984, Jeanne Kirkpatrick, then United States Ambassador to the United Nations, stated that "unilateral compliance with [the United Nations'] charter's principles of nonintervention and nonuse of force may make sense in some specific isolated instances, but are hardly a sound basis for either U.S. policy or for international peace and stability." Taylor, *Mrs. Kirkpatrick Chides Latin Critics*, N.Y. Times, Apr. 13, 1984, at A3, col. 1. She also stated that "the legalistic approach to international affairs" was inadequate to cope with the realities of Communist aggression and subversion, but stopped short of saying that the United States should disregard international law. *Id.*

129. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9).

130. Memorial of the United Kingdom (U.K. v. Alb.), 1949 I.C.J. Pleadings (1 *Corfu Channel*) 20-21, 25, annexes 10-14 (Memorial dated Sept. 30, 1947) [hereinafter cited as Memorial]. On October 22, 1946, two British warships, H.M.S. *Saumarez* and H.M.S. *Volage*, struck mines while passing through the North Corfu Channel. *Id.*; see I. CHUNG, *supra* note 12, at 20. Forty-four lives were lost, 42 were injured; one ship was a total loss, and the other crippled. *Id.* Britain announced a sweep of the channel. "[I]n view of the serious accidents which recently occurred to two of His Majesty's warships passing through the Corfu Channel and of which the Albanian authorities are no doubt aware, British mining authorities will shortly sweep the

for the loss of life and property, claiming that Albania had omitted to notify peaceful shipping when all the circumstantial evidence indicated that the mines could not have been laid without Albanian knowledge or connivance.¹³¹ The United Kingdom had swept the channel, and in so doing had violated Albanian territorial waters, entering the mouth of Saranda harbor and coming within 300 yards of the shore.¹³²

Both countries took their complaints to the United Nations Security Council, where it was decided that the body lacked the factfinding capability to judge the dispute, and referred the dispute to the evidentiary expertise of the International Court of Justice.¹³³ The British Memorial to the Court made the following points: 1) North Corfu Channel had been swept at the end of the war under the direction of the Central Mine Clearance Board;¹³⁴ 2) It was known that the channel was safest along the Albanian coast because German minefields

channel." Memorial, *supra*, at 72 (note from the Government of the United Kingdom to the Government of Albania, Oct. 26, 1946). The operation was carried out under the observation of Capitaine de Fregate R. Mestre, the French member of the Central Mine Clearance Board, *see infra* note 134, but without the express consent of that international body. *See* I. CHUNG *supra* note 12, at 26, 32.

131. Memorial, *supra* note 130, at 20-21.

132. I. CHUNG, *supra* note 12, at 22-23. The Government of Albania related the incident as follows:

Since the morning of 12 November a large number of warships flying the British flag have been sailing all over the waters off the southern Albanian shore between Butrinto and Carab Ouron. All the British vessels navigated in battle formation in our territorial and extra-territorial waters in token of intimidation and provocation.

Today, 13 November 1946, at 10 a.m. and throughout the whole day, a large number of British warships and minesweepers varying in number from hour to hour between eleven and twenty-three entered our territorial waters at Santiqaranta at five hundred, one thousand, one thousand and five hundred metres from the port on the pretext of clearing mines. British warships frequently fired machine-gun bursts in the air and into the water with a view to creating incidents.

Id. at 24-25 (quoting Telegram from the Government of Albania to the Secretary General of the United Nations (Nov. 13, 1946)).

133. Memorial, *supra* note 130, at 37, 387-93.

134. I. CHUNG, *supra* note 12, at 26. The Central Mine Clearance Board was constituted after the War:

In order to carry out the task of removing remaining mines, the International Central Mine Clearance Board was set up in November 1945, by agreement between the Governments of the Soviet-Union, the United States, the United Kingdom and France. On the recommendation of the Central Board, other Powers had been invited to become members of the Zone Boards. The Mediterranean Zone Board consisted of representatives

still remained to the west; and 3) The minesweeping operation had produced newly laid mines close to the Albanian coastline, where the Albanian authorities had to have been aware of the mine laying operation.¹³⁵

The British allegation was that the laying of the minefield constituted a violation of articles 2 through 5 of the Hague Convention,¹³⁶ and absent the Hague Convention, that the laying of such a minefield was a crime against humanity.¹³⁷ Albania at all times denied knowledge of any minefield in its territorial waters, and persisted in pressing charges that its national sovereignty had been violated.¹³⁸

When the International Court of Justice finally reached the merits of the British claim, the Court indicated the following: Control by a state of its territorial waters neither involves automatic responsibility for acts committed there, nor does it shift the burden of proof to the sovereign power.¹³⁹ The question was thus one of the extent of Albanian knowledge.¹⁴⁰ Al-

of France, Greece, the Soviet-Union, the United Kingdom, the United States and Yugoslavia.

