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Russia-Ukraine Conflict: The War at Sea

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

On February 21, 2022, Russian President Vladimir Putin recognized the independence of the two breakaway regions in eastern Ukraine—the Luhansk and Donetsk People’s Republics—and ordered troops into the region to carry out “peacekeeping operations.”¹ The following day, Moscow recognized the separatists’ claims to the entire Donbass region, setting the stage for Russia’s full-scale invasion of Ukraine on February 24, 2022, by land, sea, and air forces.² Over one hundred missiles were initially fired at targets in Ukraine from land-based platforms and warships, followed by ground assaults along three main axes—“in the north, from Belarus down towards Kyiv; in the east, from western Russia down towards Kharkiv; and in the south, from Crimea up to Kherson.”³

The Russian invasion was immediately condemned by the international community. By a vote of 141 countries in favor, 5 against, and 35 abstentions, the United Nations (UN) General Assembly adopted a resolution on March 2, 2022, demanding Russia

immediately cease its use of force against Ukraine and . . . refrain from any further unlawful threat or use of force against any Member State . . . [and] . . . immediately, completely, and unconditionally withdraw all . . . its military forces from the territory of Ukraine within its internationally recognized borders.⁴

Two weeks later, on March 16, the International Court of Justice indicated provisional measures against Russia by a vote of thirteen to two in order to, *inter alia*, “immediately suspend the military operations that it commenced on 24 February 2022 in the territory of the Ukraine.”⁵ And, on

1. *Russia-Ukraine Tensions: Putin Orders Troops to Separatist Regions and Recognizes Their Independence*, NEW YORK TIMES (Mar. 30, 2022), <https://www.nytimes.com/live/2022/02/21/world/ukraine-russia-putin-biden>.

2. Victor Jack & Douglas Busvine, *Putin Recognizes Separatist Claims to Ukraine’s Entire Donbass Region*, POLITICO (Feb. 22, 2022), <https://www.politico.eu/article/vladimir-putin-russia-ukraine-donbass-separatist-recognition/>.

3. Eleanor Watson, *100 Days of War in Ukraine: A Timeline*, CBS NEWS (June 3, 2022), <https://www.cbsnews.com/news/ukraine-russia-war-timeline-100-days/>.

4. G.A. Res. ES-11/1, ¶¶ 3–4 (Mar. 18, 2022).

5. *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Order, ¶ 86(1) (Mar. 16, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

March 24, the General Assembly reiterated the need for Russia to comply with Resolution ES-11/1, demanding that Russia immediately cease all hostilities against Ukraine.⁶

Moscow's renewed aggression against Ukraine comes eight years after Russia illegally invaded, annexed, and occupied Crimea in February 2014.⁷ Russia's invasion of the peninsula was clearly a violation of Article 2(3) and 2(4) of the UN Charter,⁸ which was condemned by the UN General Assembly on March 27, 2014.⁹ Many nations, including the United States¹⁰ and member States of the European Union,¹¹ view Moscow's invasion and ongoing occupation of Crimea as a violation of international law. The Council of Europe further determined that the outcome of the subsequent referendum organized by Moscow in Crimea and Russia's illegal annexation of Crimea in March 2014 have no legal effect.¹²

Both acts of Russian aggression in 2014 and 2022 contravene not only the UN Charter but also the 1994 Budapest Memorandum, in which Russia specifically pledged to respect the "independence and sovereignty and the

6. G.A. Res. ES-11/2, ¶¶ 1–2 (Mar. 28, 2022).

7. Harry Kamian, U.S. Chargé d'Affaires to the OSCE Permanent Council, *Five Years of Illegal Occupation of the Autonomous Republic of Crimea by Russia* (Feb. 28, 2019), <https://osce.usmission.gov/illegal-occupation-of-crimea-by-russia/>.

8. U.N. Charter art. 2(3)–(4) ("3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

9. G.A. Res. 68/262 (Apr. 1, 2014) ("2. Calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means").

10. White House, Statement by President Biden on the Anniversary of Russia's Illegal Invasion of Ukraine (Feb. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/26/statement-by-president-biden-on-the-anniversary-of-russias-illegal-invasion-of-ukraine/>.

11. Press Release, Council of the European Union, Ukraine: Declaration by the High Representative on Behalf of the European Union on the Illegal Annexation of Crimea and Sevastopol (Feb. 25, 2021), https://www.consilium.europa.eu/en/press/press-releases/2021/02/25/ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-illegal-annexation-of-crimea-and-sevastopol/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Ukraine%3a+Declaration+by+the+High+Representative+on+behalf+of+the+European+Union+on+the+illegal+annexation+of+Crimea+and+Sevastopol.

12. Council of Europe Res. 1988, ¶ 16 (Apr. 9, 2014), <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=20873&lang=en>.

existing borders of Ukraine.”¹³ The memorandum also requires Russia to refrain from the “threat or use of force against the territorial integrity or political independence” of Ukraine.¹⁴

Although much has been written about the Russia-Ukraine conflict, most writings have focused on land warfare. This article explores the conflict at sea, discussing the law of naval warfare as it applies to war zones and immediate control of the area of operations, access to the Black Sea, use of naval mines, naval bombardment, cyber operations at sea, targeting and seizure of merchant vessels, humanitarian corridors, use of unmanned maritime systems, and neutrality. The article will begin by discussing a series of events at sea that preceded the Russian invasion, including the Kerch Strait incidents and interference with freedom of navigation in the Black Sea.

II. PRELUDE TO WAR

A. Kerch Strait Incident

In 1985, the Soviet Council of Ministers approved straight baselines along Russia’s coast in the Black Sea. Baseline segment 35–36 of Declaration 4450 closed the Kerch Strait at the mouth of the Sea of Azov, effectively claiming the sea as internal waters (a historic bay) of the Soviet Union.¹⁵ Nevertheless, following the collapse of the Soviet Union in 1991, the Sea of Azov ceased to be bordered by a single State and could no longer be considered internal waters under international law. The 220-mile-long, 110-mile-wide, sea is now comprised of the territorial seas and exclusive economic zones (EEZ) of Russia and Ukraine.¹⁶

Completely overlapped by the Ukrainian and Russian territorial seas, the Kerch Strait connects two areas of EEZs in the Black Sea and the Sea of

13. Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons ¶ 1, Dec. 5, 1994, 3007 U.N.T.S. 167.

14. *Id.* ¶ 2.

15. U.S. DEP’T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 109, CONTINENTAL SHELF BOUNDARY: TURKEY-USSR AND STRAIGHT BASELINES: U.S.S.R. 8–9, app. 3 (Sept. 29, 1988).

16. *Sea of Azov*, WORLD ATLAS (Mar. 22, 2021), <https://www.worldatlas.com/seas/sea-of-azov.html>.

Azov. It is used extensively by ships of numerous nations engaged in international trade, logging nearly thirty thousand transits in 2020.¹⁷ The strait therefore meets both the geographic and functional criteria of a strait used for international navigation under Part III of UNCLOS, where the unimpeded right of transit passage applies.¹⁸ Accordingly, passage of foreign-flagged shipping through the strait cannot be hampered or suspended by Russia or Ukraine for any purpose during peacetime, nor for neutral shipping during an international armed conflict.¹⁹

Despite being parties to UNCLOS, a 2003 bilateral agreement between Russia and Ukraine purports to limit navigation through the strait inconsistent with Part III of the convention. Article 2 of the agreement provides that Russian and Ukrainian-flagged merchant and government ships “enjoy freedom of navigation in the Sea of Azov and Kerch Strait.”²⁰ The same transit rights apply to foreign-flagged merchant vessels going to or returning from a Russian or Ukrainian port.²¹ Foreign-flagged warships and other government, noncommercial vessels, however, may transit the strait and enter the Sea of Azov only if invited by Russia or Ukraine or by mutual agreement of both States.²²

Authority to regulate foreign warship transit rights appears to be based on Article 1 of the 2003 agreement, which suggests that Russia and Ukraine

17. Rosmorport Federal State Unitary Enterprise, *VTS Service*, https://www.rosmorport.com/filials/nvr_serv_nav/#coverage_kerch (last visited Feb. 27, 2023) (scroll down to ¶ 4, VTS of the Kerch Strait table).

18. United Nations Convention on the Law of the Sea arts. 37–38, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

19. *Id.* arts. 42, 44.

20. Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait art. 2, Dec. 24, 2003, www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien-valentin/agreement-sea-of-azov (unofficial translation) [hereinafter 2003 Sea of Azov/Kerch Strait Agreement]; Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, *reprinted in* U.N. Division for Ocean Affairs and Law of the Sea, *LAW OF THE SEA BULLETIN* NO. 54, at 131 (2004).

21. 2003 Sea of Azov/Kerch Strait Agreement, *supra* note 20, art. 2.

22. *Id.* art. 3.

consider the Sea of Azov and Kerch Strait to be internal waters.²³ Nonetheless, both Ukraine²⁴ and the European Union,²⁵ two of the principal users of the strait, have indicated that ships (including warships) of all nations enjoy the right of transit passage in the Kerch Strait. Moreover, Ukraine specifically denies that it had treated the Kerch Strait and Sea of Azov as common internal waters either before or after execution of the 2003 agreement. Rather, Ukraine asserts that it has applied the regime of transit passage to the strait, as reflected in 2001 and 2002 *notes verbales*.²⁶

By annexing the Crimean Peninsula in 2014, Russia solidified its control of the approaches to the Kerch Strait. Despite Ukrainian protests, Russia constructed a bridge across the strait between 2016 and 2018 to connect mainland Russia with the Crimea. The dimensions of the bridge limit the size of ships that can transit the strait to an air draft of less than 33 meters and a length of less than 160 meters, thereby impeding navigation in violation of the 2003 agreement, as well as the right of transit passage reflected in UNCLOS.²⁷ Prior to construction of the Kerch Strait bridge, Panamax-class vessels accounted for over 20 percent of ship traffic through the waterway, but these ships no longer can make the transit.²⁸

Accordingly, in September 2016, Ukraine instituted arbitration proceedings against Russia with the Permanent Court of Arbitration, under Article 287 and Annex 7, Article 1 of UNCLOS, concerning coastal-State rights in the Black Sea, Sea of Azov, and Kerch Strait. Ukraine requested, *inter alia*, that the arbitral tribunal adjudge that:

f. Ukraine has the right to passage through the Kerch Strait; any restrictions placed by the Russian Federation on Ukrainian transit through the Kerch Strait are not compatible with UNCLOS;

g. The Russian Federation shall cooperate with Ukraine in the regulation of the Kerch Strait, including pilotage along the canal in the Kerch

23. *Id.* art. 1.

24. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, ¶¶ 17.m, 18.f, 242 (Perm. Ct. Arb. Feb. 21, 2020), <https://pcacases.com/web/sendAttach/9272> [hereinafter Ukr. v. Russ., Case No. 2017-06].

25. European Parliament Res. of Oct. 25, 2018 on the Situation in the Sea of Azov, ¶ G.3, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0435_EN.pdf.

26. Ukr. v. Russ., Case No. 2017-06, *supra* note 24, ¶ 242.

27. Press Statement, Heather Nauert, Spokesperson for the U.S. Dep't of State, The Opening of the Kerch Bridge in Crimea (May 15, 2018), <https://ru.usembassy.gov/statement-by-spokesperson-nauert-on-the-opening-of-the-kerch-bridge-in-crimea/>.

28. European Parliament Res. of 25 Oct. 2018, *supra* note 25, ¶ C.

Strait; the Russian Federation's failure to cooperate is not compatible with UNCLOS; and

h. The Russian Federation may not lay a submarine cable, construct a bridge, or construct a pipeline through and across the Kerch Strait from Russian territory to the Crimean Peninsula without Ukraine's consent; any such activities engaged in or authorized by the Russian Federation are not compatible with UNCLOS.²⁹

The tribunal has yet to issue a final ruling.

Six months after the Kerch bridge was opened Russian authorities blocked access to the strait by positioning a large container ship under the bridge.³⁰ Three Ukrainian naval vessels attempting to transit the strait—the *Gyurza*-M-class artillery boats *Berdyansk* and *Nikopol* and the tugboat *Yani Kapu*—were fired on and detained by Russian coast guard patrol boats. Russia tried to justify the attack by claiming that the Ukrainian vessels illegally entered a closed area of its territorial sea as they approached the strait and refused to comply with an order to leave the area.³¹ UNCLOS allows a coastal State to “suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.”³²

Following the incident, Ukraine filed with the International Tribunal for the Law of the Sea (ITLOS) a request for the prescription of provisional measures under Article 290(5) of UNCLOS, requiring Russia to promptly:

- a. Release the Ukrainian naval vessels *Berdyansk*, *Nikopol*, and *Yani Kapu* and return them to the custody of Ukraine;
- b. Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
- c. Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.³³

29. Ukr. v. Russ., Case No. 2017-06, *supra* note 24, ¶ 9(f)–(g).

30. Andrew Osborn, *Russia Blocks Ukrainian Navy from Entering Sea of Azov—Russian State TV*, REUTERS (Nov. 25, 2018), <https://www.reuters.com/article/uk-ukraine-crisis-russia-kerch/russia-blocks-ukrainian-navy-from-entering-sea-of-azov-russian-state-tv-idUKKCN1NU0LW>.

31. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, ITLOS Rep. 2019, ¶ 71.

32. UNCLOS, *supra* note 18, art. 25(3).

33. Detention of Three Ukrainian Naval Vessels, *supra* note 31, ¶ 24(1).

On May 25, 2019, by a vote of nineteen to one, ITLOS ordered Russia, *inter alia*, to release the Ukrainian naval vessels immediately and return them to the custody of Ukraine and to release the detained Ukrainian servicemen immediately and allow them to return to Ukraine.³⁴ Russia complied with the tribunal's order on June 25, 2019.³⁵

Both the European Union and the United States denounced the construction of the bridge and in October 2020³⁶ and April 2021,³⁷ respectively, imposed sanctions on the Russian entities and individuals associated with the construction of the bridge. The European Parliament additionally passed a resolution in 2018 condemning the construction of the bridge and the laying of underwater cables in the strait without the consent of Ukraine as a clear breach of international maritime law and a violation of Ukraine's sovereignty and territorial integrity.³⁸ The resolution also affirms that transit passage applies through the Kerch Strait and condemns Russia's practice of interfering with navigational rights by blocking and inspecting Ukrainian and foreign-flagged commercial vessels going through the strait, including more than 120 ships registered in the European Union, which were bound to or from Ukrainian ports.³⁹

B. Closure Areas

In 2021, Russia closed portions of the Black Sea off the Crimea Peninsula and near the Kerch Strait to foreign warships and other government vessels

34. *Id.* ¶ 124(a)–(c).

35. Ministry of Foreign Affairs of the Russian Federation, Note Verbale No. 7812 of June 25, 2019, *reprinted in* Letter from Ministry of Foreign Affairs of Ukraine to Registrar of the International Tribunal for the Law of the Sea (June 26, 2019), https://www.itlos.org/fileadmin/itlos/documents/cases/26/C_-_26_-_UA_Supplementary_Report_on_Compliance_with_annex.pdf.

36. Press Release, Council of the European Union, Ukraine: Two Persons and Four Entities Involved in the Construction of the Kerch Railway Bridge Added to EU Sanctions List (Oct. 1, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/10/01/ukraine-two-persons-and-four-entities-involved-in-the-construction-of-the-kerch-railway-bridge-added-to-eu-sanctions-list/>.

37. Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Russian Persons in the Crimea Region of Ukraine (Apr. 15, 2021), <https://home.treasury.gov/news/press-releases/jy0125>.

38. European Parliament Res. of Oct. 25, 2018, *supra* note 25.

39. *Id.*

from April 24 to October 31.⁴⁰ The closure areas included sections of the territorial sea, as well as the EEZ. Kyiv immediately condemned the Russian announcement as inconsistent with international law,⁴¹ as did Washington. U.S. State Department spokesperson Ned Price expressed deep concern over Moscow's declaration, denouncing the closure as an unprovoked escalation in Russia's ongoing campaign to undermine and destabilize Ukraine.⁴² The closures coincided with a significant build-up of Russian forces in Crimea and along the Ukrainian border.⁴³

Generally, all ships, including warships and other government vessels, enjoy a right of innocent passage through foreign territorial seas.⁴⁴ Nonetheless, international law, as reflected in Article 25 of UNCLOS, allows coastal States, without discrimination in form or fact among foreign ships, to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises."⁴⁵ The authority of the coastal State to suspend innocent passage, however, is not unlimited.

