

## Chapter XII

# Submarine Mines In International Law

by  
Thomas A. Clingan, Jr.\*

The extensive and organized use of explosive submarine mines is primarily a creature of the twentieth century, although more primitive devices date back to far earlier times. During the Russo-Japanese war of 1904-1905, the establishment of a Russian minefield outside Port Arthur generated much criticism.<sup>1</sup> It was this outcry that led to the negotiation of the Hague Convention (VIII) of 1907 Relative to the Laying of Automatic Submarine Mines.<sup>2</sup> Since that time, both the pattern of usage of submarine mines, and the technology involved, have changed, and these changes have raised issues concerning the state of international law on this subject. The question is whether evolution in mine warfare technology requires modification of traditional rules of international law, and, if so, what changes are required?

There has always been an internal tension inherent in the law of mine warfare. Two important underlying principles are at stake. On the one hand, the doctrine of the freedom of navigation is one of the hoariest and most fundamental in the law of the sea. On the other, the long-recognized principle of self-defense has great force. The international law of mine warfare brings into play an attempt, under varying circumstances, to balance these fundamental norms. In seeking to strike an appropriate balance, many different factors and elements must be taken into consideration. In various situations, certain elements, such as the existence of a state of war, the nature of the interests of the mining state, the location of the proposed mining, and the type or category of mine involved, among others, play a role.

*The Commander's Handbook on the Law of Naval Warfare* (NWP 9)<sup>3</sup> initiates its discussion of naval mines with the following statement: "The general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines."<sup>4</sup> In examining this statement, one must first note that the Hague Convention deals with the use of mines by belligerents, which traditionally meant in time of war. In order to accept the Hague Convention as a guide to the employment of mines, it is necessary first to do away with the argument that since the Charter of the United Nations has "done away" with aggressive warfare as a legal concept, there no longer exist such corollary concepts as "belligerency" and "neutrality."

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If one were to accept this neat theory, then the Convention, being contrary to the spirit of the Charter, could not be a legal basis for the employment of submarine mines. Advocates of this position have argued that reference must be made, to support the Convention's rules, to humanitarian law<sup>5</sup> or to reliance upon the right of self-defense authorized by the Charter.<sup>6</sup>

To my mind, the argument is specious and could bring about undesirable consequences. To argue that war no longer exists flies in the face of reality. Armed conflict continues, though not on the scale of the two World Wars. One would have to be blind to the facts, indeed, to claim that the Charter has in fact eliminated war in the sense of the use of armed force, or to paper over the issue by calling war by a different name.

It must also be recognized that not permitting the rules of war for regulating conduct in "in-between" situations such as conflict involving a limited use of force would, in most cases, result either in formal declarations of war before such concepts as blockade or limitations on mine warfare could be called into play, or the acceptance of unregulated violence. This idea is inconsistent with the entire theory of the humanitarian law of armed conflict, whose principles are applicable irrespective of whether a formal state of war exists or the "rightness" or "wrongness" of the parties to the conflict.<sup>7</sup> This is clearly not a desirable outcome. Thus, Thorpe<sup>8</sup> has noted that a consequence of this position is that no assistance can be derived from these older rules at times when operational commanders most need that assistance. He says, "It is very important to remember that the actual practice of states, if generally accepted or even tolerated, is a most potent force in shaping the law, and in the twilight area between the traditional concept of peace and war it is clearly sensible to draw assistance where one can from the traditional law of war, and this, I suggest, states have done."<sup>9</sup> This is compelling reasoning.

Thorpe gives some examples of the state practice to which he refers. These examples demonstrate that in certain special situations, particularly those that involve some aspects of national security, the international community has not objected to interferences with the use of the high seas.

