The Law Applicable to Naval Mine Warfare in a Non-International Armed Conflict

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90 Int’l L. Stud. 475 (2014)
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I. INTRODUCTION

If the law of armed conflict is at the vanishing point of international law,¹ and the law of armed conflict as applicable in non-international armed conflicts is at the vanishing point of the law of armed conflict, then maritime law of armed conflict in non-international armed conflicts is at the vanishing point of it all. As paradoxical as it is—given that maritime issues have played such a signal role in the development of the modern law of armed conflict (LOAC)²—the search for a coherent set of rules that distils non-international armed conflict (NIAC) maritime LOAC will leave one relatively unsatisfied. There are few instruments, only scattered incidents and a corresponding paucity of State practice. Additionally, the predominant crystallizing work in the field of maritime LOAC—the San Remo Manual³—consciously and understandably sidesteps this issue in its quest for clarity.

1. In all these matters the lawyer must do his duty regardless of dialectical doubts—though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.


3. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 73 (Louise Doswald-Beck ed., 1995) (“However, it should be noted that although the provisions of this Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated in paragraph 1 in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.”).
within the already under-instrumentalized field of maritime international armed conflict LOAC.

This is not to say, however, that there is nothing available from which to build an assessment of the law applicable to naval mine warfare in a NIAC context. Indeed, as I seek to outline below, there was, in fact, a quite detailed three-stage appreciation of conflict in maritime contexts prior to WWII, and there is at least some possibility that components of this scheme have survived the post-1949 and 1977 “Geneva Law” codification processes. Similarly, there are a few post-1949 NIAC situations where the impact and consequences of maritime operational law issues have been reported or recorded. One is the West Breeze merchant ship case arising out of French operations relating to Algeria. Another involves maritime operations—including naval mine warfare—during the El Salvadoran conflict. A third is maritime operations involving Sri Lankan forces and the Liberation Tigers of Tamil Eelam (LTTE) “Sea Tigers,” who also engaged in naval mine warfare during that long and costly conflict. Some of the International Court of Justice (ICJ) judges in the Nicaragua case thought that this situation was one governed by Common Article 3 (and thus a NIAC). These are perhaps the high water marks where NIAC is generally


8. See, e.g., Nicaragua, supra note 6, ¶¶ 116–24 (contras-U.S. accountability nexus in relation to training), ¶ 219 (determination that as between the contras and Nicaragua it is an armed conflict “not of an international nature”).
not universally) considered to have been the conflict classification. There have also been maritime operations carried out within conflicts of mixed character where the precise characterization of the context is either highly contested or involves both a NIAC and international armed conflict (IAC)—the 2010 Gaza Flotilla incident\(^9\) and Libya 2011,\(^10\) for example. However, this mixed characterization can render the utility of these case studies contentious in terms of distilling rules of NIAC maritime LOAC, as opposed to IAC maritime LOAC.

By far the richest source of what might be closely assimilated to NIAC maritime LOAC resides in pre-1949 State practice and custom: the early nineteenth century rebellions by Spanish colonies\(^11\); the American Civil War\(^12\); the late nineteenth century insurrections in Haiti and Cuba\(^13\); the Brazilian Naval Revolt of 1893–94\(^14\); and the Spanish Civil War.\(^15\) Thus, to

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13. T. S. Woolsey, Consequences of Cuban Belligerency (1892–1896), 5 YALE LAW JOURNAL 182 (1896); George Grafton Wilson, Insurgency and International Maritime Law, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 46 (1907).


15. Norman J. Padelford, Foreign Shipping During the Spanish Civil War, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 264 (1938); McNair, supra note 11, at 484–90; Raoul Genet, The Charge of Piracy in the Spanish Civil War, 32 AMERICAN JOURNAL OF
distill what the NIAC LOAC in relation to naval mine warfare might look like, it is vital to take as our start point the pre-1949 legal scheme applicable to maritime operations taking place within NIAC contexts. Only then can we take the next step of determining whether this scheme remains relevant, and, if so, the extent to which it can be appropriately and legitimately distilled and assimilated to the post-1949 LOAC landscape.

My aim in this short study is to identify some general and specific “rules” applicable to modern NIAC maritime LOAC, with special attention to the issue of naval mine warfare. To achieve this aim, and given the debilitating paucity of post-1949 LOAC on the issue, it is necessary to first outline the law (such as it could be said to exist) and State practice of the nineteenth century and first half of the twentieth century, as applied in what might today be characterized as NIAC situations. I will then proceed upon the (rebuttable) presumption that this scheme has, in general, survived the post-1949 LOAC codification process as it relates to NIAC contexts, and is capable of assimilation with other modern paradigm-setting developments affecting maritime LOAC—most particularly the 1982 United Nations Law of the Sea Convention (LOS Convention) and its parallel customary rules. On this basis, I will describe and elaborate upon a set of rules (both general and specific), which might form one possible stepping-off point for further discussions of the law applicable to naval mine warfare in maritime NIAC contexts.

INTERNATIONAL LAW 53 (1938). In general, see HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW pt. III (1947).


