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Some current (and enduring) challenges in the application and interpretation of the law of naval warfare

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Abstract

As a nuanced and quite domain-specific subset of international humanitarian law (IHL), the law of naval warfare (LONW) occasionally differs from general IHL in terms of rule content, interpretation, and application. For example, the targeting regime in the LONW is primarily platform-based, while the concept of civilian direct participation in hostilities is significantly less relevant at sea. Similarly, the application of the common Article 2 threshold at sea does not always parallel its application in other battlespaces and domains. Such inconsistencies – when compared to IHL more generally – can appear to be archaic and obtuse, but fidelity to the historical provenance and differential interpretation and application of these specialist rules is both essential and, in the current geostrategic environment, worth recalling. Given this predisposition

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to difference, this article outlines five current risks attending the modern application and interpretation of the LONW: misinterpretation and misapplication of the LONW due to a failure to appreciate its often sui generis nature; the lure of application and interpretation by analogy from shore-based LOAC; the heavy reliance of the LONW on historical examples; the highly lex specialis *nature of the LONW in relation to the non-fragmentation trends underpinning the modern international law interpretive endeavour; and the consequences often assumed to flow from the aged nature of the LONW's main sources.*

Keywords: naval warfare, armed conflict, customary law of naval warfare, direct participation in hostilities, 1907 Hague Conventions.

Introduction

The law of naval warfare (LONW) is a domain-nuanced body of law constituting a sub-regime within the general regime of the law of armed conflict (LOAC).[1] As such, it would be logical and appropriate that the application of the LONW would be closely coherent with that of its parent LOAC regime. This includes consistency in relation to key regime-wide concepts (such as direct participation in hostilities, or DPH[2]), schemes (such as the prisoner of war (PoW) treatment scheme[3]) and approaches (such as a focus on the status or conduct of a person when making targeting decisions that may involve the application of lethal force in relation to that person[4]). Conscious and constant vigilance in seeking and imposing this conceptual coherence across the regime has long been considered an essential prerequisite to paradigmatic coherence within the LOAC more generally. As the International Committee of the Red Cross (ICRC) has observed,

> [a] common complaint heard from legal and non-legal military officers alike is that the international law relevant to their operations is a patchwork of

1 The components of the LONW are the LOAC applicable at sea, prize law, the law of neutrality and the law of the sea.

2 See International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009, p. 12 ("Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations"); Rob McLaughlin, "Organised Armed Groups and Direct Participation in Hostilities", in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia*, Federation Press, Sydney, 2019.

3 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 43–46; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, paras 8.25–8.99.

4 Michael N. Schmitt, "Precision Attack and International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 859, 2005, pp. 459–463; Michael N. Schmitt and Eric Widmar, "'On Target': Precision and Balance in the Contemporary Law of Targeting", *Journal of National Security Law and Policy*, Vol. 7, No. 3, 2014, pp. 383–391.

> provisions from many different treaties and customary rules … and that these instruments are difficult to stitch together into operationally relevant doctrine, education and field training. Another common complaint is that intricate terminology tends to dominate discussions of this body of law. These are serious concerns, since military commanders stand at the interface between the law and its application in the field.[5]

An examination of the maritime-domain-specific history that stands behind the development or incorporation of many of these concepts, schemes and approaches within the LONW confirms this point, disclosing clear instances of a need for differential application and interpretation when considering armed conflict at sea. For example, the LONW is founded upon a "platform" status-based targeting methodology, as opposed to the personnel status- and/or conduct-based targeting methodology that infuses the LOAC more generally.[6] That is to say, the observable potential target at sea is a vessel or aircraft; certainly, there are people on or in the platform (usually), but it is the platform itself that is targeted. The commander ashore, by contrast, is concerned fundamentally with the status of the *person* – for example, combatant[7] or member of an organized armed group,[8] as opposed to civilian. Additionally, given the sanctity of the requirement to assume civilian status in cases of doubt,[9] it may also be necessary in some situations (e.g., where the civilian is engaged in certain hostile conduct) to further interrogate the targetability of a person. This is particularly the case where the person otherwise "looks" to be a civilian; in such cases, the commander ashore will be concerned as to the nature of that individual's conduct and whether it meets the criteria for civilians directly participating in hostilities (CDPH). At sea, however, it is the platform rather than the person that matters.[10]

Consequently, at sea, the status and conduct of the crew of a vessel are derivative rather than primary – that is, the crew are "tarred" with the status "brush" of the vessel they are in. This means that merchant mariners generally share the

5 ICRC, *Handbook on International Rules Governing Military Operations*, Geneva, 2013, p. 6.

6 See, *inter alia*, US Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, August 2017 (US Naval Commander's Handbook), para. 8.6; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, and International Institute of Humanitarian Law, Sanremo, 1995 (San Remo Manual), commentary paras 40.1–40.2.

7 For the LONW – as for the LOAC – this is a specifically defined category of persons. For the LONW, the relevant provisions are Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 13, as amplified by AP I, Arts 43–44. The category of combatants relevantly includes "[m]embers of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who [do] not benefit by more favourable treatment under any other provisions of international law": GC II, Art. 13(5).

8 See generally, R. McLaughlin, above note 2, pp. 192–194.

9 AP I, Article 50(1).

10 See below in relation to the case of Captain Charles Fryatt during World War I, and responses to his prosecution and execution, which can fairly be said to "prove the rule".

rights and liabilities that attend their vessel's status.[11] Take, for example, a belligerent auxiliary vessel,[12] which is generally commanded and crewed by civilian mariners, although some auxiliaries will carry detachments of armed forces personnel for specific tasks such as operating specialized sensor, communications and cryptological equipment.[13] Because an auxiliary vessel is *ab initio* a military objective in the same way that a warship is,[14] the civilian crew in that auxiliary vessel shares the same liability to attack that their platform's status brings.[15] This means that the civilian crew are not considered as collateral damage – they are inherently targetable with their ship (and States must ensure that these crews are aware of this liability). It must be noted, however, that other approaches do exist – for example, one such approach asserts that the principle of proportionality does formally apply, although it will generally be the case that the expected military advantage in neutralizing the auxiliary will far outweigh the incidental civilian harm.[16]

These inconsistencies are more than merely historically curious; indeed, they can result in quite significant differences between the application of key LOAC rules at sea and ashore. For example, an appreciation of the history behind the application of the PoW regime in naval warfare allows us to understand why it is that the civilian crews of enemy merchant vessels that have resisted or even attacked adversary warships are not prohibited from such conduct and, upon capture, are treated as PoWs.[17] Yet that same conduct – attacking the enemy's military forces – carried out by a civilian ashore would result in that civilian (if captured) being treated as a civilian who is potentially liable (depending on the relevant domestic laws) to criminal prosecution for DPH for their otherwise LOAC-compliant battlefield conduct.[18] Indeed, at the Hague Conference of 1907, where the issue of whether the land-based concept of *francs-tireurs* (a term which gained prominence as a result of

11 See, for example, Robert Tucker, "The Law of War and Neutrality at Sea", *International Law Studies*, Vol. 50, 1955, Appendix, Chap. 5; J. A. Hall, *The Law of Naval Warfare*, 2nd ed., Chapman and Hall, London, 1921, p. 124; "The Hipsang", in Cecil Hurst (ed.), *Russian and Japanese Prize Cases; Being a Collection of Translations and Summaries of the Principal Cases Decided by the Russian and Japanese Prize Courts Arising out of the Russo-Japanese War 1904–05*, Vol. 1: *Russian Cases*, HM Stationery Office, London, 1912; Pearce Higgins, *The Hague Peace Conferences*, Cambridge University Press, Cambridge, 1909, p. 608.

12 San Remo Manual, above note 6, para. 13(h): "auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service".

13 For example, USNS *Bowditch* is a US Military Sealift Command auxiliary vessel with a civilian mariner crew of twenty-four and a military crew of twenty-seven. See Military Sealift Command, "Oceanographic Survey Ships", available at: www.msc.usff.navy.mil/Ships/Ship-Inventory/Oceanographic-Survey-Ship/ (all internet references were accessed in November 2025).