Thorpe's first example is the case of the *West Breeze*. This ship, a British merchantman, was stopped on the high seas en route to Casablanca by a French warship. The French believed she carried arms and contraband for Algerian rebels. When stopped and searched, she was within a 32-mile security zone that the French had established off the Algerian coast. After being searched, with no contraband discovered, the vessel was permitted to proceed on its way.<sup>10</sup> Thorpe's second example, more familiar to us all, was the interdiction of offensive weapons destined for Cuba in 1962.<sup>11</sup>

Each of the examples illustrates an interference with the freedom of the high seas, and in both instances the objective was the protection of the security of the state carrying out an act which otherwise would be in violation of international law.<sup>12</sup> In the Algerian situation, it is clear that the boarding and

searching of the British vessel in peacetime would have been contrary to international law. The right of a warship to visit and search is a right confined, on the high seas, to belligerents. In the Cuban interdiction, normally referred to as "quarantine," the activities undertaken by the U.S. Navy resembled, but were not identical to, a blockade. The right of blockade, like the right of visit, is a right of a belligerent. In this regard, they both are similar to the right to lay mines. That the activity was conducted in a limited way is suggestive of application of the laws of war. Thorpe's point, therefore, is that state practice continues to support the application of the laws of war, and thus it is legitimate to say that the Hague Convention remains a valid set of guidelines with respect to the employment of mines, unless it can be shown that these rules do not adequately serve the newer technologies that have been developed.

There is no doubt that the Hague rules were developed to be utilized in time of war.<sup>13</sup> These rules do not render the use of naval mines illegal. Rather, they provide for certain restrictions for the purpose of protecting neutral shipping. While regarding mining as legal in proper circumstances, one must be mindful of the provisions of other relevant conventions. For example, Additional Protocol 1 to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts prohibits weapons "of a nature to cause superfluous injury or unnecessary suffering."<sup>14</sup> Given that this Protocol comes some 70 years after the Hague Convention, and taking account of the state practice and attitudes of maritime states in the interim, it can hardly be argued that the Protocol was aimed at mines. The Hague rules themselves were designed to limit the effect of mines on neutral shipping. Likewise, the similar language used in Hague Convention No. IV of 1907 Respecting the Laws and Customs of War on Land<sup>15</sup> should not be viewed as limiting the Hague rules regarding mines. As was argued above, state practice seems to support the principle that the rules have certain applicability in conditions short of formal war, such as periods of high tensions, where the need to protect neutral shipping is just as strong as in wartime. Accordingly, I shall examine first what the rules provide for in wartime, and then move to questions of restrictions during peacetime and periods of high tension or undeclared hostilities, such as the Vietnam conflict. It will be necessary, in each case, to address the question of the impact of new technologies, today and in the future, on the application of rules structured to deal with mines as they were known at the time the Convention was negotiated.

To begin with, the Hague rules do not by their terms differentiate between various zones of the oceans, except that article 2 proscribes the laying of "automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."<sup>16</sup> Obviously, the qualification contained in that phrase creates a yawning loophole in the prohibition, since

it could easily be circumvented by arguing that the mines were laid for another purpose, *e.g.*, a legitimate blockade. Thus, belligerents have the right to lay mines in their own territorial seas and internal waters, and in many instances in those of the enemy. While the Convention does not expressly refer to the high seas, and thus mines may also be sown there, a reasonable inference is that such laying should not be done indiscriminately and should be restricted to reasonably limited areas. Article 3 requires “every possible precaution” to protect peaceful shipping and, when the minefield is no longer under surveillance, notification of the danger zones as soon as military exigencies permit.<sup>17</sup> Neutral powers are permitted to mine their own waters<sup>18</sup> and, by implication, belligerents may not do so because such mining would be a violation of the neutral’s sovereignty. The Convention applies to anchored automatic contact mines, and also to unanchored contact mines, which are prohibited except when constructed to become harmless one hour at most after control is lost over them.<sup>19</sup> Anchored mines must also become harmless if they should break their moorings.<sup>20</sup>

How should these rules be interpreted with respect to more modern devices not envisaged at the time they were adopted? The principles they embody give us some guidance.