Id. Certain other governments had been invited to send observers, but Albania was not so invited because it possessed no mine-sweeping forces. *Id.*; see Memorial, *supra* note 130, at 54 (annex 3 to No. I, International agreement between the governments to the United Kingdom, France, the Soviet Union, and the United States, setting up the International Central Mine Clearance Board (Nov. 22, 1945)).

135. Memorial, *supra* note 130, at 22, 48-52.

136. *See id.*

137. *Id.*

138. Contre-Memoire du Gouvernement Albanais (U.K. v. Alb.), 1950 I.C.J. Pleadings (2 Corfu Channel) 55, 138-46.

139. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Judgment of Apr. 9). The Court acknowledged a degree of state responsibility for illegal acts occurring within the waters of a state, i.e., the duty to give some explanation, but went on to state:

But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

Id.

140. *Id.* at 22. The Court formulated the issue as one of obligation to notify. Albania's obligation to notify shipping of the existence of mines in her waters depends on her having obtained knowledge of that fact in sufficient time before October 22nd; and the duty of the Albanian coastal authorities to warn the British ships depends on the time that elapsed between the moment that these ships were reported and the moment of the first explosion.

Id.; see also I. CHUNG, *supra* note 12, at 157, 166.

bania had not disputed the consequences of knowledge of the minefield, and had agreed that knowledge would involve international responsibility.¹⁴¹ The Court stated Albania's legal obligations plainly, and in so doing created an international standard for the peacetime use of mines:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. *Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain 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 communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.*¹⁴²

Ultimately, the Court held Albania liable for the British lives and property lost on October 22, 1946, and the British liable to the Albanians for invasion of sovereign Albanian waters during the British minesweeping operation.¹⁴³

The Court in no way indicated that the use of mines during peacetime was illegal *per se*, which would suggest that the peacetime use of mines is legal in defense of sovereignty. The appropriate standard for mine use in peacetime is logically the neutral wartime standard. There is an added requirement that states laying mines in peacetime should in no way obstruct the innocent passage of any ship through any portion of its territorial waters that functions as an international highway.¹⁴⁴

141. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Judgment of Apr. 9); see also I. CHUNG, *supra* note 12, at 157.

142. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22-23 (Judgment of Apr. 9) (emphasis added).

143. *Id.* at 23, 35.

144. *Id.* at 28. The Court expressed this standard by stating:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

Id.

The *Corfu Channel* decision, in respect to the use of mines, may be said to stand for the proposition that mine use during peacetime is legal, and while not covered by the Hague Convention, is bound by a stricter standard of use in which freedom of the seas is determinative.¹⁴⁵ The British Ambassador to the United Nations anticipated this result when he stated in his address to the Security Council that anything violative of the Hague standard of mine use was illegal a fortiori during peacetime in that any such offense is clearly repugnant to freedom of the seas.¹⁴⁶

V. SYNTHESIS OF CUSTOMARY INTERNATIONAL LAW
STANDARD RELATIVE TO THE LAYING OF
AUTOMATIC SUBMARINE MINES

The importance of law to the international community is greater today than ever before in history.¹⁴⁷ Peace no longer depends upon the precarious balancing of alliances, as it did in 1907.¹⁴⁸ Rather, peace today hinges upon the ability of opposing blocs of nations to exist in amicable relations all over the world.¹⁴⁹ Today, as never before, the consequences of war are extreme and final. There is developing a body of practices whereby international law provides a mutually acceptable set of rules for the peaceful resolution of disputes.¹⁵⁰

That automatic submarine mines still give cause for international concern is evident from international debate and dis-

145. See *supra* note 142.

146. I. CHUNG, *supra* note 12, at 33 (quoting Sir Alexander Cadogan, Ambassador of the United Kingdom to the United Nations Security Council).

147. See M. KAPLAN & N. KATZENBACH, *supra* note 24, at v-vi.

148. *Id.* at 41-50.

149. *Id.* at 50-55.

