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Waging war at sea: Land warfare but just add water?

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Abstract
The experts who drafted the original San Remo Manual on International Law Applicable to Armed Conflicts at Sea *(San Remo Manual) sought to enhance humanitarian protections for civilian navigation, including by incorporating elements of the 1977 Additional Protocol I (AP I) rules on the conduct of hostilities. This approach was notwithstanding Article 49(3)–(4) of AP I, which limits the application of these*

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treaty rules to sea warfare affecting civilians and civilian objects on land, and preserves existing treaty and customary law protections at sea. The rationale for extending these AP I rules to naval warfare without landward effects is not always clearly articulated in the San Remo Manual. If intended as a response to the excesses of the Second World War – particularly the expansion of attacks against merchant vessels – this move is understandable. However, to the extent that key aspects of the traditional law of naval warfare endured after the war, then arguably this move represented an expansion of belligerent rights and a corresponding narrowing of humanitarian obligations. The application of AP I's land warfare "targeting" rules to sea was already the subject of significant academic debate in the 1980s, making the San Remo Manual's position a decisive development.

Since 1994, many States have adopted a similar approach in their military manuals, often citing the San Remo Manual as a reference. This article examines the significance of that decision taken by the San Remo Manual's drafters and argues that the fit between the traditional law of naval warfare and the AP I targeting framework remains an uneasy one at times – especially as regards merchant vessels, their cargo, and civilian crews and passengers. Although the San Remo Manual itself acknowledged this tension, it has not been fully explored in subsequent scholarship. This article argues that in relation to the traditional law of naval warfare "belligerent rights" of visit and search and blockade, aspects of the traditional law should be "restored" concerning the use of force against merchant vessels. This approach better reflects the San Remo Manual's underlying humanitarian objectives while addressing persistent ambiguities in the application of distinction, proportionality and precautions at sea – areas that are in urgent need of clarification as part of the ongoing update of the San Remo Manual and in State practice.

Keywords: law of naval warfare, San Remo Manual, international humanitarian law at sea, conduct of hostilities, customary law of naval warfare, prize law.

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Introduction

Over the past two centuries, the law of naval warfare has undergone moments of partial codification, expansion, fragmentation and exceptionalism. As will be outlined in this article, the "classic" or "traditional" law of naval warfare that existed at the time of the 1909 London Declaration concerning the Laws of Naval War[1] and 1913 *Manual of the Laws of Naval War* (Oxford Manual)[2] was relatively restrained when it came to targeting. While lawfully targeting enemy belligerent warships outside of neutral waters was always foreseen within the law, the treatment of merchant ships was much more nuanced. The "traditional" law allowed for direct attacks against

1 Declaration concerning the Laws of Naval War, London, 26 February 1909 (London Declaration).

2 Institute of International Law, *Manual of the Laws of Naval War*, Oxford, 9 August 1913 (Oxford Manual).

enemy or neutral merchant vessels only when they were directly supporting the naval hostilities of the belligerent, thus requiring a significant level of involvement. Beyond this narrow scope, neutral merchant vessels engaged in actions in support of a belligerent were principally subject only to capture, while enemy merchant vessels were, under the traditional law of naval warfare, always liable to capture irrespective of their activities at sea. Of course, methods of naval warfare including the lawful exercise of visit and search, such as for contraband control or blockade enforcement, did allow for belligerents to use force up to and including rendering a vessel incapable of navigation or sinking it if it persistently refused to stop upon being summoned or actively resisted boarding. However, sinking a vessel in such circumstances was effectively a last resort.[3]

The experience of the First World War shattered this classic framework. Belligerent governments expanded considerably the range of goods deemed contraband (expansions that were constantly supported by their prize courts) and took more lethal actions against merchant ships in support of the war effort.[4] Following the First World War, an attempt was made in the 1936 *Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930* (1936 Procès-Verbal)[5] to reaffirm the restraint to be applied to the destruction of merchant vessels and to preserve humanitarian considerations. Despite this, the Second World War saw an unprecedented expansion of attacks against merchant vessels that clearly went beyond the "classic" or "traditional" law of naval warfare. Arguments in support of this expansion included reprisal action,[6] grounds that merchant ships had received orders to ram submarines,[7] the declaration of large submarine operational zones where authorization was provided to sink all enemy merchant ships, and broad views of assimilation of both enemy and merchant ships into the naval war effort.[8] The war in practice saw a policy that began to look a lot like sinking merchant ships on sight.