II. THE PRE-1949 SCHEME FOR ASSESSING INTERNAL ARMED CONFLICT SITUATIONS WITH MARITIME DIMENSIONS AND CONSEQUENCES

The first conundrum faced in attempting to distill the law applicable in maritime internal conflict situations prior to 1949 is one of typology. What, precisely, do we call this context? It is problematic to simply call it “maritime NIAC” for two reasons. First, the concept of NIAC is a post-1949 LOAC crystallization. This is not to say that the concept of internal conflicts rising to a certain level of severity and recognition, and carrying with it a number of legal consequences, was foreign to LOAC before 1949; it was not, of course. In fact, as will hopefully become evident below, there was a highly nuanced scheme in the maritime domain for determining status and its consequences in such contexts. The second problem is one of scope. The modern concept of NIAC is not fully correspondent with the pre-1949 scheme for describing internal conflict contexts. The status of “insurrection” (or “insurgency”), for example, would today likely be included within NIAC; previously, it was a political status less than “belligerency” (itself a status which might today be said to be split between modern IAC and NIAC contexts), but more than mere “rebellion.” Consequently, in this first section, I will seek to remain as true as possible to the applicable pre-1949 scheme and will refer to maritime rebellion, maritime insurrection and maritime belligerency where accurate. In seeking an umbrella term to cover the scheme in general, but to ensure it is understood distinctively from NIAC, I will refer to “internal conflicts.” As will become evident, it is not sensible to use the concept of “internal armed conflict” as the catch all. This is because the legal notion of “armed conflict” is, as with NIAC, also predominantly understood in a 1949 Geneva Conventions context. Thus some of the internal conflict categorizations that make up the lower levels of the pre-1949 scheme would today not be categorized as armed conflict at all, but rather as riots or other internal unrest below the NIAC threshold.

18. See, e.g., Wilson, supra note 13, at 47–49; Moir, supra note 12, at 338–39. See also Anthony Cullen, Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law, 183 MILITARY LAW REVIEW 66, 68 n.9 (2005). See generally Sandesh Sivakumar, The Law of Non-International Armed Conflict 9–20 (2012). This issue is discussed in more detail below.
A. The Rebellion—Insurgency—Belligerency Scheme at Sea

A number of the key legal distinctions and thresholds which dominate the pre-1949 internal conflicts categorization scheme were driven by maritime concerns, and were often expressed in maritime legal terminology. As noted above, this tripartite conflict categorization scheme for conflict other than State-versus-State conflict is difficult to precisely translate into modern NIAC terms. But it is central to situating maritime obligations and responses—for both the conflict parties and for third (or external) States—in relation to an internal conflict.

The first level in the scheme was rebellion, which in current LOAC parlance would equate generally to less-than-NIAC civil unrest and riot. This level of internal conflict was assessed, then as now, to be purely a matter of domestic criminal law, with no alteration in either conflict-State or external-State rights and responsibilities. In terms of maritime consequences, this category of internal conflict heralded no alteration in legal relationships or obligations between the conflict State, other States and the rebel group. Indeed, rebel action at sea was simply criminal activity and thus characterizable, where it met the general requirements drawn from customary international law now crystallized in LOSC Article 101, as piracy.

The next level up within the scheme, insurrection, was the most problematic and amorphous of the three levels of categorization. Insurrection appears to have generally been considered a political characterization with some minor and contextually variable legal consequences in the maritime domain for those external States which recognized the situation as one of maritime insurgency. Wilson, assessing a series of U.S. and UK cases that dealt with insurgency contexts in the nineteenth century, argued that “[t]he distinction between insurgency and belligerency, or as was well said in the opinion of Chief Justice Fuller in the case of The Three Friends, between ‘war

19. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 (referred to as Common Article 3 because it appears in identical wording in each of the four 1949 Conventions); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 609.
20. Cullen, supra note 18, at 69–71; Moir, supra note 12, at 338.
22. See generally Cullen, supra note 18, at 72–73.
in a material sense’ and ‘war in a legal sense,’ has received far more recognition in international practice than in international law.”

The primary maritime purpose of insurgency status was arguably to allow external States a degree of freedom in defining their relationship with the rebels. As Lauterpacht observed in 1947, recognition of insurgency evidenced “the combination of a refusal to recognize full belligerent status with the concession of some belligerent rights and with the maintenance of a measure of official intercourse.” He continued: “[r]ecognition of insurgency creates a factual relation in that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity and of economic interest.”

Lauterpacht, among others, cites as an example the Brazilian Naval Revolt of 1893–94 in which the United States, United Kingdom and other external States did not afford belligerent status to the rebels, thus denying their legal right to engage in naval bombardment of government positions in Rio de Janeiro harbor that caused interference with commercial shipping and interests; however, they did concede to the Naval rebels a right to blockade the harbor, so long as it was effective. This approach is more recently evident in the U.S. and French responses to maritime operations conducted by both sides during the Spanish Civil War.