The Russian declaration is problematic for several reasons. First, suspension of innocent passage must be "temporary." Closing portions of the territorial sea for twenty-four hours a day, seven days a week, for a period of six months would not be considered temporary. Second, the suspension cannot discriminate in form or fact among foreign ships. The Russian declaration, however, is limited to foreign warships and other government vessels and thus discriminates in fact among types of foreign ships. Third, the suspension of innocent passage must be essential for the protection of the coastal State's security. Russia has failed to disclose why it is necessary to

40. Polina Devitt, *Russia's Plan to Restrict Foreign Warships Near Crimea Will Keep Kerch Strait Open—RLA*, REUTERS (Apr. 16, 2021), <https://www.reuters.com/world/europe/russias-plan-restrict-foreign-warships-near-crimea-will-keep-kerch-strait-open-2021-04-16/>.

41. Andrew Osborn, *Russia Beefs Up Warship Presence in Black Sea as Ukraine Tensions Simmer*, REUTERS (Apr. 17, 2021), <https://www.reuters.com/world/europe/russia-beefs-up-warship-presence-black-sea-ukraine-tensions-simmer-2021-04-17/>.

42. Press Statement, Ned Price, Spokesperson for the U.S. Dep't of State, *Russia's Intention to Restrict Navigation in Parts of the Black Sea* (Apr. 19, 2021), <https://www.state.gov/russias-intention-to-restrict-navigation-in-parts-of-the-black-sea/>.

43. Matthias Williams & Robin Emmott, *Ukraine Says Russia Will Soon Have Over 120,000 Troops on its Borders*, REUTERS (Apr. 20, 2021), <https://www.reuters.com/world/europe/russia-reach-over-120000-troops-ukraines-border-week-ukraine-says-2021-04-20/>.

44. UNCLOS, *supra* note 18, art. 17.

45. *Id.* art. 25(3).

close off portions of the Black Sea. In short, Russia's purported closure areas are inconsistent with international law.

More importantly, to the extent that Russia's closure areas extend beyond the territorial sea, Russia may only establish temporary warning areas to advise ships and aircraft that it is conducting activities at sea that may pose a hazard to navigation and overflight.⁴⁶ Temporary warning areas established under the International Maritime Organization (IMO)/International Hydrographic Organization (IHO) Worldwide Navigational Warning Service or International Civil Aviation Organization Aeronautical Information Services are not "exclusion" zones. Beyond the territorial sea no State may subject any part of the high seas, including the EEZ, to its sovereignty.⁴⁷ Seaward of the territorial sea, all ships and aircraft enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the seas related to these freedoms.⁴⁸ All ships and aircraft, therefore, retain the right to transit through these areas recognizing that there is an increased risk in doing so.

To the extent the Russian exercise areas purport to close portions of the Black Sea beyond the twelve-nautical-mile territorial sea limit, they are inconsistent with international law. Nonetheless, Russia has a right to establish warning areas to conduct military exercises in the EEZ/high seas.⁴⁹ Foreign ships and aircraft operating in the vicinity of these areas must do so with "due regard" for Russia's right to use the high seas for lawful purposes, although the "due regard" standard applies even if Russia has not proclaimed a special area.⁵⁰ Intentional interference with Russian exercises in the EEZ would violate this "due regard" obligation. Likewise, Russia must exercise

46. Int'l Maritime Org. [IMO], World-Wide Navigational Warning Service Document, annex 1, ¶ 4.2.1.3.13 (June 24, 2013), <https://www.iho-machc.org/documents/msi/World-Wide%20Navigational%20Warning%20Service%20-%20English.pdf> ("The following subjects are considered suitable for transmission as NAVAREA warnings. . . . information concerning events that might affect the safety of shipping, sometimes over wide areas, e.g., naval exercises, missile firings"); *see also* Annex 15 to the Convention on International Civil Aviation, ¶ 6.3.2.3 (16th ed. July 2018), <https://ffac.ch/wp-content/uploads/2020/10/ICAO-Annex-15-Aeronautical-Information-Services.pdf> ("a NOTAM shall be . . . issued concerning the following information: . . . (m) presence of hazards which affect air navigation (including . . . military exercises)"); Federal Aviation Administration, Aeronautical Information Services, https://www.faa.gov/air_traffic/flight_info/aeronav/ (last visited Feb. 27, 2023).

47. UNCLOS, *supra* note 18, arts. 56, 58, 86, 89.

48. *Id.* arts. 58, 86–87, 90.

49. *Id.* arts. 58, 87.

50. *Id.* arts. 58(2), 87(2).

due regard for the high seas freedoms of other users of the area, as well as the rights of any affected coastal State, if the closure area is within its EEZ.

C. *Interference with Innocent Passage*

As mentioned above, all ships, including warships, enjoy a right of innocent passage through foreign territorial seas.⁵¹ Passage is innocent if it is not prejudicial to the peace, good order, or security of the coastal State. An exhaustive list of activities considered to be prejudicial to the peace, good order, or security of the coastal State is contained in UNCLOS, Article 19. Military-related activities considered to be prejudicial include:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- . . .
- (j) the carrying out of . . . survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State.⁵²

This list creates a presumption that warships not engaged in one of the prohibited activities automatically enjoy the right of innocent passage.

Coastal States may adopt laws and regulations relating to innocent passage, which conform to international law, regarding

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;

51. *Id.* art. 17.

52. *Id.* art. 19.

- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys; [and]
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.⁵³

A coastal State may also take the necessary steps in its territorial sea to prevent passage that is not innocent.⁵⁴ However, such laws and regulations may not hamper, deny, or impair the right of innocent passage.⁵⁵

On June 23, 2021, Russia claimed that one of its warships fired warning shots in front of a British destroyer after it ignored a warning not to enter the Russian-claimed territorial sea off the Crimean Peninsula. Russia additionally asserted that a Russian Su-24 bomber dropped four fragmentation bombs ahead of the HMS *Defender* (D36) to persuade the British warship to alter course and that *Defender* left Russian waters shortly thereafter.⁵⁶

The British Ministry of Defense denied that the incident had occurred or that the HMS *Defender* was in Russian waters.⁵⁷ Foreign Secretary Dominic Raab told reporters that no shots were fired at HMS *Defender* and the Russian explanation of the incident was “predictably inaccurate.”⁵⁸

The dustup is reminiscent of the 1988 Black Sea Bumping Incident when two Soviet warships intentionally shouldered the USS *Caron* (DD-70) and USS *Yorktown* (CG-48) while the U.S. destroyer and guided-missile cruiser were conducting innocent passage through the Soviet territorial sea off Crimea.⁵⁹ Prior to entering the Soviet territorial sea, the U.S. warships were

53. *Id.* art. 21(1).

54. *Id.* art. 25.

55. *Id.* art. 24.

56. Associated Press, *Russia Says Warning Shots Deter U.K. Warship; London Denies It*, POLITICO (June 23, 2021, 09:25 AM), <https://www.politico.com/news/2021/06/23/russia-uk-warship-black-sea-495646>.

57. Dan Sabbagh, *Royal Navy Ship off Crimea Sparks Diplomatic Row Between Russia and UK*, GUARDIAN (June 23, 2021), <https://www.theguardian.com/world/2021/jun/23/russian-ship-fired-warning-shots-at-royal-navy-destroyer-hms-defender-moscow-says>.

58. Joe Brock, *UK's Raab Says Russia's Warship Claims "Predictably Inaccurate"*, REUTERS (June 24, 2021), <https://www.reuters.com/world/uk/uks-raab-says-russia-black-sea-explanation-predictably-inaccurate-2021-06-24/>.

59. John Broder, *2 Soviet Vessels Bump U.S. Navy Warships in Black Sea*, LOS ANGELES TIMES (Feb. 13, 1988), <https://www.latimes.com/archives/la-xpm-1988-02-13-mn-10863-story.html>.

warned by a Soviet border-guard ship that it had orders to prevent a violation of Soviet territorial waters and was authorized to strike the U.S. warships. The *Caron* and *Yorktown* disregarded the warning and entered the Soviet territorial sea in innocent passage. Shortly thereafter, the U.S. warships were deliberately shouldered by two Soviet vessels—a *Krivak*-class frigate and a *Mirka*-class anti-submarine frigate.

Following this incident, U.S. and Soviet defense officials engaged in a series of talks on a range of issues, including certain legal aspects of traditional uses of the oceans. These discussions culminated in a joint statement on the Uniform Interpretation of the Rules of International Law Governing Innocent Passage (Jackson Hole Agreement).⁶⁰ Both sides agreed that the relevant rules of international law governing innocent passage of ships in the territorial sea are stated in Part II, Section 3, of UNCLOS.

Additionally, the parties agreed that all ships, including warships, regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage for which neither prior notification nor authorization is required. Finally, both sides recognized that UNCLOS Article 19 contains an “exhaustive” list of activities that would render passage not innocent and acknowledged that ships passing through the territorial sea were engaged in innocent passage if they did not conduct any of those activities. If a warship engages in conduct that renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, and in such case the warship shall do so immediately.

Assuming the incident with the HMS *Defender* did occur, were Russia’s actions consistent with the international law of the sea? There is no evidence that the British warship was engaged in any of the prohibited activities listed in Article 19 at the time of the alleged incident. Rather, British authorities affirmed that *Defender* was conducting a routine transit from Odessa to Georgia using an internationally recognized traffic separation corridor in the Black Sea.⁶¹ Although Russia has stated that the Jackson Hole Agreement remains valid, its actions against the HMS *Defender* are clearly inconsistent with that agreed interpretation.

Even if the British warship engaged in an activity that rendered its passage not innocent, international law only allows Russia to require the warship

60. Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989).

61. Sabbagh, *supra* note 57.

to leave its territorial sea immediately.⁶² Nothing in the Convention affects the immunities of warships and other government ships operated for non-commercial purposes.⁶³ Given that HMS *Defender* is a sovereign immune vessel, Russia may not use force to compel it to leave the territorial sea unless Russia is acting in self-defense in response to a hostile act or demonstrated hostile intent, which (based on press reporting) does not appear to be warranted in this case. Russia's use of warning shots and the dropping of bombs was clearly excessive and contrary to international law. If Russia was not satisfied with the *Defender's* non-responsiveness to the order to leave, Moscow's remedy was to file a diplomatic protest.

D. AIS Spoofing

In mid-June 2021, tracking data of the HMS *Defender* and HNLMS *Evertsen* placed the two warships off the coast of Sevastopol. In actuality, the British destroyer and Dutch frigate were 180 miles away in Odessa. According to the ships' automatic identification system (AIS) transmissions,⁶⁴ the two NATO warships left Odessa and sailed to within two miles of Sevastopol, home of Russia's Black Sea Fleet. Nonetheless, live webcam feeds show that the warships never left Odessa.⁶⁵

It is unclear why the ships' positions were spoofed but deploying two NATO warships in the vicinity of the Black Sea Fleet headquarters could be viewed as a provocative act given the ongoing dispute over Russia's annexation of the Crimea.⁶⁶ It is also unclear how the fake AIS data was shared with several AIS aggregators. The virtual voyage occurred two days before the incident between HMS *Defender* and Russian naval and air forces on June 23 discussed above.⁶⁷

62. UNCLOS, *supra* note 18, art. 30.

63. *Id.* art. 32.

64. AIS provides information about a ship, including its identity, type, position, course, speed, navigational status, and other safety-related information to appropriately equipped shore stations, other ships, and aircraft. International Convention for the Safety of Life at Sea, annex, ch. V, reg. 19, ¶ 2.4.5, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 (as amended).

65. H. I. Sutton, *Positions of Two NATO Ships Were Falsified Near Russian Black Sea Naval Base*, USNI NEWS (June 21, 2021), <https://news.usni.org/2021/06/21/positions-of-two-nato-ships-were-falsified-near-russian-black-sea-naval-base>.

66. *Id.*

67. Tom Bateman, *HMS Defender: AIS Spoofing is Opening up a New Front in the War on Reality*, EURONEWS (June 28, 2021), <https://www.euronews.com/next/2021/06/28/hms-defender-ais-spoofing-is-opening-up-a-new-front-in-the-war-on-reality>.

False AIS positioning can result “from the ship receiving manipulated or scrambled GPS information” or the AIS track can be “entirely simulated and imputed into the data stream from a terrestrial AIS receiver.”⁶⁸ Regardless of how the spoofing occurred, it is evident that the use of false AIS data has become part of the information war between Russian and Ukraine.

III. THE WAR AT SEA

A. Access to the Black Sea

Although entry to the Black Sea occurs primarily through the Turkish Straits, ships can also access the Black Sea from the Caspian Sea via the Volga–Don Canal, Sea of Azov, and Kerch Strait, and from the North Sea via the Rhine–Main–Danube (Europa) Canal. The commencement of hostilities on February 24, 2022, in effect, cut off access to the Black Sea for most of the international community.

1. Volga-Don Canal, Sea of Azov, and Kerch Strait

Although the Caspian is a closed sea, it is connected to the Sea of Azov by the Volga–Don Canal, which links the lower Volga River with the Don River in southwestern Russia. Passage through the canal is exclusively controlled by Russian authorities, thus allowing Russian warships from the Caspian Flotilla unimpeded access to the Sea of Azov. The Caspian Flotilla is comprised of twenty-seven warships, including gunboats, landing craft, minesweepers, and cruise-missile-capable corvettes.⁶⁹ One month prior to the invasion, several ships assigned to the Caspian Flotilla joined with units from the Black Sea Fleet to conduct naval maneuvers in the Black Sea.⁷⁰

On February 24, 2022, Rosmorrechflot (the Russian Federal Agency for Maritime and River Transport) announced that “due to a warning received from the Russian Defense Ministry’s Black Sea Fleet amid the beginning of

68. *Id.*

69. Paul Goble, *Russia’s Caspian Flotilla No Longer Only Force That Matters There*, JAMESTOWN FOUNDATION (June 24, 2021), <https://jamestown.org/program/russias-caspian-flotilla-no-longer-only-force-that-matters-there/>.

70. Interfax-Ukraine, *15 Ships of Caspian Flotilla Redeployed to Black Sea for Exercises*, KYIV POST (Apr. 18, 2021), <https://www.kyivpost.com/ukraine-politics/15-ships-of-caspian-flotilla-redeployed-to-black-sea-for-exercises.html>; *Russian Black Sea Fleet, Caspian Flotilla to Hold Live-Fire Exercise*, TASS (Jan. 25, 2022), <https://tass.com/defense/1392921>.

antiterrorist operations . . . , navigation in the Sea of Azov was suspended until further notice.”⁷¹ The legality of this exclusion zone is discussed below. In general, belligerents in an international armed conflict are authorized to establish exclusion/war zones that prohibit the entry of foreign-flagged vessels or aircraft without authorization.⁷² Russia’s establishment of the Sea of Azov exclusion zone in effect has closed the Kerch Strait to all ships, except those vessels that Russia authorizes to transport cargo to and from the Russian ports of Taganrog and Rostov-on-Don.

2. Rhine-Main-Danube Canal

The Black Sea can also be accessed by using the Rhine-Main-Danube (Europa) Canal. More than 3,500 kilometers long, the waterway traverses fifteen European countries, linking the Port of Rotterdam, Netherlands, on the North Sea with the Port of Constanta, Romania, on the Black Sea. The Danube–Black Sea Canal, which links the main Europa Canal and Danube River with the Black Sea, can be used to transport goods from the Black Sea to Western Europe. Over the past few years, the volume of goods transported through the Danube–Black Sea Canal has increased steadily.⁷³

Navigation of the waterway is regulated by the 1948 Convention Regarding the Regime of Navigation on the Danube, which applies to the navigable part of the Danube River between Ulm and the Black Sea through the Sulina channel.⁷⁴ Vessels of commerce of all States enjoy free and open navigation on the Danube.⁷⁵ Navigation of the Danube by non–Danubian State naval vessels, however, is prohibited.⁷⁶ Naval vessels of Danubian States may navigate the Danube within their respective borders but they may not navigate

71. Fatima Bahtić, *Russian Navy’s Operations Restrict Shipping in Sea of Azov amid Conflict with Ukraine*, NAVALTODAY (Feb. 24, 2022), <https://www.navaltoday.com/2022/02/24/russian-navys-operations-restrict-shipping-in-sea-of-azov-amid-conflict-with-ukraine/>.

72. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL §§ 13.9.2, 13.9.4 (rev. ed. Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

73. The Danube Commission, *Market Observation for Danube Navigation: Results in 2021*, ¶ 1.2.2 (2022), <https://www.danubecommission.org/dc/en/danube-navigation/market-observation-for-danube-navigation/market-observation-for-danube-navigation-results-in-2021/>.

74. Convention Regarding the Regime of Navigation on the Danube art. 2, Aug. 18, 1948, 1949 U.N.T.S. 196.

75. *Id.* art. 1.

76. *Id.* art. 30.

beyond the frontier of their respective countries without the agreement of the Danubian States concerned.⁷⁷ Thus, a Dutch warship would require the consent of the other fourteen riparian States to transit from Rotterdam to Constanta. Serbia, which traditionally has aligned itself politically with Russia, would be unlikely to grant such consent in the ongoing crisis.⁷⁸ The likelihood that NATO warships could access the Black Sea via the Europa Canal is therefore negligible.