As previously noted, the Hague rules were not designed to prohibit mines as a weapon, but rather to place limitations upon their use that relate to maintaining control over them to protect neutral shipping. This is implicit in rules requiring anchored mines to neutralize themselves should they break loose from their moorings, rules prohibiting unanchored mines that do not neutralize within an hour, rules requiring belligerents to do their utmost to remove mines at the cessation of hostilities,<sup>21</sup> and rules regarding notice. Thus it can be inferred that new, high technology mines should be acceptable if they satisfy the same objectives. New weapons that are under an acceptable level of control by the party laying them, or which do not threaten neutral surface shipping, would seem to be acceptable. One such weapon referred to by Thorpe is the continental-shelf mine. He notes that this mine will be a “short tethered rocket-propelled warhead” that is designed to be remotely activated by acoustic link telemetry.<sup>22</sup> Given the degree of control over this device, it is likely that its use would not create the kind of hazards which the Hague rules were conceived to prevent. Since these mines would likely be deployed beyond the territorial sea, however, the proscriptions requiring localization and notice would seem to be applicable.

But should one speculate that it is possible that these rocket-propelled devices could be deployed with nuclear capability, then I believe the conclusion should be otherwise. This prospect raises the question whether such devices would be prohibited by the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and Subsoil Thereof.<sup>23</sup> While it could

be argued that tethered mines are not "emplaced" on the ocean floor, that argument is transparently thin. A nuclear-tipped continental-shelf mine clearly violates the spirit if not the letter of that treaty. Nor does it help the issue much to argue that since these rockets might be directed only at belligerent submarines, and thus pose little if any risk to surface shipping, they are not precluded. By the better logic, keeping in mind the probable reaction of neutrals to the emplacement of such weapons, the Hague rules seem to exclude them from use. Other conceivable new technologies could be examined along similar lines.

Are the same rules applicable in peacetime? In examining this question, it is necessary to distinguish between time of unquestioned peace, that is, the complete lack of hostilities in the area, and time of peace in which there are nonetheless existing hostilities. This is the situation that obtains in an "undeclared war" where the rules of belligerency and neutrality do not apply, at least in the formal sense. Some insight can be gained in this latter category by examining the *Corfu Channel Case*<sup>24</sup> decided by the International Court of Justice in 1949. It can be recalled that the major issue in that case was whether 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. The court held in the affirmative. But a second issue arose as a result of the fact that at one point two British destroyers struck mines in the Albanian portion of the channel causing considerable damage and loss of life. The Court agreed with the British contention that Albania was responsible. It held that this responsibility rested on the basis of elementary principles of humanity, and the principle that every state has an obligation not knowingly to permit acts in its territory contrary to the rights of other states. The holding, therefore, recognized a customary international law right to mine one's own territorial sea, but also a duty to notify of the presence and location of those mines.

Rules concerning the peaceful uses of the oceans are governed by treaty law. Both the Geneva Conventions of 1958<sup>25</sup> and the 1982 U.N. Convention on the Law of the Sea<sup>26</sup> address such questions. Although the 1982 treaty is not yet in force,<sup>27</sup> there are relevant provisions representing at least emerging rules of customary international law prior to the Convention's entry into force.

What are the implications of its provisions with respect to the question of peacetime mining of the territorial sea? Article 17 accords the right of innocent passage to all vessels navigating in the territorial sea.<sup>28</sup> Article 24 proscribes the coastal state from hampering that right. Initially, then, one might argue that emplacement of mines in the territorial sea by the coastal State would hamper the right of innocent passage. However, article 25 makes it clear that the coastal State may suspend that right for reasons of security,

at least temporarily, in specified areas of its territorial sea. It would thus seem that mines could be laid in such areas or other areas in which there might be no substantial vessel traffic. Article 24(2) places an obligation on the coastal state to give appropriate publicity to any danger to navigation. Furthermore, article 22 permits a coastal state, for safety of navigation, to restrict passage of foreign vessels to certain specified sea lanes or traffic separation schemes. Reading these together, it would appear that a coastal state in peacetime could mine its territorial sea, provided that the notice required by article 24 is given. Limiting passage to safe areas and times would hardly be considered "hampering" the general right of innocent passage in such circumstances, because that term means actions of a coastal state that would discriminate among foreign ships, or restrict vessels in the territorial sea that would virtually deprive them of their legal right to innocent passage. It does not proscribe reasonable regulation.