But the possible purposes of acknowledging this insurgent status also had potential effects upon other aspects of the conflict State’s legal relationship with the rebels. This, in turn, held implications for its capacity to demand compliance by external States with every consequence of the status afforded to the rebels by the conflict State. Cullen, citing Higgins, notes that the precise implications of insurgent status were entirely situational, but that in general this status allowed the recognizing State to regard the insurgents, to some extent, “as legal contestants, and not mere lawbreak-

23. Wilson, supra note 13, at 49.
24. LAUTERPACHT, supra note 15, at 274.
25. Id. at 276–77.
26. Id. at 274–77. However, McNair argues that the better approach would be to label what the Naval rebels instituted, and what the United States and United Kingdom acquiesced in, as a “quasi-blockade,” so as to maintain the strictly political (not legal) characterization of their actions and the U.S. and UK response. McNair, supra note 11, at 487–90.
27. See, e.g., Wilson, supra note 13; Moir, supra note 12, at 339–41, briefly discussing trade and risk factors as significant in this political calculation.
ers.\footnote{28} For example, where an external State viewed a political conflict as reaching the level of insurrection, it appears that practice did not require them to honor or act upon the conflict State’s declaration that insurgent maritime forces were to be treated as pirates in terms of their dealings with the conflict State’s forces. Wilson, writing in 1907, refers to Article 308 of the 1905 Regulations for the Government of the (U.S.) Navy: “In countries . . . where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum.”\footnote{29} There is also some regional treaty authority for this proposition. Clearly encapsulating the legal distinction between insurgency and formal belligerency status, the 1928 Convention on the Rights and Duties of States in the Event of Civil Strife, which was agreed upon at the Sixth International Conference of American States, nevertheless specifically provided that:

> Article 3: The insurgent vessel, whether a warship or a merchantman, equipped by the rebels, which arrives at a foreign country or seeks refuge therein, shall be delivered by the government of the latter to the constituted government of the state in civil strife, and the members of the crew shall be considered as political refugees.\footnote{30}

This approach was also reflected in the U.S. and UK response to a Portuguese request for assistance in apprehending the \textit{MV Santa Maria}. The situation, analyzed by Zwanenberg soon after it occurred in January 1961, involved the takeover of the \textit{Santa Maria} (a Portuguese merchant vessel) by Captain Galvao and seventy men in support of the Delgado Junta (based in Brazil) which claimed authority in Portugal. The seizure resulted in the death of a crewmember and injury to another. Portuguese authorities requested U.S. and UK assistance to track and seize the vessel. Ultimately, the United States escorted the vessel to Brazil with the understanding that Galvao and his men would claim and receive political asylum in Brazil, and that the Brazilian government would hand the vessel back to Portugal.\footnote{31}

Clearly, the option to treat Galvao and his men as mere criminals to be handed to Portugal to face trial (including for the death and injury inflicted) was available to the United States as there was no formal recognition of

\footnotesize{28. Cullen, \textit{supra} note 18, at 72.}
\footnotesize{29. Wilson, \textit{supra} note 13, at 46.}
\footnotesize{31. Zwanenberg, \textit{supra} note 5, at 799–801.}
belligerency operating in favor of Galvao and his armed group. However, in line with the case-by-case, issue-by-issue approach that appears to be available when considering the political status of insurgency at sea, the United States chose to view Galvao and his men as warranting a departure from the general less-than-belligerency status norm. This meant that rather than Galvao and his armed band being treated as rebels engaged in a maritime rebellion—and thus liable to prosecution as common criminals—they were permitted to seek political asylum.

Belligerency, the third level within the scheme, was a clear legal status. Once the conflict State had accorded the rebel group formal belligerency status, both sides were bound by the law of war (or in today’s terms, IAC LOAC).32 This status could be recognized either directly (such as by express declaration), or by implication or consequence, which most routinely arose through the declaration of a blockade of rebel-held ports. By law, this recognition by the conflict State did not bind external (or “third”) States; these States were entitled to make their own determination based on a two-step test. This test centered around a set of factual criteria (generally incorporating elements such as control of territory, scale and magnitude of the conflict, whether the organized armed group (OAG) followed LOAC, and the need for third States to characterize the conflict due to its evident scale and international effects), followed by a consciously political decision as to whether such recognition was in that external State’s interests.33 However, the same potential for indirect recognition also existed for external States. Arnold McNair noted that this was the situation that underpinned the UK legal view on the consequence of recognizing the 1874 blockade imposed by rebels during the Carlist wars in Spain. The UK law officers, after reiterating that the UK government had not afforded the Serrano government belligerent recognition, then concluded that “assuming the blockade [imposed by the rebels] to be effective Her Majesty’s Government must in our opinion recognize the fact that it exists de facto and de jure. The result, however, will be that the Carlists henceforth become belligerents.”34

32. See, inter alia, Cullen, supra note 18, at 74.
33. See, e.g., Robert R. Wilson, Recognition of Insurgency and Belligerency, 31 American Society of International Law Proceedings 136 (1937); Fred K. Nielsen, Insurgency and Maritime Law, 31 American Society of International Law Proceedings 144 (1937); Discussion, 31 American Society of International Law Proceedings 153 (1937); McNair, supra note 11, at 475, citing “Resolutions of the Institute of International Law (1916)”; Moir, supra note 12, at 346–47.
34. McNair, supra note 11, at 480.
Once this step was taken, and the conflict State recognized the rebel group as a formal belligerent, the full suite of maritime LOAC applicable in a State-against-State conflict—what would today be IAC maritime LOAC (i.e., the law of naval warfare)—was then applied between the rebel group and the conflict State. As a practicality, however, once the conflict State had afforded belligerency status to the rebel group, third States usually acted in accordance with this recognition, thus instructing their vessels to submit as necessary to visit and search and related maritime LOAC regimes, now lawfully applied by both the conflict State and the rebel group.  

