THE PRINCIPLE OF PROPORTIONALITY IN MARITIME ARMED CONFLICT: A COMPARATIVE ANALYSIS OF THE LAW OF NAVAL WARFARE AND MODERN INTERNATIONAL HUMANITARIAN LAW

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Abstract

Modern international humanitarian law (IHL) implements the principle of proportionality with an individualized assessment imposing specific requirements to minimize harm to civilians. In contrast, armed conflicts at sea rely on a vessel-based construct of an older body of law composed of longstanding yet potentially antiquated treaties, and its subjective assessment of customary international law molded by State practice. This paper analyzes the development of the principle of proportionality in each body of law, contextually focusing on civilian crew members aboard naval auxiliaries and other ships which have been rendered lawful military objectives.

Keywords: proportionality, naval warfare, AP I, civilian mariners, customary international law

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I. INTRODUCTION[1]

This paper compares how the law of naval warfare and modern international humanitarian law (IHL) developed primarily through the Geneva Conventions of 1949 and its Additional Protocols of 1977 each implement civilian protections through the principle of proportionality, particularly in the context of civilians serving as crew members aboard naval auxiliaries. The analysis explores the development of the vessel-based construct of the law of naval warfare, distinct from IHL norms that are based on an individualized assessment. Part I relates the history and contemporary practice of civilian seafarers serving on board warships or naval auxiliaries. Part II gives a general overview of the rights provided to civilians in IHL. Part III examines how the law of naval warfare has historically addressed civilian protections at sea. Part IV explores the impact which the modern IHL concept of proportionality may be having on the traditional law of naval warfare.

Civilians are everywhere on the modern maritime battlefield. They provide logistical support in the form of food, equipment, ammunition and fuel, intelligence analysis, technical support of sophisticated military equipment and hardware, and numerous other support roles. They serve on a wide array of support ships (and even some warships) operating as lily pads for the delivery of troops ashore, intelligence collectors, reconnaissance platforms, undersea military bathymetric surveyors, and an expanding list of other vessels. They allow uniformed personnel to focus more on combatant activities, reduce costs, and provide a level of expertise maintaining complex weaponry and equipment which would require costly training programs for members of the armed forces. This trend is not expected to abate.

Civilianization of the maritime domain brings into play the legal construct regarding any civilian protections and rights. Modern IHL agreements provide clear language protecting civilians from direct harm except to the extent they directly participate in hostilities.[2] Civilians who

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1. While the article was submitted while the author was serving on active duty at the U.S. Naval War College, he has since retired from active duty and presently works as a civilian international maritime law practitioner at the U.S. Defense Institute of International Legal Studies, Newport, Rhode Island. The views expressed herein are those of the author alone and should not be construed as the official position of any government entity of the United States. The author is humbled and grateful to have received the invaluable help of Professor James Kraska, Professor Rob McLaughlin, Mr. Pete Pedrozo, US Army LtCol "Elton" Johnson, RAF Squadron Leader Kieran Tinkler, US Coast Guard CDR Dave Dubay, RAF Air Commodore Bill Boothby (ret.), Mr. John Hursh, and Professor Wolff Heintschel von Heinegg.

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3, art. 51(3) (entered into force 7 December 1978) [hereinafter AP I].

directly participate lose their protected status and may be directly targeted and subject to criminal prosecution.[3] In contrast, the law of naval warfare largely pre-dates the post-World War II agreements formalizing civilian protections. Instead, it establishes a vessel-based construct made at a time when States reinforced a trend to legally limit armed conflict solely to combatants as much as possible. They had seen for centuries the historical practice of States authorizing private citizens to attack enemy ships, but increasingly saw war as the exclusive preserve for official State warships built solely to fight other warships.[4] The resulting legal scheme incorporated a presumption of civilian exclusion in active participation in war, allowing it to look to the status or actions of the ship alone to determine its lawful targeting as a valid military objective.[5] Support ships which would later be called 'naval auxiliaries' could be lawfully converted into warships.[6] The status of individuals embarked aboard did not directly factor into the targeting assessment except through the prism of their ship's category or actions; to the extent a non-warship could be lawfully attacked, it generally mandated removal of civilians before destroying the ship.[7]

State practice during two world wars significantly challenged the effectiveness of the civilian protection provisions of the law of naval warfare. Civilians at sea increasingly became involved in both supporting and combatant roles aboard merchant vessels and formal naval auxiliaries. Belligerents ignored the formal steps outlined in the pre-war agreements to avoid loss of civilian life and attacked enemy merchant ships regardless of the status of those aboard. Horrified by the extensive loss of civilian life in those conflicts, States negotiated the foundational IHL agreements crystallizing civilian protections and rights. But their clear focus rested primarily on armed conflict ashore, often intentionally refusing to resolve the confusion over their applicability to the maritime domain. While for the most part they did not formally eviscerate the older body of international law on naval warfare, the scope and manner of their application to the law of naval

3. *Id*.; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009, 83-84 [hereinafter ICRC DPH Interpretive Guidance].

4. Carnegie Endowment for International Peace, *Proceedings of the Hague Peace Conferences of 1907, Vol. III*, Oxford University Press, London, 1921, 764-765.

5. *Id.* at 1037.

6. Peace Resource Center, Hague Convention (VII) Relative to the Conversion of Merchant Ships into War Ships, 2 A.J.I.L. Supp. 133, *entered into force* January 26, 1910, http://hrlibrary.umn.edu/peace/docs/con7.html [hereinafter Hague Convention VII].

7. Manual of the Laws of Naval War, Oxford, Adopted by the International Institute of International Law, August 9, 1913, art. 104, http://hrlibrary.umn.edu/instree/1913a.htm [hereinafter 1913 Oxford Manual].

warfare, in light of historical State practice and the older agreements, was arguably left unclear. This is particularly true in the context of civilian protections.

Three distinct differences between the older law of naval warfare and more recent IHL agreements impact how modern IHL could potentially incorporate or influence its individualized concept of proportionality to conflicts at sea. First, the law of naval warfare is *lex specialis* and encompasses a significant body of law unique to warfare at sea. Developed under different historical conditions than the broader law of armed conflict, it reflects several maritime traditions that have little parallel in the land context. Warfare between ships at sea takes place in a completely distinct operational environment composed of self-contained vessels manned by individuals collectively focused on a mission executed in a manner unknown ashore. The use of uniquely maritime practices such as blockades, boardings, and prize courts prompted development of legal frameworks which would be illegal ashore.[8] For example, belligerent warships may stop and search any merchant ship for enemy contraband, capture and seize it if it does have contraband, and potentially destroy it if it resists boarding.[9]

The maritime domain also implements IHL's core principle of distinction differently than on land. Combatants ashore must individually distinguish themselves in some manner identifying them as such. This is critical because military objectives, both individuals and property, often exist in close proximity with civilians, particularly in urban environments. In contrast, the need to individually distinguish those embarked aboard each vessel is both impractical and unnecessary, particularly because the fusing of military and civilian objects across a simpler operational picture is typically much less likely. Given these features, the law of naval warfare focuses almost exclusively on the conduct or use of vessels alone to distinguish ships which are lawful military objectives from those that are not. Ships embody and reflect the actions of the people aboard. Even as the level of crew involvement in those actions will vary with each individual, the collective sum of actions by a crew operating together as a team will produce actions by the vessel which potential adversaries will use to assess whether it can be lawfully targeted. The presumption is that the crew willingly follows the orders of the ship's commanding officer or master and share or at least understand their leader's intentions and objectives. All hands act as one, falling into the same targeting category absent unusual circumstances warranting otherwise. The complexities of determining whether a specific

8. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, art. 93-104, at 118-24 (Louise Doswald-Beck ed., 1995) [hereinafter SRM].