Article 38 of the treaty, in what some believe to be new law, provides for the right of transit passage for vessels passing through straits used for international navigation. This right, unlike innocent passage, is not suspendable. Like innocent passage, however, littoral states must give publicity to known dangers.<sup>29</sup> Because these passageways are sometimes only a mile or less wide, and because they often are vital waterways for international trade and military use, it is more than likely that any attempt to mine them would meet with instant protests from major maritime nations. I would conclude, therefore, that mining of international straits in peacetime would not be acceptable under customary rules. The same would hold true for routes designated as archipelagic sea lanes, subject to archipelagic sea lanes passage.<sup>30</sup>

It would seem difficult, in general, to justify the laying of mines on the high seas, beyond national jurisdiction, absent some strong showing that would engage a coastal state's traditional right to defend itself. In peacetime, a claim of self-defense justifying such a strong measure would be difficult to demonstrate. Again, laying of high seas mines would most likely be viewed by maritime states as an unreasonable interference with the freedom of navigation on the high seas guaranteed by article 87. The navigation rights contained in that article are incorporated into the exclusive economic zone rules by a cross-reference in article 58, while the rights of the coastal State in that zone are limited by article 56 to those that are essentially economic in nature. Thus the rules in the EEZ should be the same, as regards peacetime minelaying, as for the high seas beyond. This conclusion is reinforced by article 88, also applicable in the EEZ, which specifies that the high seas are reserved for peaceful purposes.<sup>31</sup> Finally, attention should be called to article 300, that calls upon all state parties to the Convention to exercise their rights, freedoms, and jurisdiction in a manner that would not amount to an abuse of rights. It would seem that mining other than in restricted areas of the

territorial sea in peacetime would raise that issue.<sup>32</sup> Arguably, however, the emplacement of such weapons as the continental-shelf mine, previously referred to, in the high seas or the EEZ might be distinguished on the grounds that they are controlled and inert until activated, thus posing no threat to surface shipping. Technically, these devices are not mines at all while inert, and thus their emplacement in peacetime would not be proscribed, nor would notice of that emplacement be required. Such emplacement arguably could be justified on the ground referred to by Myers McDougal as a "preparation for self-defense."<sup>33</sup>

Returning once again to the special "peacetime" situation where tensions or even hostilities not amounting to a formal war exist in an area, the question is whether a different set of rules do or ought to apply.<sup>34</sup> The most recent and classic example of this situation was the Viet Nam "war." During that conflict the United States mined Haiphong Harbor. Thorpe calls this "the most interesting [mining] case since 1945."<sup>35</sup> Mining of the harbor was first considered in 1968, but was rejected on the grounds that there was in fact no great military need to cut off military supplies flowing from the Soviet Union to North Viet Nam. At the time, the Director of the International Law Division, U.S. Navy Office of the Judge Advocate General, said: "If a legal state of war existed between the United States and North Vietnam we could immediately blockade the port of Hai-phong as a belligerent right of warfare. Without a state of war such a blockade would be of doubtful legality. A similar analysis could be made with respect to mining harbors, contraband, neutrality, and the right of visit and search on the high seas."<sup>36</sup> Note that this statement seems to rest on the traditional notions of war and peace. But by 1972, conditions had changed considerably. A major North Vietnamese offensive had been mounted and it was now necessary for purposes of military defense to stem the flow of Soviet weapons to the south. Thorpe describes the situation as follows:

The solution to the tactical problems of the mining had to allow the objectives to be achieved without unnecessary risk to international shipping. If Hague Convention No. VIII applied to unmoored influence mines and if instant notification was required, the mine-laying aircraft in subsequent waves would be at risk. In fact the decision was taken to lay in the internal waters and territorial seas of North Vietnam inactive mines that would become active after a period of 3 days, and give warning to all shipping once the aircraft had all returned. Of the 36 ships in harbor at Hai-Phong at the time of the announcement over one-quarter were under way within 3 hr. No ships were lost, the traffic to and from Hai-Phong was effectively disrupted and, of course, the departures from Vietnam and the release of prisoners of war followed shortly thereafter. The mining was justified and reported in accordance with Article 51 of the UN Charter by the U.S.A. as an exercise of the right of self-defense in view of the attack against South Vietnam and the need to protect the 60,000 remaining U.S. Troops.<sup>37</sup>