14 San Remo Manual, above note 6, para. 65: "Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft *and enemy auxiliary vessels* and aircraft are military objectives within the meaning of paragraph 40" (emphasis added).

15 See, for example, US Naval Commander's Handbook, above note 6, para. 7.5.

16 See, for example, David T. Lee, "The Principle of Proportionality in Maritime Armed Conflict: A Comparative Analysis of the Law of Naval Warfare and Modern International Humanitarian Law", *Southwestern Journal of International Law*, Vol. 27, No. 1, 2020, pp. 139–145.

17 See, for example, US Naval Commander's Handbook, above note 6, para. 5.4.3.2.

18 See R. McLaughlin, above note 2, pp. 191–194.

the Franco-Prussian War of 1870–71,[19] but which today is termed CDPH) should apply to warfare at sea was explicitly considered, the clear conclusion was that it should not. This was evident in the report of the specialist committee assigned the task of analyzing the proposed Regulations Respecting the Laws and Customs of War on Land, which became the Annex to 1907 Hague Convention (IV) relating to the Laws and Customs of War on Land. The purpose of this examination was to ascertain which of the draft Annex's provisions might have relevance for the proposed naval warfare conventions. The committee's assessment was that "[i]nasmuch as in the present state of affairs there can be no further thought of irregular hostilities on the seas, the considerations which prompted Article 1 [of the draft Annex] do not appear to be applicable to naval warfare".[20] In other words, differential interpretation is required.

This article seeks to describe and assess three broad sets of challenges that attend the application and interpretation of the LONW. In some regards, these challenges may appear novel; however, they are, in many cases, actually quite enduring. As has been noted many times in the last few hundred years, when it is not in daily consideration, the LONW tends to fall quickly from view, meaning that when maritime tensions periodically re-emerge, we often have to "relearn". As Thomas Baty said in 1916, reflecting on the paucity of LONW knowledge on the cusp of the twentieth century: "Then came the Russo-Japanese War of 1904–5. It found an ignorant world, which had forgotten its rights."[21] Assessing that we may now be in a similar state of forgetting, this article will therefore begin with an outline of the current geostrategic situation in relation to the potential for armed conflict at sea. This is the essential precondition for any analysis of application and interpretation challenges in the LONW because – as a sub-discipline prone to "out of sight, out of mind" forgetting, and noting the current fact of many other intensely challenging international law issues to manage – history indicates that unless there is a crisis driver, it is unlikely that the LONW will re-emerge as an issue for attention. Following this – and noting the concurrent need for nuanced LONW assessments that this situation evokes – the analysis will then drill down into five specific challenges to the application and interpretation of the LONW: the risks of misinterpretation and misapplication; the risk arising from the recent shore-based focus on the LOAC; LONW interpretation's fundamental indebtedness to historical examples; the necessity for LONW interpretive fidelity in the context of the broader trend towards systemic integration; and some challenges in relation to sources to assist in the application and interpretation of the LONW.

19 Bastian Scianna, "A Predisposition to Brutality? German Practices against Civilians and Francs-Tireurs During the Franco-Prussian War 1870–1871 and Their Relevance for the German 'Military Sonderweg' Debate", *Small Wars and Insurgencies*, Vol.30, No. 4–5, 2019, pp. 980 *et al*.

20 *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, Vol. 1, Oxford University Press, New York, 1920, p. 1037.

21 Thomas Baty, "Naval Warfare: Law and License", *American Journal of International Law*, Vol. 10, No. 1, 1916, p. 44.

Lack of appreciation of the heightened risk of international armed conflict at sea

Amongst specialist maritime scholars and practitioners, there is relatively little demurrer from the concern that we currently face a troublingly increased potential for international armed conflict (IAC) at sea. However, there is a tendency for this risk to be discounted, or even not recognized at all, amongst the broader legal and policy communities. This tendency is arguably a function of two factors. The first is strategic: the patchy history of post-1945 IAC at sea. The second is legal: the nature of the Article 2 common to the four Geneva Conventions (common Article 2) threshold at sea.

The current prospects for renewed geopolitical tension at sea

The late 2010s and early 2020s have evidenced a sense of pessimism amongst a range of observers, analysts and practitioners of maritime operations around the potential for a significant IAC at sea to manifest over the next decade. As Dale Stephens and Matthew Stubbs observed even in 2019,

> [c]learly articulating the rules of international law applicable to naval conflict is more relevant now than in living memory, with rising naval tensions in the South China Sea constantly in the news, and great power naval rivalries brewing in both the Indian and Pacific Oceans.[22]

Such perceptions of heightened risk and potential for IAC at sea are closely aligned to the fact that there appear to be increased tensions playing out at sea in interactions between antagonist warships and other vessels. In the past, it has been precisely these types of interactions within contexts of broader geopolitical tension that have signalled escalatory potential. The near-breach of the US Navy's October 1962 "quarantine" by Soviet merchant vessels and warships during the Cuban Missile Crisis was a close-run thing – interactions between US and Soviet fleet units were, on some accounts, mere minutes from causing a general conflagration between the fleets.[23] Such tense interactions between naval units at sea are more common than is often appreciated, and it is only the political palatability of, and planning for, de-escalatory responses during times of moderate tension, and the tendency to more assiduously

22 Dale Stephens and Matthew Stubbs, "The Law of Naval Warfare – Timeless Rules, Modern Challenges", in Dale Stephens and Matthew Stubbs (eds), *The Law of Naval Warfare*, LexisNexis Butterworths, Sydney, 2019, p. 1.

23 Quincy Wright, "The Cuban Quarantine", *American Journal of International Law*, Vol. 57, No. 3, 1963, pp. 553–554, sets out the four main legal arguments circulated at the time in justification of the quarantine. See also C. G. Fenwick, Brunson MacChesney and Myres McDougal, "Editorial Comment", *American Journal of International Law*, Vol. 57, No. 3, 1963, pp. 588–604; James Kraska and Pete Pedrozo, *International Maritime Security Law*, Martinus Nijhoff, Leiden, 2013, pp. 870–880; John F. Kennedy Presidential Library, "Cuban Missile Crisis", available at: www.jfklibrary.org/learn/about-jfk/jfk-in-history/cuban-missile-crisis; Atomic Heritage Foundation, "Nuclear Close Calls: The Cuban Missile Crisis", 15 June 2018, available at: www.atomicheritage.org/history/nuclear-close-calls-cuban-missile-crisis.

avoid close interactions during periods of heightened tension (which was the precise purpose of the US–Soviet Incidents at Sea Agreement negotiated in 1972[24]), that have kept these incidents subdued.

But at a time of heightened geopolitical tensions in the Indo-Pacific, Baltic and Black Seas in particular, there is an increasing tendency for these tensions to be played out between naval and coastguard units, and maritime militia vessels[25] in disputed waters. This shadow cast by the confluence of contextual tension, increased perceived risk, competing perceived national interests and a simply greater number of opportunities for incidents looks to be deeper and more sustained than at any time since the winding down of the Cold War.[26] This retreat from post-Cold War policies of limiting provocation and pursuing de-escalation at sea[27] also indicates that the current uptick in maritime incidents within a broader context of increased geopolitical tensions is a global phenomenon. There is, consequently, a re-emerging need for accurate re-engagement with the LONW given these current strategic circumstances.

However, the stepping off point for this re-engagement is itself a challenge, as a consequence of the LONW's recent relative invisibility. For some, this "long neglect" of the LONW has significantly "blurred the picture to the point that problems [of interpretation and application of the LONW] have now assumed an acute, some would even say insurmountable, complexity".[28] The potential for an unfriendly navigational harassment incident to turn into a collision, and a collision to result

24 Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, 1972, Articles II–V, available at: https://2009-2017.state.gov/t/isn/4791.htm#treaty.

25 Rob McLaughlin, "The Legal Status and Characterisation of Maritime Militia Vessels", *EJIL: Talk!*, 18 June 2019, available at: www.ejiltalk.org/the-legal-status-and-characterisation-of-maritime-militia-vessels/.