9. *Id.* at Part. V.

individual forfeits protection become much easier when one needs to only assess the platform.

A third distinct difference arising from the vessel-based focus of the law of naval warfare is the significantly weakened, or even nonexistent, scope of any individual protections from direct attack based on a crew member's civilian status. Their protection accrues from the status or actions of the ship. Specifically, the attacker need only determine whether the ship is a lawful military objective, largely ignoring the presence of any civilian crew members who may be aboard, absent unusual circumstances.[10] Moreover, the requirement to remove civilians prior to attacking the vessel may still be a formal part of the law but in practice has been largely ignored.[11]

This final distinction between these two legal constructs appears to create a significant divergence in their application of the principle of proportionality. The individualized concept developed in modern IHL to minimize collateral damage prohibits an attacker from directly targeting civilians, and from conducting attacks where the incidental loss of civilian life exceeds the military benefits.[12] Further, all practicable precautions must be taken to minimize such harm.[13] With the exception of specially protected vessels such as coastal fishing boats and hospital ships,[14] the traditional law of naval warfare does not bestow the same individual protections; it relies on the ship's actions or status to determine targetability without typically undergoing the same individualized assessment. For civilian crew members aboard naval auxiliaries, this significantly eviscerates an important legal benefit which could potentially accrue from their civilian status. This paper

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10. U.S. DEP'T OF DEF., LAW OF WAR MANUAL June 2015, ¶ 5.12.3.2, at 268 (rev. ed. Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

11. JEWISH VIRTUAL LIBRARY, Nuremberg Trial Judgments: Karl Doenitz, https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-karl-doenitz (German Grand Admiral Karl Doenitz was charged with violating the London Protocol to safeguard civilians lives before destroying the ship. The court found Doenitz guilty of violating the protocol: "The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope." The court imposed no punishment because of British and American practices that committed the same violations); See SRM *supra* note 8, ¶¶ 151, 158.

12. *See* AP I, *supra* note 2, art. 51(3) at 37.

13. DoD Law of War Manual, *supra* note 10, ¶ 5.11.

14. *Paquette Habana v. United States*, 175 U.S. 677 (1900), which found the United States government had wrongly seized and then sold two Spanish coastal fishing vessels during the Spanish-American War; hospital ships enjoy explicit protection from attack under Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), art. 22.

explores the development of these differences, first taking a look at modern IHL.

II. CIVILIAN PROTECTIONS UNDER MODERN INTERNATIONAL HUMANITARIAN LAW

Additional Protocol (AP) I to the Geneva Conventions of 1949 is the linchpin providing the modern legal underpinning requiring States to formally safeguard civilians in armed conflict. Over 170 States have formally ratified and acceded to its provisions.[15] Notably, the United States has signed but not ratified AP I and considers many of its provisions as customary international law.[16] It considers the language in some important provisions, including those relating to the protection of civilians, to reflect only a customary principle, and not a precise reflection of customary international law as written in the protocol.[17]

AP I Article 50 defines 'civilians' in the negative by describing whom they are not. First, civilians are not members of the 'armed forces' as defined in Article 43. Although civilian crew members can be similar to members of the armed forces in that they may be "under a command responsible to that Party for the conduct of its subordinates," the definition also requires they be "subject to an internal disciplinary system which… shall enforce compliance with the rules of international law applicable in armed conflict."[18] This typically means that civilian crew members would need to be subject to a distinct military justice system to satisfy this prong, which is generally not the case. Second, the term does not include individuals in four of the six categories of persons eligible for prisoner of war (POW) status under Article 4A of the Third Geneva Convention of 1949 (GC III).[19] The remaining two categories include civilians who are eligible for POW status - persons accompanying the armed forces, and "members of crews… of the merchant marine…,"[20] either of which could reasonably be extended to civilian mariners employed by combatant forces. If there is doubt about an

15. International Committee of the Red Cross, List of States Acceding to AP I, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last accessed Nov. 3, 2020).

16. Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. UNIV. INT'L L.R. 415, 420 (1987).

17. DoD Law of War Manual, *supra* note 10, ¶ 1.8.1.

18. AP I, *supra* note 2, art. 43 at 23.

19. *Id.* art. 50 at 26; Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 at 93 [hereinafter GC III].

20. GC III, *supra* note 19, at 93.

individual's status, Article 50 directs States to give an individual the benefit of the doubt in favor of civilian status absent evidence to the contrary.[21] The United States does not consider this provision to reflect customary international law, emphasizing that such status must be determined in good faith based on the information available in light of the circumstances.[22] It considers civilian crew members working aboard naval auxiliaries to be civilians accompanying the force.[23]

GC III provides few parameters regarding the nature or scope of the support which civilians may provide to combatant forces with which they are accompanying. This applies to both an individual and collective capacity. GC III broadly describes the various support roles which this category encompasses, including "members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces."[24] It further provides for issuance of an identity card to serve as proof of the person's status, but neither the convention nor the Commentary expounds further on what the term 'accompanying the force' means. The list appears to only be illustrative, since it uses the term "such as" when identifying the list of support roles.[25] The discussion on merchant mariners is even more sparse.[26] In terms of the physical proximity which civilians accompanying the force must have in relation to the members of the armed forces, GC III provides no guidance. This gives States broad latitude to employ civilians independently even when they are the only individuals aboard.

Civilians may even be employed at or near a base for a military objective. This potentially raises the specter of using civilians to improperly leverage protections to shield the objective from attack. AP I Article 51 explicitly prohibits the use of civilians "to shield military objectives from attacks or to shield military operations."[27] The United States largely embraces this provision as customary international law by confirming that "the civilian population shall not be used to shield military objectives or operations from attack, and immunity shall not be extended to civilians who

21. AP I, *supra* note 2, art. 50 at 26.

22. DoD Law of War Manual, *supra* note 10, ¶ 5.5.3.2.

23. U.S. NAVY, U.S. MARINE CORPS, AND U.S. COAST GUARD, DEP'T. OF HOMELAND SEC., THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶ 5.4.3.1 (2017) [hereinafter NWP 1-14M].

24. GC III, *supra* note 19, at 92-3.

25. *Id.*

26. JEAN DE PREUX ET AL., COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 65-66 (Jean Pictet ed., A.P. de Heney trans.,1960).