What was the reaction of the international community? Very little. In a letter from the representative of the U.S.S.R. to the President of the Security Council, the Soviets protested the mining, saying that the U.S. action was

a violation of the freedom of the high seas (even though the mines were in internal waters and the territorial sea), and rejected the U.S. claim of self-defense. The letter stated "that no aggression has been committed against the United States. On the contrary, the United States itself is acting as an aggressor in Viet-Nam."<sup>38</sup> A similar letter was submitted by the People's Republic of China.<sup>39</sup> Neither protest made any mention whatsoever of the Hague Convention or the customary law of mine warfare.

Reference again should be made to the analogous use of the belligerent right of blockade. As previously noted, the Cuban quarantine was not a traditional blockade because it did not fulfill the formal requirements. Nor was there a state of war in existence between the United States and Cuba. That event represents a modified rule of blockade responsive to and justified by the needs of the situation at the time. The justification was on the ground of collective self-defense under the Rio Pact of 1947. The widespread support among members of the Organization of American States supplied the necessary *opinio juris*. One commentator noted that "the Cuban situation illustrates that where the circumstances are right, a state will insist, even in a peacetime situation, to what was traditionally known as a belligerent right. The question today really is not a purely legal one, and it never really was."<sup>40</sup> Dean Acheson went further in a comment to the American Society of International Law, when he said: "I must conclude that the propriety of the Cuban quarantine is not a legal issue. . . . No law can destroy the state creating the law. The survival of states is not a matter of law."<sup>41</sup> To me, however, basing the quarantine on raw power, and not the law, is a most dangerous proposition.

The foregoing examples indicate a growing state practice embodying some of the rules regarding the law of war in a situation short of war. These examples are buttressed by the ruling of the International Court of Justice in the Nicaragua Case.<sup>42</sup> In that case, the Court found that on a date late in 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984, mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay of that agency. It found that at no time did the United States issue any public warning to international shipping of the existence and location of the mines. It found further that personal and material injury was caused by the explosion of the mines. The Court decided that by laying these mines, the United States acted in breach of its obligations under customary international law not to use force against another state, not to intervene in its affairs, not to violate its sovereignty, and not to interrupt peaceful maritime commerce. While the holding does not deal with the law of mine warfare as discussed here, a plea of self-defense was rejected. Clearly, even under the Hague rules, such mining cannot be defended.



Before concluding this commentary, some attention should be devoted to the operations that have recently taken place in the Persian Gulf. The author is not privy to any facts not appearing in the public media, so the underlying assumption is that they are fairly reported, which may indeed not be the case. The reflagging by the U.S. of eleven Kuwaiti tankers brought about a number of responses from Iran, including the indiscriminate laying of mines in various areas of the Persian Gulf. Assuming that some, if not most, of these areas lie outside of anyone's territorial sea, did Iran have the right to lay these mines under the rules that we have examined? First of all, the activities under examination took place during a limited conflict. This introduces more vividly the element of self-defense. But the question is whether Iran's targeting of shipping owned by a neighboring, but only arguably neutral, state under the flag of a noncombatant can be supported by the concept of self-defense. The answer depends upon how one views that traditional international right. Professor Jack Grunawalt of the Naval War College views self-defense as broader than traditional approaches would have us believe. It is his contention that the experiences of the two World Wars demonstrate that much of the law of neutrality has been ignored, and that in time of war, one of the weapons utilized was the all-out attack on the movement of goods to and from a belligerent, whether carried in neutral hulls or not. The objective was to destroy the enemy's economic capacity to maintain the war. If one perceives the destruction of Iraqi oil (or that of its supporters) in the same light, the argument can be made on Iran's behalf in the Persian Gulf. In reference to the Persian Gulf, Professor Grunawalt has said: "I would suggest to you that the law ought to recognize that neutral shipping that sustains a belligerent's warfighting capability may be subject to interdiction by whatever platforms and weapons system are available to the other side to accomplish that purpose. I would also suggest that the modern law of neutrality, as reflected in the customary practice of nations in this century, does in fact support that result."<sup>43</sup> Given the prior analysis of the mining of Haiphong harbor by the United States, it would appear that his argument has a basis in practice, and, if properly carried out, is acceptable to most maritime powers. I must confess that, while I am drawn to the logic of the argument, I am deeply concerned that if carried to extremes it could destroy the very concept of neutrality and in large part the freedom of the seas. No ship, no cargo would be safe in an area of conflict. But even if the premise is accepted, the differences between the existing situation and that in Viet Nam are notable in the manner in which the mining was carried out. As we have previously noted, mining beyond the limits of national jurisdiction can be supported where there is a legitimate national security objective. Even then, the rules regarding localization and notification must be followed, as they were in Haiphong. Thus the indiscriminate, non-notified mining by Iran cannot be found to be