Access to the Danube–Black Sea Canal was initially restricted on February 24, 2022, after Russian naval forces occupied Snake Island.⁷⁹ On February 26, Russian naval vessels began notifying all merchant vessels via VHF Channel 16 that Russia was conducting counterterrorist operations in the Black Sea and demanded that all ships located in the Odessa and Danube areas proceed immediately to the Bosphorus Strait.⁸⁰ Given Snake Island’s strategic location—twenty nautical miles from the mouth of the Danube and seventy-seven nautical miles from Odessa—Russian forces were able to control maritime traffic in the key shipping lanes connecting Ukrainian ports in the northwestern Black Sea with the Danube delta.⁸¹ In effect, merchant vessels were limited to using the Romanian Sulina Canal south of the Danube delta, which has a limited capacity of five to six ships per day.⁸²

Under the law of naval warfare, belligerents have the right to control the “immediate area of naval operations,” which is defined as the “area within

77. *Id.*

78. Maxim Samorukov, *Last Friend in Europe: How Far Will Russia Go to Preserve Its Alliance with Serbia*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Oct. 6, 2022), <https://carnegieendowment.org/politika/87303>.

79. Brad Lendon et al., *Soldiers on Snake Island Reacted with Defiant Words to Threats from Russian Warship*, CNN (Feb. 28, 2022), <https://edition.cnn.com/2022/02/25/europe/ukraine-russia-snake-island-attack-intl-hnk-ml/index.html>; Dan Lamothe & Paul Sonne, *On Ukraine’s Snake Island, a Defiant Last Stand Against Russian Forces*, WASHINGTON POST (Feb. 25, 2022), <https://www.washingtonpost.com/world/2022/06/30/ukraine-snake-island-russian-withdrawal/>.

80. Tayfun Ozberk, *Russia-Ukraine Conflict: What Happened in the Black Sea So Far?*, NAVAL NEWS (Feb. 27, 2022), <https://www.navalnews.com/naval-news/2022/02/russia-ukraine-conflict-what-happened-in-the-black-sea-so-far/>.

81. Antonia Calibăsanu et al., *The Strategic Importance of Snake Island*, CEPA (Sept. 27, 2022), <https://cepa.org/comprehensive-reports/the-strategic-importance-of-snake-island/>.

82. Josh Salisbury, *Ukraine Begins Restoring Danube River Ports in Effort to Beat Black Sea Grain Blockade*, EVENING STANDARD (June 13, 2022), <https://www.standard.co.uk/news/world/ukraine-danube-river-black-sea-grain-blockade-b1012041.html>.

which hostilities are taking place or belligerent forces are actually operating.”⁸³ To ensure proper battlespace management and force-protection objectives, a commander may restrict the activities of neutral vessels and aircraft within the immediate vicinity of naval units and, if required by military necessity, may prohibit their entry into the area altogether.⁸⁴ This includes control over the communications, except legitimate distress communications, of neutral merchant ships and civil aircraft if those communications might endanger or jeopardize the success of the operation. Merchant ships and civil aircraft that fail to conform to a commander’s restrictions may be considered to have acquired enemy character and may be liable to attack or capture.⁸⁵ A review of the interactive map on the Marine Traffic website confirms that neutral shipping complied with the Russian demands and cleared the area.⁸⁶

In late June 2022, Ukrainian forces launched a counterattack and regained Snake Island, making grain exports possible again through the Europa Canal.⁸⁷ On July 10, the Ukrainian Sea Ports Authority announced that the Bystre Canal (the Europa Canal’s Danube–Black Sea deep-water route) on the mouth of the Danube was open for use by ships transporting Ukrainian agricultural products.⁸⁸ Nonetheless, the deep-water route is limited to four vessels per day and can accommodate only vessels with a deadweight of up to five thousand tons.⁸⁹ The opening of the Bystre Canal allows Ukraine to increase its grain exports by 500,000 tons per month.⁹⁰ Given its capacity

83. U.S. NAVY, U.S. MARINE CORPS, AND U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.8 (2022) [hereinafter NWP 1-14M (2022)]. This should not be confused with the right to establish exclusion/war zones under the law of naval warfare discussed below.

84. DOD LAW OF WAR MANUAL, *supra* note 72, § 13.8.1.

85. *Id.* § 13.8.2.

86. Raul Pedrozo, *Maritime Exclusion Zones in Armed Conflict*, 99 INTERNATIONAL LAW STUDIES 526, 535 (2022).

87. Marc Santora & Ivan Nechepurenko, *Ukraine Drives Russian Forces from Snake Island, a Setback for Moscow*, NEW YORK TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/world/europe/ukraine-russia-snake-island.html>.

88. Ihor Kabanenko, *The Bystre Canal Across the Danube: “Mosquito” Tactics in Ukraine’s Grain Shipping*, JAMESTOWN FOUNDATION (July 25, 2022), <https://jamestown.org/program/the-bystre-canal-across-the-danube-mosquito-tactics-in-ukraines-grain-shipping/>.

89. *Id.*; Shamseer Manbra, *6 Bosphorus Strait Facts You Must Know*, MARINE INSIGHT (May 10, 2022), <https://www.marineinsight.com/know-more/6-bosphorus-strait-facts-you-must-know/>.

90. Kabanenko, *supra* note 88.

limitations, however, the Europa Canal is not an acceptable alternative to the Turkish Straits, through which about 48,000 ships transport over 650 million tons of cargo annually.⁹¹

3. Turkish Straits

Access to the Black Sea from the Mediterranean Sea through the Turkish Straits—the Bosphorus (Istanbul) Strait, Sea of Marmara, and Dardanelles (Çanakkale) Strait—is under the exclusive control of Türkiye and is regulated by the 1936 Montreux Convention.⁹² The convention upholds the “principle of freedom of transit and navigation” through the Turkish Straits for all ships, subject to certain limitations in times of peace and war.⁹³ Aircraft do not enjoy a right of transit through the straits and vessels of war transiting the straits may not make use of any aircraft they may have on board.⁹⁴

i. Merchant Ships

In accordance with Article 2 of the convention, in time of peace, all merchant vessels, regardless of flag or cargo, enjoy complete freedom of transit through the straits.⁹⁵ If Türkiye considers itself to be “threatened with imminent danger of war,” Article 2 continues to apply except that vessels must enter the straits by day through designated routes.⁹⁶ Although the convention is not of unlimited duration, the principle of freedom of transit and navigation reflected in Article 1 applies for an unlimited period.⁹⁷ All ships entering the straits must stop at a sanitary station near the entrance to the straits for the purpose of sanitary controls prescribed by Turkish law.⁹⁸

In time of war, if Türkiye is not a belligerent, all merchant ships, regardless of flag or cargo, may transit the straits, subject to the same conditions

91. Manbra, *supra* note 89; Paul Pryce, *Let Me Get This Strait: The Turkish Straits Question Revisited*, CIMSEC (June 1, 2022), <https://cimsec.org/let-me-get-this-strait-the-turkish-straits-question-revisited/>.

92. Convention Regarding the Regime of the Straits, with Annexes and Protocol, July 20, 1936, 173 L.N.T.S. 215 [hereinafter Montreux Convention].

93. *Id.* art. 1.

94. *Id.* art. 15.

95. *Id.* art. 2.

96. *Id.* art. 6.

97. *Id.* art. 28.

98. *Id.* art. 3.

applicable to merchant ships in time of peace under Articles 2 and 3.⁹⁹ However, if Türkiye is a belligerent, neutral merchant vessels must transit the straits by day through designated routes, but only if they do not assist the enemy.¹⁰⁰ As a general rule, neutral States are all States not party to an international armed conflict.¹⁰¹ The principal duties of a neutral State are abstention—a duty to abstain from providing belligerents with war-related goods or services—and impartiality—exercising duties and rights in a nondiscriminatory manner toward all belligerents.¹⁰²

ii. *Vessels of War*

Vessels of war, defined in annex 2 of the convention, include capital surface ships, aircraft carriers, light surface vessels, submarines, minor war vessels, and auxiliary vessels.¹⁰³ In time of peace, warships enjoy passage rights through the straits, subject to certain limitations (prior notification, tonnage restrictions, limitation on numbers of ships, and time limits). In time of war, passage rights are dependent on whether Türkiye is a belligerent in the armed conflict (or otherwise considers itself to be threatened with imminent danger of war) and the status of the warship—neutral or belligerent.

Naval auxiliary vessels that are designed specifically for the carriage of fuel, whether liquid or nonliquid, do not have to comply with the notification requirements contained in Article 13 and are not counted for the purpose of calculating the tonnage limitations under Articles 14 and 18.¹⁰⁴ However, naval auxiliaries must pass through the straits singly and their armament may not include, “for use against floating targets, more than two guns of a maximum caliber of 105 millimeters; [and] for use against aerial targets, more than two guns of a maximum caliber of 75 millimeters.”¹⁰⁵

99. *Id.* art. 4.

100. *Id.* art. 5.

101. DOD LAW OF WAR MANUAL, *supra* note 72, § 15.1.2.1.

102. *Id.* §§ 15.3.2, 15.3.2.1, 15.3.2.2.

103. Montreux Convention, *supra* note 92, art. 8, annex II.B (Capital ships include “surface vessels of war belonging to one of the two following sub-categories: (a) Surface vessels of war, other than aircraft-carriers, auxiliary vessels, or capital ships of sub-category (b), the standard displacement of which exceeds 10,000 tons (10,160 metric tons) or which carry a gun with a caliber exceeding 8 in. (203 mm.); (b) Surface vessels of war, other than aircraft-carriers, the standard displacement of which does not exceed 8,000 tons (8,128 metric tons) and which carry a gun with a caliber exceeding 8 in. (203 mm.)”).

104. *Id.* art. 9.

105. *Id.*

In times of peace, light surface vessels, minor war vessels, and auxiliary vessels, regardless of flag and whether belonging to Black Sea or non-Black Sea powers, enjoy freedom of transit through the straits, provided their transit begins during daylight and they comply with the notification requirements in Article 13 and the conditions specified in Articles 14 through 18.¹⁰⁶

In times of peace, capital ships of Black Sea powers that exceed the tonnage limitations set out in Article 14 may transit the straits, provided these vessels pass through the straits singly and are escorted by no more than two destroyers.¹⁰⁷ Although submarines generally are prohibited from transiting the straits, Black Sea powers are authorized to send submarines constructed or purchased outside the Black Sea through the straits for the purpose of rejoining their base, provided that adequate notice of the construction or purchase of such submarines is given to Türkiye.¹⁰⁸ Black Sea power submarines also may transit the strait to be repaired in dockyards outside the Black Sea, provided that detailed information is given to Türkiye.¹⁰⁹ In either case, the submarines must travel by day and on the surface and must pass through the straits singly.¹¹⁰ Submarines of non-Black Sea powers are prohibited from entering the Black Sea through the Turkish Straits.

Ships transiting the straits must provide advance notification to the Turkish government through diplomatic channels. Black Sea powers are required to provide notice eight days prior to a transit; non-Black Sea powers must provide fifteen days prior notice. Any change of date is subject to a three-day notice.¹¹¹ Vessels of war shall transit the straits expeditiously unless a delay is rendered necessary by damage or force majeure.¹¹²

The maximum aggregate tonnage of all foreign naval forces that may transit the strait at one time shall not exceed fifteen thousand tons, except as otherwise provided for Black Sea power capital ships in Article 11. The transiting foreign naval force may not exceed nine vessels.¹¹³ Consistent with these rules, six Russian warships and a Kilo-class submarine transited the straits in early February 2022, two weeks before Russia attacked Ukraine, purportedly to participate in a naval exercise in the Black Sea. Three *Ropucha-*

106. *Id.* art. 10.

107. *Id.* art. 11.

108. *Id.* art. 12.

109. *Id.*

110. *Id.*

111. *Id.* art. 13.

112. *Id.* art. 16.

113. *Id.* art. 14.

class tank landing ships (RFS *Minsk* (127), RFS *Korolev* (130), and RFS *Kaliningrad* (102)) transited on February 8; two *Ropcha*-class amphibious ships (RTS *Georgy Pobedonosets* (016) and RTS *Olenegorsky Gornyyak* (012)) and an *Ivan Gren*-class landing ship (RTS *Pyotr Morgunov*) transited on February 9; and a Kilo-class diesel-electric attack submarine (RTS *Rostov-na-Donu* (B 237)) transited on February 11. The submarine was returning to its home port in the Black Sea after an eleven-month deployment to the Mediterranean.¹¹⁴

A vessel of war, whether of a Black Sea or non-Black Sea power, that makes a port visit in the straits at the invitation of the Turkish government under Article 17 shall not be included in the tonnage limitations prescribed in the convention. Similarly, any vessel of war that has suffered damage during its transit of the straits shall not be included in the tonnage limitation.¹¹⁵ The tonnage and composition limitations of Article 14 also do not apply to a naval force that the Turkish government has invited to make a port call of limited duration in the straits.¹¹⁶ Vessels of war making a port visit in the straits shall leave by the same route used to enter the straits unless they comply with the requirements of Articles 10, 14, and 18.¹¹⁷

The aggregate tonnage of vessels of war that non-Black Sea powers may have in the Black Sea shall not exceed thirty thousand tons. However, if at any time the tonnage of the strongest fleet in the Black Sea exceeds by at least ten thousand tons the tonnage of the strongest fleet in the Black Sea at the date of the signature of the convention, the aggregate tonnage of thirty thousand tons shall be increased by the same amount, up to a maximum of 45,000 tons.¹¹⁸ There is also an exception for deployment of naval forces, not exceeding eight thousand tons, into the Black Sea for humanitarian purposes.¹¹⁹ In any event, vessels of war belonging to non-Black Sea powers may remain in the Black Sea only for twenty-one days.¹²⁰

In time of war, if Türkiye is not a belligerent, foreign vessels of war enjoy complete freedom of transit through the straits under the same conditions that apply in peacetime (Articles 10–18), with the following exception: Türkiye may prohibit the transit of vessels of war belonging to the belligerent

114. H. I. Sutton, *6 Russian Warships and Submarine Now Entering Black Sea Towards Ukraine*, NAVAL NEWS (Feb. 8, 2022), <https://www.navalnews.com/naval-news/2022/02/6-russian-warships-and-submarine-now-entering-black-sea-towards-ukraine/>.

115. Montreux Convention, *supra* note 92, art. 14.

116. *Id.* art. 17.

117. *Id.*

118. *Id.* art. 18(1).

119. *Id.* art. 18(1)(d).

120. *Id.* art. 18(2).

powers unless it is a vessel returning to its home port in the Black Sea.¹²¹ Vessels of war belonging to belligerent powers shall not engage in belligerent acts, to include make any capture, exercise the right of visit and search, or carry out any hostile act in the straits.¹²²

Under Article 20, if Türkiye is a belligerent, the passage of foreign vessels of war is left entirely to the discretion of the Turkish government.¹²³ Additionally, if Türkiye is not a belligerent but considers itself to be threatened with imminent danger of war, it may apply the provisions of Article 20.¹²⁴ Any vessel of war that has transited the straits before Türkiye invokes Article 21 that finds itself separated from its home base may return thereto. However, Türkiye may deny return rights to vessels of war belonging to a State that is threatening Türkiye.

iii. Türkiye's Decision to Close the Straits

Türkiye has implemented the provisions of the Montreux Convention faithfully for eighty-six years.¹²⁵ On February 24, 2022, immediately following the Russian invasion, Ukraine's ambassador in Ankara, Vasyl Bodna, requested that Türkiye close the straits to Russian warships.¹²⁶ On February 28, Türkiye's foreign minister announced that it was effectively closing the straits to warships of all nations, except warships returning to their home ports in the Black Sea. Specifically, Minister Mevlut Cavusoglu indicated

When Türkiye is not a belligerent in the conflict, it has the authority to restrict the passage of the warring states' warships across the straits. If the warship is returning to its base in the Black Sea, the passage is not closed. We adhere to the Montreux rules. All governments, riparian and non-riparian, were warned not to send warships across the straits.¹²⁷

121. *Id.* art. 19.

122. *Id.*

123. *Id.* art. 20.

124. *Id.* art. 21.

125. Republic of Türkiye, Ministry of Foreign Affairs, *Implementation of the Montreux Convention*, <https://www.mfa.gov.tr/implementation-of-the-montreux-convention.en.mfa> (last visited Feb. 27, 2023).

126. *Kiev Asks Ankara to Close Turkish Straits to Russian Warships*, TASS (Feb. 24, 2022), <https://tass.com/politics/1409585>.

127. Tayfun Ozberk, *Turkey Closes the Dardanelles and Bosphorus to Warships*, NAVAL NEWS (Feb. 28, 2022), <https://www.navalnews.com/naval-news/2022/02/turkey-closes-the-dardanelles-and-bosphorus-to-warships/>.