26 See, for example, Sam Bateman, "The Future Maritime Security Environment in Asia: A Risk Assessment Approach", *Contemporary Southeast Asia*, Vol. 37, No.1, 2015; Geoffrey Gresh, "The New Great Game at Sea", *War on the Rocks*, 8 December 2020, available at: https://warontherocks.com/2020/12/the-new-great-game-at-sea/; Robert Kaplan, "A New Cold War Has Begun", *Foreign Policy*, 7 January 2019, available at: https://foreignpolicy.com/2019/01/07/a-new-cold-war-has-begun/.

27 Permanent Court of Arbitration, *An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between Ukraine and the Russian Federation in respect of Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 331: "The Arbitral Tribunal considers that the military activities exception is not triggered in the present case simply because the conduct of the Russian Federation complained of by Ukraine has its origins in, or occurred against the background of, a broader alleged armed conflict. Rather, in the Arbitral Tribunal's view, the relevant question is whether 'certain specific acts subject of Ukraine's complaints' constitute military activities"; International Tribunal for the Law of the Sea (ITLOS), *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Request for the Prescription of Provisional Measures, Order of 25 May 2019, paras 44 (on Russia's rejection of any categorization of the situation as an armed conflict), 124(1)(b) ("The Russian Federation shall immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine"); James Kraska, "Did ITLOS Just Kill the Military Activities Exemption in Article 298?", *EJIL: Talk!*, 27 May 2019, available at: www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/; Yurika Ishii, "Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation): Provisional Measures Order (ITLOS)", *International Legal Materials*, Vol. 58, No. 6, 2019.

28 George Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, Kegan Paul, London, 1988, p. 29.

in loss of life and significant damage, and for force to be used in response, must not be underestimated.[29] Should the unthinkable eventuate – a short-lead-time, major-power IAC at sea – then it will already be quite late for government legal advisers to start skilling-up on the LONW and its quirks and nuances. What, for example, will a belligerent State do if an IAC at sea between that State and another breaks out, and there are "enemy" flagged merchant vessels in the State's port at the time? Will – and if so, how will – the belligerent State manage the LONW obligation-permission rule set encapsulated in Articles 1 and 4 of 1907 Hague Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities? Article 1 of the Convention reads:

> When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

However, Article 4 reads:

> Enemy cargo on board the vessels referred to in Articles 1 and 2 [the latter of which concerns vessels unable to leave the enemy port due to force majeure] is … liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.

Similarly, how would the belligerent State manage – or would it even implement? – the authorization to intern the crews of any captured enemy registered merchant vessels as PoWs (noting that crews today are predominantly multinational rather than of the nationality of the vessel's flag as was the case when the governing rule set – Articles 5–8 of 1907 Hague Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War – was crystallized)? How will the belligerent State respond to third-State consular pressure to release what will be predominantly neutral-nationality merchant mariners from indefinite PoW internment based on rules that assign status under the LONW based on ship nationality? Would the option of "parole" for neutral mariners on captured enemy merchant vessels be offered? If these were neutrals captured in enemy territory ashore, they would simply be civilians, but under the LONW, they are not. And what of a small regional State that finds itself obliged to intern a belligerent auxiliary crew, for example due to circumstances similar to those in which the *Graf Spee*'s crew were

29 Andrew Greene, "Near-Collision of US Warship and 'Aggressive' Chinese Destroyer in South China Sea Captured in Photos", *ABC News*, 4 October 2018, available at: www.abc.net.au/news/2018-10-03/south-china-sea-encounter-between-us-warship-and-chinese-vessel/10333096?nw=0&r=HtmlFragment; G. Gresh, above note 26: "As India, along with China and Russia, increasingly embrace naval power, it has resulted in a growing securitization of Eurasia's many contested seas. … [I]t is likely that Russia and China will become more overtly aggressive on the high seas amid rising tensions with the United States and its allies and partners. These factors raise the risk of the possibility of a collision between rival powers – inadvertent or otherwise – somewhere along Eurasia's disputed waterways."

required to be interned by neutral Uruguay in 1939?[30] The logistical, diplomatic, reputational, legal and commercial ramifications of implementing – or not implementing – these LONW provisions are complex and carry significant consequences. This is why the LONW needs to be better understood both in general and within its historical context. Illustrative of these contexts are the two specific issues of the common Article 2 threshold for IAC, and the often forgotten history of post-1945 IAC at sea. It is to these two factors that the analysis now turns.

The common Article 2 threshold for IAC

A key legal factor contributing to this risk of misapplication is the very low legal threshold for triggering an IAC. As traditionally understood, common Article 2 – which sets the threshold for IAC – is relatively easily activated:

> It makes no difference how long the conflict lasts, or how much slaughter takes place. … If there is only a single wounded person as a result of the conflict, the [1949 Geneva] Convention [I] will have been applied as soon as he has been collected and tended, the provisions of Article 12 [which, in the context of Geneva Convention II, relates to protection and care of the sick, wounded and shipwrecked] observed in his case, and his identity notified to the Power on which he depends.[31]

There has been some attention of late as to the complicated question of how the common Article 2 threshold interacts with the quite different contexts that can surround the use of force at sea by sovereign immune vessels (being warships, and other vessels on State non-commercial service which are appropriately authorized and identified as having the requisite authority[32]) within the context of what are often referred to as "maritime security operations", as compared to the use of force by military agents ashore. Wolff Heintschel von Heinegg's analysis of several iconic maritime incidents clearly indicates

> that certain military operations against foreign warships or military aircraft do not constitute a use of force, although they are provocative or aggressive in nature[,] because they are neither intended nor expected to directly result in damage or injury. The same holds true if they in fact, but mistakenly, result in damage or injury. State practice provides sufficient evidence that there are certain actions which are to be strictly avoided because they have the potential of

30 James Farrant, "The Admiral Graf Spee in Montevideo", in David Letts and Rob McLaughlin (eds), *Maritime Operations Law in Practice: Key Cases and Incidents*, Routledge, Abingdon, 2023, pp. 175–177.

31 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 32–33.

32 For example, as per the 1982 Law of the Sea Convention, Arts 110(5), 111(5).

> escalating a given situation, but which do not as such bring an international armed conflict into existence.[33]

Heintschel von Heinegg concludes that "not every confrontation at sea results in an international armed conflict. Although aggressive in nature or legally doubtful, most maritime operations, worrying as they may be, remain within the paradigm of incidents at sea."[34] Cameron Moore has similarly argued that incidents between warships must be understood as being "between states, not tactical commanders", and that, consequently,

> [i]t is possible to argue that the threshold of application of the law of armed conflict at sea is actually quite high. It is unlikely to apply to incidents involving the navigation of warships where there is no intention to engage in broader conflict.[35]

The 2017 ICRC Commentary on Geneva Convention II (GC II) similarly tries to distinguish maritime incidents from the common Article 2 threshold on the basis of context and intention, but without cancelling out the broadly desirable option of having the protective aspects of the LOAC apply at the first opportunity.[36]

Given that the LOAC has always looked at facts on the ground, while in practice it is politicians who decide whether to accept the legal qualification of those facts, these arguments are logical, persuasive and legally well founded. However, they do not guarantee that a legal adviser with no particular knowledge of the conduct of maritime operations, who is faced at short notice with a critical interaction between sovereign immune vessels at sea, will not simply revert to the orthodox interpretation of the common Article 2 threshold and find that an IAC at sea has commenced and that the LONW is consequently applicable in its full and forcible panoply.

The nature of post-1945 maritime IACs

The next factor contributing to the generalized under-appreciation of an uptick in potential for conflict at sea is that, as a matter of maritime operational history, maritime IACs since the large-scale, five-year-long conflict at sea during World War II have on the whole been short, sharp – even a single day or single event – conflicts. This is significant because it has perhaps distracted analysis from considering elements of the LONW as they apply in protracted conflict at sea. For example, the short Indo-Pakistani War of 3–16 December 1971 involved a series of attacks by

33 Wolff Heintschel von Heinegg, "The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities", *International Review of the Red Cross*, Vol. 98, No. 902, 2016, p. 455.