27. AP I, *supra* note 2, art. 51 at 26.

are taking part in the hostilities."[28] However, there is a clear legal distinction between civilians who intentionally place themselves in the vicinity of a military objective for the express purpose of shielding that military objective from attack, and civilians who work there to perform legitimate duties in support of combatant forces.[29] In the former, the party using civilians as human shields assumes responsibility for the harm inflicted even as the attacker must continue to take feasible precautions to avoid or minimize harm.[30] Civilians who willingly act as human shields for military objectives may be deemed to be directly participating in hostilities, and targeted directly.[31] Those lawfully providing support to combatant forces as civilians accompanying the force, or as civilian merchant crews, certainly face the risk of personal injury or death given their presence on a military objective. But since their presence is authorized, any attacker applying the IHL framework should consider the accompanying civilians and take feasible precautions to minimize harm to them.[32]

To ensure civilians benefit from the legal protections they enjoy, AP I Article 48 requires combatants to distinguish themselves from the civilian population.[33] This imposes a legal mandate for combatants to wear distinctive attire to clearly identify them as military individuals who may be attacked as military objectives with the legal right to conduct belligerent acts in armed conflict.[34] At sea, this requirement would mandate combatants wear some form of uniform aboard ship so attackers can avoid harming civilians. As will be discussed more fully in the next section, Article 48 does not formally apply in maritime conflicts.[35] Individually applying this principle in the maritime domain is not feasible given the vast distances between belligerents and the ability to remain unseen within the ship's skin. These practical realities prompt an understandable reliance on the vessel to distinguish between military and civilian objects and personnel.

The legal effect of being a civilian in armed conflict is twofold. First, a civilian has no legal right to directly participate in hostilities.[36] Such participation potentially subjects civilians to attack by belligerents and domestic criminal prosecution. However, there is notably no explicit

28. Matheson, *supra* note 16, at 426.

29. DoD Law of War Manual, *supra* note 10, ¶¶ 5.12.3.2, 5.16.

30. *Id.* ¶ 5.12.3.3.

31. NWP 1-14M, *supra* note 23, ¶ 8.3.2; ICRC DPH Interpretive Guidance, *supra* note 3, at 56.

32. NWP 1-14M, ¶ 8.3.2; DoD Law of War Manual, *supra* note 10, ¶ 5.12.3.3.

33. AP I, *supra* note 2, art. 48 at 25.

34. *Id.* art. 43, 51(2), 52(2) at 23, 26-27.

35. *Id.* art. 49 at 25.

36. *Id.* art. 43(2) at 23.

prohibition in any international convention for civilians to directly participate in hostilities.[37] Second, AP I Article 51 gives civilians "general protection against dangers arising from military operations" by prohibiting efforts to make civilians the object of attack. Civilians continue to enjoy this protection "unless and for such time as they take a direct part in hostilities."[38] To maximize such protection, an attacker must avoid attacks where the harm inflicted on civilians outweighs the expected military advantage to be gained.[39] Further, the attacker must take all feasible measures to minimize any incidental loss of civilian life.[40] Under this modern construct, civilians at sea would enjoy a number of targeting protections so long as they refrain from directly participating in hostilities.

Determining whether a civilian directly participates in hostilities has been the subject of vigorous scholarly debate. The AP I Commentary to Article 51 specifies that a civilian's participation is direct if they perform "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[41] The International Committee of the Red Cross (ICRC) applies a three-part test to assess whether the action is direct.[42] First, the act must have a threshold of harm wherein it is "likely to adversely affect the military operations or military capacity" of the enemy.[43] Second, there must be "a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."[44] Finally, the act must intend to directly support one belligerent to the detriment of another. [45] Let us presume this third prong is met, and focus on the remaining two prongs.

There is a great deal of flexibility in determining whether an action has a threshold of harm which is likely to adversely affect the enemy's military operations or capacity. The ICRC Interpretive Guidance includes actions which adversely affect the enemy's military operations even if it does not result in death, injury, or destruction of property.[46] Indeed, in the context of

37. ICRC DPH Interpretive Guidance, *supra* note 3, at 83-84.

38. AP I, *supra* note 2, art. 51(3) at 26.

39. *Id.,* art. 57(2)(iii).

40. *Id.,* art. 57(2)(ii).

41. Int'l Comm. of the Red Cross, Commentary, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 619 (1987) [hereinafter AP I Commentary].

42. ICRC DPH Interpretive Guidance, *supra* note 3, at 46.

43. *Id*.

44. *Id.*

45. *Id*.

46. *Id.* at 47.

when medical personnel may forfeit protection from harm, the AP I Commentary confirms that "…the definition of 'harmful' is very broad. It refers not only to direct harm inflicted on the enemy, for example, but also to any attempts at deliberately hindering his military operations in any way whatsoever."[47] Moreover, the acts can also include benefits to one's own side which have a detrimental effect on enemy military operations.[48] In its report on this issue, the ICRC's group of experts found the threshold was satisfied for any act "that adversely affect[ed] or aim[ed] to adversely affect the enemy's pursuance of its military objective or goal."[49] This is a fairly low threshold to satisfy in the context of civilian mariners operating on a naval auxiliary who provide fuel, food, and ammunition to warships. 'But for' this support, the warship would only be able to inflict harm on the enemy until its existing supplies of ammunition or fuel are exhausted.

The more challenging question in assessing whether civilians are directly participating in hostilities is whether there is a sufficient nexus between the act performed and the harm inflicted on the enemy. As Professor Michael Schmitt notes:

> [T]he determinative issue in the direct participation context is not whether an act harms or benefits a party. So long as it does either, it should satisfy the threshold element. But the elements are cumulative. Therefore, the key is whether the acts in question are sufficiently causally related to the resulting harm/benefit to qualify as directly caused.[50]

The ICRC distinguishes between indirect participation, which includes "conduct that merely builds up or maintains the capacity of a party to harm its adversary" and direct participation, which is harm "brought about in one causal step."[51] Direct causation does not require the act to be necessary or sufficient to the causation of harm, the ICRC explains, citing the example of a lookout who individually inflicts no harm, but whose involvement is crucial to others' imminent infliction of harm on the enemy.[52] The act can be just one piece in the process so long as it is an essential ingredient in the overall effort of harming the enemy in the immediate future. A specific example of indirect participation is the transport of weapons and equipment that can become direct participation if "carried out as an integral part of a specific

47. AP I Commentary, *supra* note 41, at 175.

48. William H. Boothby, *Direct Participation in Hostilities - A Discussion of the ICRC Interpretive Guidance*, 1 INT'L HUMANITARIAN LEGAL STUD. 143, 158, 161 (2010).

49. ICRC DPH Interpretive Guidance, *supra* note 3, at 47 n.97.

50. Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 697, 720 (2010).

51. ICRC DPH Interpretive Guidance, *supra* note 3, at 53.

52. *Id.* at 54.

military operation designed to directly cause the required threshold of harm."[53] The ICRC also recognizes that direct participation can be a team sport. The harm inflicted on the enemy often requires a symphony of supporting personnel, few of which may be performing actions actually causing the harm, but who nonetheless could be considered directly participating in hostilities.[54]

> The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.[55]

If applied in the context of civilian mariners aboard a naval auxiliary, the plethora of supporting roles civilians are authorized to perform on the maritime battlefield make it challenging to routinely conclude their individual or collective support is sufficiently tied to the infliction of imminent harm such that their participation is direct. This is true whether the nature of the support is providing routine logistic support or even conducting belligerent acts such as collecting intelligence, as the focus of this prong of the test is about direct causation of the harm, not the means of inflicting it. Absent a finding that civilians are directly participating in hostilities, modern IHL would prohibit an attacker from directly targeting those civilians, impose due precautions to minimize the harm to them, and require an assessment to determine if the military benefits outweigh the harm which is likely to be imposed on those civilians. However, there are certain tactical situations wherein the provisioning of supplies, ammunition, and other logistical support facilitates the relatively imminent application of combat power onto the enemy. In such situations, the nexus could be considered sufficiently close to conclude civilian participation in hostilities is direct.