Turkish president Recep Tayyip Erdogan re-affirmed Minister Cavusoglu's statement, emphasizing that these measures were taken to "prevent the Russia-Ukraine crisis from further escalating."¹²⁸ Consistent with this pronouncement, Russian warships operating in the Mediterranean Sea—the *Slava*-class cruisers RTS *Marshal Ustinov* (055) from the Northern Fleet and RFS *Varyag* (011) from the Pacific Fleet—were prevented from entering the Black Sea to augment Russian naval forces participating in the invasion of Ukraine.¹²⁹ Moreover, to date, no foreign warships have ignored Türkiye's warning and no State has provided notice to Türkiye of its intent to send a warship through the straits.

Türkiye's decision to close the straits to Russian and Ukrainian warships is clearly consistent with Article 19 of the convention. However, Türkiye's prohibition of passage through the straits of all foreign warships, whether belonging to the belligerents or not, to prevent escalation of the crisis, can be justified only if Türkiye considers itself threatened with imminent danger of war.¹³⁰ Given that Türkiye has amicable relations with both Ukraine and Russia, it is unlikely that Ankara can make a convincing argument that it considers itself threatened with imminent danger of war from either belligerent.¹³¹ Rather, Türkiye's de facto application of Article 21 appears to be a political expediency to mitigate adverse repercussions from Moscow. Invoking Article 21, where there is insufficient evidence to support an argument that Türkiye believes it is in imminent threat of danger of war, tarnishes Ankara's status as an honest broker and faithful guardian of the Montreux Convention. In the long term, Türkiye's actions could also have unintended consequences for the continued viability of the convention.

128. *Id.*

129. Heather Mongilio, *Turkey Closes Bosphorus, Dardanelles Straits to Warships*, USNI NEWS (Feb. 28, 2022), <https://news.usni.org/2022/02/28/turkey-closes-bosphorus-dardanelles-straits-to-warships>.

130. Turkish Television News Network NTV Interview of Turkish Foreign Minister Mevlüt Çavuşoğlu (Feb. 25, 2022) (transcript on file with author). *See also Turkey Blocks Warships from Bosphorus and Dardanelle Straits amid Russia-Ukraine Crisis*, THE NATIONAL NEWS (Mar. 1, 2022), <https://www.thenationalnews.com/world/2022/02/28/turkey-blocks-warships-from-bosphorus-and-dardanelle-straits/>; Montreux Convention, *supra* note 92, art. 21.

131. Çiğdem Üstün, *Turkey in the Black Sea: Is a Balancing Act Still Possible?*, Joint Brief 18, ISTITUTO AFFARI INTERNAZIONALI (Aug. 1, 2022), https://www.iai.it/sites/default/files/joint_b_18.pdf.

B. Maritime Exclusion/War Zones

As previously discussed, Rosmorrechflot announced the establishment of a maritime exclusion/war zone (MEZ) on February 24, 2022, suspending navigation in the Sea of Azov “until further notice.”¹³² The following day, Russia declared a MEZ to prohibit navigation in the northwest portion of the Black Sea north of 45° 21’ “due to counterterrorist operations carried out by the Russian Navy” and that ships or vessels “in this area will be regarded as terrorist threats.”¹³³ Although Russia’s invasion of Ukraine clearly violates Article 2(4) of the UN Charter,¹³⁴ as a belligerent in an international armed conflict Russia may establish MEZs to prohibit entry of foreign-flagged vessels or aircraft into particularly dangerous operational areas without its authorization.¹³⁵ The establishment of a MEZ, however, does not relieve Russia of its obligation under the law of naval warfare to refrain from attacking vessels and aircraft in the zone that do not constitute military objectives. A protected vessel or aircraft does not forfeit its protection from being attacked simply by entering the zone.¹³⁶

Russia’s decision to establish MEZs in the Sea of Azov and the Black Sea is not a novel method of warfare. Belligerents have established MEZs during armed conflict to control access to broad ocean areas and to shape battlespace management for more than a hundred years. The most recent examples of MEZs include the zones established by the United Kingdom and Argentina during the Falklands/Malvinas War, by Iran and Iraq during the Tanker War, and by the United States during the First and Second Gulf Wars.¹³⁷ Regardless of their label—exclusion zone, restricted area, operational zone, war zone—all zones have a common purpose—to control or

132. Fatima Bahtić, *Russian Navy’s Operations Restrict Shipping in Sea of Azov amid Conflict with Ukraine*, NAVALTODAY (Feb. 24, 2022), <https://www.navaltoday.com/2022/02/24/russian-navys-operations-restrict-shipping-in-sea-of-azov-amid-conflict-with-ukraine/>.

133. Message from Duty Officer, Navigation Warning Service, Dep’t of Navigation and Oceanography, Russia, <https://gcaptain.com/wp-content/uploads/2022/03/Russian-gmdss-warning.jpg> (last visited Feb. 27, 2023).

134. U.N. Charter art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

135. DOD LAW OF WAR MANUAL, *supra* note 72, §§ 13.9.2, 13.9.4.

136. *Id.* § 13.9.2.

137. See MARITIME OPERATIONAL ZONES, app. C (Dennis Mandsager et al. eds., rev. ed. 2013), <https://usnwc.edu/Research-and-Wargaming/Research-Centers/Stockton-Center-for-International-Law> (under “Downloads and Publications” select “Maritime Operational Zones”).

prohibit access of foreign ships and aircraft into the zone. Whether and to what extent a MEZ is consistent with the law of naval warfare depends largely on its function and the measures used by the belligerents to enforce them.¹³⁸

1. Functions of MEZs

MEZs have been used in the past to warn vessels and aircraft to avoid an area of naval operations, which reduces the possibility that neutral vessels will be mistakenly identified as a military objective and attacked.¹³⁹ To the extent MEZs serve to warn neutral vessels and aircraft away from belligerent activities to reduce their exposure to collateral damage and incidental injury, and to the extent the MEZ does not unreasonably interfere with legitimate neutral commerce or create a “free fire zone,” they are considered lawful.¹⁴⁰ Merchant ships, whether neutral or enemy, do not become lawful targets simply because they enter a MEZ. Before attacking a ship or aircraft in the MEZ, belligerents must first ensure that they are legitimate military objectives.¹⁴¹ Thus, while a MEZ may help to sort neutral and enemy ships, the same rules of the law of armed conflict apply inside and outside the zone.

Moreover, the extent, location, and duration of a MEZ and the measures used to enforce the zone should not exceed what is required for military necessity.¹⁴² Neutral vessels and aircraft must also be guaranteed safe passage through the MEZ if the zone significantly impedes free and safe access to neutral ports, subject to the belligerent’s right of visit and search.¹⁴³

The war zones declared by Iran and Iraq during the Tanker War were, in effect, “free fire zones.” Neither side made a distinction between military objectives and protected vessels, thereby violating the principle of distinction. Iraq indicated it would “attack all vessels” appearing in the zone and that all tankers, regardless of flag, docking at Kharg Island (an island in the Arabian Gulf belonging to Iran) would be considered legitimate targets.¹⁴⁴ Similarly, Iran declared that all its waters were a war zone and that it would “bear no responsibility for merchant ships” entering the Persian Gulf and

138. DOD LAW OF WAR MANUAL, *supra* note 72, § 13.9.

139. NWP 1-14M (2022), *supra* note 83, app. A.

140. *Id.* ¶ 7.9.

141. DoD LAW OF WAR MANUAL, *supra* note 72, § 13.9.2.

142. *Id.* § 13.9.4.

143. NWP 1-14M (2022), *supra* note 83, ¶ 7.9.

144. MARITIME OPERATIONAL ZONES, *supra* note 137.

failing to comply with the routing instructions. Thus, both zones were impermissible given that they authorized attacks on neutral merchant ships that simply ventured into the zone.¹⁴⁵

During the Falklands/Malvinas War, both Argentina and the UK declared legally questionable exclusion zones. Argentina threatened to attack any British vessel in its declared war zone, which extended to the entire South Atlantic.¹⁴⁶ The UK's "total exclusion zone" (TEZ) was equally problematic. It provided that any military or civilian ship or aircraft, regardless of flag, found within the TEZ without permission of the UK Ministry of Defense would "be regarded as operating in support of the illegal occupation" of the Falklands and would "be regarded as hostile" and liable to attack by British Forces.¹⁴⁷ Despite its apparent overreach, the TEZ was of relatively short duration and located away from the main shipping lanes in the South Atlantic. It was arguably designed to support British military operations in the Falklands by facilitating the identification of legitimate military targets rather than target all contacts in the zone. The British declaration specifically indicated that ships or aircraft within the zone would be warned of possible attack and there is no evidence that foreign-flag vessels within the TEZ were engaged by British forces.

Compare these zones with the maritime safety zone (MSZ) established by U.S. forces in the eastern Mediterranean Sea in March 2003.¹⁴⁸ The MSZ warned all ships that U.S. forces were "conducting combat operations in international waters that pose a hazard to navigation" and advised all ships to "remain clear" of the designated operation area.¹⁴⁹ The U.S. declaration further advised all vessels to "maintain a safe distance from U.S. forces," noting that any vessel entering the MSZ and approaching U.S. forces or whose intentions were unclear would be subject to visit and search, and that vessels approaching U.S. forces should maintain radio contact via Channel 16. Non-compliance with these instructions would authorize "appropriate measures in self-defense if warranted by the circumstances."¹⁵⁰ The MSZ therefore served as a warning to commercial shipping to stand clear of the immediate

145. *Id.*

146. *Id.*

147. *Id.*

148. See HYDROLANT 597/03, Eastern Mediterranean Sea (202135Z Mar 2003), reprinted in U.S. NAVY, U.S. MARINE CORPS, AND U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A (2007), appendix A.

149. *Id.*

150. *Id.*

area of operations to reduce the risk of exposure to an inadvertent attack. It also made clear that it was not a free fire zone and that self-defense measures would only be employed by U.S. forces “if warranted by the circumstances.”¹⁵¹

Experience shows that most legitimate merchant ships will avoid a declared exclusion zone and comply with any established restrictions. Furthermore, merchant shipping typically observes warning areas, which are widely disseminated by industry groups and P&I (protection and indemnity) clubs. Therefore, the presence of an unknown contact within a zone may be probative in assessing its status and hostile intentions.

2. Enforcement Measures

Enforcement of MEZs must comply with the law of naval warfare. Enforcement measures are applied differently depending on whether a merchant vessel or civil aircraft is of enemy or neutral character.

i. Enemy Merchant Vessels

Enemy merchant ships may be captured by a belligerent anywhere outside neutral waters for adjudication as prize. Nonetheless, enemy merchant ships operating within or outside the MEZ may not be attacked or destroyed unless the vessel:

- (1) persistently refuses to heave to after being ordered to do so;
- (2) actively resists visit and search or capture;
- (3) sails under convoy of enemy warships;
- (4) is armed with weapons systems beyond that required for self-defense against criminal threats;
- (5) is incorporated into, or assists in any way, the enemy’s military intelligence system;
- (6) acts in any capacity as an enemy naval or military auxiliary; or
- (7) is integrated into the enemy’s war-fighting/war-supporting/war-sustaining effort.¹⁵²

151. *Id.*

152. NWP 1-14M (2022), *supra* note 83, ¶¶ 7.5.1, 7.5.2, 8.6.2.2, 8.8.

Before destroying an enemy merchant vessel, a belligerent warship must first place the vessel's passengers, crew, and the ship's papers in a place of safety, unless the enemy merchant ship persistently refuses to stop when ordered to do so or actively resists visit and search or capture.¹⁵³ This requirement does not apply, however, if under the circumstances at the time of the attack the warship would be subject to imminent danger or would otherwise be precluded from accomplishing its mission.¹⁵⁴

There have been no reports of Ukrainian merchant vessels being attacked at sea. However, Russia claims two of its merchant ships—the ore/oil carrier *SGV Flot* and the general cargo ship *Seraphim Sarovskij*—were hit by Ukrainian missiles in the Sea of Azov on February 24, 2022.¹⁵⁵ Although the attacks have not been verified by independent sources, the Russian Federal Security Services alleged the missiles were fired from Mariupol following the Russian invasion. A fire broke out on board the *SGV Flot* and a member of the crew was injured. Both ships returned to ports in the Sea of Azov. Absent evidence that these merchant ships were engaged in intelligence collection, were employed as a naval auxiliary, or were integrated into Russia's war-fighting, war-supporting, or war-sustaining effort, the alleged Ukrainian missile attacks would be inconsistent with the law of naval warfare.

ii. *Neutral Merchant Vessels*

Neutral merchant ships are subject to the belligerent right of visit and search by Russian and Ukrainian warships to determine the enemy character of the ship or its cargo. A neutral vessel may not be captured or attacked unless it engages in certain prohibited conduct, to include:

- (1) it avoids an attempt to establish its identity;
- (2) it resists visit and search;
- (3) it is carrying contraband;
- (4) it breaches or attempts to breach a blockade;

153. Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 3 Bevens 298, reprinted in 31 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 137 (1939).

154. NWP 1-14M (2022), *supra* note 83, ¶¶ 8.6.1, 8.6.2.2.

155. *Russia Claims Two Commercial Ships Hit by Ukrainian Missiles*, INSURANCE MARINE NEWS (Feb. 28, 2022), <https://insurancemarineneeds.com/insurance-marine-news/russia-claims-two-commercial-ships-hit-by-ukrainian-missiles/>.

- (5) it presents irregular or fraudulent papers; lacks necessary papers; or destroys, defaces, or conceals papers during a visit and search;
- (6) it violates regulations established by a belligerent within the immediate area of naval operations;
- (7) it carries personnel in the military or public service of one of the belligerents; or
- (8) it communicates information in the interest of one of the belligerents.¹⁵⁶

If a neutral merchant ship resists capture, belligerent warships may use force to compel compliance. Neutral merchant ships may also be attacked or captured if they take a direct part in the hostilities on the side of the enemy or if they act in any capacity as an enemy naval or military auxiliary.¹⁵⁷ Similarly, neutral merchant ships that operate directly under the control, orders, charter, employment, or direction of the enemy, or resist an attempt to establish their identity, including resisting visit and search, can be captured or attacked.¹⁵⁸

There have been numerous independent reports of neutral merchant ships being attacked in the Black Sea without warning. It is unlikely that these attacks originated from Ukraine, but rather were most likely conducted by Russian warships of the Black Sea Fleet. On February 24, 2022, the Turkish-owned, Marshall Islands-flagged, bulk carrier M/V *Yasa Jupiter* was hit by a missile fifty nautical miles south of Odessa while en route to Romania and suffered significant damage to the bridge and deck area.¹⁵⁹ The incident prompted the Republic of the Marshall Islands Maritime Administrator to issue a ship security advisory warning vessels:

- (1) To avoid any transit or operation within the exclusive economic zone of Ukraine or Russia within the Black Sea.
- (2) That access to the Sea of Azov through the Kerch Strait is blocked by Russian forces.
- (3) That all Ukrainian ports are closed and that ships may not enter or leave port.

156. NWP 1-14M (2022), *supra* note 83, ¶ 7.10.

157. *Id.* ¶ 7.5.1.

158. *Id.* ¶ 7.5.2.

159. Maritime Administrator, Republic of the Marshall Islands, Ship Security Advisory No. 02-22 (Rev. 9), Geopolitical Conflict—Ukraine, Black Sea, Sea of Azov (Aug. 10, 2022), <https://www.register-iri.com/wp-content/uploads/SSA-2022-02.pdf>.

- (4) That access to the northwest Black Sea, north of 45° 21' has been restricted by the Russian Navy and that transit in this area should be avoided.
- (5) To ensure their AIS is always transmitting.
- (6) To comply fully with instructions if hailed by military vessels.
- (7) To not embark armed security personnel while operating in the Black Sea.¹⁶⁰

The following day, the Japanese-owned, Panamanian-flagged, bulk carrier M/V *Namura Queen*, which was en route to the port of Pivdennyi (Yuzhnyi) to load grain, was seriously damaged when it was struck by a missile at the port's outer anchorage.¹⁶¹ A fire broke out on the ship and at least two crew members were injured.¹⁶² A second Panamanian-flagged bulk carrier, the M/V *Lord Nelson*, suffered minor damages when it was hit by a missile while at anchor.¹⁶³ That same day, the Moldovan-flagged bunker tanker M/V *Millenium Spirit* was hit by a missile while it was navigating in the Black Sea, forcing the crew to abandon ship after the vessel caught fire.¹⁶⁴ Two crew members, including the master, were in critical condition. On March 2, 2022, the Bangladesh-flagged bulk carrier M/V *Banglar Samriddhi* was hit by a missile in the port of Olvia south of Mykolaiv, killing one of its twenty-nine crew members.¹⁶⁵

160. *Id.*

161. Julia Payne, *Cargo Ship Namura Queen Hit by Rocket off Ukraine—Local Agent*, REUTERS (Feb. 25, 2022), <https://www.reuters.com/world/europe/cargo-ship-namura-queen-hit-by-rocket-off-ukraine-local-agent-2022-02-25/>.

