THE LAW OF NEUTRALITY AT SEA FOR THE 80's AND BEYOND

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I. INTRODUCTION

This Article concerns the adequacy of traditional rules of neutrality in future naval conflicts. Rather than offering predictions as to what neutrality rules should or may be in future sea conflicts, I will focus on considerations that may influence the attitudes of senior naval officers and pertinent civilian officials. My purpose is to provide some insight into the thought processes of those who currently chart defense strategies and who would be operating under any future neutrality rules, since rules formulated to govern naval warfare must take into account the legitimate concerns of operational commanders in order to be effective.

Although it will be neccessary to touch upon some dramatic changes in sea combat technology, the major focus will be on trends and potential developments in the Law of the Sea (LOS). Developments of particular importance are: (1) the extension of the territorial sea to 12 nautical miles, (2) the exclusive economic zone; and (3) the concept of archipelagic waters.

II. THE TRADITIONAL RULES AND PRACTICES OF NEUTRALITY

Many of the rules of neutrality traditionally deemed applicable to armed conflict at sea were first comprehensively codified in the 1907 Hague Convention XIII (Hague XIII)[1] and later refined over

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The views expressed herein embody only the author's personal reflections and should not be taken as official positions of the U.S. Government, the Department of Defense, the Joint Chiefs of Staff, or the U.S. Navy.

1. Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545 [hereinafter cited as Hague XIII]. In general, the provisions of Hague XIII were declaratory of the customary rules restricting a belligerent's use of neutral water in existence at the time of its ratification. R. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 219 n.52 (U.S.

the course of the two World Wars.

A few key rules of neutrality affecting the use of ocean areas for the conduct of war may be briefly summarized as follows:

1. Although belligerents are obliged to refrain from acts of hostility in a neutral's waters and are forbidden to use those waters as a sanctuary or a base of naval operations, the neutral may, on an evenhanded basis, allow "mere passage" of belligerent warships through its "ordinary territorial sea."[2]
2. Although the general practice has been to prohibit belligerent submarines in the ordinary territorial sea, a neutral may, on a nondiscriminatory basis, allow them surface passage or even submerged passage.[3]
3. The law of armed conflict generally prohibits the entry of armed belligerent military aircraft into neutral airspace, including the airspace over a neutral's ordinary territorial sea.[4]
4. Belligerents are authorized to act in self-defense when attacked while in neutral waters, or when attacked from neutral waters or airspace.[5]
5. When a neutral is unable or unwilling to prevent abuse of its neutrality by a belligerent, that belligerent's adversaries may take action against the offending vessel or aircarft.[6]

Naval War College, International Law Studies V. 50, 1955). At this time, the oceans were divided between narrow bands of territorial sea and high sea. Exclusive economic zones and archipelagic waters were concepts that had not yet been developed. In terms of combatants, Hague XIII addressed only "warships"; submarines were not treated separately, and airplanes were left out entirely, having not at that point demonstrated their naval potential. Although Hague XIII used such terms as "territorial waters of a neutral" and "neutral waters", it did not directly address straits overlapped by territorial seas of neutrals.

2. In this context, "ordinary territorial sea" means the territorial sea less those portions which overlap international straits and their approaches. For a further discussion of straits, *see infra* pp. 17-22.

3. *See* R. TUCKER, *supra* note 1, at 240 n.89.

4. DEPARTMENT OF THE AIR FORCE, AFP 110-31 INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, ¶ 2-6c (1976).

5. *See* R. TUCKER, *supra* note 1, at 222-23 n.60; 3 C. HYDE, INTERNATIONAL LAW § 887 at 2238 (2d rev. ed. 1945).