34 *Ibid.*, p. 464.

35 Cameron Moore, *Freedom of Navigation and the Law of the Sea*, Routledge, Abingdon, 2021, pp. 62–63.

36 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017 (2017 Commentary on GC II), para. 263.

naval forces and significant loss of life and ships over the course of just 13 days.[37] Similarly, the Battle of the Paracels on 19–20 January 1974, when People's Republic of China (PRC) forces evicted the South Vietnamese garrison from the Paracel Islands, was a two-day naval armed conflict that resulted in significant loss of life, along with the damaging or sinking of one PRC warship and several South Vietnamese warships and auxiliaries.[38] The battle for Johnson South Reef between PRC and Vietnamese forces, on 14 March 1988, similarly lasted for one day, and resulted once again in significant Vietnamese casualties and the taking of nine Vietnamese PoWs by Chinese forces;[39] these PoWs were ultimately returned to Vietnam only in 1991.[40] During the 1980–88 Iran–Iraq War and its associated "Tanker War", the Iranian mining of a US warship on 14 April 1988 led to Operation Praying Mantis,[41] a four-day (14–18 April 1988) US naval operation against Iranian oil platforms, and Iranian Navy and Iranian Revolutionary Guard Corp Navy vessels. This combat action resulted in many Iranian casualties and, ultimately, the *Oil Platforms* case before the International Court of Justice (ICJ). The Democratic People's Republic of Korea's (DPRK) submarine-perpetrated sinking of Republic of Korea ship (ROKS) *Cheonan* on 26 March 2010[42] was also a single-day incident that constituted – as the International Criminal Court (ICC) Office of the Prosecutor advised – either the renewal of the 1950–53 armed conflict via a breach of the armistice, or a new IAC.[43] The *Mavi Marmara* incident in the eastern Mediterranean on 31 May 2010 – although it took place within a much broader and protracted conflict context[44] – is

37 See, *inter alia*, Michael Paes, "Operation Trident: Points of Interest and Strategic Lessons", *Australian Defence Force Journal*, No. 175, 2008, p. 86.

38 D. P. O'Connell, *The Influence of Law on Sea Power*, Naval Institute Press, Annapolis, MD, 1975, pp. 10-12; Toshi Yoshihara, "The 1974 Paracels Sea Battle: A Campaign Appraisal", *Naval War College Review*, Vol. 69, No. 2, 2016, p. 41.

39 Stein Tonnesson, "14 March 1988: East Asia's Last Interstate Battle", Peace Research Institute Oslo, 24 July 2015, available at: https://blogs.prio.org/2015/07/14-march-1988-east-asias-last-interstate-battle/; "Vietnam Marks Anniversary of Naval Clash with China Over Spratly Island Reefs", *Radio Free Asia*, 13 March 2018, available at: www.rfa.org/english/news/vietnam/anniversary-03132018160914.html.

40 Charlie Bradley, "South China Sea War: How 64 Vietnamese Forces Died in Bloody Skirmish Over Region", *The Express*, 11 September 2019, available at: www.express.co.uk/news/world/1176672/south-china-sea-war-vietnamese-forces-died-china-xi-jinping-autralia-spt.

41 US Naval History and Heritage Command, "Operation Praying Mantis", 7 August 2020, available at: www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/middle-east/praying-mantis.html.

42 Ministry of National Defence, Republic of Korea, *Civilian-Military Joint Investigation Group Report on the Attack on ROKS Cheonan*, September 2010, p. 220, available at: http://nautilus.org/wp-content/uploads/2012/01/Cheonan.pdf ("ROKS Cheonan was sunk by a North Korean torpedo attack while conducting its normal mission in vicinity of Baekryeong Island at 2122 hours on March 26, 2010").

43 "The fundamental contextual element needed to establish the commission of a war crime is the existence of an armed conflict. There are two possible bases for the existence of an international armed conflict between the ROK and the DPRK. The first is that the two countries are technically still at war; the Armistice Agreement of 1953 is merely a ceasefire agreement and the parties are yet to negotiate the peace agreement expected to formally conclude the 1950–53 conflict. The second is that the 'resort to armed force between States' in the form of the alleged launching of a torpedo into the *Cheonan* or the launching of shells into Yeonpyeong, created an international armed conflict under customary international law." ICC Office of the Prosecutor, *Situation in the Republic of Korea: Article 5 Report*, June 2014, para. 9, available at: https://digitallibrary.un.org/record/720841?ln=en&v=pdf.

44 *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011 (Palmer Report), paras 46–47, 73 ("The Panel considers the conflict should be treated as an international

yet a further illustration of the often short, sharp, limited, nature of LONW-governed incidents since 1945.

Indeed, in this regard, the ten-week-long UK–Argentina Falkland Islands/Islas Malvinas War in April–June 1982 (which involved significant loss of life at sea, and of warships and auxiliaries[45]) and the limited direct naval engagements between Iran and Iraq during the 1980–88 war[46] are in many ways the post-1945 outliers in terms of the length of IACs at sea. Furthermore, the single major Iran–Iraq naval engagement of the 1980–88 war, Operation Morvarid, took place very early in the conflict and tends to confirm the trend at any rate – it lasted around twelve hours over the course of 29–30 November 1980, and left the Iraqi Navy in a parlous state.[47] Thereafter, the naval component of the Iran–Iraq War mainly consisted of attacks by both sides on merchant shipping (the "Tanker War"[48]), although Iraq also struck USS *Stark* with two Exocet missiles on 17 May 1987,[49] and USS *Samuel B. Roberts* was damaged by an Iranian mine on 14 April 1988[50] (leading *inter alia*, as noted, to Operation Praying Mantis and, ultimately, the *Oil Platforms* case[51]).

Five current risks attending application and interpretation of the LONW

With this background as to how and why there is a persistent under-appreciation of the potential for IAC at sea to arise in our current geostrategic circumstances, it is now possible to describe and assess the risks that attend this "out of sight, out of

one for the purposes of the law of blockade"), 150 ("A naval blockade may only be maintained so long as it remains proportionate and a situation of armed conflict persists"), available at: https://unispal.un.org/UNISPAL.NSF/0/1922B40C9F4575598525790300457132.

45 See, *inter alia*, Sandy Woodward, *One Hundred Days: The Memoirs of the Falklands Battle Group Commander*, Fontana, London, 1992; Max Hastings and Simon Jenkins, *The Battle for The Falklands*, Pan Books, London, 1983; G. Politakis, above note 28, pp. 75–89.

46 See David Peace and J. Ashley Roach, "Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)", *Proceedings of the American Society of International Law Annual Meeting*, Vol. 82, 1988, p. 146.

47 "The operation Morvarid, a full-fledged success for Iranians, was terminated in less than 12 hours, they managed to sink up to 7 motor-torpedo boats and five missile crafts – or almost 80% – of the Iraqi Navy, destroy the oil terminals at Mina al Bakr and Khor-al-Amaya, and block the port of Al Faw. The Iraqis also lost one MiG-21, six MiG-23MS, and MiG-23BNs, and one Super Frelon. The IRIAF suffered a loss of one F-4E shot down and one damaged." Raymond McConoly, "Operation Morvarid: The Story of How Iran Damaged Iraq's Navy in 1 Day with Joint Operation", *Naval Post*, 31 May 2021, available at: https://navalpost.com/operation-morvarid/.

48 See, generally, George Walker, "The Tanker War 1980–1988", *International Law Studies*, Vol. 74, 2000, Chaps II, V; G. Politakis, above note 28, pp. 89–119.

49 Sam LaGrone, "The Attack on USS Stark at 30", *USNI News*, 17 May 2017, available at: https://news.usni.org/2017/05/17/the-attack-uss-stark-at-30.

50 Bradley Peniston, "The Day Frigate Samuel B. Roberts Was Mined", *USNI News*, 22 May 2015, available at: https://news.usni.org/2015/05/22/the-day-frigate-samuel-b-roberts-was-mined.