In the aftermath of the two World Wars and the adoption of the United Nations (UN) Charter, determining the exact rules for conducting hostilities at sea became a particular challenge. Although eminent scholars in the 1950s still articulated it in its "classic" or "traditional" terms,[9] it remained unclear whether the law had in fact evolved particularly as a result of the decisive experience of the Second World War. Of note, around the same time, the International Committee of the Red

3 This is more fully analyzed in the section on "The Traditional Law of Naval Warfare Governing When and How Force Could Be Used against Merchant Vessels" below.

4 For further details, see e.g. Robert Tucker, "The Law of War and Neutrality at Sea", *International Law Studies*, Vol. 50, 1955, pp. 363–366.

5 *Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930*, London, 6 November 1936 (1936 Procès-Verbal).

6 Horace B. Robertson Jr, "U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap between Conventional Law and State Practice", *International Law Studies*, Vol. 65, 1993, pp. 341–343, 349–351.

7 See "Doenitz", in International Military Tribunal, *Trial of the Major War Criminals*, Judgment, 1 October 1946, pp. 557–558.

8 Sally V. Mallison and Thomas W. Mallison, "The Naval Practice of Belligerents in World War II: Legal Criteria and Developments", *International Law Studies*, Vol. 65, 1993, pp. 90–91.

9 See e.g. R. Tucker, above note 4, pp. 347–351.

Cross (ICRC) observed that issues related to the safety of civilian navigation required further study by States and suggested that the outcome of such studies might, "at the appropriate moment, … be appended as an annex to the present rules and might deal more particularly with the safety of civil navigation". Those "present rules" would later become the 1977 Additional Protocol I (AP I).[10]

In the end, however, no such annex to AP I on the safety of civilian navigation was adopted. The distinction between the land and maritime domains – largely due to IHL's historical development alongside prize law and the rules of maritime neutrality – was particularly apparent during the AP I negotiations. States disagreed over how far the rules on the conduct of hostilities – particularly those found in Part IV, Section I (Articles 48–67) of AP I – should apply at sea. Article 49(3) reflected this tension, limiting the application of these rules to "sea warfare that may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea … against objectives on land." The Diplomatic Conference's reticence to address the issue of naval warfare in a comprehensive manner can be understood considering the unsettled state of the law at the time.[11]

It was this legal uncertainty that led to the drafting of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual) in the late 1980s and early 1990s. Against this backdrop, the San Remo Manual drafters' deliberate albeit cautious decision to draw upon AP I targeting concepts can be understood and assessed.[12] If the law of naval warfare had in fact changed as a result of the Second World War experience to permit sinking merchant vessels solely for their potential role in the war effort, then importing AP I's targeting concepts would have undoubtedly imposed important humanitarian limits on such attacks. However, if the Second World War experience was *sui generis* and the "traditional" or "classic" law of naval warfare was to remain the original reference point, then combining AP I's comparatively broader definition of what counts as a "military objective" with traditional law of naval warfare rules may not have represented as significant a humanitarian development as the San Remo Manual drafters might have assumed.[13]

Nearly fifty years after its adoption, the full extent of AP I's influence on the law of naval warfare remains uncertain. Although frequently invoked in academic commentary, its precise impact has yet to be subjected to comprehensive

10 ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, Geneva, 1956, pp. 53–55, available at: https://library.icrc.org/library/docs/DOC/DOC_00082.pdf (all internet references were accessed in April 2026).

11 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), paras 1894–1899.

12 This is despite Article 49(3) of AP I, which specifically does not apply such AP I targeting concepts to sea warfare that does not affect civilians on land, a point that will also be discussed in this article. See 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), Art. 49(3).

13 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual), p. 68.

and systematic assessment.[14] Although not all States are party to AP I, and scholarly debate persists as to the extent to which its rules on the conduct of hostilities extend to naval warfare that does not affect civilians ashore, many States nevertheless regard its provisions as highly relevant to the maritime domain. Many of these rules are considered reflective of customary international law, applying across all domains of warfare.[15] Moreover, due to the multi-domain nature of contemporary armed conflict, questions arise as to the extent to which developments in customary international humanitarian law (IHL) governing the conduct of hostilities in other domains – such as land, air, cyber, and outer space – may influence the rules governing the conduct of hostilities in the maritime domain.