within the rules. Whether the U.S. response in attacking and sinking the mine-laying vessel is within the bounds of reasonable response is a separate issue.

In conclusion, a good argument can be made that the Hague Convention rules continue to be viable in this age of new technology, that they provide reasonable rules of conduct, and that these rules seem to be recognized and followed. Thus the rules remain good guidelines for the operational commander, and the *Handbook* under discussion correctly sets them forth for the purpose.

## Notes

\* Professor of Law, University of Miami

1. H.A. Smith, *The Law and Custom of the Sea*, 3d ed. (London: Stevens & Sons Limited, 1959), p. 119.
2. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, *U.S. Statutes at Large*, v. 36, p. 2332, Treaty Series No. 541 [hereinafter Hague VIII].
3. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987) [hereinafter the *Commander's Handbook*].
4. *Id.*, par. 9.2.
5. Humanitarian principles have been used to require notification of mining apart from the Hague Convention. In the *Corsu Channel Case*, the Court referred to the obligation on Albania to notify of the existence of mines, saying, "Such obligations are based not on the Hague Convention No. VIII of 1907 which is applicable in time of war but to 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." Hague, International Court of Justice, *Corsu Channel Case* ([The Hague]: The Court, 1949), v. 4.
6. Article 51 of the United Nations Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." Professor Janis, in commenting, notes that "concomitant with Article 51's right to self-defense is Article 2(4)'s prohibition against 'the threat or use of force against the territorial integrity or political independence of any state.'" Mark W. Janis, *An Introduction to International Law* (Boston: Little Brown, 1988), p. 124; see also, Janis, "Neutrality," Chapter VI herein.
7. See, for example, common Article 2 of the four 1949 Geneva Conventions. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, *United States Treaties and Other International Agreements* [hereinafter U.S.T.] v. 6, p. 3114, T.I.A.S. No. 3362; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, U.S.T., v. 6, p. 3217, T.I.A.S. No. 3363; Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, U.S.T., v. 6, p. 3316, T.I.A.S. No. 3364; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, U.S.T., v. 6, p. 3516, T.I.A.S. No. 3365. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, art. 1, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, v. 1, p. 115, reproduced in Dietrich Shindler & J. Toman (eds.), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 621 (hereinafter Additional Protocol I).
8. A.G.Y. Thorpe, "Mine Warfare at Sea - Some Legal Aspects for the Future," *Ocean Development and International Law*, v. 18, p. 255 at p. 256 (1987).
9. *Id.*, p. 257.
10. See, Anna Van Zwanenberg, "Interference with Ships on the High Seas," *International and Comparative Law Quarterly*, v. 10, p. 785 at p. 791 (1961).
11. For details, see, Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off. 1963), v. 4, pp. 523-24.
12. Article 22 of the Geneva Convention of the High Seas prohibits boarding a foreign merchant ship on the high seas unless there is reasonable ground for suspecting that the ship is engaged in piracy or the slave trade, or is of the same nationality as the boarding ship though showing a different flag. Convention on the High Seas, April 29, 1958, U.S.T. v. 13, p. 2312, T.I.A.S. No. 5200.

13. The Hague Convention applies to belligerents. Article 7 states that "The provisions of the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention." Hague VIII, *supra* note 2.