51 ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (Merits), 6 November 2003, paras 25–26.

mind" challenge. From the perspective of applying and interpreting the LONW, there are five significant challenges: misinterpretation and misapplication of the LONW due to a failure to appreciate its often *sui generis* nature; the lure of application and interpretation by analogy from the shore-based LOAC; the heavy reliance of the LONW on historical examples; the highly *lex specialis* nature of the LONW in relation to the non-fragmentation trends underpinning the modern international law interpretive endeavour; and finally, the consequences that could be assumed to flow from the aged nature of the LONW's main sources. In this regard, it is important to register (as noted previously) that while eloquent, logical and provocative arguments have been made for the desuetude, or even evolved illegality (in respect of UN Charter law, for example), of several LONW rule sets (such as prize law), this article takes the position that neither law nor State practice has extinguished the relevance of these admittedly often quite old rules.

The risk of misinterpretation and misapplication of the LONW

The requirement for different interpretations of the LOAC as between sea and shore can and does manifest in different legal characterizations assigned to otherwise similar conduct. This is well illustrated in the 1916 German trial and execution of British Merchant Marine Captain Charles Fryatt, a merchant mariner and master of the British merchant vessel SS *Brussels*. Captured, tried and executed by the German Navy, Fryatt's alleged offence was that on 20 March 1915 he had attempted to ram a German U-boat as it sought to stop and capture his vessel.[52] In essence, he was characterized by the German Naval Court Martial as a *francs-tireur*. Yet, as the official history of the Merchant Navy in World War I records,

> [i]t was Captain Fryatt's plain duty to escape capture if he could, and his obligation was the more binding in that the Admiralty had instructed all merchant captains to thwart submarine attacks by every means in their power.[53]

These initial instructions had included that all merchant vessels – armed or not – should not surrender to German U-boats and should seek to defend themselves,

52 James Brown Scott, "The Execution of Captain Fryatt", *American Journal of International Law*, Vol. 10, No. 4, 1916. This direction had been given in early 1915 by then First Lord of the Admiralty, Winston Churchill; for context as to the U-boat threat and responses in early 1915, see Winston Churchill, *The World Crisis 1911–1918*, Vol. 2, Odhams Press, London, pp. 724–736.

53 See Archibald Hurd, *History of the Great War – Based on Official Documents by Direction of the Historical Section of the Committee of Imperial Defence: The Merchant Navy*, Vol. 2, 1924, Chaps X, "The Merchant Service on the Defensive", and XV, "The Case of Captain Fryatt", available at: www.naval-history.net/WW1Book-MN2a-Merchant_Navy_in_WW1_Hurd.htm. The British statement of 27 July 1916, regarding the execution of Captain Fryatt, was very clear as to the British view of the lawfulness of Fryatt's actions: "What Captain Fryatt did was to ram a German U-boat with a British merchant ship. And the world in general hailed him as a hero. What Germany did was to wait her chance, capture the captain on a later voyage, and condemn him as a 'franc-tireur,' which means a disguised and secret foe who under pretense of being a non-combatant tricks the military into sparing him and then attacks them. The German pretense was too shallow for argument. Captain Fryatt was absolutely within his rights; and the real German purpose was manifestly so to terrify merchant captains that they should not dare to resist." Charles Horne (ed.), *Source Records of the Great War*, Vol. 4, National Alumni, 1923, p. 281.

including, if unarmed, by ramming.[54] These instructions were further formalized in October 1915, noting that

> [t]he right of the crew of a merchant vessel forcibly to resist visit and search, and to fight in self-defence, is well recognised in International Law, and is expressly admitted by the German Prize Regulations in an addendum issued in June 1914, at a time when it was known that numerous vessels were being armed in self-defence.[55]

James Brown Scott, commenting at the time upon the Fryatt case, specifically noted that the general scholarly view amongst English, US, German and other scholars "call[ed] attention to the differences between the laws of land and maritime warfare, and state[d] the confusion which results if they be not kept separate and distinct".[56]

Edwin Maxey similarly recognized the distinction to be drawn between the LOAC ashore and the LONW at sea:

> Under international law, the crew of a merchant vessel has the right to resist an unlawful attack by an enemy warship and has a legal right to capture or sink the warship if it can. By making such an attempt, the members of the crew become combatants and subject themselves to the risk of being sunk or captured; but in case they are captured, they are legally entitled to being treated as prisoners of war. The chances of being sunk are such that a merchant vessel will not often assume the risks of resisting capture by an enemy warship. But if its crew choose to assume the risks, those risks are determined by international law.[57]

54 See "The Story of Captain Fryatt", *Great Eastern Railway Magazine*, September 1916, p. 224, available at: https://web.archive.org/web/20050525150855/http://www.york.ac.uk/inst/irs/irshome/features/readings/readings.htm#EX09. This source records that on 25 July 1916 (in the course of asking for US intervention in the German court-martial of Captain Fryatt), Sir E. Grey wrote to the US ambassador: "Should the allegations on which the charge against Captain Fryatt is understood to be based be established by evidence His Majesty's Government are of opinion that his action was perfectly legitimate. His Majesty's Government consider that the act of a merchant ship in steering for an enemy submarine and forcing her to dive is essentially defensive, and precisely on the same footing as the use by a defensively-armed vessel of her defensive armament in order to resist capture, which both the United States Government and his Majesty's Government held to be the exercise of an undoubted right."

55 See, *inter alia*, the "Instructions for Defensively Armed Merchant Ships" promulgated by the Admiralty War Staff Trade Division, 20 October 1915, reprinted in US Department of State, *Papers Relating to the Foreign Relations of the United States, 1916: Supplement: The World War*, 1929, pp. 250–251, para. A(1), available at: https://history.state.gov/historicaldocuments/frus1916Supp/pg_250. Germany was aware of these instructions, as a letter from the German ambassador in the United States (Bernstorff) to the US secretary of State (File No. 763.72/2623, 8 March 1916, available at: https://history.state.gov/historicaldocuments/frus1916Supp/d256) indicated: "The order to use arms on British merchantmen was supplemented by instructions to the masters of such ships to hoist false flags and to ram U-boats." The UK confirmed the use of force aspect of these instructions to, *inter alia*, the US ambassador in Germany, who cabled the Department of State on 7 March 1916 (File No. 763.72/2477, available at: https://history.state.gov/historicaldocuments/frus1916Supp/d257), advising that "it should be made quite clear that the British Government gave the orders for immediate attack to its armed merchantmen solely on the basis of the general assumption set up by it that any submarine sighted has hostile intentions".

56 J. B. Scott, above note 52, pp. 870–871.

57 Edwin Maxey, "The Execution of Captain Fryatt", *Canadian Law Times*, Vol. 37, 1917, pp. 457–458.

The legal consequences of applying such "ashore"-informed general LOAC perspectives and appreciations – in this case, in relation to what is now known as DPH – to armed conflict at sea can therefore include applying the wrong treatment and detention scheme to merchant vessel crews. As evidenced in the Fryatt case, and more recently perhaps in the report of the Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission Report) in relation to the 2010 *Mavi Marmara* incident (see below), this risk of incorrect application is not simply theoretical. This challenge is also reflected in the next risk on our list – the recent pervasiveness of shore-based non-international armed conflict (NIAC) and counterterrorism LOAC considerations.

The risk arising from a shore-based focus on the LOAC

One key current reason underpinning a potential for interpretive error, and which indicates that such potential is not merely theoretical, is the land- and counterterrorism-based focus of military operations, and thus LOAC interpretive endeavours, over the last two decades. The almost overwhelming dominance of this land-based LOAC interpretive context and narrative has indeed led to assertions of exactly this nature in operational contexts. For example, the Turkel Commission Report on the 2010 boarding by the Israel Defense Forces (IDF) of the Gaza-blockade-breaching *Mavi Marmara* clearly characterized passenger and crew conduct as CDPH, and did not demur from the initial Israeli view that these individuals could be liable to criminal prosecution for their uses of force against the IDF units involved (though they ultimately were not subjected to such prosecution).[58] This would make sense if there was a complete analogy between CDPH characterization ashore and at sea, but as the LONW mandates, this is not the correct approach at sea: while passengers may be characterized as CDPH, the crew of neutral merchant vessels that take on "enemy character" via conduct (such as seeking to breach a blockade or actively resisting belligerent enforcement rights) are generally to be made PoWs (which implies immunity from criminal prosecution).[59] This "maritime uniqueness" also serves to indicate the next risk to be assessed: the LONW's indebtedness to (often quite old, but not necessarily dated) historical case study exemplars.