Since the adoption of AP I and the publication of the San Remo Manual, State practice and the outputs of expert bodies[16] have revealed diverse interpretations and applications of the treaty and customary rules governing hostilities at sea, particularly those stemming from the principles of distinction (i.e., both people and objects), proportionality and precaution.

Meanwhile, the maritime domain – a busy global commons – has seen dramatic changes in how conflicts are, and will in the future be, waged within it. For example, merchant shipping, now the backbone of the global economy, looks nothing like it did at the end of the Second World War. It is now highly globalized, deeply

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14 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed., Cambridge University Press, Cambridge, 2022, p. 300; 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. 1975; Alistair Oakes, "Civilians on the Water: Distinction in Attacks on Merchant Vessels", in Dale Stephens and Matthew Stubbs (eds), *The Law of Naval Warfare*, LexisNexis Butterworths, Australia, 2019, p. 51; David A. Melson, "Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I", *The Army Lawyer*, July 2009, available at: https://apps.dtic.mil/sti/tr/pdf/ADA521426.pdf; Wolff Heintschel von Heinegg, "The Current State of the Law of Naval Warfare: A Fresh Look at the San Remo Manual", *International Law Studies*, Vol. 82, 2006, pp. 260, 278; Wolff Heintschel von Heinegg, "The Law of Armed Conflict at Sea", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed, Oxford University Press, Oxford, 2021, pp. 532–533; Wolff Heintschel von Heinegg *et al., Newport Manual on the Law of Naval Warfare*, 2nd ed., published in *International Law Studies*, Vol. 105, 2025 (Newport Manual); Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, 2nd ed., Edward Elgar, Cheltenham, 2024, pp. 375–376; Anthony Erman, "The Concept of Direct Participation in Hostilities in Naval Warfare", in D. Stephens and M. Stubbs (eds), *The Law of Naval Warfare*, above, pp. 114–115; Tom Dannenbaum, "Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on Blockade", *International Law Studies*, Vol. 97, 2021, pp. 357–358; Wolff Heintschel von Heinegg, "The Law of Military Operations at Sea", in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd ed., Oxford University Press, Oxford, 2015, p. 412.

15 See "Introduction", in 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:

> It was decided not to research customary law applicable to naval warfare as this area of law was recently the subject of a major restatement, namely the San Remo Manual on Naval Warfare. The general rules contained in the manual were nevertheless considered useful for the assessment of the customary nature of rules that apply to all types of warfare.

16 International Law Commission, *Subsidiary Means for the Determination of Rules of International Law: Texts and Titles of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc A/CN.4/L.1019, 25 May 2025, draft conclusions 10–11, available at: https://documents.un.org/doc/undoc/ltd/g25/082/67/pdf/g2508267.pdf.

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interconnected, and less tied to any single State.[17] Means and methods of naval warfare have also evolved: technological advancements now allow for merchant vessels to be directly attacked or incidentally harmed more cost-effectively, over greater distances and with far greater destructive force. These changes have increased risks for civilian mariners and heightened the stakes for maritime commerce during armed conflict.

Yet even as the need to think through the importance of ensuring legal and practical protection for merchant vessels during armed conflict at sea becomes increasingly vital, their ongoing protection must be considered in light of the longstanding practice of States. Throughout history, warring parties have relied on merchant shipping to support their war efforts – not only by transporting troops and military logistics or even taking "direct part in hostilities",[18] but also to search for, collect and care for the wounded, sick, shipwrecked and dead, as well as to deliver humanitarian assistance and conduct evacuation operations. These practices are all likely to persist in future conflicts at sea, particularly in large-scale conflicts.[19] The challenge therefore lies in striking a careful balance between protecting merchant vessels and their crews and passengers, as well as the populations that depend on them, while facing the contemporary realities of modern naval warfare and ensuring that lawful military goals can be meaningfully attained.