6. DEPARTMENT OF THE NAVY, NWIP 10-2 LAW OF NAVAL WARFARE ¶ 441, *reprinted in* R. TUCKER, *supra* note 1, at 359, 383. When a naval commander is faced with the possibility of enemy attack from neutral waters, it is irrelevant whether the neutral is incapable of preventing such abuse of its waters or is actually unwilling to do so, since the naval commander will suffer the same harm in either event. Nonetheless, some writers have sought to impose a higher standard of restraint on belligerent self-help against enemy neutrality violations in cases of willing but ineffective neutrals, than in cases of unwilling neutrals, apparently on the premise that the ineffective neutral, unlike the unwilling neutral, has discharged his duty by employing the "means at his disposal" (Hague XIII, *supra* note 1, at art. 25) to prevent such violations. *See* R. TUCKER, *supra* note 1, at 222-23 ("to prevent an enemy from gaining a material advantage"). In light of the practical equivalence of the harm suffered in either event, the realism of different standards may properly be questioned. Official U.S. publications do not make such a distinction. *See* NWIP 10-2, *supra*, at ¶ 441; DEPARTMENT OF THE ARMY, FM 27-10 THE LAW OF LAND WARFARE ¶ 520 (1956); AFP 110-31, *supra* note 4, at ¶ 2-6c.

A review of international armed conflicts since the end of World War II demonstrates that the attempt to outlaw the resort to force has resulted neither in the abolition of the use of force nor in the termination of the utility of some form of neutrality law. In general, however, the post-1945 practice is differentiated from earlier practice by the withering away of formal declarations of war and formal declarations of neutrality.[7] In the limited conflicts of the post-War period, isolated engagement rather than sustained naval combat has been the rule. Accordingly, the post-War practice concerning neutrality has primarily involved actions by belligerents to interdict third-party shipping.[8] Variously denominated, such interdiction efforts have occurred in virtually all post-1945 international[9] conflicts in which use of the seas has played a significant role.

In relatively low-threat environments, contraband systems and "visit and search" have survived,[10] as have blockades[11] and "in-

7. The only formal declarations of war subsequent to World War II arose from the series of Arab-Israeli wars, beginning in 1948, and the Indo-Pakistani War of 1965. In the predominantly civil wars of this era (the Korean and Vietnam Wars), neutrality has seldom played any role whatsoever. For an excellent discussion of the neutrality declarations (or lack thereof) in these conflicts, *see* Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249, 257-63 (1976).

8. In the Korean War, the Arab League and Indonesia refused to allow the transit of United Nations' forces and supplies through their territory, citing their neutral duty of impartiality. Ceylon also refused to allow the transit of Indonesian supplies to Pakistan in the 1965 Indo-Pakistani War for the same reason. Spain and most of NATO also denied use of their territory for U.S. efforts to resupply Israel during the 1973 Yom Kippur War, but only after the Arab states threatened an oil embargo. Williams, *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 MIL. L. REV. 9, 34 (1980). On the other hand, Soviet resupply of Arab states was facilitated in the 1967 and 1973 Arab-Israeli Wars by the grant of transit facilities by the Eastern European states and airspace by Turkey. Norton, *supra* note 7, at 261 n.47.

9. Interdiction efforts have also been undertaken in civil and national liberation wars. A close and effective blockade of the Biafran coast was maintained by the federal government of Nigeria during its civil war from 1967 to 1969. During the Algerian Emergency, the French visited and searched foreign vessels on the high seas as far from Algeria as the English Channel. The French encountered diplomatic difficulties with many of the countries whose flag vessels were affected, since they did not officially recognize the Algerian insurgents as belligerents and did not provide an alternate legal justification for their interference with third-party shipping. D. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 122-23 (1975).

10. For a discussion of pre-1967 Egyptian control of Suez Canal shipping via implementation of full scale contraband systems to all transiting ships, see generally Gross, *Passage through the Suez Canal of Israel-Bound Cargo and Israel Ships*, 51 AM. J. INT'L L. 530 (1957). Norton, *supra* note 7, at 305-06, discusses contraband lists promulgated by India and Pakistan during their 1965 war.