14. Additional Protocol I, *supra* note 7, art. 35, para. 2.

15. Convention (IV) Respecting Laws and Customs of War on Land, Regulations Annex, Oct. 18, 1907, art. 23(e), *U.S. Statutes at Large*, v. 36, p. 2227, Malloy, v. 2, p. 2269.

16. Hague VIII, *supra* note 2, art. 2.

17. *Id.*, art. 3, second paragraph.

18. *Id.*, art. 4.

19. *Id.*, art. 1 (1).

20. *Id.*, art. 1 (2).

21. *Id.*, art. 5.

22. He elaborates: "Modern technology allows for the possibility of interrogating the weapon remotely to ascertain its state of arming. If the weapon breaks loose, it will become sterilized. The mine will have sensors that could have discriminatory devices built in. The remote arming devices have a high reliability factor that transforms the mine into a highly discriminatory weapon, and, if designated as an antisubmarine warfare weapon, will pose no dangers to nonbelligerent surface shipping." Thorpe, *supra* note 8, pp. 263-264.

23. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor in the Subsoil Thereof, Feb. 11, 1971, U.S.T. v. 23, p. 701, T.I.A.S. No. 7337.

24. Hague, International Court of Justice, *Corfu Channel Case* ([The Hague]: The Court, 1949), v. 4.

25. Primarily, the Convention on the High Seas, April 29, 1958, U.S.T. v. 13, p. 2312, T.I.A.S. No. 5200.

26. United Nations Conference on the Law of the Sea, 3d, United Nations Convention on the Law of the Sea, A/CONF. 62/122 (n.p.: 1982) [hereinafter LOS Convention].

27. At the time of writing, 42 ratifications of the needed 60 have been filed. It should not be overlooked, however, that some of the provisions of the treaty represent rules of customary international law and thus may have binding force on that ground.

28. This right is defined in article 19 of the LOS Convention, *supra* note 26, as passage which is not prejudicial to the peace, good order, or security of the coastal State. The article specifies a number of activities which could bring the innocence of a vessel's passage into question.

29. LOS Convention, *supra* note 26, art. 44.

30. See LOS Convention, *supra* note 26, Part IV.

31. This expression is a term of art, which does not preclude all military activities.

32. Article 301, LOS Convention, *supra* note 26, requires states to refrain from any threat or use of force in any manner incompatible with international law. It would seem that mining might engage this provision, as well, except in legitimate cases of self-defense.

33. Editorial Comment, Myres McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," *American Journal of International Law*, v. 49, p. 356 at p. 361 (1955).

34. See, generally, William O. Miller, "Belligerency and Limited War," in Richard B. Lillich and John Norton Moore, eds., *U.S. Naval War College International Law Studies*, Volume 62, *The Use of Force, Human Rights and General International Legal Issues* (Newport, Rhode Island: Naval War College Press, 1980), v. 62, p. 164. Miller stresses the problems relating to classifying activities in strict categories of "war" and "peace."

35. Thorpe, *supra* note 8, p. 269.

36. Geoffrey E. Carlisle, "The Interrelationship of International Law and U.S. Naval Operations in Southeast Asia," *JAG Journal*, v. 22, p. 8 at pp. 11-12 (1967).

37. Thorpe, *supra* note 8, p. 270.

38. Letter dated 11 May 1972, Doc. S/10643. United Nations, Security Council, *Official Records: Security Council*, 27th Year, Special Supplement No. 1 (New York: 1972), p. 55.

39. Letter dated 12 May 1972, Doc. S/10644, *id.*, pp. 55-56.

40. William O. Miller, "Law of Naval Warfare," in Lillich & Moore, *supra* note 34, p. 263 at p. 269.

41. Quoted in Miller, *supra* note 34, pp. 170-171.

42. The judgment in the case of "Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)" can be found in: Hague, *International Court of Justice Yearbook 1985-1986* ([The Hague]: The Court, 1987), pp. 142-160.

43. Richard Grunawalt, "The Rights of Neutrals and Belligerents," Council on Ocean Law and The Law of the Sea Institute, *Transcript of an Evening Panel Discussion on the Persian/Arabian Gulf Tanker War: International Law or International Chaos*, January 26, 1988.