150. I J. SCOTT, *supra* note 35, at 108-09. After accepting the presidency of the Second Hague Peace Conference, on June 15, 1907, M. de Nelidow opened his address:

This task, gentlemen, as outlined in the program of the Conference and accepted by all the governments, is composed of two parts. On the one hand, we are to seek the means of settling in a friendly manner any differences which may arise among the nations, and of thus preventing ruptures and armed conflicts. On the other hand, we must endeavor, if war has broken out, to mitigate its burdens both for the combatants themselves, and for those who may be indirectly affected.

Id.

cord attending the recent uses to which they have been put.¹⁵¹ While it may never be simple to determine when the use of force is justified in international relations,¹⁵² it is possible to adopt universal, humanizing standards as to the *manner* in which force is employed.¹⁵³ A standard for the legal use of automatic submarine mines may be synthesized from the past practices under the Hague Convention and the *Corfu Channel* case.¹⁵⁴

The goal of the standard is to insure the safety of all peaceful shipping from attack without notice or justification; in short, to preserve the freedom of the seas.¹⁵⁵ The priorities of this standard are in keeping with those of the Hague Convention, namely that the right to freedom of the seas is superior to the right of any belligerent to war on the seas.¹⁵⁶ However, this standard acknowledges the totality of naval war in its present state of sophistication, and accommodates the inevitable by recognition of the war zone. The legal effect of the war zone is the local promotion of the right of the belligerent to war on the seas over the neutral shipper's right to freedom of the

151. The Soviet Union was quick to call the mining of Nicaraguan harbors which damaged a Soviet freighter a "grave crime," committed with the complicity of the United States. Burns, *Moscow Holds U.S. Responsible for Mines Off Nicaragua's Ports*, N.Y. Times, Mar. 22, 1984, at A1, col. 3 (quoting a protest note handed by Soviet Foreign Minister Andrei Gromyko to the American chargé d'affaires, Warren Zimmerman). In a letter to the President of Colombia, the French Foreign Minister, Claude Cheysson, is quoted as calling the mining of Nicaraguan ports "a blockade undertaken in time of peace against a small country, which presents a serious problem of political ethics." *France Said to Offer to Help Nicaragua Clear Ports of Mines*, N.Y. Times, Apr. 6, 1984, at A7, col. 1 (quoting a Sandinista Press release). On April 4, the United States used its privileged role in the United Nations Security Council to veto a resolution condemning the mining of Nicaraguan ports. *U.S. Vetoes U.N. Bid to Condemn Mining of Nicaraguan Ports*, N.Y. Times, Apr. 5, 1984, at A8, col. 1. The results of the vote were 13 for, the United States against, and Britain abstaining. *Id.* But by April 6, Britain, too, had voiced its concern for what it perceived as a threat to the principle of freedom of the seas. Smith, *Britain Criticizes Mining of Harbors Around Nicaragua*, N.Y. Times, Apr. 7, 1984, at A1, col. 4 (quoting remarks of Andrew Burns, press counselor of the British Embassy).

152. See M. KAPLAN & N. KATZENBACH, *supra* note 24, at 201-28.

153. See 1 J. SCOTT, *supra* note 35, at 108-09.

154. See *infra* notes 159-76 and accompanying text.

155. This has consistently been the purpose of mine use restraint. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9); Hague Convention, *supra* note 2, preface.

156. See Hague Convention, *supra* note 2, preface.

seas.¹⁵⁷ The value of the war zone to neutral shippers is that, since they are at least given warning,¹⁵⁸ they know their legal rights before compromising them.

A synthesis of the Hague Convention requirements as they emerged from World War II, and the peacetime standard for mine use found in *Corfu Channel* yields a customary international standard regarding the use of automatic submarine mines. The use of mines is legal, in war, for belligerent purposes.¹⁵⁹ Unanchored mines must have a one hour time limit, and may be used anywhere.¹⁶⁰ Anchored mines must become harmless when free of anchorage.¹⁶¹ If unsupervised, or in a war zone, notification of anchored mines must be given to neutrals.¹⁶² Anchored mines may be used anywhere, unless used solely to effect a commercial blockade, but unsupervised use on the high seas without the declaration of a war zone cannot be considered legal.¹⁶³