11. For a discussion of the U.S.-U.N. close-in blockade of North Korea during the Korean War, the Indian blockade of the Bangladesh coast near the end of the 1971 Indo-Pakistani War, and the Egyptian blockade of the Straits of Bab al Mandeb during the 1973 Yom Kippur War, see generally Mallison & Mallison, *A Survey of the Interna-*

terdiction measures."[12] Recent conflicts in higher threat environments, in actions reminiscent of the war zones of the World Wars, have seen the promulgation of exclusion zones.[13] While in some conflicts Law of the Sea concerns were apparently subordinated to perceived military necessities,[14] more often the Law of the Sea has influenced either the initial or subsequent behavior of belligerents.[15] In light of recent trends and potential developments, the influence of the Law of the Sea may become even more pronounced in future conflicts.

III. TRENDS AND POTENTIAL DEVELOPMENTS IN THE LAW OF THE SEA

These trends and potential developments are largely embodied in the United Nations Convention on the Law of the Sea (UNCLOS).[16] Assuming broad-based adherence,[17] it remains to be seen whether all the concepts reflective of existing maritime freedoms will go unchallenged. For example, some states with 12-mile territorial sea claims which overlap key straits could attempt to ignore the international community's interests in navigational freedom

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tional Law of Naval Blackade, Feb. 1976 U.S. NAVAL INST. PROC. 44, 49-51; Norton, *supra* note 7, at 302-03 (blockade of North Korea).

12. The U.S. implemented several interdiction measures in the Vietnam War. For example, in 1972, the U.S. mined North Vietnamese ports, internal waters, and claimed territorial waters to interdict the delivery of supplies. *See generally*, Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam*, 29 JAG J. 143 (1977). In addition, Operation Market Time was initiated in 1965, with the stated objective of preventing seaborne infiltration by small craft of enemy personnel, weapons, and supplies into South Vietnam. To accomplish this, units of the U.S. Navy, U.S. Coast Guard, and the South Vietnamese Navy engaged in the surveillance, visit and search, and capture or destruction of enemy vessels. Mallison & Mallison, *supra* note 11, at 50.

13. In the Iran-Iraq War, both sides declared certain areas of the Persian Gulf as war zones, applicable to all naval and merchant vessels. Similarly, in the Falkland Islands (Islas Malvinas) conflict, the United Kingdom and Argentina initially declared a 200 nautical mile Total Exclusion Zone, emanating from the approximate center of the disputed islands, applicable to all naval and merchant vessels. The zone was subsequently extended by both parties as hostilities increased.

14. The French actions against foreign-flag shipping during the Algerian Emergency and the British Total Exclusion Zone around the Falkland Islands (Islas Malvinas) appear to be cases in point. *See supra* notes 9 & 13.

15. Operation Market Time and the mining of North Vietnamese waters represent clear instances of the incorporation of Law of the Sea concerns into all planning stages. *See supra* note 12.

16. Third United Nations Conference on the Law of the Sea, United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (opened for signature Dec. 10, 1982) [hereinafter cited as UNCLOS].

17. It must be emphasized that despite its relatively large number of signatories, UNCLOS (*id.*) only has the status of a treaty not yet in force. The United States has announced that it will not become a party to the Convention, and that it will actively pursue an alternative sea-bed mining regime.

through straits.[18] Similarly, a state may attempt to use the archipelagic concept to close off vast areas that have traditionally been high seas, thereby disregarding UNCLOS provisions on passage through archipelagic sea lanes. For current purposes, however, it will be assumed that any uncertainties in the Law of the Sea will resolve themselves along the concepts contained within UNCLOS.

The principal Law of the Sea concepts of concern here include: the 12-nautical mile territorial sea, both in its ordinary sense and where it overlaps international straits; the exclusive economic zone; and the regime of archipelagic waters. These conceptual trends must be considered against a backdrop of advances in naval combat technologies which include the development of the nuclear-powered submarine, the greatly expanded role of aviation in naval warfare, the advent of guided missiles with widely varying ranges, and the development of nuclear weapons.