The United States does not embrace the ICRC three-part test to determine whether a civilian directly participates in hostilities. It refuses to be tied to a specific test because of the contextual nature in which these determinations must be made.[56] Instead, the United States identifies factors which aid this assessment, including: "whether the act is the proximate or 'but for' cause of [harm to the enemy]; the degree to which the act is temporally or geographically near the fighting; the degree to which the act is

53. *Id.* at 53.
54. *Id.* at 54.
55. *Id.* at 54–55.
56. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 5.9.3.

connected to military operations;" and several others.[57] It further provides examples of actions which could constitute direct participation in hostilities, including supplying weapons and ammunition in close geographic or temporal proximity to their use.[58] Similar to the ICRC test, application of these factors to a naval auxiliary providing support to combatant forces would require a contextual look at the situation. The delivery of ammunition to a warship seeking to engage the enemy in close temporal or geographic proximity to the fighting, an activity traditionally performed by uniformed military personnel, and necessary to the infliction of harm in the immediate future, can reasonably lead one to conclude it constitutes direct participation in hostilities. More typical settings which have less imminent impact on the infliction of harm onto the enemy would likely not warrant the same conclusion and require an attacker to consider their presence aboard and weigh the harm inflicted against the military advantage to be gained.

Practical use of the individualized IHL concept of civilian direct participation in hostilities would be extremely challenging unless using a vessel-based application of the principle of distinction. Individual assessments on the maritime battlefield would be almost impossible to implement, and probably unwarranted when applied solely to crew members. Relying solely on the actions or status of the ship to assess the degree of participation in hostilities by crew members aboard would allow an attacker to make the same targeting conclusion for all hands without assessing the individual actions of any single crew member. Even the most inconsequential act of the most junior civilian mariner could potentially be deemed to constitute "an integral part of a concrete and coordinated tactical operation that directly causes harm."[59] Using this flexible application of the principle of distinction, the ship's actions could be deemed sufficiently direct to warrant collective forfeiture of the individual targeting protections that each crew member would enjoy under Article 51.

This review of civilian protections provided in modern IHL helps set the stage for a comparative look with those provided by the law of naval warfare. Even as this paper conceptually applied modern IHL rules to civilian mariners lawfully working aboard a naval auxiliary, it should not be construed as implying support to incorporate them into the law of naval warfare. Its intent, rather, was to demonstrate how such provisions would apply if deemed a part of this body of law.

57. *Id.* at 229–30.

58. *Id.* ¶ 5.8.3.1.

59. "ICRC DPH Interpretive Guidance, *supra* note 3, at 54–55.

III. THE DEVELOPMENT OF CIVILIAN LEGAL PROTECTIONS IN THE LAW OF NAVAL WARFARE

While the law of naval warfare has a long history reaching back centuries, its modern underpinnings can date back to 1856 as a seminal moment which began its modern development. In that year, the maritime powers of the age signed the Paris Declaration to outlaw privateering.[60] State issuance of official licenses to private individuals to attack enemy ships in armed conflict had been standard practice for centuries, which legitimized the use of private vessels to accomplish State objectives in war (and sometimes even in peace), and forcing other merchant ships to arm themselves for protection against private marauding raiding ships authorized to attack them.[61] The Paris Declaration banned this practice, leaving the fighting to State warships alone. Costly technological improvements gave warships a decided combat edge over their privately-funded counterparts, influencing States to largely abandon the practice of arming merchant ships and embrace support for only their capture in wartime.[62]

This development significantly influenced how participants at the 1907 Hague Convention sought to protect civilian mariners. They negotiated the Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships (Hague Convention VII), one of a number of conventions governing numerous aspects of the law of armed conflict codified at the event. This agreement fully supported the progress made by the Paris Declaration to limit war at sea to members of the armed forces, but recognized merchant vessels typically manned by civilians would likely be needed to support combatant forces, subjecting them to potential attack. Their solution was to establish a formal process to convert a civilian-manned merchant ship into a warship operated by combatants,[63] carefully defining 'warship' with specific criteria to allow any belligerent to distinguish between lawful combatants and civilians.[64] It was generally understood that only warships could engage in belligerent attacks, and only against enemy warships; other enemy public or private vessels would be unarmed and

60. *Declaration Respecting Maritime Law* (Apr. 16, 1856), https://ihl-databases.icrc.org/ihl/INTRO/105?OpenDocument.

61. *See* Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INT'L L. STUD. 60 (1955); JAN MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 13 (Palgrave Macmillan, 2014).

62. Tucker, at 61.

63. Carnegie Endowment for Int'l Peace, *Proceedings of the Hague Peace Conferences, in Vol. I*, OXFORD UNIV. PRESS 235 (1920); Hague Convention VII, *supra* note 6.

64. Hague Convention VII, *supra* note 6, art. 2-6.6.

generally only subject to visit, search, and capture.[65] If the search produced contraband, the warship could then take the merchant ship to a prize court; it could destroy it only in exigent circumstances after safeguarding its crew.[66] These provisions, if followed, would protect civilians at sea quite well.

The advent of the submarine in World War I made it almost impossible to effectively abide by these legal requirements. Enemy merchant ships were routinely attacked without warning and without first placing civilians aboard into a place of safety prior to the destruction of their ship. Submarines had neither the space aboard nor the time to take these steps without exposing themselves to mortal danger because the British took control of its merchant marine, armed its merchant ships,[67] directed them to automatically attack German submarines coming within a certain range,[68] and even developed Q-ships, which posed as harmless merchant vessels to lure German submarines close in before attacking them with guns hidden on the deck.[69] The pre-war presumption of innocent, unarmed civilian-manned merchant ships proved largely false, as civilians were now present on armed ships deemed military objectives as naval auxiliaries. It called into question whether the carefully structured construct developed before the war would continue to remain legally valid.

After the war States opted to keep the pre-war requirements intact, even explicitly extending their provisions to submarines. President Wilson had justified to Congress his request for a state of war with Germany on the German refusal to properly adhere to those pre-war agreements which he believed prohibited attacks against merchant ships without first placing passengers into a place of safety.[70] The London Naval Treaty of 1930 reaffirmed these requirements for both surface ships and submarines, citing them "as established rules of international law," remaining permanently in force even as the other provisions of the agreement expired in 1936.[71] It did provide exceptions to the requirement of removing merchant ship crews "in the case of persistent refusal to stop on being duly summoned, or of active

65. 1913 Oxford Manual, *supra* note 7, art. 31-32.

66. *Declaration concerning the Laws of Naval War*, UNIV. OF MINN.: HUM. RTS. LIBR., Feb. 26, 1909, at Ch. IV [hereinafter 1909 London Declaration]; 1913 Oxford Manual, *supra* note 7, art. 104.