The use of mines is also legal in war by neutrals, in defense of neutrality.¹⁶⁴ Unanchored mines must have a one hour time limit, and may be used anywhere.¹⁶⁵ Anchored mines must become harmless when free of anchorage.¹⁶⁶ Neutral countries laying mines must give notification of their use and location in advance via the diplomatic channel.¹⁶⁷ They may only use mines in defense of neutrality, and anchored mines only within their territorial waters.¹⁶⁸

The use of mines is legal, during peace, for neutral purposes.¹⁶⁹ States laying mines during peacetime may only use anchored mines that become harmless when free of their

157. See THE INTERNATIONAL LAW OF THE SEA, *supra* note 25, §§ 558-61; *supra* note 97 and accompanying text.

158. See *supra* notes 80-112 (discussing the inception of the war zone, its effects on neutral's rights, and its contribution to norms of mine use).

159. Hague Convention, *supra* note 2, preface.

160. *Id.* art. 1.

161. *Id.*

162. *Id.* art. 3.

163. *Id.* arts. 2-3; see also *supra* note 112 and accompanying text.

164. Hague Convention, *supra* note 2, art. 4.

165. *Id.* arts. 1, 4.

166. *Id.*

167. *Id.* art. 4.

168. *Id.*; see *supra* note 77 and accompanying text.

169. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22-23 (Judgment of Apr. 9); *supra* notes 129-46 (discussing the evolution of this standard).

anchorage.¹⁷⁰ They must also give notification of their use and location in advance via the diplomatic channel.¹⁷¹ During peacetime, states laying mines in their territorial waters may do so in defense of sovereignty, but only if such territorial waters are not a strait connecting two open bodies of ocean.¹⁷²

This standard reflects the origin of mine use regulation in that it draws its considerations from the Hague Convention.¹⁷³ It further reflects standards of mine use observed by the great world powers during the World Wars, at variance with the Hague Convention, that are both widespread and consistent enough to be deemed customary under international law.¹⁷⁴ Lastly, the standard reflects the holdings of the International Court of Justice regarding the use of mines during peacetime.¹⁷⁵ Any use of mines inconsistent with the standard is illegal and incurs international responsibility.¹⁷⁶

VI. RECENT MINE USE IN NICARAGUA AND THE RED SEA

Using the criteria that emerged from the Hague Conference,¹⁷⁷ it is possible to evaluate the legal nature of recent mine use in Nicaragua and the Red Sea.¹⁷⁸ In Nicaragua, a state of civil unrest exists.¹⁷⁹ It is unclear whether wartime or peacetime standards apply.¹⁸⁰ If mines are being employed for

170. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22-23 (Judgment of Apr. 9); see also Hague Convention, *supra* note 2, arts. 1, 4.

171. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22-23 (Judgment of Apr. 9); Hague Convention, *supra* note 2, arts. 3, 4.

172. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 28 (Judgment of Apr. 9); *supra* note 144 (discussing the right of innocent passage).

173. See Hague Convention, *supra* note 2; *supra* note 49 and accompanying text (defining the variables dealt with by the Convention).

174. See *supra* notes 80-121 and accompanying text.

175. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9); see *supra* notes 139-46 and accompanying text.

176. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9); see *supra* notes 142-45 (discussing liability for violation of peacetime standards of mine use).

177. See *supra* note 49 and accompanying text (discussing relevant variables).

178. See *supra* notes 11-19 and accompanying text (discussing the details of recent mine use).

179. See *U.S. Vetoes U.N. Bid to Condemn Mining of Nicaraguan Ports*, N.Y. Times, Apr. 5, 1984, at A8, col. 1.

180. See 1 L. OPPENHEIM, *supra* note 1, § 75a. See generally *id.* §§ 71-75g. The issue is one of recognition. Traditionally, a series of objective criteria existed to de-

belligerent purposes, knowledge of this is of vital importance to shipping. It would alert innocent commerce of the possible presence of mines on the high seas, not merely in the territorial waters of Nicaragua, as one would expect during peacetime mine use.¹⁸¹ As there is no general condition of war existing at sea, and one party to the belligerency does not even possess an identifiable navy,¹⁸² wronged parties may wish to argue that

termine when an internal armed resistance to a sovereign authority was organized enough and successful enough to constitute a rebellion, and thereby invoke the law of war between the parties. *Id.* § 75a(c). An intermediate stage exists, in which third states recognize the rebels as insurgents:

Where a status of insurgency exists, there is in effect an international acknowledgement of an internal war, but third parties are left substantially free to determine the consequences. . . . [Third states are] still free, under traditional international law, to help the legitimate government, but should desist from helping the rebels. . . . Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest.