162. Mikhail Voytenko, *Japanese Bulk Carrier Hit by Missile, Count of Stricken Ships Rising to 3, Ukraine*, FLEETMON (Feb. 25, 2022), <https://www.fleetmon.com/maritime-news/2022/37381/japanese-bulk-carrier-hit-missile-count-stricken-s/#:~:text=Japanese%20bulk%20carrier%20NAMURA%20QUEEN,which%20reportedly%2C%20is%20already%20extinguished.>

163. *Russian Ship Fires on Sanzhiyka, Then Announces “Security Guarantees” for Passage of Ships*, UKRINFORM (Mar. 25, 2022), <https://www.ukrinform.net/rubric-ato/3439809-russianship-fires-on-sanzhiyka-then-announces-security-guarantees-for-passage-of-ships.html>.

164. Xavier Vavasseur, *Two Civilian Vessels Hit by Russian Missiles off Odessa—Ukraine MoD*, NAVAL NEWS (Feb. 25, 2022), <https://www.navalnews.com/naval-news/2022/02/two-civilian-vessels-hit-by-russian-missiles-off-odessa-ukraine-mod/>.

165. *Id.*; *One Killed as Two Cargo Ships Hit by Explosions off Ukraine*, AL JAZEERA (Mar. 3, 2022), <https://www.aljazeera.com/news/2022/3/3/two-cargo-ships-hit-by-explosions-around-ukraine-one-killed>.

There is no indication that any of these vessels were engaged in activities that would render them subject to capture or attack by either of the belligerents. These indiscriminate attacks (purportedly by Russia) on neutral shipping do not comport with the law of naval warfare, in particular the principle of distinction.

C. Naval Mines

On March 3, 2022, the Estonian-owned M/V *Helt* struck a free-floating mine twenty miles south of Odessa and sank in the Black Sea after six crew members were rescued.¹⁶⁶ That same day, the Spanish Hydrographic Office issued a navigational warning (0092/2022) recommending that ships avoid navigating in the northwest part of the Black Sea due to mine danger.¹⁶⁷ A second warning (0122/2022) was subsequently issued cautioning ships about the possibility of drifting mines in the northwest, west, and southwest areas of the Black Sea.¹⁶⁸ Similar warnings were issued by the NATO Shipping Centre, indicating that drifting mines had been detected and deactivated in the Western Black Sea and that the threat of more drifting mines could not be ruled out.¹⁶⁹

The Russian Federal Security Service (FSB) intelligence service alleged that “Ukrainian naval forces had deployed barriers of mines around the ports of Odessa, Ochakov, Chernomorsk and Yuzhny” and that these mines had broken loose from their moorings during a storm.¹⁷⁰ As a result, the FSB claimed that over 420 mines were “now floating freely in the western Black

166. *Estonian Cargo Ship Sinks After Possible Mine Strike Near Odesa*, THE MARITIME EXECUTIVE (Mar. 3, 2022), <https://www.maritime-executive.com/article/estonian-cargo-ship-sinks-after-possible-mine-strike-near-odesa>.

167. Armada Española, Instituto Hidrográfico de la Marina, *NAVAREA III Warnings in Force, No. 0092/2022, Black Sea—Northwestern Part, Mines Area*, https://armada.defensa.gob.es/ihm/Aplicaciones/Navareas/Index_Navareas_xml_en.html (last updated Feb. 2, 2023) (scroll down and select No. 0092/2022).

168. Armada Española, Instituto Hidrográfico de la Marina, *NAVAREA III Warnings in Force, No. 0122/2022, Black Sea, Possible Drifting Mines*, https://armada.defensa.gob.es/ihm/Aplicaciones/Navareas/Index_Navareas_xml_en.html (last updated Feb. 2, 2023).

169. NATO SHIPPING CENTRE, *Risk of Collateral Damage in the North Western, Western, and Southwest Black Sea* (Dec. 12, 2022), <https://shipping.nato.int/nsc/operations/news/-2022/risk-of-collateral-damage-in-the-north-western-black-sea-2>.

170. Agence France-Presse, *Russia Warns of Ukrainian Mines in the Black Sea*, INQUIRER.NET (Mar. 20, 2022), <https://newsinfo.inquirer.net/1570918/russia-warns-of-ukrainian-mines-in-black-sea>.

Sea” and, given the direction of the currents and wind, could possibly float toward the Bosphorus.¹⁷¹ A similar warning was issued on March 18, 2022, by the captain of the Port of Sochi:

[D]ue to stormy conditions, anchor mines set by the Ukrainian Navy on the approaches to the ports of Odessa, Ochakov, Chernomorsk, [and] Pivdenny . . . have become adrift. Please be especially careful when sailing in the southwestern and northwestern parts of the Black Sea due to the possibility of detonation of drifting mines.¹⁷²

Ukrainian officials denied the Russian allegations, indicating that the drifting mines were Soviet-era naval mines seized in Sevastopol by the Russians when they invaded Crimea in 2014.¹⁷³ Ukrainian officials alleged that the mines were intentionally set drift by Russian forces to indiscriminately disrupt commercial shipping in the Black Sea and discredit Ukraine.¹⁷⁴

1. Uses of Mines

Use of naval mines can be both a means and method of naval warfare. They can be used for area denial, coastal and harbor defense, anti-surface and anti-submarine warfare, and blockade.¹⁷⁵ When used exclusively for defensive purposes (e.g., moored mines used in area denial or harbor defense) laying of naval mines is considered a method of naval warfare and does not constitute an attack. When directed against a military objective (e.g., free-floating mines designed to hit a specific target) use of naval mines is a means of naval warfare that qualifies as an attack and is subject to the rules and principles of targeting law. The principle of distinction requires means and methods of warfare that constitute an attack only be directed at military objectives. Unless they do something to lose their protected status, civilians and civilian objects may not be attacked. Therefore, weapons, such as drifting armed

171. *WARNING! Real Danger at Sea: Russia Has Mined the Recommended Routes from the Bosphorus to Odessa, Blaming it on Ukraine*, BLACK SEA NEWS (Mar. 19, 2022), <https://www.blackseanews.net/en/read/186754>.

172. *Id.*

173. *Ukraine Accuses Russia of Setting Stolen Mines Adrift in the Black Sea*, THE MARITIME EXECUTIVE (Mar. 30, 2022), <https://www.maritime-executive.com/article/ukraine-accuses-russia-of-setting-stolen-mines-adrift-in-the-black-sea>.

174. *Id.*

175. NWP 1-14M (2022), *supra* note 83, ¶ 9.2; DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.1.

contact mines, which are incapable of being directed specifically at a military objective, are forbidden by the law of naval warfare due to their indiscriminate effect.¹⁷⁶

Generally, there are six different categories of naval mines—moored, drifting/floating, bottom, remotely controlled, submarine launched mobile, and rising/rocket mines.¹⁷⁷ The mines being employed in the Black Sea by Russia and Ukraine appear to be either moored or drifting/floating automatic contact mines.

2. Applicable Legal Regime

To be a lawful means of naval warfare, the employment of naval mines must adhere to the law of armed conflict. The rules applicable to the use of automatic contract mines are contained in Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines.¹⁷⁸ Neither Russia nor Ukraine are parties to Hague VIII, but these rules reflect customary international law and are designed to regulate the employment of mines to mitigate the severity of war and ensure the security of peaceful neutral navigation.¹⁷⁹

Hague VIII prohibits the laying of unanchored automatic contact mines unless they “become harmless one hour . . . after the person who laid them ceases to control them.”¹⁸⁰ It also prohibits the use of anchored automatic contact mines that “do not become harmless as soon as they have broken loose from their moorings.”¹⁸¹ Belligerents are also prohibited from laying “automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.”¹⁸² Nonetheless, mining for some other purpose—strategic blockade of enemy ports, coasts, and waterways—is permissible even if commercial shipping is incidentally affected.¹⁸³ In May 1972, for example, the United States lawfully mined all entrances to

176. NWP 1-14M (2022), *supra* note 83, ¶ 7.2.2.1.

177. CHATHAM HOUSE, INTERNATIONAL LAW APPLICABLE TO NAVAL MINES (Oct. 2014), https://www.chathamhouse.org/sites/default/files/field/field_document/20140226NavalMines.pdf.

178. Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541 [hereinafter Hague VIII].

179. NWP 1-14M (2022), *supra* note 83, ¶ 9.1.2.

180. Hague VIII, *supra* note 178, art. 1.

181. *Id.*

182. *Id.* art. 2.

183. NWP 1-14M (2022), *supra* note 83, ¶ 9.2.3; DOD LAW OF WAR MANUAL, *supra* note 72, § 3.6.

North Vietnamese ports to prevent the entry of commercial shipping and the departure of North Vietnamese naval units.¹⁸⁴ Advance notification was provided to all concerned parties, as well as the United Nations, and neutral shipping was given three days to leave the ports before the mines became active.¹⁸⁵

The general rule that belligerents must take feasible precautions for the protection of civilians applies when using naval mines.¹⁸⁶ When employing automatic contact mines, belligerents must take every possible precaution “for the security of peaceful [neutral] shipping.”¹⁸⁷ In this regard, “belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners” and to governments through diplomatic channels.¹⁸⁸ Feasible precautions may also include surveillance and monitoring of minefields by the belligerents to reduce the risk of harm to peaceful neutral shipping.¹⁸⁹ If a peaceful neutral vessel inadvertently sails near the minefield, a belligerent may issue an appropriate warning to the vessel to stand clear of the area. Additionally, belligerents must accurately record the location of minefields to facilitate proper notification and subsequent removal or deactivation of the mines at the conclusion of the conflict.¹⁹⁰

Ship owners are normally notified of danger zones by a notice to mariners (NOTMAR) or other navigational warning issued pursuant to the IMO/IHO World-Wide Navigational Warning Service.¹⁹¹ Spain is the Naval Area (NAVAREA) Coordinator for the Mediterranean Sea, Black Sea, and

184. President Richard Nixon, Address to the Nation on the Situation in Southeast Asia, May 8, 1972, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/address-the-nation-the-situation-southeast-asia>.

185. *Id.*

186. NWP 1-14M (2022), *supra* note 83, ¶ 7.2.2.1; DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.2.1.

187. Hague VIII, *supra* note 178, art. 3.

188. *Id.*; NWP 1-14M (2022), *supra* note 83, ¶ 9.2.3; DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.3.2.

189. DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.3.3.

190. NWP 1-14M (2022), *supra* note 83, ¶ 9.2.3; DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.3.3.

191. See generally Int'l Hydrographic Org., *Navigation Warnings on the Web*, <https://iho.int/navigation-warnings-on-the-web> (last visited Feb. 28, 2023).

Sea of Azov (NAVAREA III).¹⁹² Notification must also be provided to governments through diplomatic channels.¹⁹³

Neutral States may also lay automatic contact mines during an international armed conflict. If they do so, they must comply with the same rules and take the same precautions applicable to the belligerents.¹⁹⁴

At the conclusion of the conflict, States that have laid mines are required “to do their utmost to remove the mines which they have laid, each Power removing its own mines.”¹⁹⁵ If a belligerent has laid anchored automatic contact mines off the coast of the other belligerent, the position of these mines must be notified to the other belligerent and each State must proceed without delay “to remove the mines in its own waters.”¹⁹⁶

Since 1997, Standing NATO Mine Countermeasures Group 1 has conducted naval mine clearance and ordnance disposal operations in the Baltic Sea to clear and destroy naval mines and other explosive remnants from the First and Second World Wars, as well as the Cold War.¹⁹⁷ Of the more than 160,000 naval mines laid in the Baltic Sea during these wars, only 20 percent have been removed or destroyed.¹⁹⁸ Removal or deactivation of mines can also be conducted pursuant to a bilateral agreement between States. For example, Article 2 of the Agreement on Ending the War and Restoring Peace in Viet-nam requires the United States to “remove, permanently deactivate or destroy all the mines in the territorial waters, ports, harbors, and waterways of North Viet-Nam.”¹⁹⁹

Emplacement of mines is also regulated by the law of neutrality and the law of the sea. Both Russia and Ukraine are parties to the 1907 Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War and UNCLOS. The principal right of a neutral State is the inviolability of its territory. This inviolability extends to neutral waters, which include internal

192. *Id.*

193. Hague VIII, *supra* note 178, art. 4.

194. *Id.*

195. *Id.* art. 5.

196. *Id.*

197. NATO, *NATO Ships Participate in Historical Ordnance Disposal Operation Open Spirit 2022* (May 23, 2022), <https://mc.nato.int/media-centre/news/2022/nato-ships-participate-in-historical-ordnance-disposal-operation-open-spirit-2022>.

198. NATO, *NATO Forces Clear Mines from the Baltic in Open Spirit Operation* (May 7, 2021), <https://mc.nato.int/media-centre/news/2021/nato-forces-clear-mines-from-the-baltic-in-open-spirit-operation>.

199. Agreement on Ending the War and Restoring Peace in Viet-nam, Jan. 27, 1973, 935 U.N.T.S. 6.

waters, the territorial sea, and archipelagic waters of the neutral State.²⁰⁰ Belligerents have a corresponding duty to respect the inviolability of neutral States.²⁰¹

Thus, during an international armed conflict, belligerents have a duty to respect the sovereignty of neutral States.²⁰² Belligerents must also abstain from any act that constitutes a violation of neutrality, such as an act of hostility committed by a belligerent warship in neutral waters.²⁰³ The belligerents may therefore not emplace mines in neutral waters.²⁰⁴

Neutral waters do not include the contiguous zone and EEZ of the neutral State under the law of naval warfare.²⁰⁵ While coastal States enjoy limited law enforcement jurisdiction in the contiguous zone and sovereign rights over resources in the EEZ, UNCLOS does not affect the rights of belligerents under the law of naval warfare.²⁰⁶ Rather, these zones are subject to high seas freedoms and belligerents may conduct attacks from and within them. Belligerents may, therefore, lawfully employ mines (if consistent with the Hague VII rules) beyond the territorial sea of a neutral State.²⁰⁷ This includes the employment of mines to establish limited barred areas in the EEZ or on the high seas, provided there is an alternate route around or through the mine field available for use by neutral shipping with reasonable assurance of safety.²⁰⁸ Additionally, mining areas of indefinite extent is prohibited.²⁰⁹

Belligerents also retain the right of transit passage through international straits overlapped by neutral waters and archipelagic sea lanes passage

200. NWP 1-14M (2022), *supra* note 83, ¶ 7.3; DOD LAW OF WAR MANUAL, *supra* note 72, §§ 15.7, 15.7.1.

201. NWP 1-14M (2022), *supra* note 83, ¶ 7.2; DoD Law of War Manual, *supra* note 72, § 15.3.1.

202. Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War art. 1, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545.

203. *Id.* arts. 1, 2.

204. NWP 1-14M (2022), *supra* note 83, ¶ 9.2.3; DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.3.5.

205. NWP 1-14M (2022), *supra* note 83, ¶¶ 7.3, 7.3.8; DOD LAW OF WAR MANUAL, *supra* note 72, § 15.7.1.

206. UNCLOS, *supra* note 18, arts. 33, 56.

207. NWP 1-14M (2022), *supra* note 83, ¶ 7.3; NWP 1-14M (2022), *supra* note 83, § 13.11.3.5.

208. NWP 1-14M (2022), *supra* note 83, ¶ 9.2.3; NWP 1-14M (2022), *supra* note 83, § 13.11.3.5.

209. NWP 1-14M (2022), *supra* note 83, ¶ 9.2.3; NWP 1-14M (2022), *supra* note 83, § 13.11.3.5.

through neutral archipelagic waters.²¹⁰ However, when transiting through the strait or an archipelagic sea lane, belligerent warships and military aircraft must refrain from the threat or use of force against the neutral State, as well as acts of hostility (such as laying mines) and other activities not incident to their transit.²¹¹ Additionally, while belligerents may employ mines to channelize neutral shipping, they may not do so in a manner that denies neutral ships the right of transit passage or archipelagic sea lanes passage.²¹² Closing off a strait or archipelagic sea lane is only lawful if an alternative convenient route is available for use by neutral shipping.

3. Mines in the Black Sea

Ukraine has admitted to laying mines in the exercise of their right of self-defense but has not specified the type of mines employed.²¹³ As a belligerent in the conflict, Ukraine may lawfully lay defensive mines in its territorial sea for area denial or harbor defense. Nonetheless, if the mines employed by Ukrainian forces are anchored automatic contact mines, they must become harmless as soon as they have broken loose from their moorings. To the extent Ukraine has employed automatic contact mines that cannot comply with this requirement, they are in violation of the law of armed conflict.