67. CHARLES D. GIBSON, *MERCHANTMAN? OR SHIP OF WAR*, 40-41 (1986).

68. *Id.* at 42-43.

69. *Id.* at 50-51.

70. S. DOC. NO. 65-5, 1st Sess., at 3-8 (Wash. 1917), https://www.loc.gov/law/help/digitized-books/world-war-i-declarations/ww1-gazettes/US-address-of-president-to-congress-April-1917-1-OCR-SPLIT.pdf.

71. Limitation and Reduction of Naval Armament (London Naval Treaty) art. 23-24, Apr. 22, 1930, 46 Stat. 2858 [hereinafter London Naval Treaty of 1930].

resistance to visit or search."[72] The London Protocol in 1936 further confirmed this rule, and the accompanying Second London Naval Treaty also prohibited States to arm merchant ships in peacetime for the purpose of converting them into warships.[73] It was understood that the protocol did not apply to merchant ships that took actions such as sailing in a convoy with enemy warships; essentially such actions rendered them a lawful military objective.[74] By the time World War II began, there was broad legal consensus of the requirements to attack a merchant ship only under certain specific conditions, and to remove civilians aboard those vessels prior to such attack.[75] Indeed, even Nazi Germany codified the requirements of the London Protocol in its prize laws, and when war broke out submarine commanders were largely directed to adhere to them.[76] Their applicability to naval auxiliaries, however, was doubtful, since they were directly supporting combatant forces.

World War II repeated the same violations of codified international law as in the prior conflict. Belligerents routinely destroyed enemy merchant ships and their civilian crews instead of taking them to prize courts because they were deemed to be closely integrated with enemy armed forces.[77] This assessment was not unfounded. From the very beginning of the conflict, the British armed its civilian merchant fleet, placed them under Admiralty oversight, directed them to provide intelligence on the position of enemy submarines and ram them if possible.[78] Some British merchantmen even launched torpedo bombers to attack German submarines.[79] The United States also took steps to integrate its merchant marine by painting them the same 'wartime grey' as its warships, directing them to collect intelligence, and placing its merchant marine, including its members, under military control and subject to the Navy disciplinary code.[80] These factors helped convince

72. *Id.*; Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, 173 L/N.T.S. 353 (entered into force Nov. 6, 1936), http://hrlibrary.umn.edu/instree/1936a.htm [hereinafter London Protocol].

73. Limitation of Naval Armament (Second London Naval Treaty) art. 9, Mar. 26, 1936, 50 Stat. 1363.

74. H. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*, 70 INT'L LAW SERIES, 315 (1998).

75. 2 LASSA OPPENHEIM, International Law § 194a, at 382-85 (Hersch Lauterpacht ed., 6th ed. Longmans, Green and Co. 1940).

76. 58 W. T. Mallison Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, 1 INT'L LAW SERIES, 115 (1966).

77. GIBSON, *supra* note 67, at 119-21.

78. 46 INT'L LAW STUDIES, INTERNATIONAL LAW DOCUMENTS, 1946-47, at 299 (U.S. Naval War College ed., 1948).

79. GIBSON, *supra* note 67, at 103.

80. *Id.* at 89-90, 99, 102.

the Nuremberg court to impose no punishment on German Grand Admiral Karl Doenitz for violating Article 22 of the London Naval Treaty which applied the London Protocol to submarines.[81] The court recognized Doenitz only reluctantly abandoned the protocol in light of these British practices,[82] which converted many Allied merchant ships into naval auxiliaries.

The Nuremberg court found it particularly improper to impose punishment when the Allies also practiced unrestricted submarine warfare, targeting enemy merchant ships without safeguarding their crews, ostensibly considering them military objectives due to their full integration with enemy fighting forces.[83] It took less than twenty-four hours after the Pearl Harbor attack for the United States to direct its fleet to "execute unrestricted air and submarine warfare against Japan."[84] The justification may have been deemed reprisal for the surprise attack,[85] but a post-war alibi indicated it was impossible to distinguish between civilian Japanese merchant ships and military enemy naval auxiliaries.[86] This suggested the civilian-manned Japanese merchant fleet had been incorporated into its combatant fleet, and in fact it had been placed under military control early in 1941, prior to the outbreak of war.[87] As naval auxiliaries, these vessels clearly became lawful military objectives which obviated the need to apply the London Protocol's requirement to remove any civilian crew members to a place of safety prior to attack. By the close of World War II, the vessel-based construct appeared to support the targeting of civilian-manned naval auxiliaries without regard to the civilian status of those aboard. It is now time to examine any impact which the subsequent development of the principle of proportionality in post-war IHL agreements may have had on the law of naval warfare.

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81. *Nuremberg Trial Judgement: Karl Doenitz*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-karl-doenitz (last visited Nov. 3, 2020).

82. "The Trial of Admiral Doenitz," 1 *Office of Naval Intelligence Review,* No. 12, at 29-32 (1946) https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/t/the-trial-of-admiral-doenitz.html.

83. Gibson, *supra* note 67, at 119-21.

84. James M. Steele, *Running Estimate and Summary in* 1 [7 Dec. 1941 to 31 Aug. 1942] at 5 (American Naval Records Soc'y, 2013), http://www.ibiblio.org/anrs/docs/Volumes/Nimitz_Graybook%20Volume%201.pdf.

85. NWP 1-14M, *supra* note 23, at 8-12.

86. Mallison, *supra* note 76, at 122.

87. Mark P. Parillo, The Japanese Merchant Marine in World War II, at 73 (1987) (unpublished Ph.D dissertation, Ohio State University) (on file with OhioLink).

IV. IMPACT OF THE MODERN CONCEPT OF THE PRINCIPLE OF PROPORTIONALITY ON THE LAW OF NAVAL WARFARE

AP I participants found it challenging to apply to naval conflicts their newly-christened individualized civilian protections so eagerly embraced in the land domain. Belligerents had relied on the vessel-based construct created by the traditional law of naval warfare to consider enemy merchant ships as naval auxiliaries almost as if they had been converted to warships under Hague Convention VII. Civilian mariners found themselves aboard vessels deemed military objectives, subjecting themselves to harm and extinguishing their rights under the London Protocol to be removed prior to attack. Even as AP I established trendsetting civilian protection mandates for land combatants, it did not impose them on belligerents at sea. Among the excluded legal obligations was the requirement to distinguish between civilians and combatants at sea, to conduct any proportionality assessment, to exercise feasible precautions minimizing the harm to civilians, and to avoid making civilians the object of attack. These were not inadvertent omissions, but rather intentional decisions by the AP I drafters. The specific language of Article 49 reads:

> The provisions of this Section [i.e. Articles 48 through 67] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.[88]

This decision did not reflect any desire to create a warfare domain without limits. It merely signaled a determination "not to undertake a revision of the rules applicable to armed conflict at sea" because the conditions of war at sea "were radically transformed during the Second World War and in subsequent conflicts. It is therefore difficult to determine exactly which are the rules that still apply," as "they are controversial or have fallen into disuse."[89] The Commentary does not elaborate further, but at least one likely primary culprit was the unrestricted targeting of enemy and neutral merchant fleets which killed thousands of civilian merchant mariners, seemingly with State acquiescence. This left (and continues to leave) the law of naval warfare without codified provisions implementing the principles of distinction or proportionality.