This meant that the law relating to contraband and visit and search, blockade, naval mine warfare and, critically, the law of maritime neutrality then came fully into play. One example of such a situation was the American Civil War subsequent to the recognition of Confederate States’ belligerency afforded by, inter alia, Great Britain, France, Spain and Holland.

B. Post-1949 Transference Challenges

When considering the lingering relevance of this scheme for post-1949 NIAC maritime LOAC, the key distinction is the insurrection-belligerency threshold. Below the level of insurrection, the “normal” peacetime rules of maritime communication applied. Rebels had no legal authority to blockade ports or impose visit and search regimes and no legal authority to commission or deploy warships or naval crews; rebel action at sea was in every respect simply criminal activity. If we equate (reasonably, I believe) this level of internal conflict with the current concept of internal riots and unrest below the NIAC threshold, then there is almost no pre-1949 to post-1949 transference problem. Both contexts were simply routine law enforcement, with no alterations in the triangular set of relationships between the conflict State, the rebels and external States.

35. See, e.g., Moir, supra note 12, at 348.
36. The manner in which these means and methods were exercised was contested at the time. For example, a long running debate existed over the validity and scope of applicability of the doctrine of continuous voyage when dealing with the seizure of contraband. See, inter alia, JAMES W. GANTENBEIN, THE DOCTRINE OF CONTINUOUS VOYAGE PARTICULARLY AS APPLIED TO CONTRABAND AND BLOCKADE (1929).
37. McNair, supra note 11, at 474–75.
38. Wilson, supra note 13, at 56.
The insurrection threshold does not present a significant challenge for direct transference. The post-1949 concept of NIAC arguably covers most of the scope of the pre-1949 concept of insurrection, given that such situations would highly likely meet the lowest of the three modern NIAC thresholds. As noted above, there were two primary maritime hallmarks of insurrection status. The first was the allocation by an external State of the political status of insurrection to the conflict. The second was a consequent belief by that external State that any inscriptionist maritime forces who happened to fall into their power should normally not be treated as pirates in relation to their acts against the conflict State’s own vessels, regardless of the conflict State’s call that they do so. The presence of both hallmarks suggests a level of gravity in the scope of the conflict and the organization and capabilities of the rebel group, such that these situations might be properly equated with modern NIACs rather than less-than-NIACs. The correspondence of insurrections and NIACs is quite close in other ways as well. The third State’s belief that it could lawfully choose not to treat apprehended maritime rebels as pirates so long as their attacks had only been upon conflict State vessels is in general accord with current NIAC LOAC, which does not require third States to prosecute as criminals rebels who have engaged only in attacks upon the conflict State’s forces and who happen to fall into their hands.\(^{39}\)

It is, however, belligerency which presents the most difficult transference problem between the pre-1949 internal conflict scheme, and the post-1949 NIAC LOAC context. Clearly, a number of belligerency situations would today fall within the 1977 Additional Protocol I\(^{40}\) Article 1(4) scope of “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,” which are now equated to IACs. However, the original concept of belligerency was not specifically limited to anti-colonial conflicts, although many of the situations where recognition of belligerency status was afforded or discussed by third States, were in fact tied to rebellions against colonial powers (such as the Spanish South American colony rebellions in the first part of the nineteenth century). But there remain pre-1949 internal conflict contexts where belligerency was either recognized

\(^{39}\) This maritime insurrection custom appears to have been considered the *prima facie* rule, rather than an exception or alternative.

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(e.g., the American Civil War), or was seriously considered although not granted (such as with respect to the Spanish Civil War). These situations do not neatly fit within the post-1949 Additional Protocol I Article 1(4) conception of a rebel group fighting a war of national liberation against colonial domination or a racist regime. In the American Civil War, for example, it was arguably the rebelling entity which could have been more aptly described as the racist regime. The upshot, however, is that there were pre-1949 belligerency contexts which did not fall within the scope of post-1949 Article 1(4) NIACs, and within which the pre-1949 scheme asserted the applicability of what is today IAC LOAC.

The critical question, therefore, is whether this aspect of the pre-1949 scheme—a select set of belligerency contexts which do not involve rebels fighting for liberation against a colonial power or a racist regime, but which do require application of what is today categorized as IAC LOAC as between the conflict parties, and for external States in their relations with both conflict parties—is still in existence.41 The ICJ has determined, including in the Nicaragua case (which has a direct nexus to naval mine warfare in a NIAC context), that customary rules can co-exist with treaty crystallization, and that parallel sets of treaty and customary rules can include differences in nuance.42 Additionally, a number of States, including the United States, have signed the 1957 Protocol to the previously noted regional Convention on the Rights and Duties of States in the Event of Civil Strife, Article 2 of which states: “The provisions of Article 1 [on suspending export/import of materiel for rebel groups, etc.] shall cease to be applicable for a Contracting State only when it has recognized the belligerency of the rebels, in which event the rules of neutrality shall be applied.”43