Risks flowing from LONW interpretation's fundamental indebtedness to historical examples

Mark Janis notes that "the traditional law of the sea was much more the creature of customary than conventional development".[60] This general statement holds

58 See Palmer Report, above note 44, paras 47, 59; *The Public Commission to Examine the Maritime Incident of 31 May 2010: Report*, Part 1, January 2010 (Turkel Commission Report), paras 188–203, 216, 234, 239, 255.

59 Rob McLaughlin, "Active Resistance by Merchant Vessel Crews during International Armed Conflict is Not 'Direct Participation in Hostilities'", *International Law Studies*, Vol. 99, 2022, pp. 306–307.

60 Mark Janis, *Sea Power and the Law of the Sea*, Lexington Books, Lanham, MD, 1976, p. 76.

true for the deep reliance upon historical examples and consequent customary rule distillation that characterizes analysis, interpretation and application of the LONW. In his 1975 book *The Influence of Law on Sea Power*, D. P. O'Connell – a historian of international law as much as he was an international lawyer – observed how

> [a]n approach to the subject [of the law applicable to naval operations] from the historical point of view makes it possible to envisage a philosophy of law in relation to strategy which can bring some coherence to the analysis of contemporary questions. The law has never been static. Its pliable character has meant that it has been made to serve the purposes of sea power, and so it has become a weapon in the naval armoury. Just how it has played this role has depended on the issues that occasioned resort to naval force, but it has always been prominent in giving form and character to the issues as well as in influencing the conduct of those who have sought their resolution.[61]

For example, the intensely practical and incident-based,[62] often judge-made,[63] and (within the LOAC) *sui generis* roots of prize law – which "has never been codified"[64] – make that body of law almost unintelligible. This also makes the LONW highly sensitive to modern critiques[65] – unless it is viewed within its historical context.[66] As R. G. Marsden observed in 1909, "[t]he prize jurisdiction now vested in our high court of justice originated in the disciplinary powers conferred upon the admirals of the early fourteenth century by their patents".[67] Consequently, the occasionally counter-intuitive nuance and stasis[68] of this body of law can be subject to perceptions of opacity unless its historical roots are understood.[69]

The same must be said as regards the LONW-specific rule on the false use of enemy or neutral flags at sea (that is, when warships fly enemy colours to deceive the enemy on approach, but hoist their true colours prior to an actual armed

61 D. P. O'Connell, above note 38, p. 16.

62 Hugo Grotius, *Commentary on the Law of Prize and Booty*, 1605 (but not published until 1868 in Latin), was the general work from which *Mare Liberum* (published 1609) was drawn (it is Chapter 12 in the *Commentary*). This treatise was written in response to a specific incident which provoked a need for legal assessment of competing Dutch and Portuguese claims.

63 Australian Law Reform Commission (ALRC), *Criminal Admiralty Jurisdiction and Prize*, Report No. 48, 1990, para. 142: "municipal prize courts, especially those of Britain, played a key role in adapting the judge-made prize law inherited from the 19th century to the changed conditions of the World Wars in the 20th century". See also, S. W. D. Rowson, "British Prize Law, 1889 –1944", *Law Quarterly Review*, Vol. 61, 1945, p. 49: "It must be noted that the number of judicial decisions has so far [in World War II] been very small in comparison with the large number of the last war. The reason is partly historical due to the different course taken by this war, and partly legal, because, thanks to the achievements of the British Prize Courts twenty years ago, England to-day has a clear and comprehensive body of Prize Law, such as no other country can boast of."

64 ALRC, above note 63, para. 142.

65 Andrew Clapham, *War*, Clarendon, Oxford, 2021, pp. 339–357.

66 D. P. O'Connell, above note 38, pp. 18–21.

67 R. G. Marsden, "Early Prize Jurisdiction and Prize Law in England", *English Historical Review*, Vol. 24, No. 96, 1909; Arnold W. Knauth, "Prize Law Reconsidered", *Columbia Law Review*, Vol. 46, No. 1, 1946, pp. 70–72.

68 G. Politakis, above note 28, p. 639.

69 *Ibid.*, pp. 696–697; ALRC, above note 63, paras 145–146.

engagement) not being classified as perfidy, as would generally be the case ashore. Indeed, this is expressly stated in Article 39(3) of Additional Protocol I to the Geneva Conventions.[70]

As Politakis observes, the LONW's heavy reliance on historical examples and precedents can create an unhealthy dichotomy whereby "looking to the past resembles an excursion through anachronisms, while looking ahead obliges a confession of impotence".[71] This state of affairs also highlights the fourth risk to be noted: the challenge of maintaining what some might call "anachronistic" *lex specialis* in the face of the systemic drive for non-fragmentation in international law.

The necessity of LONW interpretive fidelity, and the trend towards systemic integration

The LONW is intensely sensitive to the broader ongoing legal methodological debate around the interaction (and generally competition) between systemic interpretive coherence and *lex specialis*[72] interpretive fidelity. The International Law Commission (ILC), in its report on *Fragmentation of International Law*, describes the purpose of interpretive approaches thusly:

> Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. … In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well.[73]

70 See, for example, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: https://ihl-databases.icrc.org/en/customary-ihl/rules. Here, the commentary to Rule 62 ("Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited") notes the countervailing *lex specialis* rule applicable in the LONW: "Several manuals indicate that naval forces may fly enemy colours to deceive the enemy but must display their true colours prior to an actual armed engagement." However, in relation to Rule 63 ("Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited"), the commentary is silent on the LONW exception. Some national doctrine publications specifically recognize this exception as applicable to false flags generally – neutral or enemy – so long as the correct battle ensign is hoisted prior to engagement. See, *inter alia*, Norway, *Manual of the Law of Armed Conflict*, 2013, paras 9.5, 9.27–9.28; New Zealand, *Manual of Armed Forces Law*, Vol. 4: *Law of Armed Conflict*, DM 69, 2nd ed., 2017, para. 8.9.15: "A warship may fly the flag of the opposing force or a neutral state to disguise its nationality provided that it displays its true colours before attack. The practical advantage of false flags is now greatly diminished as identification of warships based on the flag alone is now unlikely. Electronic support measures enable shore- and sea-based assets to identify targets at great distance." See also the list of traditional authorities cited in *Commission of Inquiry into the loss of HMAS Sydney II*, Vol. 1: *Evidence and Conclusions*, July 2009, paras 1.19–1.23.

71 See G. Politakis, above note 28, p. 23, who is scathing of this failure to engage, thus "keeping all future-oriented legal queries simply frozen".

72 Noting, of course, that *lex specialis* is but one such exceptionalist interpretive approach, others being *lex posterior* (later treaty abrogating an earlier treaty) and *lex superior* (higher order of law over an inferior body of law).

73 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, paras 35, 37.