This article traces the development of the law of naval warfare, examines the impact of AP I on the traditional law of naval warfare and analyzes some consequences of the San Remo Manual's adoption of AP I as the benchmark for attacks against merchant vessels[20] at sea. It argues for preserving the traditional law governing the use of force against merchant vessels in contexts such as visit and search, contraband control and blockade enforcement, highlighting the unique historical legacy of such methods.

The article will extensively engage with scenarios in which merchant vessels persistently refuse to stop upon being duly summoned or actively resist visit and search. In such scenarios, the precautions in attack under Article 57 of AP I largely reflected in San Remo Manual Rule 46 – especially the target verification requirements – cannot, in practice, be fully satisfied. In most cases, only a "reasonable suspicion" exists as to the vessel's cargo, and any assessment of the anticipated military advantage of an attack will always remain inherently speculative. Moreover,

17 For more detail, see the section on "Transformation of the Maritime Domain" below.

18 In the context of the principle of distinction under the rules governing the conduct of hostilities, the concept of "direct part in hostilities" is more commonly used to refer to people rather than objects. However, similar terminology is often applied to vessels in the context of naval warfare, as illustrated in, for example, Article 46 of the London Declaration, above note 1, and Article 60 of the Oxford Manual, above note 2. This concept will be covered in more detail later in this article.

19 See Rob McLaughlin, "Calling Up (and Creating) Auxiliaries: The Use of Merchant Ships for Transport and Logistics", in Douglas Guilfoyle and Jennifer Maddocks (eds), *Armed Conflict and International Law in the Indo-Pacific Region*, Oxford University Press, forthcoming.

20 Under the contemporary law of naval warfare, a merchant vessel is understood to mean any vessel engaged in commercial or private service, excluding warships, auxiliaries, or State vessels such as customs or police ships. In practice, this category spans container ships, bulk carriers, tankers, passenger ships and ferries. See, for example, San Remo Manual, above note 13, Rule 13(i).

the mere attempt to breach, or even the successful breach of, a blockade does not in itself satisfy the definition of a military objective under either treaty or customary international law, and vessels making (or succeeding in) such an attempt may not be made the object of direct attack simply for doing so. They may, however, be subjected to escalating force under the "traditional" law of naval warfare to compel compliance – including, if necessary, sinking – provided that sufficient opportunity is given for the vessel to submit to boarding. In this way, the "traditional" law preserves humanitarian considerations in its very requirements.

This article contends that there is an urgent need for greater clarity from States as to how the principles of distinction, proportionality and precaution are to be interpreted and applied in contemporary naval warfare, particularly as regards merchant vessels, cargo, civilian crew and passengers. Efforts to enhance protections for civilian navigation, including through the adoption of AP I targeting frameworks, have not been fully articulated, either in the San Remo Manual or by States themselves.

Only a limited number of national military manuals appear to address maritime operations in situations of armed conflict. Those that do generally offer sparse guidance; concepts drawn from AP I are invoked in a general manner, without sufficient explanation of their specific implications at sea. This article explores some of these uncertainties and identifies key areas in which States should articulate a considered and coherent position on the interpretation and application of the rules governing the conduct of hostilities in naval warfare today.

The "traditional" or "classic" law of naval warfare

Sources

Prior to the adoption of AP I in 1977, international armed conflict at sea – including aerial operations directed against maritime targets and producing no effects ashore – was governed by the pre-existing law of naval warfare. This traditional law was comprised of an intricate patchwork of treaty and customary international law, much of which is rooted in developments from the late nineteenth and early twentieth centuries.

Despite a long list of relevant instruments,[21] there has never been a comprehensive multilateral treaty on the conduct of all aspects of naval warfare, and the

21 The relevant treaties included: Declaration Respecting Maritime Law. Paris, 16 April 1856 (Paris Declaration); Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899; Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907 (Hague Convention VII); Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907 (Hague Convention VIII); Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907 (Hague Convention IX); Hague Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, The Hague, 18 October 1907 (Hague Convention XI); Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907 (Hague Convention XIII); Convention

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exact rules have always been subject to much debate between States. Many existing treaties have been ratified by only a limited number of States,[22] and this reflects, in part, the historical context in which these instruments were first adopted: colonial structures shaping international participation at the time excluded many people and political entities from international legal processes and from recognition as sovereign States.[23] Some instruments have since been superseded by more recent agreements[24] or have never entered into force.[25]