As with a good portion of the law of naval warfare, the principles derive from customary international law. There are a number of collateral sources

88. AP I, *supra* note 2, art. 49(3) at 152.

89. AP I Commentary, *supra* note 41, at 606.

that make the case that these principles have been integrated into the law of naval warfare even without their codification in a formal written agreement. In the context of assessing the lawful use of nuclear weapons, the International Court of Justice emphasized in an advisory opinion that States must distinguish between civilians and combatants, and to "never make civilians the object of attack."[90] The Court found these rules to "constitute intransgressible principles of international customary law" without identifying any exceptions that could exempt application to the law of naval warfare.[91] It further cited AP I Article 1, which determined that civilians "remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" even in situations not addressed by any formal agreement.[92] Whether such protection of civilians at sea is an 'established custom' could be a point of contention.

The 1998 Rome Statute of the International Criminal Court provides another potential source to extend proportionality to maritime conflicts. It designates as a war crime certain violations of the law of armed conflict "within the established framework of international law," including direct attacks on civilians who do not directly participate in hostilities.[93] Should the 'established framework' of the law of naval warfare consider attacks on civilians aboard a vessel deemed a military objective (such as a naval auxiliary) to be a violation of the law of armed conflict, then it would constitute a war crime under this statute. Given the vessel-based construct of the law of naval warfare, and the inability of civilian crew members to arguably forfeit individual targeting rights they never had, it remains unclear whether this statute could be uniformly leveraged to prosecute someone for killing civilians aboard such a vessel, particularly since the attacker would formally be targeting the ship, not the individuals aboard. To this point, there have not been any cases in the International Criminal Court relating to war crimes committed against civilians at sea.[94]

Maritime legal scholars took a close look at these issues while examining the contemporary state of the law of naval warfare in 1995 as they compiled the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Manual). Published under the auspices of the International

90. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 78-79.

91. *Id.*

92. AP I, *supra* note 2, art.1(2) at 7.

93. Rome Statute of the International Criminal Court, art. 8, ¶ 2(b)(i), July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002).

94. See generally *Cases*, INT'L CRIM. CT., https://www.icc-cpi.int/cases (select "Crimes" filter; then select "War Crimes" to narrow search to 28 cases) (last visited Oct. 10, 2020).

Institute of Humanitarian Law, and probably the most eminent modern compilation of the law of naval warfare, it incorporates the requirement to avoid targeting civilians directly.[95] It further includes the principle of distinction, acknowledging the lack of formal treaty provisions but ultimately making a conclusory statement affirming the requirement as "an essential element of that body of law, no matter how inchoate..."[96] It also assimilates the principle of proportionality to mandate an assessment of the military advantage gained against the harm inflicted on civilians or other protected persons,[97] and fully embraces AP I Article 52(2)'s definition of military objectives.[98]

After validating these principles as an integral part of the law of naval warfare under customary international law, San Remo Manual participants then applied the vessel-based construct to implement the principle of distinction. In contrast to the individualized standards AP I imposes on belligerents ashore, conflicts at sea distinguish combatants from civilians by looking to the status or actions of the vessel alone to identify whether it constitutes a military objective. The San Remo Manual provides legal clarity by identifying lists of vessels whose status or actions would 'enable naval commanders to establish whether a given vessel was liable to attack or not.'[99] It endorses the designation of any warship or naval auxiliary as a military objective based on their status alone.[100] Status protects from harm select categories of vessels, including coastal fishing vessels, hospital ships, and merchant ships (enemy and neutral); they may be attacked only if they engage in certain specific conduct which reasonably can be construed as support to the enemy sufficient to warrant their designation as a military objective.[101] Activities which can render neutral merchant ships as military objectives subject to attack include sailing under an enemy convoy, refusing to allow a belligerent warship to board and search it for enemy contraband,

95. SRM, *supra* note 8, ¶ 46, at 16.

96. Salah El-Din Amer et al., *Explanation, in* SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 57, 114 (Louise Doswald-Beck ed., 1995) [hereinafter SRM Commentary].

97. SRM, *supra* note 8, ¶ 46(d), at 16.

98. *Id.* ¶ 40, at 15.

99. SRM Commentary, *supra* note 96, ¶ 40.7, at 116.

100. SRM, *supra* note 8, ¶ 65, at 21; *see also* 1913 Oxford Manual, *supra* note 7, at 180-81.

101. Hospital ships: 1913 Oxford Manual, *supra* note 7, at 183-184; SRM, *supra* note 8, ¶¶ 49-51, at 17-18; Fishing Vessels: 1913 Oxford Manual, *supra* note 7, at 185-86; SRM, *supra* note 8, ¶¶ 47-48, at 16-17; Enemy Merchant Vessels: 1913 Oxford Manual, *supra* note 7, at 181, 198; SRM, *supra* note 8, ¶¶ 59-61, at 16-17; Neutral Merchant Vessels: 1909 London Declaration *supra* note 7, at 167; SRM, *supra* note 8, ¶¶ 67-69 at 21-22.

or resisting capture while attempting to breach a blockade.[102] In one recent example from 2010, a team of international legal scholars examined the legality of certain actions taken by Israeli military forces against a vessel openly seeking to breach a declared blockade of Gaza. They concluded the ship's non-warship status initially protected it from harm, but once it actively resisted capture while attempting to breach a blockade, it became a lawful military objective subject to attack.[103] Particularly in light of the impracticality of forcing maritime commanders to individually distinguish each individual aboard the vessel, the application of the principle of distinction through the prism of the vessel makes perfect sense. In the case of naval auxiliaries, their status renders it an inherent military objective.

The U.S. recognizes the differences between armed conflict ashore and at sea, and fully embraces the practice of using the status or conduct of the ship to distinguish combatants and civilians:

> The law of land warfare has divided enemy nationals into different categories in order to facilitate the protection of the civilian population from hostilities. Similarly, the law of naval warfare has sought to classify enemy vessels to protect those that are civilian or non-combatant in character.[104]

This understanding implements the principle of distinction in the maritime context by analogizing a ship to an individual, embracing vessel-based traditional law of naval warfare norms that culminates with the establishment of categories of vessels which are liable to attack, those that are not, and the circumstances in which those that are protected may forfeit such protection.[105] The law of war manuals from many other States share this position.[106]

In doing so, those States' war manuals sanction reliance on the vessel alone to distinguish between lawful military objectives and civilians entitled to protection. They also had the effect of creating a presumption that, absent unusual circumstances, all hands aboard support the conduct (or share the status) which may warrant its lawful targeting.

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102. 1913 Oxford Manual, *supra* note 7, at 177-78; SRM, *supra* note 8, ¶¶ 67, 98, at 21-22, 27.

103. Turkel Commission, *The Public Commission to Examine the Maritime Incidents of 31 May 2010 Report, Part One*, ¶ 177 (2010), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf.

104. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 13.3.2.

105. *Id.* ¶¶ 13.4 - 13.6.