Higgins, *International Law and Civil Conflict*, in *THE INTERNATIONAL REGULATION OF CIVIL WARS* 163, 170 (E. Luard ed. 1972) (footnotes omitted).

A state of belligerency is easier to determine. A state of belligerency exists when an armed conflict meets four criteria: 1) The armed conflict must be widespread; 2) The rebels must occupy and administrate a substantial portion of territory; 3) The conduct of hostilities must be in accordance with the rules of war and through armed forces responsible to an identifiable authority; and 4) Circumstances must exist which make it necessary for third parties to define their attitude by acknowledging the status of belligerency. *Id.* at 170-71.

The current international usage seems to treat recognition subjectively and as a function of political convenience, thereby making it difficult to determine the status of the parties to the Nicaraguan conflict. See M. KAPLAN & N. KATZENBACH, *supra* note 24, at 128-34. The rebels do not control any significant amount of Nicaraguan territory, being based in the neighboring countries of Costa Rica and Honduras, nor are they organized, in the sense of comprising a single ideological movement which answers to a central authority. See *C.I.A. Threats Said to Influence Rebels*, N.Y. Times, Apr. 22, 1984, at A1 col. 6, at A10, col. 1. Traditionally these factors would militate against recognizing a state of civil war. Today, the United States recognizes an insurgency, defined *supra* note 4, indicating that the United States does not regard the existence and purposes of the insurgents as illegal. See REPORT OF THE SELECT SENATE COMM. ON INTELLIGENCE, S. REP. NO. 665, 98th Cong., 2d Sess. 3-4 (1984). This is not to be taken to mean that the United States recognizes the insurgents as having all the rights of a belligerent. See 1 L. OPPENHEIM, *supra* note 1, §§ 71-75g.

181. See Hague Convention, *supra* note 2, arts. 1, 4 (discussing the differences between neutral and belligerent use of mines); see also notes 142-46 and accompanying text (discussing the peacetime standard of mine use derived from *Corfu Channel*).

182. Nicaraguan rebels do have some launches and other small craft. See Kinzer, *Nicaragua, Citing Raids, Says Rebels Have New Skills*, N.Y. Times, Mar. 7, 1984, at A3, col. 4.

the more exacting peacetime standards apply.¹⁸³ Peacetime standards would not recognize as valid the declaration of Nicaraguan waters to be a war zone, which might otherwise excuse some damage as the result of an assumed risk.¹⁸⁴ Also, the customary law test may indicate a significant disproportion between the military efficiency of mining in a civil war and the resulting destruction of values.¹⁸⁵ For instance, it may be acceptable in a general war to jeopardize all external maritime relations in return for a secure coast, while it may not be acceptable to do so in a civil war. First, in civil war there may not be as high a degree of military efficiency in blockading the nation's ports where the state's waters are not truly the zone of hostilities, as it would be in a general war. Second, the destruction of values may be proportionately greater than in a general war, i.e. if one party to a civil war closes maritime commerce, both sides in the struggle may starve, or be put to equal disadvantage.

Regardless of whether the declaration and imposition of a war zone is legal, the use of long-lived floating mines would remain illegal.¹⁸⁶ At least one nation has determined that the damage to its ship which occurred off Nicaraguan shores was

183. In that situation, an injured party might seek reparations from the Nicaraguan Government, invoking the *Corfu Channel* argument that the Nicaraguan Government would become responsible if it knew of a minefield in their territorial waters, yet failed to warn neutral shipping. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22-23 (Judgment of Apr. 9); see also *supra* notes 140-42 and accompanying text (discussing this argument).

184. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Judgment of Apr. 9); Hague Convention, *supra* note 2, art. 3. This was undoubtedly what the rebels hoped to achieve by the declaration of a war zone: "The coasts of Nicaragua are a war zone, and therefore we are not responsible for the loss of civilian lives in this zone." Kinzer, *Nicaraguan Port Thought to Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3 (quoting a release of March 1, 1984, by the rebel Democratic Revolutionary Alliance, based in Costa Rica).