The 12-Mile Territorial Sea

Since the development of the rules of neutrality, one obvious evolution in the Law of the Sea has been the trend from a three-mile to a twelve-mile territorial sea. As expressed in UNCLOS, the territorial sea remains an area of coastal state sovereignty subject to the right of innocent passage by foreign ships. If the 12-nautical mile territorial sea does become customary, one obvious impact would be the overlapping of territorial seas in well over 100 international straits which are less than 24 miles in width. If such extensions of territorial seas into straits were not qualified by explicit or *de facto* preservation of international transit freedoms, strait states might claim the right to limit vessel transits to innocent passage, and to require consent for overflight.

International Straits

In recognition of the unique status of straits, UNCLOS spells out the right of transit passage. The transit passage regime is the outcome of balancing the competing interests of coastal states bordering the straits, which seek to control their coastal waters, and of the international community, which uses the straits for navigation and commerce. As articulated by the UNCLOS, the historical use of straits by ships and aircraft of all nations is to be continued,[19]

18. UNCLOS describes this interest in navigational freedom as the regime of "transit passage" (*id.* at art. 38), which is the most recent articulation of the ancient practice of free use of international straits as oceanic highways of commerce and navigation.

19. UNCLOS's formulation of transit passage, which permits "continuous and expeditious transit" of international straits by ships and aircraft (*id.* at art. 38), preserves for all states their historic ability to engage in direct transit through straits, whether by

while the strait states are accorded authority in the areas of resource management, environmental protection, and navigational safety.[20]

The Exclusive Economic Zone

Through World War II, the ocean was normally divided between narrow bands of territorial seas and the high seas. Since then, however, new zones of coastal state resource competences have evolved seaward from the territorial sea, culminating in the concept of the exclusive economic zone (EEZ). The EEZ concept has come to mean sovereign coastal state rights to control resources of the water column and sea bed out to 200 nautical miles from coastal baselines.[21] In addition, UNCLOS would permit the exercise of coastal state jurisdiction over marine scientific research,[22] environmental protection,[23] and the establishment and use of artificial islands, structures, and installations having economic purposes.[24] The UNCLOS formulation of the EEZ explicitly preserves the freedoms of navigation and overflight to the international community.

Archipelagic Waters

The final Law of the Sea development of interest here is the archipelagic concept. Since the 1950's, some island nations have tried to extend their sovereignty to encompass the high seas between their constituent islands. Until the Third U.N. Conference on the Law of the Sea, these efforts had involved only a handful of countries whose claims were protested by maritime nations.[25] Over

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aircraft overflight, surface vessel transit, or submerged passage by submarine. In this sense, UNCLOS is declaratory of customary practice rather than law-making in nature.

20. *Id.* at art 194(1) & art. 21. However, the straits states' authority to regulate the maritime environment and navigational safety for ships in transit passage is subordinate to generally accepted international standards. *Id.* at art. 39(2).

21. The baseline is defined as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." *Id.* at art. 5.

22. *Id.* at art. 56(1)(b)(ii) & art. 246(1).

23. *Id.* at art. 56(1)(b)(iii) & art. 194(1). The coastal state's authority in this regard is limited to generally accepted international standards. *See supra* note 20.

24. *Id.* at art. 60.

25. In a 1955 note to the United Nations, the Republic of the Phillipines claimed "all waters around, between and connecting the different islands belonging to the Phillipine Archipelago irrespective of their widths or dimensions . . ." as internal waters. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 282-83 (1965). However, the U.S. opposed the archipelagic claim by only recognizing a three mile territorial sea for each island. *Id.*

In 1957, Indonesia also claimed the waters between its constituent islands as natural appurtenances of its land territory. The major maritime nations (Australia, Japan, the Netherlands, the Scandinavian countries, Great Britain, the United States, and others) reacted strongly against this declaration. *Id.* at 287-88.