106. Ministry of Def., *JSP 383: The Joint Service Manual of the Law of Armed Conflict,* ¶¶ 13.27, 13.40-41 (2004) [hereinafter UK Law of War Manual]; *Australian Defence Doctrine Publication 06.4*, 11 May 2006, ¶¶ 6.39, 6.41 [hereinafter Australian Law of War Manual]; *Kommandanten-Handbuch - Rechtsgrundlagen für den Einsatz von Seestreitkräften*, ¶¶ 1029, 1031 (2002) [hereinafter German Navy Law of War Handbook].

In contrast to the principle of distinction, the way in which the principle of proportionality applies to the maritime domain is not articulated well. The principle is incorporated as an integral component of maritime conflict in the law of war manuals of the United States,[107] Germany,[108] the United Kingdom,[109] Australia,[110] New Zealand,[111] Norway,[112] Israel,[113] Denmark,[114] China,[115] and many others.[116] They adopt almost uniformly the list of activities identified in the San Remo Manual which could render a ship a military objective, authorize attacks on such vessels without warning, and blandly incorporate the proportionality language of AP I Article 57. But with one exception, they do not articulate any differences in how proportionality is applied at sea in contrast to other warfare domains, seemingly implying the individualized assessment used ashore remains valid in a maritime context.[117] The International Committee of the Red Cross (ICRC)'s database of customary IHL also lacks any amplifying clarification.[118] Even the San Remo Manual Commentary does not flesh out whether proportionality is implemented differently at sea than ashore. Indeed, in applying the principle in the context of the German attack on the *Lusitania* in 1915, it suggests the number of civilians aboard may have rendered the attack disproportionate relative to the military advantage gained in destroying its military cargo.[119] Although this suggests an individualized proportionality assessment should be applied for non-warships rendered a military objective, this example may reflect international consensus only in the case of a passenger vessel which has been lawfully deemed a military objective, as it is one of the specially exempted vessels entitled to additional protections.[120] The lack of clarity is particularly relevant for civilian mariners providing lawful support aboard

107. DOD LAW OF WAR MANUAL, *supra* note 9, ¶¶ 13.5.2, 5.12.3.3; NWP 1-14M, supra note 22, ¶ 8.3.2.

108. German Navy Law of War Handbook, *supra* note 102, ¶ 1001.

109. UK Law of War Manual, *supra* note 102, ¶ 15.22.1.

110. Australian Law of War Manual, *supra* note 102, ¶ 6.26.

111. *DM 69 (2d Ed) New Zealand Defence Forces Manual of Armed Forces Law, Vol. 4*, 2017, ¶ 10.4.12.

112. *Norwegian Manual of the Law of Armed Conflict (English)*, 2018, ¶ 10.32.

113. ICRC Database of Customary International Law, *Practice Relating to Rule 14, Proportionality in Attack*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 (last visited Nov. 3, 2020) [hereinafter ICRC Database].

114. *Id.*

115. *People's Republic of China Law of Armed Conflict Manual*, 203 (2003).

116. See ICRC Database, *supra* note 113.

117. *Id.*

118. *Id.*

119. SRM Commentary, *supra* note 96, ¶ 46.5.

120. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 13.5.2.1; SRM, *supra* note 7, ¶ 47(e).

naval auxiliaries, since they work on a military objective without the ability to minimize the danger should the enemy wish to attack the ship.

Any discussion on how proportionality applies to civilians aboard naval auxiliaries should understand the larger dialogue on how the principle applies to any civilian providing lawful support to combatants at a military objective. The United States has struggled to determine how it believes proportionality should apply in this latter context. The June 2015 version of the DoD Law of War Manual explicitly rejected an express prohibition on attacking such civilians because the civilians assumed the risk of harm.[121] This position directly responded to concerns that full application of the principle of proportionality in such situations encourages belligerents to intentionally use civilians to shield military objectives from attack.[122] An update in December 2016 adjusted its position:

> However, sometimes civilian personnel work in or on military objectives in order to support military operations. For example, civilian workers sometimes serve as members of military aircrews, as technical advisers on warships, and as workers in munitions factories. Such persons assume a certain risk of injury. Provided such workers are not taking a direct part in hostilities, those determining whether a planned attack would be excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them. Those making such determinations may consider all relevant facts and circumstances.[123]

This carefully crafted language treads delicately between the competing concerns of safeguarding any civilian rights while preventing misuse. It mandates feasible precautions and some level of consideration in light of their civilian status. But it remains unclear whether that entails a shore-based proportionality assessment or something less, providing no examples of the kind of facts and circumstances which a commander should deem relevant. There is also continuing emphasis on an 'assumption of risk' argument that civilians who willingly accompany combatant forces to provide support warrant less consideration before an attack. Whether or not that is a valid factor to consider, the formal creation of a quasi-combatant category of civilians who count less in any collateral damage assessment would be a new development in IHL presently without foundation in relevant international agreements.[124]

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121. DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 5.12.3.2.

122. *Id.*

123. *Id.* ¶ 5.12.3.3.

124. Munitions Factories: Civilian Assumption of Risk in Armed Conflict and the United States' DoD Law of War Manual, 56 MIL. L. & L. WAR REV. 251, 284 (2017).

The discussion further fails to clarify the extent to which its guidance applies in the maritime arena. Its sole maritime example includes an embarked technical advisor, tellingly overlooking the more obvious example of a crew of civilian mariners operating aboard a naval auxiliary. The manual's maritime section has only a single additional example where drafters devoted clear language explaining the need for a full proportionality assessment—passenger ships which have been rendered a military objective.[125] Notably, in conformity with the majority of state law of war manuals, the United States omits any clarifying explanation of how civilian mariners aboard a naval auxiliary would enjoy any rights they may have under the principle of proportionality.

Nonetheless, the lack of clarity may reflect a ringing endorsement to apply proportionality using a vessel-based construct. With AP I expressly refusing to apply the individualized concepts to the maritime domain, the law of naval warfare does not need to explain whether its implementation of proportionality mirrors AP I as a matter of customary international law since the original law remains valid. While States could make their positions clearer, a reasonable presumption is that nothing has changed without an affirmative acceptance of AP I civilian protection provisions as a matter of customary international law. Such explicit language expressly incorporating the AP I provisions into naval warfare law has not occurred in any law of war manual in the ICRC database.[126] One State, Denmark, has done the opposite. It fully articulates in its law of war manual how its naval forces implement proportionality. It ignores the status of anyone on a ship rendered a military objective; instead, the attacker only must assess the harm which could be inflicted on other vessels in the vicinity that are not military objectives.[127] If States agree with this position, it would serve them well to follow Denmark's lead.

State practice in the world wars may not necessarily reflect a rejection of the pre-war agreements. The signatories of the London Protocol understood well that its provisions did not apply to merchant ships, which had been deemed a military objective.[128] Belligerents targeted all enemy merchant ships because they could not effectively differentiate between merchant ships which were conducting ordinary commerce unrelated to the war and those which were providing direct or war-sustaining support to enemy combatant forces.[129] This issue essentially boiled down to a problem

125. *See* DOD LAW OF WAR MANUAL, *supra* note 10, ¶ 13.5.2.1.
126. *See* ICRC Database, *supra* note 113.
127. *Id.*
128. Levie, *supra* note 74, at 115.
129. Tucker, *supra* note 61, at 3.

implementing the principle of distinction. The Allies can accept much of the blame for aggressively mobilizing their merchant fleets to blur the difference between supporting ships and any other ship. Those merchant ships which genuinely had no role in the conflict were essentially collateral damage. Arguably, had belligerents effectively determined whether a given merchant ship was a military objective, they would have been more willing to fully implement the London Protocol and earlier law of naval warfare provisions safeguarding civilians at sea.