Ukrainian officials allege that the floating mines in the Black Sea are R-421-75 type mines seized by Russian forces in 2014 from the 174th Armament Base in Sevastopol.²¹⁴ Ukraine has accused Russia of sowing the mines in the Black Sea as “uncontrolled drifting ammunition, turning them into a de facto weapon of indiscriminate action.”²¹⁵ Although the origin of the sea mines remains unclear, the British Defense Ministry indicated that “it has high confidence that Russian activity” set the mines adrift in the Black

210. UNCLOS, *supra* note 18, arts. 38, 53.

211. NWP 1-14M (2022), *supra* note 83, ¶¶ 7.3.6, 7.3.7; DOD LAW OF WAR MANUAL, *supra* note 72, §§ 15.8.1, 15.8.2.

212. DOD LAW OF WAR MANUAL, *supra* note 72, § 13.11.3.5.

213. Jonathan Saul, *Analysis: The Sea Mines Floating Between Ukraine’s Grain Stocks and the World*, REUTERS (June 10, 2022), <https://www.reuters.com/markets/commodities/sea-mines-floating-between-ukraines-grain-stocks-world-2022-06-10/>.

214. Jonathan Saul, *Ukraine Says Russia Planting Mines in Black Sea as Shipping Perils Grow*, REUTERS (Mar. 30, 2022), <https://www.reuters.com/world/europe/ukraine-says-russia-planting-mines-black-sea-shipping-perils-grow-2022-03-30/>.

215. *Russia Trades Accusations with Ukraine on Drifting Black Sea Mines*, REUTERS (Apr. 2, 2022), <https://www.reuters.com/world/europe/russia-trades-accusations-with-ukraine-drifting-black-sea-mines-2022-03-31/>.

Sea.²¹⁶ If these allegations are true, Russia's deployment of drifting automatic contact mines in the Black Sea that are incapable of being directed at a specific military objective violate the principle of distinction and are prohibited by the law of armed conflict due to their indiscriminate effect.

Since the beginning of the war, thirty free floating mines have been destroyed in the Black Sea—three by Türkiye, three by Romania, one by Bulgaria, one by Russia, and twenty-two by Ukraine.²¹⁷ While conducting mine-clearing operations on September 8, 2022, the Romanian minesweeper *Lieutenant Dimitrie Nicolescu* was damaged when it struck a floating mine about twenty-five nautical miles northeast of Constanta.²¹⁸ The vessel was assisted back to port by Romania naval tugs *Grozaşul* and *Viteazul* after it lost maneuverability, but no crew members were injured.²¹⁹ The threat of drifting sea mines in the Southwest portion of the Black Sea still exists.²²⁰

D. Naval Bombardment

1. Sea-Based Missile Attacks

There have been numerous reports of Russian missile attacks on targets in the Ukraine from ships in the Black Sea and Caspian Sea. In March 2022, for example, ships of the Caspian Flotilla reportedly fired Kalibr cruise missiles and destroyed a military fuel-storage facility, a lawful military objective, in Ukraine.²²¹ In August 2022, eight X-101 (X-555)-type cruise missiles were fired from the Caspian at targets in central, southern, and western Ukraine, seven of which were shot down before they reached their intended targets.²²²

216. UK MoD: *Mines in the Black Sea are "Almost Certainly" of Russian Origin*, THE MARITIME EXECUTIVE (Apr. 3, 2022), <https://www.maritime-executive.com/article/uk-mod-mines-in-black-sea-are-almost-certainly-of-russian-origin>.

217. *Mine Scare in the Black Sea*, BOSPHORUS NAVAL NEWS (Sept. 10, 2022), <https://turkishnavy.net/2022/09/10/mine-scare-in-the-black-sea/>.

218. Tayfun Ozberks, *Romanian Minesweeper Hits Sea Mine in The Black Sea*, NAVAL NEWS (Sept. 11, 2022), <https://www.navalnews.com/naval-news/2022/09/romanian-mine-sweeper-hits-sea-mine-in-the-black-sea/>.

219. *Id.*

220. NATO SHIPPING CENTRE, *supra* note 169.

221. *Russia Strikes Ukraine with Cruise Missiles from Two Seas*, REUTERS (Mar. 20, 2022), <https://www.reuters.com/world/europe/russia-strikes-ukraine-with-cruise-missiles-black-sea-caspian-sea-2022-03-20/>.

222. *Russia Fired Eight Missiles at Ukraine from the Caspian Sea*, APA (Aug. 2, 2022), <https://apa.az/en/cis-countries/russia-fired-eight-missiles-at-ukraine-from-the-caspian-sea-382111>.

Long-range cruise missiles have also been fired by Russian naval forces operating in the Black Sea. The Black Sea Fleet has six surface ships—two *Grigoryevich*-class frigates and four *Byan-M* corvettes—and six *Kilo*-class diesel-electric attack submarines that can fire Kalibr cruise missiles.²²³ Kalibr NK missiles launched from a Russian *Kilo*-class submarine in the Black Sea in July 2022 purportedly struck a civilian business center, a protected civilian object, in Vinnytsia, killing twenty-three civilians.²²⁴ Similarly, between October 10–17, coordinated Russian missile strikes from the Black Sea Fleet allegedly attacked non-military targets, including civilian infrastructure (energy grid), residential buildings, and schools. Russia denied the allegations, indicating that the missiles hit military targets, including the energy grid.²²⁵ As of November 29, 2022, Russia has deployed twelve warships into the Black Sea, including one vessel equipped with eight Kalibr missiles.²²⁶

2. Legal Regime

i. Hague Convention (IX)

Rules regarding naval bombardment of land-based targets with weapons (naval guns, rockets and missiles, and air-delivered ordnance) are contained in Hague Convention (IX). These rules have been further developed by State practice during the two World Wars, the Vietnam and the Falkland/Malvinas conflicts, and the two Gulf wars.²²⁷

In general, the law of armed conflict prohibits belligerents from making noncombatants and civilians the target of direct attack, causing superfluous injury to and unnecessary suffering of combatants, and wantonly destroying property.²²⁸ Thus, the bombardment by naval forces of undefended ports,

223. Sam LaGrone, *Russian Sea-Based Kalibr Cruise Missiles Part of New Round of Strikes in Ukraine*, USNI NEWS (Oct. 25, 2022), <https://news.usni.org/2022/10/25/russian-sea-based-kalibr-cruise-missiles-part-of-new-round-of-strikes-in-ukraine>.

224. Heather Mongilio, *Russians Used Sub-Launched Missiles to Strike Vinnytsia Business Center*, USNI NEWS (July 15, 2022), <https://news.usni.org/2022/07/15/russians-used-sub-launched-missiles-to-strike-vinnytsia-business-center>.

225. LaGrone, *supra* note 223.

226. Ukrayinska Pravda, *Russian Flotilla in Black Sea Includes 12 Ships, One with Kaliber Missiles*, YAHOO!NEWS (Nov. 29, 2022), <https://news.yahoo.com/russian-flotilla-black-sea-includes-120101801.html>.

227. Convention No. IX Concerning Bombardments by Naval Forces in Time of War, Oct 18, 1907, 36 Stat. 2351, T.S. No. 542 [hereinafter Hague (IX)].

228. NWP 1-14M (2022), *supra* note 83, ¶ 8.9.1.

towns, villages, dwellings, or buildings is forbidden.²²⁹ This prohibition does not apply to the bombardment of military works, military or naval establishments, depots of arms or war material, workshops or plants that could be utilized for the needs of the belligerent fleet or army, and ships of war in the harbor.²³⁰ The commander of a naval force may destroy these military objectives with weapons after a summons to local authorities “followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.”²³¹ The commander incurs “no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.”²³² Nonetheless, “if for military reasons immediate action is necessary, and no delay can be allowed the enemy,” military objectives in undefended ports (etc.) may be attacked but the “commander shall take all due measures in order that the town may suffer as little harm as possible.”²³³

Additionally, after due notice is given, the bombardment of undefended ports (etc.) “may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use” of the belligerent naval force.²³⁴ Requisitions for provisions or supplies “shall be in proportion to the resources” of the port (etc.). Requisition shall only be demanded in the name of the commander of the naval force, and shall, as far as possible, “be paid for in cash; if not, they shall be evidenced by receipts.”²³⁵ However, undefended ports (etc.) “may not be bombarded on account of failure to pay money contributions.”²³⁶

ii. State Practice

State practice since 1907 has further developed the rules of Hague (IX). Wanton or deliberate destruction of areas of concentrated civilian habitation is prohibited. However, a military objective within an area of concentrated civilian habitation “may be attacked, if required, for the submission of the

229. Hague (IX), *supra* note 227, art. 1.

230. *Id.* art. 2.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* art. 3.

235. *Id.*

236. *Id.* art. 4.

enemy with the minimum expenditure of time, life, and physical resources, provided the attack meets other law of war requirements.”²³⁷ Consistent with the principle of proportionality, “the anticipated incidental injury to civilians, or collateral damage to civilian objects, must not be excessive in light of the military advantage anticipated by the attack.”²³⁸

If the military situation permits, a commander “should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment.”²³⁹ A warning need not be given, however, if “civilians are unlikely to be affected by the attack.”²⁴⁰ To ensure protection of the force or mission accomplishment, warnings may be general rather than specific.

Nonetheless, an attack that “treats a number of clearly separated and distinct military objectives located in an area as a single military objective containing a concentration of civilians and civilian objects is prohibited.”²⁴¹ Similarly, a “bombardment for the sole purpose of terrorizing the civilian population is prohibited.”²⁴² In this regard, “some fear and terror will be experienced by civilians whenever military objectives in their vicinity are attacked.”²⁴³ Thus, a legal attack that otherwise causes incidental terror to the civilian population is not prohibited.

Undefended cities or towns that are open to immediate entry by belligerent ground forces may not be bombarded. This prohibition does not, however, apply to a city or town that is behind enemy lines; military objectives located therein may be attacked.²⁴⁴

Agreed demilitarized zones are exempt from bombardment.²⁴⁵ Similarly, agreed hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement between the belligerents.²⁴⁶

Medical establishments and units (mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded.²⁴⁷ Medical establishments and units should be clearly marked with a distinctive

237. NWP 1-14M (2022), *supra* note 83, ¶ 8.9.1.1.

238. *Id.*

239. *Id.* ¶ 8.9.2.

240. *Id.*

241. *Id.* ¶ 8.9.1.1.

242. *Id.* ¶ 8.9.1.2.

243. *Id.*

244. *Id.* ¶ 8.9.1.3.

245. *Id.*

246. *Id.* ¶ 8.9.1.5.

247. *Id.* ¶ 8.9.1.4.

medical emblem—Red Cross, Red Crescent, or Red Crystal. Nonetheless, “any object recognized as being a medical facility may not be attacked, whether or not marked with a protective symbol.”²⁴⁸

Belligerents have a responsibility “to ensure such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety.”²⁴⁹ If a medical facility is “used for military purposes inconsistent with their humanitarian mission, they must be warned about the inconsistent use, if feasible.”²⁵⁰ If the warning goes unheeded, the medical facility may be attacked.

There have been several reports of alleged Russian attacks on Ukrainian medical facilities. Since the beginning of the war, the World Health Organization reports that there have been over 750 attacks on healthcare facilities in Ukraine.²⁵¹ In March 2022, for example, a Russian air strike on a maternity and children’s hospital in Mariupol killed three people, including a child, and injured seventeen others (staff and patients).²⁵² Similarly, in November 2022, a Russian S-300 surface-to-air missile struck a maternity ward in Vilniansk, killing a newborn child and injuring his mother.²⁵³ These attacks, if intentional, are a clear violation of the law of armed conflict.

iii. 1954 Hague Convention (Cultural Property)

Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded.²⁵⁴ Cultural property is defined in the 1954 Hague Convention as:

248. *Id.*

249. *Id.*

250. *Id.*

251. World Health Org., *Surveillance System for Attacks on Health Care*, https://extranet.who.int/ssa/LeftMenu/Index.aspx?utm_source=Stopping%20attacks%20on%20health%20care%20QandA&utm_medium=link&utm_campaign=Link_who (last visited Feb. 27, 2023) (select 2022 date range and Ukraine).

252. *Ukraine War: Three Dead as Maternity Hospital Hit by Russian Air Strike*, BBC NEWS (Mar. 10, 2022), <https://www.bbc.com/news/world-europe-60675599>.

253. Matthew Bigg, *A Russian Missile Strikes a Maternity Ward, Killing a Newborn, Ukraine Says*, NEW YORK TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/world/europe/ukraine-newborn-russian-missile-strike.html#:~:text=A%20Russian%20missile%20hit%20a,during%20the%20nine%2Dmonth%20war>.

254. NWP 1-14M (2022), *supra* note 83, ¶ 8.9.1.6; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments.”²⁵⁵

These structures, however, lose their protected status if used for military purposes. Moreover, the local population is responsible for ensuring that such buildings and monuments are clearly marked with the distinctive emblem of such sites—a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white, or the cultural property sign contained in 1954 Hague Convention.²⁵⁶ Such buildings—even if displaying a protective emblem—lose their protection from attack if they are used for military purposes.

Although Russia is a party to the 1954 Hague Convention, there is mounting evidence that Russia is routinely violating its obligations under the convention. As of mid-October 2022, the United Nations Educational, Scientific and Cultural Organization (UNESCO) reports that Russian attacks in Ukraine have damaged or destroyed 204 cultural sites—87 religious sites, 13 museums, 38 historic buildings, 38 buildings dedicated to cultural activities, 18 monuments, and 10 libraries.²⁵⁷

255. 1954 Hague Convention, *supra* note 254, art. 1.

256. *Id.* arts. 6, 16–17; NWP 1-14M (2022), *supra* note 83, ¶ 8.9.1.6.

257. Kostya Akinsha, *Russian Bombings Threaten Kyiv's Cultural Heritage*, WALL STREET JOURNAL (Oct. 18, 2022), <https://www.wsj.com/articles/putin-closes-in-on-kyivs-cultural-heritage-ukraine-putin-unesco-taras-shevchenko-11666127051>.

iv. Additional Protocol I (Installations Containing Dangerous Forces)

For States that are a party to Additional Protocol I, “works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”²⁵⁸ Additionally, “other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.”²⁵⁹ Moreover, these works, installations, or military objectives may not be made the object of reprisals.

To facilitate the identification of these protected objects, the parties to the conflict “may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol.”²⁶⁰ However, the absence of such marking in no way relieves any party of its obligations under Article 56.²⁶¹

The special protection against attack of these works and installations shall cease:

- (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
- (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
- (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.²⁶²

258. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 56, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* art. 56(2).

If a work, installation, or military objective is attacked, “all practical precautions shall be taken to avoid the release of the dangerous forces.”²⁶³

It is incumbent on the parties to the conflict to endeavor to avoid locating any military objectives in the vicinity of these protected works or installations. Nevertheless,

installations erected for the sole purpose of defending the protected works or installations . . . are permissible and shall not . . . be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.²⁶⁴

On March 4, 2022, Russian forces captured the Ukrainian Zaporizhzhia Nuclear Power Plant after heavy fighting and artillery shelling. Renewed shelling around the plant in August and September 2022 disabled the plant’s connections to the power grid, prompting an intervention by the International Atomic Energy Agency (IAEA).²⁶⁵ An IAEA assessment issued on September 5 warned that “continued military action represented a constant threat to nuclear safety and security because critical safety functions (containment of the radioactivity and cooling in particular) could be impacted.”²⁶⁶

As a party to AP I, Russia’s attacks on the Zaporizhzhia power plant appear to be inconsistent with its obligations under the treaty. Russia has not provided evidence that the power plant is providing “electric power in regular, significant and direct support of military operations” and that an attack “is the only feasible way to terminate such support.”²⁶⁷ Moreover, the IAEA assessment of the plant indicates that continued Russian military action represents a clear threat to nuclear safety and security. In other words, continued Russian attacks on the plant could “cause the release of dangerous forces and consequent severe losses among the civilian population.”²⁶⁸ An attack under these circumstances would be a direct violation of Russia’s obligations under Article 56 of AP I.²⁶⁹

263. *Id.*

264. *Id.* art. 56(5).

265. MARK HOLT & MARY BETH D. NIKITIN, CONG. RSCH. SERV., IN11883, RUSSIAN MILITARY ACTIONS AT UKRAINE’S NUCLEAR POWER PLANT (Sept. 12, 2022).

266. *Id.*

267. AP I, *supra* note 258, art. 56.

268. *Id.*

269. *Id.*

For States not party to AP I, like the United States, “dams, dikes, levees, and other installations . . . should not be bombarded if the anticipated harm to civilians would be excessive in relation to the anticipated military advantage to be gained by bombardment.”²⁷⁰ There may be a number of reasons to attack such facilities, to include “denial of electric power to military sources, use of a dangerous facility (e.g., by causing release from a dam) to damage or destroy other military objectives, or to pre-empt enemy release of the dangerous forces to hamper the movement or advance of U.S. or allied forces.”²⁷¹ Attacks on such facilities are permitted under customary international law if conducted in accordance with the rules of discrimination, proportionality, and precautions in attack.