Except for the universally ratified Geneva Convention II of 1949[26] (which addresses the protection of wounded, sick and shipwrecked members of armed forces at sea), no multilateral treaty specifically focused on naval hostilities has been adopted since the 1930s, when the 1930 London Treaty – now no longer in force, save for the 1936 Procès-Verbal – was concluded. Although the 1909 London Declaration on the Laws of Naval War[27] was signed by the mainly European countries that negotiated it, no State ever ratified it, so it never entered into force; despite this, the unratified London Declaration is said to have reflected the customary law of the time and is therefore influential.[28] Similarly, the 1913 Oxford Manual[29] provides useful commentary on what was understood to reflect customary international law at that time.[30]

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on Maritime Neutrality, 20 February 1928 (entered into force 12 January 1931) (Havana Convention); International Treaty for the Limitation and Reduction of Naval Armaments, 112 LNTS 65, 22 April 1930 (entered into force 31 December 1930) (London Treaty), pp. 66–96 (although no longer in force apart from the 1936 Procès-Verbal, above note 5); and 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).

22 For example, at the time of writing, Hague Convention VII has been ratified/acceded to by thirty-four States; Hague Convention VIII has been ratified/acceded to by thirty-eight States; Hague Convention IX has been ratified/acceded to by thirty-seven States; Hague Convention XI has been ratified/acceded to by thirty-two States; Hague Convention XIII has been ratified/acceded to by thirty states; and the 1936 Procès-Verbal to the London Treaty has been ratified/acceded to by fifty-one States. Of course, there have been several provisions that have been recognized as customary international law, but in a fragmented manner; these aspects will be discussed below.

23 In 1900, roughly fifty sovereign States existed, predominantly in Europe, the Americas and parts of Asia; today, the number comes closer to 200. Some States opted to ratify these instruments after gaining independence (e.g. Fiji and South Africa ratified Hague Convention VIII in the 70s, and Ukraine ratified Hague Convention VI in 2015), while others have not done so.

24 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907.

25 For example, Hague Convention XII, above note 21, and the London Declaration, above note 1. 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, pp. 274–281.

26 Prior to the adoption of Geneva Convention II, various predecessors sought to address armed conflict at sea. These are discussed in ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017 (ICRC Commentary on GC II), paras 79–96.

27 London Declaration, above note 1.

28 San Remo Manual, above note 13, p. 61.

29 Oxford Manual, above note 2.

30 San Remo Manual, above note 13, p. 61.

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Main rules

In terms of the conduct of hostilities at sea, the collective influence of these traditional sources of law allowed for belligerent naval forces to capture and attack the warships and what we would now understand to be the auxiliaries of an enemy belligerent State.[31] However, to the extent that a warship or naval auxiliary constituted a cartel vessel (for example, vessels that "act as bearers of a flag of truce")[32] or had surrendered,[33] it could not be attacked.

Traditionally, the primary operational objective of belligerent naval operations against merchant vessels was capture under prize law. The traditional law also allowed belligerent naval forces to stop and board any merchant vessel at sea (beyond territorial water limits of neutral States) to ascertain the status of the vessel and its cargo.[34] Enemy-flagged merchant ships, or ships otherwise found to have enemy character, were subject to capture at any time, regardless of the nature of their cargo;[35] however, there were treaty rules that exempted certain enemy-flagged vessels from capture, such as small coastal vessels and vessels engaged in religious, scientific or philanthropic missions. Hospital ships were also exempt from capture (provided that these vessels were employed in their innocent roles).[36]

Neutral-flagged merchant vessels could also be subject to capture under prize law. The London Declaration distinguishes between two levels of "unneutral service" that permit such capture, categorized by the gravity of the conduct involved.[37] The first level involves a single, isolated act of unneutral service, which renders the vessel liable to capture under the rules of visit and search concerning the carrying of contraband.[38] In such cases, the vessel retains its neutral character

31 Pursuant to Rule 13(h) of the San Remo Manual, above note 13, an "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". For the evolution of the auxiliary in naval warfare, see R. McLaughlin, above note 19; and see the article by Pornomo Rovan Astri Yoga in this issue of the *Review*: Pornomo Rovan Astri Yoga, "Between Warships and Merchant Ships: The Legal Status, Operational Functions and Targeting Rules of Auxiliary Vessels", *International Review of the Red Cross*, Vol. 108, No. 931, 2026.