Consequently, the first approach at play in the cascading international law–LOAC–LONW interpretive conundrum is the general preference for systemic integration (or the technique of "mutual supportiveness"), which privileges "read[ing] the relevant materials from the perspective of their contribution to some generally shared – 'systemic' – objective".[74]

This interpretive coherence (systemic integration) project seeks to privilege coherence in interpretation and application, and in terminology, across the key component regimes of international law. Support for this approach is often cited as leveraging Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, being reflected in ICJ decisions including the 1971 Namibia Advisory Opinion,[75] the 1980 WHO and Egypt Advisory Opinion[76] and the 2003 *Oil Platforms* case,[77] and (as noted above) endorsed by the ILC in its *Fragmentation of International Law* report.[78] This is a laudable and necessary development if the system is to avoid irremediable fragmentation. Consequently, the general trajectory of interpretive endeavour in international law is undoubtedly towards this system-wide coherence objective; indeed, the vast – decades-long – endeavour to ensure and refine the parameters and detail of LOAC–international human rights law (IHRL) interaction is perhaps one of the examples par excellence of this trend.[79]

However, the ILC also recognized that this preference for, and trend towards, systemic harmonization has limits in that whilst it can resolve "apparent" interpretive conflicts, it may not resolve "genuine" interpretive conflicts.[80] One such situation occurs when the preference for systemic integration confronts an exceptionalist need for *lex specialis* interpretive fidelity in order to ensure sensitivity to context.[81]

Significantly, the ILC also recognized that "fragmentation" can affect interpretive coherence not only between legal "regimes" but also between sub-regimes within a single regime[82] – precisely the challenge posed by the LONW within the LOAC. Consequently, while fidelity to *lex specialis* does not dispute the validity of this general inter-regime coherence project, it does preserve some highly contextualized, generally practice-proven exceptional interpretations necessary for the legitimate operation of certain unique rule sets. Thus, where validly invoked, this rule-bespoke exceptionalism is necessary in order to ensure critical elements of *regime* (such as

74 *Ibid.*, paras 412–414.

75 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971.

76 ICJ, *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, Advisory Opinion, 20 December 1980.

77 ICJ, *Oil Platforms*, above note 51, pp. 41—42.

78 ILC, above note 73, paras 251–256 *et al.*

79 See, *inter alia*, ICRC, *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 2nd ed., Geneva, 2025, paras 125–131, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/Introduction/commentary/2025.

80 To paraphrase the ILC, above note 73, para. 42, quoting Christopher Borgen, "Resolving Treaty Conflicts", *George Washington International Law Review*, Vol. 37, No. 3, 2005, pp. 605–606.

81 ILC, above note 73, para. 119.

82 *Ibid.*, para. 55.

the LOAC) or *sub-regime* (such as the LONW) coherence. At a regime level, this is why, for example, detention in the LOAC is increasingly understood as an amalgam of LOAC and IHRL rules[83] (the systemic coherence imperative), whilst the narrower PoW regime is still considered to be *sui generis*, specialist and self-contained to the general exclusion of broader IHRL principles.[84]

As noted, however, this requirement for exceptionalism can also manifest at a sub-regime level such as that of the LONW within the LOAC. For the LONW, this imperative for situational (but not complete) exceptionalism ensures that adequate attention is given to operational domain sensitivity, practicality in employment of naval capabilities, and historical nuance when interpreting and applying the LONW. Consequently, the associated challenge in identifying and contextualizing LONW source material in order to understand the architecture of LONW exceptionalism is an inescapable element of applying and interpreting the LONW, and it is to the risks attending this factor that the analysis now turns.

Challenges in relation to sources to assist in the application and interpretation of the LONW

In any application and interpretive endeavour concerning the LONW, it is important to note that this sub-discipline is (incorrectly) considered by some LOAC practitioners and scholars to be arcane, archaic, obsolete or all three.[85] Steven Haines points out the context for this perception:

> In the past quarter of a century, the *lex specialis* for armed conflict has been subjected to intense public, official, judicial and academic attention, becoming one of the most intensely scrutinized areas of public international law today. … One element of the *lex specialis* has been largely overlooked, however. The law

83 See, for example, ICRC Customary Law Study, above note 70, Rule 99 ("Arbitrary deprivation of liberty is prohibited"), which is stated to be beholden to "both international humanitarian law and human rights law. Although there are differences between these branches of international law, both international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention." See also *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines*, 2012 (Copenhagen Process Principles and Guidelines), available at: www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/Copenhagen-Process-Principles-and-Guidelines-EN.pdf.

84 Copenhagen Process Principles and Guidelines, above note 83, Principle IX: "The Copenhagen Process Principles and Guidelines are intended to apply to international military operations in the context of non-international armed conflicts and peace operations; they are not intended to address international armed conflicts." The Copenhagen Process (2007–12) involved a number of States and international organizations deliberating upon, and then distilling guiding principles for, the treatment and transfer of detainees in NIACs and certain peace operations.

85 ICRC, "Naval Warfare", *How Does Law Protect in War?*, available at: https://casebook.icrc.org/law/naval-warfare. Cf. J. Ashley Roach, "The Law of Naval Warfare at the Turn of Two Centuries", *American Journal of International Law*, Vol. 94, No. 1, 2000, p. 76; Martin Fink, "The Ever-Existing 'Crisis' of the Law of Naval Warfare", *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022, p. 1979.

> regulating the conduct of hostilities in naval war – the [LOAC] applicable at sea – has attracted little general attention or focused scrutiny.[86]

However, as Haines continues, the LONW in fact remains as relevant and robust as any other aspect of the LOAC, and the fact that it may require revisiting, and perhaps even revision, proves rather than negates this conclusion. Indeed, until the upsurge in piracy off the coast of Somalia in the 2000s, the charge of quaint obsolescence – of being "chiefly of historical significance" – was intermittently levelled at the law of piracy.[87] Arguments regarding the desuetude of another supposedly extinct doctrine in the LOAC, recognition of belligerency,[88] require similar scrutiny. The initial point to be made in respect of this risk is simply that long periods of dormancy or "forgotten-ness" do not necessarily render legal regimes irrelevant, and even the precise criteria for identifying and declaring desuetude are themselves unsettled.[89] Indeed, it often takes but a single incident or series of incidents to resurrect such areas of law as matters of immediate concern – as the experience of piracy certainly attests.

Why is the LONW sometimes considered obsolete?

That being said, the tendency to perceive the LONW as archaic, arcane and obsolete is not without some foundation. This is in many ways a function of two factors. The first is that recent incidents where application of the LONW was warranted are often thought of as rare. This is a misperception, but it is nevertheless widely held, and also draws life from the fact that cases and commentary where the LONW should be relevant are often dealt with by reference to other legal regimes. Politakis has observed of LONW jurisprudence that

> authors have practically nothing to quarrel over but a few lines from the *Donitz* judgment of the Nuremberg Tribunal, while the ICJ pronouncements in the *Corfu Channel* and the *Nicaragua* cases have not touched upon truly controversial matters of the law of sea warfare.[90]

86 Steven Haines, "War at Sea: Nineteenth-Century Laws for Twenty-First Century Wars?", *International Review of the Red Cross*, Vol. 98, No. 2, 2016, p. 420.

87 Edwin Dickinson, "Is the Crime of Piracy Obsolete?", *Harvard Law Review*, Vol. 38, No. 3, 1925, p. 334: "A few years ago it might have been surmised that in America at least a good deal of the old code in respect to piracy had passed from the law in reserve into the law in history. The important cases were nearly all one hundred years old or more"; John Kavanaugh, "The Law of Contemporary Sea Piracy", *Australian International Law Journal*, Vol. 8, 1999, p. 127: "The contemporary pirate is more likely to infringe copyright than attack ships. … But the sea pirate is not dead."

88 Rob McLaughlin, *Recognition of Belligerency and the Law of Armed Conflict*, Oxford University Press, Oxford, 2020, pp. 225–230.

89 Jan Wouters and Sten Verhoeven, "Desuetudo", *Max Planck Encyclopedia of Public International Law*, 2008, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1027?rskey=4iNo39&result=1&prd=MPIL.

90 G. Politakis, above note 28, pp. 11–12.

The *Oil Platforms* case, for example, offered a clear opportunity for the ICJ to engage with the LONW,[91] but the Court did not take this up and instead focussed on the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, and the "importable" law of national self-defence.[92] Similarly, the 2018 Kerch Strait incident has been widely dissected[93] and decided in law of the sea terms.[94] This is understandable and appropriate, but it misses the fact that it has been argued that the LOAC was also applicable to that situation. In other words, many situations liable to LONW analysis and jurisdiction tend to be dealt with as law of the sea situations only. This does not mean that the LONW is irrelevant; it just means that the LONW's applicability has been sidelined.