185. See *supra* notes 118-21 and accompanying text. The underlying notion is proportionality. The test balances the relative gains and losses of a given military course of action in varying contexts, such as general and limited wars. W. MALLISON, *supra* note 1, at 182. Thus the application of this test to a decision to mine harbors in the context of a civil war seeks to determine if there is a reasonable proportionality between the military gains to the rebels, and the significant costs to the rebels. Since they aspire to belligerent status and recognition as the legal rulers of Nicaraguan territory, one of the conditions the rebels would traditionally have to satisfy is an adherence to the laws of war. See I L. OPPENHEIM, *supra* note 1, § 75a(a).

186. Hague Convention, *supra* note 2, art. 1.

most probably caused by a long-lived floating mine.¹⁸⁷ Article 1 of the Hague Convention prohibits the use of long-lived floating mines¹⁸⁸ and custom has upheld that prohibition.¹⁸⁹ If in fact this is the case, then the efforts made to notify neutral shipping of a war zone were meaningless acts, in that knowledge of where a minefield was laid is useless if it is free to drift. Logic dictates that no one is safe from an active mine whose location is unknown.

If anchored mines were being used after all, then the issue remaining is whether peacetime or wartime standards apply. Nicaraguan rebels repeatedly announced their intention to mine Nicaraguan waters, declaring them to be a war zone.¹⁹⁰ Further, they stated the goal of the mining was to exclude arms shipments which they alleged were to be used in a genocidal campaign against the Miskito Indians, meaning that they were not using mines solely to effect a commercial blockade.¹⁹¹ If wartime standards do in fact apply, then the issue becomes whether notification was adequate as to specificity of location, promptness, and scope of reach.¹⁹²

In the Red Sea and Gulf of Suez cases the relevant facts

187. See Kinzer, *Nicaraguan Port Thought to Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3 (referring to the results of the Dutch Navy report); see also *supra* note 13 (discussing relevant details of the report).

188. See Hague Convention, *supra* note 2, art. 1.

189. See *supra* notes 80-121 and accompanying text (discussing state practices in the World Wars).

190. See Kinzer, *Nicaraguan Port Thought to Be Mined*, N.Y. Times, Mar. 16, 1984, at A3, col. 3 (quoting a release of March 1, 1984, by the rebel Democratic Revolutionary Alliance based in Costa Rica). A Honduras-based group called the Nicaraguan Democratic Force, led by Adolfo Calero Portocarrero claimed that critics of the mining failed to recognize the importance of disrupting navigation around Nicaraguan ports. Kinzer, *Mining to Continue, Rebel Chief Says*, N.Y. Times, Apr. 12, 1984, at A10, col. 1. "These people do not realize that we are at war. . . . We consider Nicaraguan harbors to be war zones. We assert our right to continue mining Nicaraguan harbors in order to stop the massive flow of Soviet arms which are intended for use in a genocidal campaign against Miskito Indians and Nicaraguan peasants." *Id.* (quoting Adolfo Calero Portocarrero).

191. Kinzer, *Mining to Continue, Rebel Chief Says*, N.Y. Times, Apr. 12, 1984, at A10, col. 1. Use of mines solely to effect a commercial blockade is prohibited by the Hague Convention, *supra* note 2, art. 2.

192. See R. TUCKER, *supra* note 88, at 301. A declaration of a war zone without identifiable parameters is a meaningless exercise, to the extent that it affords neutral shipping no real protection. *Id.* Promptness of notification to neutral governments and shippers is required by the Hague Convention, *supra* note 2, art. 3.

are better established.¹⁹³ There was no war to justify mining in the region.¹⁹⁴ The purpose for the mine laying was not neutral,¹⁹⁵ nor was it belligerent in the sense of sinking the ships of the enemy and its allies.¹⁹⁶ No country or group has in fact claimed credit for the incidents.¹⁹⁷ What is known is that anchored mines were used without notification on an international highway.¹⁹⁸ This usage violates articles 3 and 6 of the Hague Convention, the standard of which applies a fortiori in peacetime.¹⁹⁹ In fact, no peacetime use of mines may be justified other than in the territorial waters of a power, and then only with the notification of innocent international shipping.²⁰⁰

It is apparent that the Red Sea cases are prima facie international wrongs.²⁰¹ No steps were taken to protect innocent shipping and the mining served no discernable political

193. Underwater explosions damaged 18 merchant ships in the Gulf of Suez and the Red Sea between early July and early September of 1984. Miller, *'Minelike' Object Off Egypt Is Linked to Russians*, N.Y. Times, Sept. 25, 1984, at A13, col. 1. Egypt, the United Kingdom, France, Italy, the Netherlands, and the United States cooperated to sweep the waters off Egypt and Saudi Arabia during August and September. *Id.* The British ship H.M.S. *Gavinton* found a mine-like object in the sea-bottom of the northwestern part of the Gulf of Suez, approximately 15 miles south of the exit of the Suez Canal. *Id.*

194. The only belligerency in the region affecting commerce is between Iran and Iraq. See Miller, *Suez Canal Eases Back to Normal*, N.Y. Times, Aug. 18, 1984, at A3, col. 1.