41. See, e.g., Cullen, supra note 18, at 68 n.9 (“the doctrine of belligerency, used in traditional international law for the recognition of internal armed conflict, has fallen into disuse and is now considered obsolete”). But a number of other scholars who have specifically addressed this doctrine, have concluded that formal belligerency, although in “disuse,” nevertheless remains “relevant.” See, e.g., Yoram Dinstein, Concluding Remarks on Non-International Armed Conflicts, in NIAC IN THE TWENTY-FIRST CENTURY, supra note 4, at 399, 408–10; Marko Milanovic, What Exactly Internationalises an Internal Armed Conflict?, EJIL TALK (May 7, 2010), http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/; LIBYA IN CONFLICT, supra note 10, at 7–10, 28; Moir supra note 12, at 351.

42. E.g., Nicaragua, supra note 6, ¶¶ 172–82.

This is a clear reference to the pre-1949 maritime internal conflict scheme in a context which indicates a belief that at least one component of that scheme was still alive as of 1957—the status of belligerency, and the consequences it entailed for the application of maritime IAC LOAC and neutrality law within the triangular relationship between the conflict State, the OAG and external States. There are also other indicators. One is that the negotiating background to Common Article 3 of the 1949 Geneva Conventions does not disclose a widespread belief that the doctrine of belligerency had ceased to be of relevance. Another is the fact that a Prize Court sitting in Alexandria, Egypt, in the November 1950 case of The Fjeld, expressly determined that the Egyptian government, “by [inter alia] creating a Prize court governed by the principles of international law” had provided belligerent recognition of the Jewish armed party to the conflict.

The consequence is that we ought not simply dismiss pre-1949 maritime internal conflict LOAC as irrelevant. Indeed, in the absence of any post-1949 instruments dealing with this issue, and where post-1949 maritime internal armed conflict State practice appears to hearken back to this scheme, it is difficult to see why the pre-1949 scheme should be considered defunct. Certainly we must accept that this scheme has been amended by post-1949 developments in means and methods of warfare, conflict characterization and contextual overlays such as the LOSC. But this does not extinguish the maritime belligerency scheme in its entirety, nor alter it beyond all recognition such that reference back is rendered nugatory or deceptive. Even if we decide that post-1949 treaty crystallization has extinguished all of those elements of the pre-1949 conflict categorization scheme that have any correspondence to post-1949 scope, concepts or context, we are still left with the legal possibility that a subset of maritime belligerency situa-

44. See, e.g., SIVAKUMARAN, supra note 18, at 159–62.
45. The Fjeld, 17 INTERNATIONAL LAW REPORTS 345, 349 (Prize Ct of Alexandria 1950) (Egypt).
46. Cullen, supra note 18, at 78, in discussing the Spanish Civil War, analyzed the contemporaneous legal arguments as indicating an end to the relevance of the belligerency doctrine, not least because this status was not ultimately afforded. I humbly disagree on this point. Indeed, I submit, it is equally arguable that the effort the United Kingdom, United States, France and others went to in order to define both parties as below the belligerency level—for a range of maritime trade and associated purposes—is strong evidence of a belief that the doctrine was still at that time considered operative. The fact that it was denied application is perhaps more appropriately understood as a baldly political outcome, rather than as an indication that the law was by then considered to have become obsolete or ineffective.
tions, in which State-against-State LOAC was historically applied, persists outside the scope of modern IAC, modern NIAC and Additional Protocol I Article 1(4) conflicts.47

C. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines

As a final point, it is relevant to briefly assess the direct applicability of the one instrument we do have which deals with pre-1949 naval mine warfare, the 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII),48 in order to assess whether it applied in pre-1949 internal conflict maritime contexts. State practice between 1907 and 1949, although scant, did not seem to take Hague VIII as a start point; rather it focused on the nineteenth century customary rules on the maritime consequences of insurrection and belligerency status, as noted previously in terms of the focus of legal analysis concerning maritime aspects of the Spanish Civil War. Additionally, there are a range of post-1949 legal factors, such as the LOSC and State practice, which indicate that Hague VIII on naval mines is not entirely relevant to NIACs below the old belligerency threshold. This is not to say that some of the principles it encapsulates do not apply in NIAC maritime contexts, for indeed they must: the ICJ in the Nicaragua case has made it clear that they have migrated into custom applicable in both IAC and NIAC contexts.49

III. SOME RULES DISTILLED FROM THE PRE-1949 MARITIME INTERNAL CONFLICT SCHEME, AS AMENDED TO REFLECT MODERN LOAC AND LAW OF THE SEA CONCEPTS WITH SPECIFIC APPLICATION TO NAVAL MINE WARFARE

If the concept of belligerency at sea has survived the post-1949 reordering of LOAC, the following rules are an attempt to distill and update these traditional rules, as they may apply in a NIAC where naval mine warfare is an

47. See, e.g., Yair M. Lootsteen, The Concept of Belligerency in International Law, 166 MILITARY LAW REVIEW 109, 130 (2000); Cullen, supra note 18, at 96, is also critical of generalized assertions to the effect that the 1977 Additional Protocol II has (quoting Medard Rwelamira) simply “restated” the traditional belligerency rule.