Although several countries proclaimed archipelagic status without objection in the late 1970's, (Cape Verde (1977), Sao Tome & Principi and Fiji (1978), and the Solomon

the course of the negotiations, the archipelagic concept achieved acceptance in the treaty text, but only with the very important qualification that the long-standing interests of the international community in commerce and navigation through areas historically classified as high seas be taken into account.

That qualification is the regime of archipelagic sea lanes passage—a right to transit sea lanes through archipelagos. "Sea lanes passage" includes the freedoms of overflight, surface transit, and submerged passage, and applies to 50-mile-wide corridors designated by the archipelagic state and, even in the absence of their designation as archipelagic sea lanes, along routes normally used for international navigation.

Outside of the sea lanes, archipelagic waters are the functional equivalent of the territorial sea—the archipelagic state's sovereignty extends not only to the water column but also to the superjacent airspace and the underlying seabed. That sovereignty is qualified, as in the case of the territorial sea, only by foreign ships' right of innocent passage. Thus, in a manner analogous to its treatment of straits, UNCLOS balances the interests of the international community in unimpeded transit[26] and the interest of the coastal state in resource control, environmental protection, and maritime safety.[27]

IV. POTENTIAL IMPACT OF TRENDS AND DEVELOPMENTS IN THE LAW OF THE SEA ON THE LAW OF NEUTRALITY AT SEA

The possible impact of these Law of the Sea trends and developments on traditional rules of neutrality applicable in naval conflicts, and the adequacy of these rules in the future, warrants consideration. At the outset, it is important to avoid attempts to apply traditional neutrality rules in a wooden or mechanical fashion. The historical development of the Law of the Sea has resulted from a constant reappraisal of the balance between legitimate interests of coastal states and those of the international community. So too, the law of neutrality applicable to naval conflicts cannot be static, but must continuously adjust to reflect fairly changes in both the interests of the neutral coastal state and the military needs of the belligerents.[28] What was appropriate in the days of wooden

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Islands (1979)), the absence of protest was probably due to an unwillingness to disturb the sensitive negotiations in session at UNCLOS. *See generally* Broder & Ban Dyke, *Ocean Boundaries in the South Pacific*, 4 U. HAWAII L. REV. 1 (1982); *cf.* A. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW: 1974 288 (1975).

26. *See supra* note 19.

27. *See supra* note 20.

28. As expressed by McDougal and Feliciano with specific reference to changes in naval technology:

> To appraise the lawfulness of the newer modalities [in the conduct of

ships and cannon shot may or may not be appropriate in an era of nuclear-powered submarines, and naval platforms capable of mounting cruise missiles.

Instead, each recent Law of the Sea trend or potential development must be individually evaluated to determine whether application of the traditional law of neutrality would be reasonable and realistic to the extent that belligerents, whether small coastal navies or large superpower forces, could be expected to abide by the traditional rules. In this inquiry, analysis of the peacetime authority granted by the Law of the Sea to the coastal state in affected ocean areas will be highly relevant to the determination of the wartime status of those areas under the neutrality laws.

The Ordinary Territorial Sea

Extending neutral jurisdiction coextensively with an expanded ordinary territorial sea of 12 nautical miles probably represents an acceptable balance between the interests of neutral states and the needs of belligerent navies. While extending the area from which hostilities are nominally excluded, and certainly improving a neutral's chances of staying out of the fray,[29] the expansion of the ordinary territorial seas would remove only a relatively small area available for belligerent naval operations. In addition, the areas in question, which exclude straits and their approaches, do not seem especially strategic. Accordingly, most naval planners would not deem neutral status of an expanded ordinary territorial sea of 12 miles an unacceptable burden.

International Straits

Unlike most stretches of ordinary territorial sea, international straits frequently have great strategic value. If expansion of the territorial sea were to result in the automatic extension of Hague XIII "territorial waters" neutrality rules, adherence to these rules would be seriously threatened.