E. Drone Warfare

The use of unmanned systems to support military operations has grown exponentially in the past twenty years, both in terms of the number of systems employed and the complexity and lethality of the missions they are assigned. Over ninety States and nonstate actors operate surveillance or weaponized unmanned systems in support of combat operations.²⁷² In combat, these systems have proven their ability to enhance situational awareness, reduce human workload, and improve mission performance at reduced cost and risk to both civilian and military personnel.²⁷³ As new technologies are developed that increase system persistence, stealth, mobility, versatility, and survivability, unmanned systems are the preferred alternative for dull, dirty, or dangerous missions.²⁷⁴

Although unmanned maritime vehicles (UMV) have been used since the 1960s to support naval forces during armed conflict at sea, they have been used predominantly for mine clearing operations.²⁷⁵ Today, however, navies

270. NWP 1-14M (2022), *supra* note 83, ¶ 8.9.1.7.

271. DOD LAW OF WAR MANUAL, *supra* note 72, § 5.13.

272. KELLEY SAYLER, A WORLD OF PROLIFERATED DRONES: A TECHNOLOGY PRIMER 5 (2015).

273. U.S. DEP’T OF DEFENSE, PUB. NO. 14-S0553, UNMANNED SYSTEMS INTEGRATED ROADMAP: FY 2013–2038, at 20 (2014) [hereinafter DOD INTEGRATED ROADMAP].

274. *Id.*

275. Edward Marolda & R. Blake Dunnivant, *Combat at Close Quarters: Warfare on the Rivers and Canals of Vietnam*, in THE U.S. NAVY AND THE VIETNAM WAR 29 (Edward Marolda & Sandra Doyle eds., 2015); H.R. REP. NO. 105-132, at 198 (1997); U.S. DEP’T OF THE NAVY, THE NAVY UNMANNED SURFACE VEHICLE (USV) MASTER PLAN 2, 3, 24, 72

around the world are operating a variety of unmanned surface vehicles (USV) and unmanned underwater vehicles (UUV), both autonomous or remotely navigated, that can be launched from aircraft, submarines, or surface ships to perform missions in support of fleet operations in times of peace and war. Varying in size and displacement, UMVs are capable of operating effectively in bad weather and low visibility and can perform a wide variety of functions, to include intelligence, surveillance, and reconnaissance; harbor security; offensive mining and minesweeping; electronic warfare; communications; precision strikes; anti-submarine and anti-surface warfare; and ocean mapping and tracking.²⁷⁶

Since 2017, Houthi rebels in Yemen have increasingly used UMVs—water-borne improvised explosive devices—to attack ships and port facilities in the Red Sea and Gulf of Aden. Although most of the attacks have had limited success, over the past five years Houthi rebels conducted twenty-four drone attacks using explosive-laden UMVs. Over two-thirds of these attacks were directed at merchant shipping (16), civilian ports (4), or oil production and distribution facilities (2).²⁷⁷

Unsurprisingly, in September 2022, a UMV was discovered on the beach near the Russian naval base in Sevastopol. The UMV, about the size of a kayak, was powered by an inboard, single motor waterjet. The UMV was equipped with several sensors for steering, situational awareness, navigation, and communications, including a mast mounted camera, forward looking infrared-type device, and an antenna. The drone was armed with explosives and apparently designed to ram another vessel and detonate, like the manned

(2007); William Ervin et al., *Unmanned Underwater Vehicle Independent Test and Evaluation*, 32 JOHNS HOPKINS APL TECHNICAL DIGEST 752, 753 (2014).

276. DOD INTEGRATED ROADMAP, *supra* note 273, at 109; *see also* USV MASTER PLAN, *supra* note 275, at 1–3; U.S. DEP'T OF THE NAVY, THE NAVY UNMANNED UNDERSEA VEHICLE (UUV) MASTER PLAN xvi, xx–xxii (2004).

277. Håvard Haugstvedt, *Red Sea Drones: How to Counter Houthi Maritime Tactics*, WAR ON THE ROCKS (Sept. 3, 2021), <https://warontherocks.com/2021/09/red-sea-drones-how-to-counter-houthi-maritime-tactics/>; *Yemen's Houthis Attack Saudi Ship, Launch Ballistic Missile*, REUTERS (Jan. 30, 2017), <https://www.reuters.com/article/us-yemen-security-saudi-idUSKBN15E2KE>; Jon Gambrell, "External Source" Causes Oil Tanker Blast off Saudi Arabia, AP NEWS (Dec. 14, 2020), <https://apnews.com/article/dubai-saudi-arabia-united-arab-emirates-jiddah-yemen-5493fe28dab563c4a457a325b20e3c62>; Caleb Weiss, *Houthis Increase Use of Suicide Drone Boats in Recent Weeks*, LONG WAR JOURNAL (Mar. 11, 2020), <https://www.longwarjournal.org/archives/2020/03/houthis-increase-use-of-suicide-drone-boats-in-recent-weeks.php>.

explosive boats used by the Italian Navy during the Second World War.²⁷⁸ The UMV costs about \$250,000 and can perform a variety of missions, including “long-range maritime reconnaissance and coastal surveillance, escorting and supporting the traditional fleet, convoying merchant ships, zoning in artillery fire, defending . . . bases and countering amphibious operations.”²⁷⁹ The eighteen foot naval drone can carry a payload of up to 440 pounds, has a range of five hundred miles, and has a maximum speed of fifty miles per hour.²⁸⁰ Kyiv has indicated it wants to purchase up to one hundred of these sea drones.

In late October 2022, Ukrainian forces carried out an unprecedented large-scale drone attack against the Black Sea Fleet in Sevastopol using both unmanned aerial vehicles and U MVs. According to the Russian Ministry of Defense, seven U MVs were destroyed during the attack.²⁸¹ The Black Sea Fleet flagship, *Admiral Makarov*, sustained minor damage during the attack.²⁸² Although the raid was of limited success, it demonstrates the ability of stealth U MVs to conduct dangerous missions against high-value targets, despite Russia’s vast naval superiority, at reduced cost and risk to personnel.

F. Humanitarian Corridor

Ukraine and the Russian Federation produce nearly one-third of the world’s wheat and barley and half of its sunflower oil. With the outbreak of hostilities on February 24, 2022, export of these commodities to global markets was significantly reduced. Although the law of naval warfare does not expressly provide for the establishment of humanitarian corridors, the parties to the

278. H. I. Sutton, *Ukraine’s New Weapon To Strike Russian Navy In Sevastopol*, NAVAL NEWS (Sept. 21, 2022), <https://www.navalnews.com/naval-news/2022/09/ukraines-new-weapon-to-strike-russian-navy-in-sevastopol/>.

279. Sam LaGrone, *Ukraine Launches Crowd Funding Drive for \$250K Naval Drones*, USNI NEWS (Nov. 11, 2022), <https://news.usni.org/2022/11/11/ukraine-launches-crowd-funding-drive-for-250k-naval-drones>.

280. *Id.*

281. Hugo Bachega & James Gregory, “Massive” Drone Attack on Black Sea Fleet—Russia, BBC NEWS (Oct. 29, 2022), <https://www.bbc.com/news/world-europe-63437212>.

282. H. I. Sutton, *Russian Navy Pulls Warships from Black Sea into Port After Attacks*, USNI NEWS (Nov. 7, 2022), https://news.usni.org/2022/11/07/russian-navy-pulls-warships-from-black-sea-into-port-after-attacks?utm_source=USNI+News&utm_campaign=4d911e1048-USNI_NEWS_DAILY&utm_medium=email&utm_term=0_0dd4a1450b-4d911e1048-230852577&mc_cid=4d911e1048&mc_cid=962cf58401.

conflict may mutually agree to establish such corridors to facilitate safe passage through an area for a set period of time.²⁸³

On March 11, 2022, the IMO proposed that Russia and Ukraine agree to establish a “blue safe maritime corridor” to allow for the evacuation of neutral ships and their crews from the high-risk areas in the Black Sea and Sea of Azov.²⁸⁴ Russia agreed to the proposal and informed the IMO that it would establish a humanitarian corridor on March 27 to ensure safe passage for merchant vessels from the Ukrainian ports of Chernomorsk, Kherson, Mykolaiv, Ochakov, Odessa, and Yuzhne.²⁸⁵ The proposed maritime traffic lane would be eighty miles long and three miles wide, beginning at an assembly area just outside the Ukrainian territorial sea southeast of Odessa and continuing to the south to an exit area in international waters. Moscow indicated that the corridor would remain open daily from 8 a.m. to 7 p.m. and requested Ukrainian authorities “provide for the safety and security of the merchant vessels and their crews transiting to the assembly area.” The proposal, which appeared to be consistent with Russia’s duty to ensure neutral vessels are guaranteed safe passage through the established MEZ in the northwest Black Sea, was apparently not acceptable to Ukrainian authorities.

However, on July 22, 2022, representatives from Ukraine, the Russian Federation, and Türkiye signed an initiative (witnessed by the UN Secretary-General) establishing a mechanism for the safe transportation of grain, foodstuffs, and fertilizer from Ukrainian ports to global markets.²⁸⁶ Implementation of the initiative will “contribute to the prevention of global hunger, . . . reduce and address global food insecurity, and . . . ensure the safety and security of merchant ships entering or departing Ukrainian ports.”²⁸⁷

As part of the initiative, the parties established a Joint Coordination Centre (JCC) in Istanbul, under UN auspices, comprised of representatives of Ukraine, the Russian Federation, Türkiye, and the UN. The JCC is tasked

283. Michael Schmitt, *Ukraine Symposium—Protected Zones in International Humanitarian Law*, ARTICLES OF WAR (Aug. 24, 2022), <https://lieber.westpoint.edu/protected-zones-in-international-humanitarian-law/>.

284. IMO, *IMO Council Decisions on Black Sea and Sea of Azov Situation* (Mar. 11, 2022), <https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSStatement.aspx>.

285. IMO, Circular Letter No. 4543, *Communication from the Government of the Russian Federation* (Mar. 28, 2022), https://armatorlerbirligi.org.tr/wp-content/uploads/2022/03/IMO_SIRKULER_NO.-4543.pdf.

286. U.N. Secretary-General, *Note to Correspondents on Today’s Agreement* (July 22, 2022), <https://www.un.org/sg/en/content/sg/note-correspondents/2022-07-22/note-correspondents-today%E2%80%99s-agreements>.

287. *Id.*

with enabling merchant ships to safely transport commercial foodstuffs and fertilizer from the Ukrainian ports of Odesa, Chornomorsk, and Yuzhny.²⁸⁸ The JCC will be responsible for monitoring “the movement of commercial vessels to ensure compliance with the Initiative”; ensuring “the on-site control and monitoring of cargo from Ukrainian ports”; and reporting “on shipments facilitated through the Initiative.”²⁸⁹ The mandate of the JCC is limited to the “export of bulk commercial grain and related food commodities” from Ukraine.²⁹⁰ It does not have authority over export of food from other countries or exports of “containers and non-food items not included under the provisions outlined in the Initiative.”²⁹¹

Between August 1 and October 24, 2022, the JCC enabled the movement of more than 8.5 million metric tons of foodstuffs under the Black Sea Grain Initiative.²⁹² However, following the drone attack on Sevastopol on October 30, 2022, Russia informed the JCC that it was suspending its participation in the implementation of the grain deal but would continue to address pressing issues with the United Nations and Türkiye. Despite Russia’s suspension, JCC inspected forty outbound vessels and movement plans were approved for twelve outbound and four inbound vessels for October 31.²⁹³ Following discussions with the United Nations, Russia informed the JCC on November 2, 2022, that it was resuming its participation in the initiative.²⁹⁴ As of November 18, over 11.2 million metric tons of grains and foodstuffs have been

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. U.N. Black Sea Grain Initiative Joint Coordination Centre, *Information Note on the Backlog of Vessels* (Oct. 24, 2022), <https://www.un.org/en/black-sea-grain-initiative/information-note-24-october-2022>.

293. U.N. Black Sea Grain Initiative Joint Coordination Centre, *Information Note from the United Nations Secretariat at the Joint Coordination Centre* (Oct. 30, 2022), <https://www.un.org/en/black-sea-grain-initiative/information-note-30-october-2022>.

294. Heather Mongilio, *Russia Resumes Participation in Grain Deal After Sevastopol Attack*, USNI NEWS (Nov. 2, 2022), https://news.usni.org/2022/11/02/russia-resumes-participation-in-grain-export-deal-after-sevastopol-attack?utm_source=USNI+News&utm_campaign=3d03c7c74f-USNI_NEWS_DAILY&utm_medium=email&utm_term=0_0dd4a1450b-3d03c7c74f-230852577&mc_cid=3d03c7c74f&mc_cid=962cf58401.

moved from the three Ukrainian ports in the Black Sea.²⁹⁵ The grain deal was extended for an additional 120 days on November 18, 2022.²⁹⁶

G. *Qualified Neutrality*

Since February 24, 2022, over forty nations have provided billions of dollars in lethal military aid, including weapons and ammunition, to meet Ukraine's evolving battlefield requirements.²⁹⁷ As discussed below in Section H, the European Union and the United States have also imposed economic sanctions on Russia and Russian entities in response to the invasion. These actions are clearly inconsistent with the traditional law of neutrality but have been justified by several scholars and government bureaucrats under the concept of qualified (benevolent) neutrality.²⁹⁸

Historically, the law of neutrality requires neutral States—i.e., States not party to the conflict—to observe strict impartiality and to abstain from providing war-related goods or other military assistance to the belligerents. However, after war was outlawed as an instrument of national policy,²⁹⁹ some States took the position that they could discriminate in favor of a State that is the victim of a war of aggression and were not bound by their

295. U.N. Black Sea Grain Initiative Joint Coordination Centre, *Information Note from the United Nations Secretariat at the Joint Coordination Centre* (Nov. 1, 2022), <https://www.un.org/en/black-sea-grain-initiative/information-note-1-november-2022>; Heather Mongilio, *Black Sea Grain Deal Extended by Another Four Months*, USNI NEWS (Nov. 18, 2022), <https://news.usni.org/2022/11/18/black-sea-grain-deal-extended-by-another-four-months>.

296. Mongilio, *supra* note 295.

297. The two largest donors, the United States and the United Kingdom, have provided over \$27 billion and \$4 billion, respectively. Kiel Institute for the World Economy, *Ukraine Support Tracker* (updated Dec. 7, 2022), <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>; Katharina Buchholz, *Where Military Aid to Ukraine Comes From*, STATISTA (Nov. 10, 2022), <https://www.statista.com/chart/27278/military-aid-to-ukraine-by-country/>.

298. See, e.g., Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, ARTICLES OF WAR (Mar. 1, 2022), <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>; Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, ARTICLES OF WAR (Mar. 7, 2022), <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>.

299. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (Kellogg-Briand Pact).

obligations of strict impartiality and abstention. Thus, proponents of qualified neutrality argue that supplying weapons and other war material to the victim of aggression is not inconsistent with the law of neutrality.³⁰⁰

The United States is a leading advocate of qualified neutrality. Prior to the Second World War, the U.S. Congress passed the Neutrality Act of 1935, which prohibited the export of “arms, ammunition, and implements of war” from the United States to foreign nations at war and required U.S. arms manufacturers to apply for an export license.³⁰¹ The Neutrality Act of 1937, enacted after the outbreak of the Spanish Civil War in 1936, prohibited (inter alia) U.S. merchant ships from transporting arms to belligerents.³⁰² Additionally, the President was authorized to bar all belligerent ships from U.S. waters and to extend the export embargo to any additional “articles or materials.”³⁰³ However, the President was also authorized to allow belligerent nations to acquire any items except arms (e.g., oil and other raw materials) from the United States so long as they immediately paid for such items and carried them on non-U.S. ships (“cash-and-carry” provision).³⁰⁴ Following the German invasion of Poland in September 1939, Congress passed the Neutrality Act of 1939, which lifted the arms embargo and put all trade with belligerent nations under the terms of “cash-and-carry.”³⁰⁵ Beginning in 1940, aid was provided to the Allies under the Lend-Lease program, whereby the United States would provide supplies but would defer payment. While it is clear that the United States took these actions out of a sense of moral responsibility, it was equally motivated by U.S. national security concerns and a desire to buy time to prepare the U.S. armed forces for any future involvement in the war.³⁰⁶

Other States take the position that they may violate the law of neutrality if the UN Security Council has identified a specific State as an aggressor and has taken preventative or enforcement action against the aggressor under Chapter VII of the UN Charter. This position is based on Article 25 of

300. See NWP 1-14M (2022), *supra* note 83, ¶ 7.2.1.

301. Neutrality Act of 1935, 49 Stat. 1081 (Aug. 31, 1935).

302. Neutrality Act of 1937, 50 Stat. 121 (May 1, 1937).

303. *Id.*

304. *Id.*

305. Neutrality Act of 1939, 54 Stat. 4 (Nov. 4, 1939).

306. U.S. Dep’t of State, Office of the Historian, *The Neutrality Acts, 1930s*, <https://history.state.gov/milestones/1921-1936/neutrality-acts> (last visited Feb. 27, 2023); U.S. Dep’t of State, Office of the Historian, *Lend-Lease and Military Aid to the Allies in the Early Years of WWII*, <https://history.state.gov/milestones/1937-1945/lend-lease> (last visited Feb. 27, 2023).

the Charter, which requires member States to comply with the decisions of the Security Council, to include an obligation to support a UN action at the expense of their neutrality. Article 2(5) of the Charter also requires member States to give the UN “every assistance in any action it takes in accordance with the present Charter” and to “refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.” Consistent with this view, absent a decision by the UN Security Council, the law of neutrality remains in full force and neutrals must observe strict impartiality between the parties to the conflict. Obviously, in the case of the Russia-Ukraine conflict, intervention by the Security Council is precluded. As a permanent member of the Council, Moscow can veto any resolution that purports to take preventative or enforcement action against Russia under Chapter VII for its unlawful invasion of the Ukraine.