32 Oxford Manual, above note 2, Art. 45.

33 *Ibid.*, Art. 17; Wolff Heintschel von Heinegg and Hans-Joachim Unbehau, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, Order No. 2002U-01441, German Federal Ministry of Defence, 2002 (German Handbook), p. 167, para. 324, translation by Bundessprachenamt (Referat SM 3) available at: https://usnwc.libguides.com/ld.php?content_id=2998104.

34 Oxford Manual, above note 2, Art. 32; Australian Defence Force, *Law of Armed Conflict*, ADDP 06.4, Defence Publishing Service, 2006 (Australian Manual), p. 6-12, para. 6.46; UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 (UK Manual), para. 13.91 (recognizing this right only when "there are reasonable grounds for suspecting that they are subject to capture").

35 Oxford Manual, above note 2, Art. 33.

36 Hague Convention XI, above note 21, Arts 3–4; GC II, Arts 22, 24.

37 London Declaration, above note 1, Arts 45–46. For a description of the two levels in discussions at the Hague Peace Conferences, see Alexander Pearce Higgins (ed.), *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Text of Conventions with Commentaries*, Cambridge University Press, Cambridge, 1909, Chap. III, pp. 645–648, available at: https://oll.libertyfund.org/titles/higgins-the-hague-peace-conferences-concerning-the-laws-and-usages-of-war.

38 London Declaration, above note 1, Art. 45.

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and continues to benefit from the legal protections afforded to neutral vessels;[39] capture is permitted only during the specific voyage on which the unneutral service is being performed. Examples of conduct falling into this category include transport undertaken specifically to carry members of the enemy's armed forces or to transmit intelligence on their behalf, or, where known to the owner, charterer or master, the carriage of an enemy military detachment or individuals who, during the voyage, directly assist enemy military operations.

The second, more serious level arises when a neutral vessel is continuously employed in the service of the enemy.[40] In such cases, that neutral vessel and its cargo was to be condemned and, in a general way, was to receive the same treatment as would be applicable to her if she were an enemy merchant vessel – namely, capture and subsequent condemnation (i.e., subject to forfeiture under prize proceedings).[41] This category applies when a vessel is under the orders or control of an agent placed on board by the enemy government, under the exclusive employment of the enemy government, exclusively engaged at the time in the transport of enemy troops or in the transmission of intelligence, or "tak[ing] a direct part in the hostilities".[42]

Some scholars have argued that by the end of the Second World War, State practice had expanded both the scope of what constituted unneutral service and the severity of its consequences. On this view, certain forms of conduct, particularly those within the second category described above, could, where necessary, render neutral vessels liable to attack and destruction on sight.[43] In 1955, Tucker asserted that the differing levels of unneutral service needed to be maintained, albeit with some accommodation of the experience of the Second World War:

> The most serious forms of unneutral service occur when neutral merchant vessels (or neutral private aircraft) directly participate in the military operations of a belligerent, either by entering into the actual hostilities or by serving in any capacity as a naval or military auxiliary to belligerent forces (e. g., as colliers, troopships; laying of mines, reconnoitring). In performing these acts neutral merchant vessels (and aircraft) are considered to acquire an enemy character and must bear the same treatment accorded to enemy warships (and military aircraft). As such they are always liable to capture and – if necessary – to attack and destruction on sight.
>
> The general principle involved is reasonably clear, and no attempt need be made to enumerate all of the acts that may result in this assimilation to an enemy's

39 *Ibid.*, Arts 46–54.

40 *Ibid.*, Art. 46.

41 *Ibid.*

42 *Ibid.*, Art. 46; Oxford Manual, above note 2, Art. 60.

43 See, for example, Wolff Heintschel von Heinegg (ed.), *Visit, Search, Diversion and Capture: The Effect of the United Nations Charter on the Law of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Norwegian Navy School of Tactics, Norwegian Red Cross, Bergen, 20–24 September 1991*, Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Vol. 24, 1995, pp. 39–40, referencing R. Tucker, above note 4, p. 319.