195. Neutral mine laying requires notification to innocent shipping in advance, and, except for the use of unanchored mines in defense of neutral status, occurs only within the territorial waters of a nation. See *supra* notes 75-77 and accompanying text.

196. Since no recognized belligerency exists in the region, no legitimate belligerent use of mines is possible. See *supra* note 194 and accompanying text.

197. See Miller, *'Minelike' Object Off Egypt Is Linked to Russians*, N.Y. Times, Sept. 25, 1984, at A13, col. 1. It was reported that continuing recriminations between Egypt and Libya concerned the probable source of the mine-laying. *Id.* No group has since claimed credit for the incidents.

198. See *id.* The Red Sea and the Gulf of Suez form the approach to the Suez Canal, an international highway of great strategic and commercial value. Because this canal saves ships the 5,000 mile passage around the Cape of Good Hope, allowing the oil resources of the Middle East to reach Europe and America at a substantially reduced cost, the area is heavily trafficked by ships of all nations. Miller, *Suez Canal Eases Back to Normal*, N.Y. Times, Aug. 18, 1984, at A3, col. 1.

199. See *supra* notes 142-46 and accompanying text (discussing the rationale behind this position).

200. See *supra* notes 169-72 and accompanying text (discussing peacetime standards for mine use).

201. Like the mining of the North Corfu Channel in 1946, this mining was a legally indefensible attack on innocent commerce without notification or cause. See *generally* *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Judgment of Apr. 9).

goals.²⁰² Every civilized nation condemned the mining,²⁰³ and several, the United States among them, mounted the international minesweeping effort that produced the incriminating mine.²⁰⁴

The United States at the same time sponsored the mining efforts of Nicaraguan rebels which resulted in demonstrable injury to innocent commerce.²⁰⁵ The United States has accounted for this by offering the justification of self-defense.²⁰⁶ The legal justification of the use of force is important but it is not all: It only justifies the use of those certain kinds of force which are not prohibited by the laws of war.²⁰⁷ While the facts and circumstances of the mining operations are not public knowledge,²⁰⁸ the question has been raised: Was the customary international standard of mine usage observed?

CONCLUSION

The recent lawless use of automatic submarine mines has served to bring to light the importance of international standards in the manner of their use. While existing international law has enjoyed mixed observance, intervening history supports the existence of customary international norms of mine usage. Those norms, drawn from the Hague Convention, are

202. See *supra* note 197 and accompanying text. The only possible political goal to be served by this kind of attack on innocents is the promulgation of terror. See *supra* note 5. Usually terrorist violence against innocents is accompanied by prompt publicity for the terrorist cause. See Jenkins, *supra* note 5, at 16. In the absence of such claims of credit, only the broadest kind of speculation as to motive is possible.

203. This is evidenced by the broad international support of Egyptian minesweeping efforts. See *supra* note 193.

204. See Miller, 'Minelike' Object Off Egypt Is Linked to Russians, N.Y. Times, Sept. 25, 1984, at A13, col. 1.

205. See *supra* notes 11-18 (discussing the available details of United States-sponsored mining of Nicaraguan harbors).

206. President's State of the Union Address, 21 WEEKLY COMP. PRES. DOC. 140, 146 (Feb. 6, 1985). President Reagan stated that United States support of democratic revolutionary groups in Latin America was legally defensible under the UN Charter as self defense. *Id.*

207. See R. TUCKER, *supra* note 88, at 50.

208. Briefings made before the Senate Select Committee on Intelligence are not publicly available. The 1984 report of that Committee does acknowledge a United States role in the mining of Nicaraguan harbors, but gives no details at all concerning the mining. REPORT OF THE SENATE SELECT COMM. ON INTELLIGENCE, S. REP. NO. 665, 98th Cong., 2d Sess. 7 (1984).

still valid today, despite the technological changes in mines and the addition of the war zone to the belligerent's arsenal.

Juden Justice Reed