Some post-World War II State practices may reflect current international viewpoints on how proportionality is to be implemented in maritime conflicts. The Iran-Iraq War in the 1980s included over 450 attacks on the enemy and neutral shipping, causing over 300 civilian mariner casualties primarily aboard tankers carrying war-sustaining oil necessary to support and fund each side's war efforts.[130] Iraqi attacks focused on Iranian and neutral-flagged tankers controlled mainly by the Iranian military, which convoyed many of them to Iranian ports.[131] Although the belligerents were not well-known for concerning themselves with adherence to law of armed conflict norms, the international community also remained silent about the apparent disregard for civilian crew members during attacks on ships integrated with belligerent armed forces and carrying war-sustaining oil. Only one of eight United Nations Security Council resolutions promulgated during the war specifically addressed attacks on merchant ships; it condemned Iranian attacks on neutral merchant ships ostensibly conducting ordinary commerce in neutral ports.[132] In legal parlance, it criticized Iran for attacking merchant ships which were not military objectives. Notably absent from any resolution were objections about unrestricted attacks on merchant ships integrated and controlled to a large degree by the Iranian military. To the extent customary international law is generally established by States through a sense of legal obligation, this example may not warrant much attention given the belligerents in this war did not appear to base their actions to fulfill any legal obligations.[133] Nonetheless, while the international community's silence may reflect ambivalence or political favoritism, it also could represent a tacit endorsement that such attacks were consistent with World War II standards

130. Ronald O'Rourke, *the Tanker War*, U.S. NAVAL INST. PROC., 6 (May 1988), https://www.usni.org/magazines/proceedings/1988/may/tanker-war.

131. J. Ashley Roach, *Missiles on Target: The Law of Targeting and the Tanker War*, 82 AM. SOC'Y INT'L L. PROC. 154 (1988); George K. Walker, *The Tanker War, 1980-88: Law and Policy*, 74 INT'L L. SERIES 387 (2000).

132. G.A. Res 552 (June 1, 1984).

133. *See generally* John B. Bellinger II. & William J. II Haynes, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007).

allowing attacks on civilian ships deemed a military objective without consideration of any civilians aboard.

The 1982 Falklands/Malvinas conflict between Britain and Argentina may offer another contemporary example. Each side directed and controlled civilian vessels crewed mainly by civilians to carry out activities, including belligerent acts, in support of combatant forces. The British requisitioned civilian merchant vessels to support its combatant forces, including the *Atlantic Conveyer,* which delivered critical fighter jet aircraft and other equipment to British forces in the combat area of operations.[134] When the ship was subsequently struck by Argentine missiles, killing several civilian crew members, the British lodged no complaints about any potential violations of international law by Argentina. Similarly, Argentina placed under military control the civilian fishing trawler *Narwal*, manned almost exclusively by civilians, to collect intelligence about the British maritime task force.[135] Clearly a belligerent act, the British subsequently attacked and boarded the ship.[136] Argentina did not criticize the British actions as illegal even as it suffered the death of one civilian mariner. This contrasts with Argentina's strong legal criticism of the sinking of the *General Belgrano* outside the declared British maritime exclusion zone, which demonstrates Argentina's willingness to legally object to enemy actions which it considered contrary to the law of naval warfare.[137]

A contrasting view is found in the findings of the 2010 Turkel Commission. Israel asked a group of distinguished Israeli and non-Israeli legal experts to examine the legality of its use of military force to board the *Mavi Mamara*, a civilian passenger vessel seeking to breach an Israeli blockade against Gaza. After the ship refused an Israeli request to board the vessel, Israel boarded it using military force. While most civilians aboard the ship did not physically oppose the boarding, a smaller subgroup did so, resulting in several casualties on both sides.[138] The commission acknowledged the ship became a valid military objective under the law of war, but fully applied the civilian protection provisions embraced in AP I as the basis for any military attacks against the ship. The commission found that

134. SIR LAWRENCE FREEDMAN, THE OFFICIAL HISTORY OF THE FALKLANDS ISLAND CAMPAIGN VOLUME II: WAR AND DIPLOMACY 462 (2005).

135. *Id.* at 363.

136. *Id.*

137. *Hundimiento del General Belgrano - Comunicados oficiales*, LA NACIÓN, May 4, 1982, https://web.archive.org/web/20130517050451/http:/www.elhistoriador.com.ar/documentos/dictadura/hundimiento_del_general_belgrano_comunicados_oficiales.php.

138. Turkel Commission, *supra* note 103, ¶¶ 1-3.

a proportionality assessment was required except against those civilians who were directly participating in hostilities.[139]

> [U]nder international humanitarian law, the flotilla vessels became valid military objectives once they resisted capture. However, the presence of civilians on board the vessels is relevant to the assessment of the principle of "proportionality" discussed above. For instance, had the *Mavi Marmara* been "attacked," Israeli forces would have had to assess whether the expected incidental loss of civilian life or injury to civilians would be excessive in relation to the concrete and direct military advantage anticipated by the attack.[140]

The affirmation of an individualized proportionality assessment may reflect a contextual understanding unique to this case. There was a clear distinction between crew members who sought to resist the boarding and a larger group of civilians known to acquiesce in it. This could have been deemed an unusual situation where the attacker could not presume the entire crew or embarked passengers supported the actions which gave rise to the ship's designation as a military objective. In such circumstances, even as the ship remains a lawful military objective, a requirement for an attacker to conduct a full proportionality assessment would be understandable. Controversially, the commission applied the concept of direct participation in hostilities to assess whether some civilians aboard the vessel forfeited their civilian protections. Under this line of thinking, had there been no separate group of civilians clearly disassociated from the hostile activities, the Israelis could have lawfully attacked the ship without a proportionality assessment. This action would be consistent with both the law of naval warfare and AP I civilian protection provisions. This contrasting perspective reveals differences in how some believe the law of naval warfare protects civilians at sea.

Comparing two distinct legal constructs highlights unique differences in the implementation of the principle of proportionality in different warfare domains, which reflects the diverse histories and operational realities present in each. It underscores potential seams in how the law of naval warfare wishes to articulate the implementation of proportionality at sea. Reliance on customary international law, and focusing on State practice and policy positions, can leave unsatisfied those who want to provide the same degree of clarity which codified treaty such as AP I brings to combatants ashore. Regardless, the principle of proportionality continues to play a role as an "intransgressible" right consistent with established norms of international law. What those norms are, and how they are applied, can be a subject of

139. *Id.* ¶¶ 177, 183, 192-95, 201.
140. *Id.* ¶ 188.

debate in the absence of a codified tradition, and where an international consensus in light of modern IHL standards can be challenging to identify. For civilian crew members embarked on naval auxiliaries, the law of naval warfare likely imposes no obstacles to having their ship targeted as a military objective without regard to their presence as civilians. Efforts to incorporate individualized norms must originate with States who see value in altering the current construct.