Source implications flowing from the LONW's "comparative antiquity"

The second reason that this "arcane, archaic and obsolete" perception has some currency is the fact that most specialist LONW treaties and instruments are more than 100 years old and are thus *prima facie* suspect in terms of current relevance. The "comparative antiquity"[95] of the essential corpus of LONW-specific instruments is bounded by the four-sentence 1856 Paris Declaration, the 1907 Hague Conventions dealing with LONW matters (i.e., those which ultimately entered into force),[96] and – although of more recent provenance – the 1949 GC II regarding the sick, wounded

91 Rob McLaughlin and Dale Stephens, "International Humanitarian Law in the Maritime Context: Conflict Characterization in Judicial and Quasi-Judicial Context", in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, T. M. C. Asser, The Hague, 2014.

92 ICJ, *Oil Platforms*, above note 51, paras 21–22, 26, 42 *et al*.

93 See, for example, J. Kraska, above note 27; Y. Ishii, above note 27; James Kraska, "The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?", *EJIL: Talk!*, 3 December 2018, available at: www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/; Valentin Schatz and Dmytro Koval, "Ukraine v Russia: Passage through Kerch Strait and the Sea of Azov – Part I: The Legal Status of Kerch Strait and the Sea of Azov", *Völkerrechtsblog*, 10 January 2018, available at: https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/; Valentin Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov – Part II: Ukraine's Rights of Passage through Kerch Strait", *Völkerrechtsblog*, 12 January 2018, available at: https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-2/; Valentin Schatz and Dmytro Koval, "Ukraine v Russia: Passage through Kerch Strait and the Sea of Azov – Part III: The Jurisdiction of the Arbitral Tribunal", *Völkerrechtsblog*, 15 January 2018, available at: https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-3/.

94 With the notable exception of Judge Lijnzaad, who argued that the matter was one of IAC and PoW status: ITLOS, *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, Declaration of Judge Lijnzaad, para. 5.

95 D. Stephens and M. Stubbs, above note 22, p. 1.

96 Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; Convention (VII) Relating to the Conversion of Merchant Ships into Warships; Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines; Convention (IX) Concerning Bombardment by Naval Forces in Time of War; Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.

and shipwrecked at sea.[97] This factor has three significant implications in relation to sources for the LONW.

The first implication of the LONW's "comparative antiquity" is that, given this paucity of recent treaty law in the LONW – what Politakis has called an intentional "penury of binding legal instruments" which has sometimes led to assessments of the LONW being "undecipherable",[98] and Fink has described as the normalcy of a "continuing crisis" in LONW crystallization[99] – there is significant emphasis in the LONW on customary international law. This is perhaps highlighted in the reliance placed upon more recent incident reports such as the previously noted *Mavi Marmara* report and the ICC Office of the Prosecutor report on the sinking of ROKS *Cheonan*. Additionally, the LONW applicable in NIAC is even less instrumentally based, relying predominantly on customary international law for its content.[100]

The second implication – which follows from the points above – is that the LONW has tended to be, and remains, characterized by a select number of highly influential "soft-law" publications that tend to dominate analytical endeavour. As Politakis notes, "[i]n view of the dearth of legal sources on the subject, doctrinal works are most often confined to a narrative discourse on state practice and a review of the relevant literature".[101] These doctrinal works are of three types. The first is specialist national military manuals and naval codes such as the 1895 Russian Regulations as to Naval Prizes,[102] the US Code of Naval Warfare of 1900,[103] the 1955 US *Law of Naval Warfare Manual*,[104] the US Navy, Marine Corps and Coast Guard *Commander's Handbook on the Law of Naval Operations*,[105] and the German *Commander's Handbook: Legal Bases for the Operations of Naval Forces*.[106] The second is expert commentaries, commencing with the 1913 *Manual on the Laws of Naval War*, or Oxford Manual,[107] and reflected today in the 1995 *San Remo Manual*

97 For a more detailed account of the instrumental basis of the LONW, see David Letts and Rob McLaughlin, "Law of Naval Warfare", in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016.

98 G. Politakis, above note 28, p. 9.

99 M. Fink, above note 85, p. 1988.

100 Martin Fink, "Challenges of Applying the Law of Naval Warfare in Non-International Armed Conflict at Sea", *Military Law and the Law of War Review*, Vol. 61, No. 1, 2023.

101 G. Politakis, above note 28, p. 11.

102 As amended – see C. Hurst (ed.), above note 11, Appendix A.

103 US Navy, *Code of Naval Warfare*, 1900, available at https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2653&context=ils.

104 US Navy, *Law of Naval Warfare*, NWIP 10-2, 1955, available at: www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/l/law-naval-warfare-nwip-10-2-1955/law-naval-warfare-chapters-1-6.html.

105 US Navy, Marine Corps and Coast Guard, *The Commander's Handbook on The Law of Naval Operations*, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, March 2022.

106 Germany, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, Order No. 2002U-01441, 1992, available at: https://usnwc.libguides.com/ld.php?content_id=2998104.

107 Institute for International Law, *Manual on the Laws of Naval War*, Oxford, 1913, available at: https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1913.

on International Law Applicable to Armed Conflicts at Sea[108] (which itself is in need of updating[109]), the 1960 and 2017 ICRC Commentaries on GC II[110] and the recent *Newport Manual on the Law of Naval Warfare*.[111] The third regular source for LONW analysis is a select cadre of historically significant academic works on the LONW such as texts by Hall (1914)[112] and Tucker (1955),[113] and Natalino Ronzitti's 1988 collection of documents with commentaries.[114] The LONW has a long history, and almost all of its sources are historical; the consequences of this legal antiquity for LONW analysis and interpretation should never be understated or underestimated, and certainly cannot be ignored.

Conclusion

This article has sought to outline why the analysis and exegesis of the LONW – often and enduringly subject to "out of sight, out of mind" invisibility and a consequent trend for post-conflict "forgetting" – requires some dusting off. It has suggested that the current geostrategic environment, enduring uncertainties as to how common Article 2 operates at sea, and a better appreciation of the nature of post-1945 IACs at sea all provide contextually significant reasons for deeper and wider engagement with the LONW. However, this objective is not without inherent problems, and the analysis has therefore also sought to describe five risks and challenges that will inevitably attend efforts to rejuvenate the study, application and interpretation of the LONW. Several of these challenges are manifest in the LONW's long and often nuanced history – including the high priority placed on *lex specialis* interpretation, the LONW's heavy reliance on custom distilled from historical examples, and the "comparative antiquity" of its key sources. Other challenges are more a result of the clash between enduring LONW precepts and modern LOAC interpretive trends, such as with status and characterization paradigms and the dangers of importing recent shore-based LOAC concerns such as CDPH into LONW analysis.

108 San Remo Manual, above note 6. On the origins, purpose and process behind the San Remo Manual, see Wolff Heintschel von Heinegg, "The San Remo Manual – History, Methodology and Future Application", in D. Stephens and M. Stubbs (eds), above note 22.

109 David Letts, "International Law and Armed Conflicts at Sea: The *San Remo Manual* – Now is the Time for a LOTE!", *Australian Naval Review*, No. 1, 2020; International Institute of Humanitarian Law, "San Remo Manual: Update Process Launched at the Institute", 3 September 2025, available at: https://iihl.org/san-remo-manual-update-process-launched-at-the-institute/.

110 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960; 2017 Commentary on GC II, above note 36. Both are available at: https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949.

111 James Kraska *et al., Newport Manual on the Law of Naval Warfare*, published in *International Law Studies*, Vol. 101, 2023, available at: https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3047&context=ils.

112 J. A. Hall, *The Law of Naval Warfare*, 1st ed., Chapman and Hall, London, 1914.

113 R. Tucker, above note 11.

114 Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, 1988.

Nevertheless, as challenging as the endeavour may be, it is essential that the discipline of international law makes some room for the application and interpretation of the LONW to resurface into the observable shallows so that it is no longer out of sight and out of mind.