Legally permitting neutrals to prohibit belligerent transit through waters overlapping international straits and approaches would not adequately take into account essential mobility needs of belligerents. A law of neutrality which would seriously impede mil-

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> naval conflicts], devised to meet new conditions of warfare, in terms of the requirements projected in traditional law for an older modality developed under very different conditions, is to impose an impossible rigidity upon the processes of customary development and largely to doom such appraisal to irrelevance . . .

M. McDOUGAL AND F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 479-80 (1961).

29. This assumes the neutral could enforce its neutrality impartially. *Supra* notes 4 & 6.

itary operations in this manner would not survive for long. Fortunately, however, that ill-advised extension does not seem likely.

Although the text of Hague XIII does not separately address the rights and duties of belligerents and neutrals in overlapped straits,[30] the negotiating history reveals a general understanding that the rights of a neutral to prohibit belligerent passage through territorial sea did not extend to straits connecting parts of the high seas.[31] Recent commentary[32] and historic practice[33] also generally support the right of belligerent passage through international straits bordered by neutrals. Accordingly, the potential impact of the peacetime UNCLOS transit passage regime may lie in its refinement of the character of an existing passage right.

The practice of neutral straits states has accorded passage to belligerent aircraft, surface warships, and submarines.[34] Although, over the years, Scandinavian legislation has been susceptible to a reading requiring belligerent submarines to transit on the surface, it has not been established that belligerents adhered to any such restriction.[35]

A neutral's interest in avoiding involvement in hostilities would seem best served by minimizing the time belligerent warships and military aircraft spend in its straits. This aim is furthered by the transit passage regime which requires that passage in straits be "continuous and expeditious"[36] and "in the normal mode"[37] of the craft in question. With respect to the submerged passage of submarines, it must be noted that under modern technology submarines are designed to operate more safely and with greater speed in the

30. *See* Hague XIII, *supra* note 1, which states its rules in terms of "territorial waters" and "neutral waters".

31. The formulation adopted in the Convention did not specifically address this question, and the matter was "left under the empire of the general law of nations." [REPORT TO THE CONFERENCE FROM THE THIRD COMMISSION ON THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR] (Renault, Reporter), *reprinted in* 2 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: 1 CONFERENCE OF 1907 288, 298 (J. SCOTT ed. 1920); *see also* UNCLOS art. 35(c) (consistent with note 16) *supra* note 16.

32. *See* R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS: WITH PARTICULAR REGARD TO INTEROCEANIC CANALS 190-91 (1964); M. MCDOUGAL AND R. FELICIANO, *supra* note 28, at 452; R. TUCKER, *supra* note 1, at 233; WILLIAMS, *supra* note 8.

33. Historic practice, though somewhat limited before the advent of twelve mile claims, indicates that belligerent warships were permitted to transit international straits under color of international law. *See* 1 E. BRUEL, INTERNATIONAL STRAITS 111-21 (1947); 32 AM. J. INT'L L. SUPP. 142-46 (1938); ROYAL NOTICE NO. 366, *Svensk Forfattningssamling* 1966, *reprinted in translation in* U.N.L.S., U.N. DOC. ST/LEG/SER.B/15 AT 259 (1970) JUNE 3.

34. *Supra* note 26.

35. *See* F. LIPSCOMB, THE BRITISH SUBMARINE 90 (1954).

36. UNCLOS, *supra* note 16, art. 38.

37. *Id.* at art. 39.

submerged mode. It would certainly be anomalous if submerged passage through straits were prohibited during conflict periods, when the risks of surface passage are at their greatest.[38]

Additionally, positing a conventional conflict between the superpowers, the threat of "going nuclear" would be increased by surface passage. Requiring ballistic missile submarines to surface when passing through straits would threaten the fragile nuclear balance by localizing part of the deterrent capability. Information facilitating the destruction of strategic submarines might induce a belligerent to strike before its capabilities were reduced or cause it to believe that the nuclear balance had shifted sufficiently in its favor to launch a preemptive strike. Hence, it is highly unlikely that any requirement to surface in straits, even if acknowledged by belligerents, would be in the overall interests of neutrals or belligerents.