49. See e.g., Nicaragua, supra note 6, at ¶¶ 215–20 (general IHL obligations), ¶¶ 215, 254 (notice regarding sowing of naval mines in Nicaraguan ports).
operational option. The issue of mine warfare carried out within the context of a NIAC, but within archipelagic sealanes or straits used for international navigation, is, however, not addressed. The focus of these rules is naval mine warfare carried out in the territorial sea of the conflict State or in international waters. Most of these rules follow from the analysis above and do not require significant additional elaboration. Therefore, additional commentary beyond the analysis above is only provided where it is felt to be necessary for the purposes of clarity.

A. OAG with Belligerent Status

In those situations where an OAG has achieved belligerent status the following rules will apply:

1. The full range of LOAC mine warfare law applies to both parties, because the full suite of IAC LOAC applies as between the conflict parties.

2. This suite of rules also applies as between the conflict State and third States which have recognized the belligerency of the OAG, and the OAG and third States which have recognized the belligerency of the OAG. This third-State recognition of belligerency may be afforded either expressly or tacitly (such as by directing their vessels to submit to visit and search by both conflict parties).

3. Where a NIAC OAG has belligerent status, the full rules on maritime neutrality with respect to means and methods of naval warfare, including mine warfare, apply in relation to third States which have recognized that belligerent status.

Custom recognizes that an OAG given belligerent status may arm and flag warships, manned by a military crew (as was the case in the American Civil War), and thus lawfully and legitimately engage in naval mine warfare to the same extent conflict-State authorities may under what is now understood as IAC maritime LOAC. Of course, this can only be the case if it is accepted that the full customary consequences of recognition of bellig-

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50. Woolsey, supra note 13, at 183, notes the case of the Confederate warship Sumpter, whose commissioned status Dutch authorities in Curacao accepted as an incident of their recognition of Confederate belligerent status despite attempts by the Union to have her dealt with by the Dutch as a pirate vessel.
erency status have survived in modern LOAC. However, the inescapable fact appears to be that there have been very few recognitions of maritime belligerency since 1949, although the previously noted *The Fjeld* case in 1950 and, as some have argued—correctly in my view—the Israeli maritime blockade of Gaza, are clear expressions of tacit recognition of belligerency via the imposition of a blockade and/or the application of the law of neutrality.\(^5\) It is also arguable that an indirect or third-party recognition of belligerency status recently occurred in the Libyan revolution in relation to the maritime powers and authorizations available to an OAG (but also arguably more widely) within the Libyan revolution context.\(^5\)

At first glance, however, we must confront the challenge of coherence. It would be difficult to recognize belligerency status in a maritime context without the possibility of the same status being afforded to operations ashore. This is because it would be manifestly unjust, and clearly contrary to the thrust of NIAC LOAC, to allow the maritime elements of an OAG to legitimately access the rights and obligations of a combatant at sea, while denying them that same status ashore. It would not have been possible, for example, for a third State to argue that the LTTE Sea Tigers had belligerency status at sea, and thus could legitimately employ means and methods of naval warfare such as mine warfare, visit and search and so on, but to simultaneously argue that the LTTE ashore remained an OAG whose acts of violence, even if in technical accordance with LOAC, remained characterized as criminal acts for which they enjoyed no combatant immunity.

But this problem is best addressed by splitting it into its two component parts, thus allowing this challenge to coherence to be readily resolved. First, in a situation where the conflict State has recognized the belligerent status of the OAG, then this is of general application and requires that IAC LOAC be applied in its relationship with, and operations against, the OAG both at sea and ashore. Second, if the conflict State has not recognized the OAG’s belligerent status but third States have done so, then again there is, in fact, no coherence problem. The conflict State will continue to treat the OAG as criminal and its acts as crimes (regardless of apparent LOAC compliance) wherever they occur (ashore or at sea). However, third States can, independently of the conflict State’s wishes, treat those OAG members most likely to interact with third-State vessels and nationals at sea, i.e., maritime rebels, in accordance with the IAC maritime LOAC (particularly


\(^5\) See, in particular, *LIBYA IN CONFLICT*, supra note 10.
neutrality law and means and methods LOAC) that is applicable as between a belligerent and a third State at sea.

Thus, if the customary doctrine of recognition of belligerency (at least within the maritime context) is merely dormant—as remains a clear possibility—then the potential remains for a duly recognized OAG to engage in naval mine warfare in a fully reciprocal relationship with conflict-State authorities, and almost certainly also with third States in terms of the law of naval warfare and maritime neutrality law. Clearly, should any conflict State afford its adversary OAG belligerency status, then the doctrine will have self-evidently resurrected as for that conflict at least, but the conflict State will need to recognize that it will be intensely problematic to claim, on one hand, to legitimate the LOAC compliant maritime acts of the rebels, while maintaining on the other that similarly LOAC compliant acts perpetrated ashore, perhaps by the same rebels, maintain their character as simple criminality.