As discussed above, although most States oppose the Russian invasion of Ukraine, that does not justify turning a blind eye to the rule of law (in general) or the storied law of neutrality (in particular). The validity of qualified neutrality is questionable as a matter of law and may be seen as political expediency to allow States to justify their violations of the law of neutrality on moral and ethical grounds to contain Russian expansionism. The law of neutrality serves important goals. By imposing duties and conferring rights on neutral and belligerent States, the law of neutrality is designed to prevent escalation of the conflict.

Neutral States that fail to comply with their duty of abstention and impartiality may lose their neutral status and become a party to the armed conflict.³⁰⁷ For example, conducting an armed attack against one of the belligerents would bring the neutral State into the armed conflict as a party.³⁰⁸ Similarly, a neutral State that provides actionable intelligence to one of the belligerents that allows that belligerent to successfully attack the other belligerent would become a party to the conflict. That does not mean that a violation of neutrality automatically brings a neutral into the armed conflict as a co-belligerent.³⁰⁹ For instance, simply providing weapons and other war-related material to Ukraine does not, in-and-of-itself, mean that any of the States

307. NWP 1-14M (2022), *supra* note 83, ¶ 7.2.

308. See generally Michael N. Schmitt, *Ukraine Symposium—Are We at War?*, ARTICLES OF WAR (May 9, 2022), <https://lieber.westpoint.edu/are-we-at-war/>.

309. NWP 1-14M (2022), *supra* note 83, ¶ 15.4.1.

engaged in such conduct have become parties to the armed conflict with Russia.³¹⁰

That said, if a neutral State engages in conduct that breaches its neutral status, the aggrieved belligerent may (but is not required to) undertake such proportionate self-help enforcement actions as it deems necessary, including the use of force, to ensure compliance by the neutral State with its obligations of abstention and impartiality under the law of neutrality.³¹¹

Russia has taken the position that the provision of weapons and other war-related material to Ukraine violates the law of neutrality. Specifically, Moscow warned the United States and NATO allies to stop arming Ukraine, indicating that the weapons shipments are “adding fuel” to the conflict and could have “unpredictable consequences.”³¹² The Minister of Defense additionally warned that Russia could target NATO transports carrying weapons to the Ukraine.³¹³

To date, Russia has not exercised its right of self-help under international law, which is understandable given its inability to defeat the Ukrainian armed forces on the battlefield. Nevertheless, the Kremlin continues to warn the United States and its allies that increased Western support for Ukraine is “dragging out the conflict” and risks “possible direct confrontation between

310. The number and type of weapons being provided by the United States, however, is not insignificant and has provided Ukraine with the capability to prolong the conflict. As of late August 2022, Washington has provided Ukraine with the following major weapon systems: High Mobility Artillery Rocket Systems (HIMARS) and ammunition; 1,500 Tube-Launched, Optically-Tracked, Wire-Guided (TOW) missiles; 155mm howitzers; 105mm howitzers; 120mm mortar systems; National Advanced Surface-to-Air Missile Systems (NASAMS); Phoenix Ghost Tactical Unmanned Aerial Systems; Switchblade tactical unmanned aerial systems; Puma unmanned aerial systems; Mi-17 helicopters; Harpoon coastal defense systems; Scan Eagle unmanned aerial systems; VAMPIRE counter-unmanned aerial systems; Stinger anti-aircraft systems; Javelin anti-armor systems; High Speed, Anti-Radiation Missiles; and over 27,000 other anti-armor systems. Jordan Williams, *Here's Every Weapon US Has Supplied to Ukraine with \$13 Billion*, THE HILL (Aug. 26, 2022), <https://thehill.com/policy/defense/3597492-heres-every-weapon-us-has-supplied-to-ukraine-with-13-billion/>.

311. NWP 1-14M (2022), *supra* note 83, ¶ 7.2.

312. Joseph Clark, *Russia Reportedly Warns U.S., Allies to Stop Arming Ukraine*, WASHINGTON TIMES (Apr. 15, 2022), <https://www.washingtontimes.com/news/2022/apr/15/russia-reportedly-warns-us-allies-stop-arming-ukra/>.

313. Rory Sullivan, *Nato Transport Carrying Weapons in Ukraine is a “Target”, Russia Warns*, INDEPENDENT (May 4, 2022), <https://www.independent.co.uk/news/world/europe/russia-nato-weapons-deliveries-ukraine-b2071337.html>.

Russia and the West.”³¹⁴ In late December 2022, Russian Foreign Ministry spokeswoman Maria Zakharova warned that Russia would consider the shipment of U.S. Patriot air defense missiles to Ukraine as a “provocative move” that would represent an escalation in U.S. support, entailing “possible consequences” for the United States. She further indicated that “equipment supplied by the U.S. is a legitimate target for Russian attacks” and that the United States, through its arms shipments, has “effectively become a party” to the war.³¹⁵

One incident that warrants closer scrutiny is the sinking of the Russian flagship *Moskva* in May 2022. Press reports indicated that the United States provided real-time intelligence to Ukrainian forces that was used to locate, attack, and sink the *Moskva* with two ground-based Neptune anti-ship missiles.³¹⁶ U.S. officials sent mixed messages on the information provided. Some indicated that Ukrainian forces already had targeting data on the *Moskva* and the United States simply confirmed that data, emphasizing that the attack was executed without the prior knowledge of U.S. officials.³¹⁷ Others, however, stated that the U.S. intelligence was more than just a report on the *Moskva*’s location sixty-five nautical miles south of Odesa and was vital to sinking the Russian cruiser. The attack killed forty Russian sailors and wounded an additional one hundred.³¹⁸ If it is true that the United States directly assisted in the attack by providing real-time, actionable intelligence that was used by Ukrainian forces to attack the Russian warship, the United States has crossed the threshold of mere violation of neutrality and has become a party to the armed conflict.

314. *Russia Warns U.S. That its Deeper Involvement in Ukraine Brings Growing Risks*, REUTERS (Nov. 29, 2022), <https://news.yahoo.com/russia-warns-u-deeper-involvement-143326039.html>.

315. Voice of America, *Russia Warns US On Sending Patriot Missiles To Ukraine*, EURASIA REVIEW (Dec. 22, 2022), <https://www.eurasiareview.com/17122022-russia-warns-us-on-sending-patriot-missiles-to-ukraine/>.

316. Ken Dilanian et al., *U.S. Intel Helped Ukraine Sink Russian Flagship Moskva, Officials Say*, NBC NEWS (May 5, 2022), <https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-sink-russian-flagship-moskva-officials-say-rcna27559>.

317. Helen Cooper et al., *U.S. Intelligence Helped Ukraine Strike Russian Flagship, Officials Say*, NEW YORK TIMES, (May 5, 2022), <https://www.nytimes.com/2022/05/05/us/politics/moskva-russia-ship-ukraine-us.html>.

318. *Id.*

H. Seizure of Russian Yachts (Sanctions Enforcement)

As part of an international campaign to pressure Russia to withdraw from Ukraine, authorities from around the world have arrested numerous superyachts belonging to Russian billionaires allied with President Vladimir Putin. In total, sixteen yachts have been seized by Antigua (1), Croatia (1), Dominican Republic (1), Fiji (1), France (2), Germany (1), Italy (5), Spain (3), and the United Kingdom (1).³¹⁹ These seizures are based on sanctions imposed on Russia by the European Union (EU) and the United States. All the seizures, save one (the *Baltic Leader*), were executed within the internal waters of the arresting State and can therefore be justified as a port State control measure. The seizure of the *Baltic Leader*, however, occurred outside the territorial sea of France and raises serious issues under the international law of the sea.

The EU sanctions regime, initiated in 2014 following Russia's illegal annexation of Crimea, allows EU member States to seize assets belonging to any of the Russian individuals listed in the Council Regulations as being responsible for undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine.³²⁰ The list was expanded in February 2022 to include the Russian State-owned bank Promsvyazbank and its chief executive officer, Pyotr Fradkov, after Moscow recognized the break-away regions of Donetsk and Luhansk as independent States and invaded Ukraine.³²¹ The United States also imposed sanctions in March 2014, which were updated in February 2022 to include Promsvyazbank on the sanctions

319. *Update on Russian Yachts Seized: 82m Alfa Nero Searched in Antigua*, SUPERYACHT TIMES (May 27, 2022), <https://www.superyachttimes.com/yacht-news/update-on-russian-yachts-seized>.

320. Council of the European Union, Council Regulation (EU) No. 269/2014 of Mar. 17, 2014, Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, L. 78/6, 57 OFFICIAL JOURNAL OF THE EUROPEAN UNION 6 (Mar. 17, 2014). These measures have been expanded each year since 2014. *See generally* Council of the European Union, *Timeline—EU Restrictive Measures Against Russia over Ukraine*, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/> (last visited Feb. 27, 2023).

321. Council of the European Union, Council Implementing Regulation (EU) 2022/260 of Feb. 23, 2022, Implementing Regulation (EU) No 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, LI 42/3, 65 OFFICIAL JOURNAL OF THE EUROPEAN UNION 3 (Feb. 23, 2022).

list.³²² Additionally, five Russian-flagged vessels reportedly owned by a subsidiary of Promsvyazbank, including the *Baltic Leader*, were listed in the February 2022 update.

The *Baltic Leader*, a Russian cargo ship, arrived in Rouen, France, on February 19, 2022. After taking on a load of vehicles, the ship departed port on February 25, 2022, to deliver the cars to St. Petersburg.³²³ After traveling down the River Seine, *Baltic Leader* turned north into the English Channel and exited the French territorial sea around 4:45 pm. At no time during this seven-hour transit did French authorities interact with the Russian ship. *Baltic Leader* maintained a northerly course for about three hours until it entered the Dover Strait traffic separation scheme. While in the traffic separation scheme, the Russian ship was intercepted, boarded, and seized by three French Gendarmerie law enforcement vessels—*Scarpe*, *Fourmentin*, and *Cormoran*—at 11:00 pm about twenty-five nautical miles from the French coast. Following the boarding, the *Baltic Leader* was escorted back to Port Boulogne-sur-Mer, France, the following day. French authorities executed the seizure based on the EU sanctions and the U.S. Treasury Department's determination that the vessel was owned by a subsidiary of Promsvyazbank.³²⁴

The seizure of the *Baltic Leader* beyond the territorial sea violates one of the most fundamental principles of the law of the sea—the exclusive jurisdiction of States over vessels that fly their flag on the high seas. UNCLOS provides that ships of all States enjoy high seas freedoms of navigation beyond the territorial sea.³²⁵ Unless otherwise provided in an international treaty (e.g., UN Charter) or UNCLOS, ships shall sail under the flag of one State only and are subject to that State's exclusive jurisdiction on the high

322. See generally U.S. Dep't of the Treasury, Ukraine-/Russia-Related Sanctions, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> (last visited Feb. 27, 2023).

323. *France Seizes Suspected Russia-Owned Ship in Channel*, THE GUARDIAN (Feb. 26, 2022), <https://www.theguardian.com/world/2022/feb/26/france-seizes-suspected-russian-owned-ship-in-channel>.

324. Michael Petta, *The Seizure of a Russian Merchant Vessel Raises Questions About High Seas Freedoms*, LAWFARE (Mar. 16, 2022), <https://www.lawfareblog.com/seizure-russian-merchant-vessel-raises-questions-about-high-seas-freedoms>.

325. UNCLOS, *supra* note 18, arts. 58, 86, 87, 90.

seas.³²⁶ Thus, boarding and seizing a vessel beyond the territorial sea³²⁷ requires the consent of the flag State unless there are reasonable grounds to suspect that the vessel is engaged in piracy, slave trade, unauthorized broadcasting, or is without nationality (Stateless).³²⁸ Nonconsensual boardings and seizures can also occur if authorized by a Security Council resolution adopted under Chapter VII of the UN Charter.³²⁹

None of these exceptions apply in the case of the *Baltic Leader*. Moreover, unlike the enforcement of sanctions imposed by a UN Security Council resolution, EU sanctions do not trump France's treaty obligations under UNCLOS. Without consent of the flag State—in this case Russia—the *Baltic Leader* was illegally boarded and seized by French authorities.

IV. CONCLUSION

The Russia-Ukraine conflict demonstrates that the law of naval warfare, although antiquated, is still relevant and necessary to regulate the conduct of hostilities and protection of war victims during armed conflict at sea. It also serves an important role in regulating the relationship between the belligerents, neutrals, and non-belligerent States. Like the law applicable to land warfare, the law of naval warfare is designed to protect combatants, noncombatants, and civilians—to include prisoners of war and the wounded, sick, and shipwrecked—from unnecessary suffering and to facilitate the restoration of peace. Governments must therefore ensure that objective application of the law is not colored by their disdain for Russia's act of aggression and their plainly unlawful attacks on innocent civilians and civilian objects.

As evidenced by the UN General Assembly resolution discussed above, most States agree that Russia's invasion of Ukraine is unconscionable and an affront to the rules-based international order. However, certain actions taken by Ukraine and its supporters are equally incompatible with the rule of law. Little was said about the alleged Ukrainian missile attack on two Russian merchant vessels—the *SGV Flot* and *Seraphim Sarovskiy*—operating in the

326. *Id.* art. 92.

327. The seizure in this case occurred twenty-five nautical miles from the coast, outside the French contiguous zone. In the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea; and (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. *Id.* art. 33.

328. *Id.* art. 110.

329. U.N. Charter arts. 39, 42, 48. *See, e.g.*, S.C. Res. 2292, ¶ 3 (June 14, 2016).

Sea of Azov during the early days of the war, a clear violation of the law of naval warfare if the ships were not engaged in activities that would make them military objectives.

No State has complained about Türkiye's de facto closure of the Turkish Straits to all warships, neutral and belligerent. Türkiye's decision to close the straits to Russian and Ukrainian warships is clearly consistent with Article 19 of the Montreux Convention. However, Türkiye has failed to provide any credible evidence that it considered itself threatened with imminent danger of war and was therefore entitled to close the straits to all warships. Türkiye's de facto application of Article 21 was a political expediency to appease Moscow and calls into question the continued viability of the Montreux Convention.

Arguing that States may qualify their neutrality based on Russia's act of aggression equally undermines the rule of law and could have the unintended consequence of widening the war. The rules of abstention and impartiality are designed to prevent escalation of the conflict. Neutral States that fail to comply with these obligations may lose their neutral status and become a party to the armed conflict. Clearly, a neutral State (such as the United States) that provides actionable intelligence to the Ukrainian armed forces that they use to successfully attack Russian military objectives, like the *Moskva*, would become a party to the conflict. That is not to say that every violation of neutrality (e.g., simply providing war-related material) automatically converts a neutral State into a co-belligerent. Nevertheless, if a State breaches its neutrality, the aggrieved belligerent (e.g., Russia) may undertake such proportionate self-help enforcement measures as it deems necessary (including the use of force) to ensure compliance by the neutral State with its obligations of abstention and impartiality.

Finally, the illegal seizure of the *Baltic Leader* by French authorities in the English Channel violated one of the most fundamental principles of the law of the sea—the exclusive jurisdiction of States over vessels that fly their flag on the high seas. Boarding and seizure of the *Baltic Leader* seaward of the territorial sea and contiguous zone of France required flag State consent. The Russian-flagged vessel was not engaged in any of the universal crimes (piracy, slave trade, or unauthorized broadcasting) that would authorize a nonconsensual boarding. Absent a UN Security Council resolution authorizing nonconsensual boardings, the seizure of the *Baltic Leader* on the high seas without Russia's consent was clearly a violation of the international law of the sea.

The law is the law, and it should be applied objectively—not based on political expediencies or the individual whims of any State. To do otherwise,

like Russia's act of aggression and repeated violations of the law of war, undermines the rules-based international order that international law is meant to preserve.