Beyond the issue of submerged passage, the traditional law of neutrality prohibits acts of hostility by belligerent vessels passing through neutral straits, though allowing actions in self-defense. Because straits are natural "choke points," no naval commander can pass through without being prepared to respond to hostile action. In the regime of transit passage, the concept of peacetime transit in the "normal mode" includes the use of routine defensive measures such as air and surface search radar, and sonar. In wartime, the use of such defensive measures, which do not threaten the coastal state or its resource interests, is made even more necessary by the heightened potential for imminent attack. Attempts by neutrality laws to restrict such measures would be highly unrealistic and possibly counterproductive since they could breed disrespect for the laws in general.

The Exclusive Economic Zone

Recently it has been suggested that neutral status should extend to the waters of a neutral's Exclusive Economic Zone (EEZ). Such suggestions may have relied on a combination of references in Hague XIII[39] and the UNCLOS grant of certain rights in the EEZ to coastal states.[40] For practical military reasons, however, such suggestions would be fundamentally resisted by many nations.

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38. The argument that surface transit of belligerent submarines is necessary to ensure the safety of other vessels within the straits is unconvincing, given the existence of long range anti-ship missiles which, from a distance, are capable of "anonymously" striking shipping in a strait.

39. *See* Hague XIII, *supra* note 1 arts. 3 & 8, which refer to "the jurisdiction of a neutral".

40. *See* UNCLOS, *supra* note 16, art. 56. The Convention amplifies the three areas of jurisdiction in other articles. *See* UNCLOS, art. 60 (jurisdiction of artificial islands, installations and structures for economic purposes; art. 211(5), (6) (protection and pres-

As a matter of textual analysis, the resource-related rights and jurisdictions of a coastal state in its EEZ are a far cry from the type of jurisdiction envisioned by Hague XIII in connection with prize ships and the arming of vessels for operations against a belligerent. From the context of the two Hague XIII articles, it seems clear that only the territory of a neutral is inviolable.[41] The EEZ, unlike the territorial sea, does not form a part of a nation's sovereign territory. The regime of the EEZ preserves the high seas freedoms of navigation, overflight, and other internationally lawful uses of the sea. In peacetime, this allows for weapons exercises and other peaceful military undertakings; in times of conflict, it would allow for belligerent operations.

From a practical standpoint, the EEZ is more critical to naval operations than the ordinary territorial sea. Unlike the relatively minor expanse of ocean encompassed by extending the territorial sea to 12 miles, 200-mile EEZs would occupy nearly 40 per cent of the world's oceans.[42] In general, the depth of EEZ waters would be more suited to naval operations than the relatively shallow waters of territorial seas. Additionally, as the distance from the neutral's coast increases, the potential impact of belligerent operations diminishes as does the coastal state's capability to observe and enforce its neutral status. Thus, the extension of neutral status to a neutral's EEZ does not seem either appropriate or realistic.

Archipelagic Waters

Claims to archipelagic waters are only a relatively recent development. The argument might be made that archipelagic waters have no claim to neutral status since they are separate and distinct from territorial waters, and since only territorial waters are mentioned in Hague XIII or in conventional formulations of naval warfare laws of neutrality.[43] However, such an approach would exalt form over substance, ignore the expectations of neutral archipelagic states, and deny international law an opportunity for progressive development. The alternative course is to recognize that UNCLOS confers sovereignty over archipelagic waters and superjacent airspace, that such sovereignty must be recognized during peacetime as well as times of war, and that neutral status has traditionally been accorded to the full extent of a neutral's sovereignty.[44]

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ervation of the marine environment largely through implementation of international standards); art. 246 (marine scientific research on reasonable conditions).