An OAG with belligerent status engaged in a NIAC can interfere with neutral vessels, including by laying naval mines in accordance with IAC maritime LOAC to the same extent as conflict-State authorities. External States which have not recognized the OAG’s belligerent status must be treated in accordance with normal peacetime arrangements, because the law of neutrality does not apply as between the OAG and that State. However, nationals and vessels of such States who do enter the conflict zone when warnings regarding the conduct of hostilities have been given by conflict-State authorities will lose any right to claim redress from the conflict State. Nor will they be able to claim redress from the OAG as a legal entity because they have not recognized its belligerent status (and thus its “legal” existence).53

B. OAG with Less than Belligerent Status

As is the case in those instances where an OAG has achieved belligerent status, there are certain rules which follow from my earlier analysis relating to situations where the OAG has not attained the status of a belligerent. These are:

1. The conduct of naval mine warfare by the OAG in the internal waters and territorial sea of the conflict State is a crime against the domestic law of

53. See, e.g., Woolsey, supra note 13, at 184; Wilson, supra note 13, at 56–59.
that State and, when occurring within the territorial sea, an interference with innocent passage. This right of temporary interference without discrimination as to form, fact or flag within the territorial sea\textsuperscript{54} is available to the conflict State, but not to the OAG.\textsuperscript{55}

2. In this situation, conflict-State authorities are not responsible for damage inflicted on external-State vessels by OAG mines provided that they have previously notified the international community of all relevant information they have in relation to OAG naval mining operations.\textsuperscript{56}

3. An OAG that has not been accorded belligerent status may not engage in mine warfare in international waters. If it does, then depending upon the factual situation, this conduct is

\begin{itemize}
  \item[i.] Piracy under international law\textsuperscript{57}; or
  \item[ii.] A Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) offense.\textsuperscript{58}
\end{itemize}

4. An OAG below the status of belligerent may not flag a vessel. No OAG vessel in international waters may claim any sovereign immune or auxiliary

\begin{footnotesize}
\begin{itemize}
  \item[54.] LOSC 1982, supra note 16, art. 25(3).
  \item[56.] See, e.g., Heintschel von Heinegg, supra note 4, at 222; Moir, supra note 12, at 339 n.10, 340–41, summarizes the views of Castren, Schwarzenberger, Wilson and others that “insurgents” below the status of belligerents could nevertheless “enter into agreements [with third States] on ‘routine matters’ and make arrangements with the ICRC.” However, as Moir points out, it is essential that any such insurgent/third-State agreements and relationships are not colored (where some form of equality of treatment is at issue) with “neutrality” terminology; rather, he proposes, they are better described through use of the political concept of “non-interference.”
  \item[57.] See infra note 59.
\end{itemize}
\end{footnotesize}
status beyond that accorded by the flag it flies. No OAG vessel may therefore engage in mine warfare activities.

In general, non-belligerent status OAG action against conflict-State authority vessels in international waters can readily be characterized as piracy or as some other form of armed robbery or violence at sea when occurring in the conflict State’s territorial sea, so far as the conflict State is concerned. However, there is practice indicating that non-belligerent status OAG action against conflict-State vessels in the territorial sea is not treated as piracy so far as third States are concerned. On one level, this is mandated by the applicable definition. Logically, OAG action inside its territorial sea of the State with which it is conflict cannot be treated as piracy by a third State as it does not take place in international waters. Additionally, both practice and some instruments exist that are centered around the political concept of insurgency status. This provides precedent for the view that OAG maritime force members who have committed violent acts only against conflict-State vessels, but who come into the power of a third State, can be afforded political asylum and need not—indeed, perhaps, should not—be handed back to conflict-State authorities.

59. LOSC 1982, supra note 16, art. 101, which defines piracy as follows:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

60. Zwanenberg, supra note 5, at 807, argued in 1961 that the state of the law requires that peaceful voyages on the high seas or voyages directed solely against the established government [by the insurgent OAG] should not be treated as piratical. The aim of the insurgents is political, not private; their action is directed against one State only. On the other hand their ships will be treated as pirate ships if they attack the ships of other States indiscriminately.

Reed cites Oppenheim on this issue, summarizing the state of the law as

[until that time [formal recognition of belligerency], third parties may, without making a formal pronouncement and without conceding to the rebellious forces belligerent rights
should not automatically be subject to prosecution in a third State for piracy. Their vessels and equipment, however, should routinely be returned to conflict-State authorities. If the group was of merely rebellious status (i.e., the conflict was not considered to have achieved the political status of an insurgency), then members of the group can be handed back to conflict-State authorities for prosecution.

However, what is abundantly clear is that non-belligerent status OAG action against third-State vessels in international waters is piracy so far as all States are concerned. The fact that there is a political component to the OAG’s actions does not remove their conduct of mine warfare entirely from the realm of “private” purpose and/or gain. The existence of a “dual-purpose” rationale—political purpose linked to the NIAC and private gain, which may include the desire to punish or harm, or to raise its public profile, or to steal or raise assets or funding for carrying out the conflict—does not negate the private gain requirement necessary for a charge of piracy. Non-belligerent status OAG conduct—regardless of whether the OAG is purportedly exercising LOAC rights in international waters—is clearly legally definable as piracy if the violence, private ends and two vessel rules are met, which are the standard elements of the crime as expressed in Article 101(a). Thus, if non-belligerent status OAG “LOAC” action at sea is readily and validly describable as the crime of piracy, there is very little scope to argue that non-belligerent status OAGs have any LOAC rights in international waters at all. Additionally, Article 102 makes it clear that a conflict-State naval vessel whose crew has mutinied (such as by declaring their allegiance to the rebels as occurred in the Brazilian Naval Revolt) loses its sovereign immune status and is capable of being characterized as a pirate ship. The ultimate consequence is that an OAG below the level of recognized belligerency may not interfere with external State shipping in international waters. Neutrality law is irrelevant to the situation, and the OAG has no rights under international law to excuse what is otherwise clearly criminal conduct in international waters vis-à-vis third States. Any

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affecting foreign nationals, refrain from treating them as law-breakers. This is true as long as they do not arrogate to themselves the right to interfere with foreign subjects outside the territory occupied by them.