41. *See* Hague XIII, *supra* note 1, arts. 3 & 8.

42. KNAUSS, DEVELOPMENT OF THE FREEDOM OF SCIENTIFIC RESEARCH ISSUE OF THE THIRD LAW OF THE SEA CONFERENCE, 1 OCEAN DEV. & INT'L L.J. 93, 97 (1973).

43. *See* Hague XIII, *supra* note 1; UNCLOS, *supra* note 16, arts. 46-54.

44. *See* UNCLOS, *supra* note 16, art. 49; Hague XIII, *supra* note 1, art 1.

Some practical problems might be resolved by analogizing archipelagic sea lanes to international straits overlapped by territorial seas.[45] By adopting a regime similar to the wartime passage rights, belligerent mobility requirements could be accomodated without undue prejudice to the interests of the neutral archipelagic state. The parallel construction of the regimes of transit passage and archipelagic sea lanes is certainly a material consideration in this regard.

However, the principal practical problem forseeable for the application of the law of neutrality to archipelagos is the verification issue. Certain archipelagic states embrace vast, strategic, ocean areas. Yet these same states lack the substantial naval or air forces necessary to prevent belligerent use of their waters either for sanctuary or for bases of operation.

If traditional rules regarding neutrality are deemed applicable to archipelagic waters, one belligerent would have a clear right to use proportionate measures against neutrality violations by its opponent where the neutral is unwilling or unable to cure the violations. However, given the large strategic ocean areas involved and the range and destructiveness of modern weaponry, this limited right against known violations is not sufficient.

The most obvious example is the possibility that a ballistic missile submarine could take refuge within an archipelago. Since the submarine's presence might well be revealed only by the launch of its missiles, it would be effectively protected from attack until the opponent's allowable corrective measures against neutrality violations had become meaningless.

In a less dramatic scenario, long-range anti-ship cruise missiles could be fired from within neutral archipelagic waters at a battle group over the horizon. If the strike were sufficiently effective, there would be no opposing forces left on the scene to undertake corrective measures.

What then is the solution? When a neutral cannot or will not take meaningful measures to preclude potential violations, may a belligerent step in and undertake the mission of verifying that neutral waters are free of the enemy? Or would this contravene the traditional rule of inviolability of neutral sovereignty? If a departure from this rule were permitted for surveillance missions, would such missions have to be identified so that they would not be confused with prohibited belligerent operations? If the surveillance/verification mission detected a violator, would the matter have to be

45. Closure of large ocean areas encompassed within archipelagic baselines to the passage of belligerent warships and aircrafts would severly impact strategic and tactical mobility by requiring significant diversion around such areas. In this respect, the sea lanes are the functional equivalent of straits: both provide a more direct route.

referred to the neutral for action, or could those engaged in surveillance attack the violator pursuant to their belligerent right to take corrective measures against known violations? What would happen if two opposing surveillance forces met? May aircraft be used for surveillance/verification missions despite the traditional prohibition on overflight of soverign waters? What standard would justify initiation of surveillance/verification missions: in the discretion of the belligerent; upon a reasonable determination that the enemy might use neutral waters; upon determination that the enemy was using neutral waters? What would be the impact of a pattern of prior abuses without evidence of a present violation? Would a different standard apply for a neutral archipelagic state that was willing, but plainly unable, to take actions that would effectively ensure that neutrality violations were precluded, than in the case of another neutral whose words or deeds demonstrated a clear unwillingness, regardless of the level of its capabilities?

These are the types of questions, stemming from the changes in the Law of the Sea and advances in military technology, that will be crucial in the progressive development of the law of armed conflict. Mechanical extensions of traditional neutrality concepts will not effectively take into account the operational concerns and requirements of modern naval warfare. Rather, a balancing of the interests of belligerents and neutrals, already partially set down in the UNCLOS, must lead to the evolution of appropriate standards which will best serve all the parties involved.