Reed, supra note 55, at 287 n.4 (citation omitted).

61. LOSC 1982, supra note 16, art. 102 (“Piracy by a warship, government ship or government aircraft whose crew has mutinied. The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.”).
State may take those OAG mariners and their vessels engaged in mine warfare in international waters into custody with a view to prosecution, most likely for piracy or a SUA-based offense.

C. Conflict State Authority with Regard to Mining Activities in its Internal Waters and Territorial Seas

The following rules derive from my earlier analysis with regard to the authority of the conflict State engaged in a NIAC with an opponent below the level of a belligerent:

1. The State may use naval mine warfare in its internal and territorial waters, so long as:

   i. It complies with its obligations to provide notice of navigational hazards or the temporary closing of a section of its territorial sea, as imposed by normal peacetime requirements, including the LOSC and SOLAS obligations; and

   ii. The minelaying is not a blockade, or attempted blockade, of the OAG.

2. The State is entitled to treat all mine warfare activities carried out by the OAG in the State's internal waters and territorial sea as a criminal offense.

3. However, if the OAG rebels concerned have escaped to international waters and are apprehended by a third State, third States may afford them a political insurgency status. In this status, the rebels may be validly granted political asylum, rather than returned to conflict-State authorities for prosecution for those acts committed against conflict-State forces inside its own internal waters and territorial sea.

   Pre-1949 custom is very clear that it is only when conflict-State authorities recognize the belligerency status of the OAG that they can claim for themselves the LOAC-based right to impose a blockade or to institute a visit and search regime. It is thus vital that a conflict State dealing with a

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maritime rebellion or maritime insurgency (that is, a status below the level of a recognized belligerency) by, *inter alia*, use of naval mines as a sea denial or protective weapon, must base its actions clearly on non-LOAC authorizations. The most clearly available source of potentially applicable law would likely be UN Charter Article 51 and parallel custom in relation to national self-defense. However, any State claiming a security or defensive response that is “analogous” to or looks like visit and search or naval mine warfare, for example, must expressly and clearly ground that response in the applicable law—that is, national self-defense, not LOAC. Restrictions imposed upon third-State vessels (which must not be characterized as “neutral” vessels), and acts such as laying naval mines that can directly affect third-State vessels, must not be characterized nor implemented as LOAC naval mine warfare or visit and search regimes. They must, rather, be implemented in accordance with the limitations and requirements imposed by the normal peacetime maritime rules, as temporarily broadened when—and only when—the additional authorizations available under the law of national self-defense are invoked.

IV. CONCLUSION

If we approach the issue of modern NIAC maritime LOAC, including in relation to naval mine warfare, from a treaty- and case law-based perspective, we will confront the fact that it is a sparse study indeed. If we seek to distill modern NIAC maritime LOAC from more than simple post-1949 LOAC analogies and extrapolations, then we must delve more deeply into the pre-1949 legal scheme for characterizing and regulating the central—and triangular—set of relationships between a conflict State, its adversary OAG and third States. It then becomes quite clear that a structured, nuanced, flexible and useful scheme for analyzing NIAC maritime LOAC is—

63. Zwanenberg, * supra* note 5, at 793–94, notes the *Virginius* (1878) and *Mary Lowell* (1879) cases, where a right of national self-defense claimed by Spanish authorities as the basis to board U.S. vessels in international waters suspected of supporting Cuban rebels was not well supported.

64. *Id.* at 795–98. Zwanenberg assesses (and I agree) that the scarce State practice available does indicate that national self-defense can be used to support a “visit and search-like” peacetime power with respect to third state vessels, but only in the relevant territorial sea and internal waters. See also Cullen, * supra* note 18, at 70, *inter alia*, citing Richard Falk’s 1964 assessment that “the incumbent government can demand that foreign states accept the inconvenience of domestic regulations designed to suppress rebellion, such as the closing of ports or interference with normal commerce.”
sues, centrally informed by State practice, existed prior to 1949. Further, if we then assume (fairly, I believe) that those elements of this scheme which are not inconsistent with post-1949 LOAC developments have remained intact, we are then faced with the more manageable task of integrating this pre-1949 scheme with post-1949 LOAC, modern law of the sea and maritime crime law. This is the only sensible way to approach the question of “what rules govern naval mine warfare in a maritime NIAC context?” To do otherwise leaves us confronting a very limited legal horizon comprising few post-1949 indicators, the need for significant analogical reasoning and an unwarranted disdain for a clearly applicable and workable pre-1949 scheme.