> armed forces. It is not the mere fact of assisting a belligerent that permits this severe treatment. Nor is it simply the consideration that the belligerent exercises a close control and direction over the neutral merchant vessel. The decisive consideration is rather that the services rendered are in direct support of the belligerent's military operations. It is this support, leading as it does to the identification of the neutral merchant vessel (or aircraft) with the belligerent's naval or military forces, that permits a treatment similar to that meted out to these forces.[44]

Similarly, in 1967, drawing upon the 1909 London Declaration, Colombos drew a distinction between "grave" acts of unneutral service and "less grave" acts, noting that in the former case, neutral merchant ships were liable to attack, whereas in the latter they were subject to the same "treatment as an enemy merchant vessel", namely capture.[45] In both Tucker and Colombos' accounts, there is little discussion on the acts themselves that would situate an enemy or neutral merchant vessel within either category, but emphasis was placed upon the directness of the engagement in hostilities.

Meanwhile, a belligerent warship could also capture a neutral vessel that was engaged in an activity which, while not *per se* unneutral service, the belligerent was still lawfully entitled to prevent. This occurred if the vessel were suspected of carrying contraband or breaching a blockade.[46]

Hence, when it comes to merchant vessels (enemy and neutral), the primary operational focus for the classic law of naval warfare was upon capture[47] – but to secure an actual condemnation of a merchant vessel, a hearing would have to be conducted by a prize court in the belligerent State. That court would consider the evidence, decide whether the vessel in question did in fact (1) have enemy character, (2) carry contraband or (3) seek to breach a blockade, and determine whether the vessel and/or cargo should be condemned or released. Having enemy character or seeking to breach a blockade were each sufficient grounds for the vessel and all its cargo to be condemned, while the penalty for carriage of contraband was more variable.[48]

In exceptional circumstances, where operational imperatives demanded, a captured vessel could be sunk at the venue of capture (and hence not returned to a home port), provided that the passengers, the crew and the ship's papers were placed in a position of safety.[49] This was much more controversial in the case of a neutral

44 R. Tucker, above note 4, pp. 319–320.

45 Constantine John Colombos, *The International Law of the Sea*, 5th ed, Longmans, London, 1962, pp. 700–701.

46 London Declaration, above note 1, Arts 21, 37.

47 The Oxford Manual and London Declaration are almost exclusively focused on capture.

48 London Declaration, above note 1, Arts 21, 40, 45–46.

49 See e.g. Raleigh C. Minor, "Should the Submarine Be Used in Warfare upon Commerce?", *Virginia Law Review*, Vol. 3, No. 8, 1916, p. 575.

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vessel, given the less certain grounds for condemnation.[50] As a result, the London Declaration allowed only narrow exceptions for destruction of captured neutral vessels based upon operational necessities.[51] The justification for such sinking would then need to be reviewed by a prize court to determine the lawfulness of the action, and compensation may be payable to the ship owner in circumstances where such sinking was not lawfully justified.[52]

There remained uncertainty in the traditional law of naval warfare about whether a neutral merchant vessel which refused to submit to search obtained "enemy character" as a result.[53] In cases of "forcible resistance", the London Declaration provided that the vessel and cargo would be subject to condemnation as if they had enemy character.[54]

The traditional law of naval warfare governing when and how force could be used against merchant vessels

If a merchant vessel refused to submit to boarding, a belligerent could use force up to and including sinking that vessel. This applied, for example, to enemy merchant vessels actively resisting visit and search, as well as to neutral merchant vessels that had been suspected of carrying contraband or violating a legally established blockade and had refused belligerent orders to stop.[55] This principle was expressly reflected in the 1936 Procès-Verbal,[56] which carried over a key provision of the lapsed 1930 London Treaty (Article 22):

> … *except* in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety.[57]

Drafted long before modern notions such as AP I's "military objective" concept, Article 22 remains in force for fifty-one States,[58] including several major naval powers, some of which rely on it to justify action against merchant vessels resisting lawful

50 See e.g. Thomas Baty, *Britain and Sea Law*, G. Bell and Sons, London, 1911, pp. 2–6; R. Tucker, above note 4, pp. 347–351.

51 London Declaration, above note 1, Arts 48–49.

52 *Ibid*., Arts 51–52.

53 R. Tucker, above note 4, p. 78.

54 London Declaration, above note 1, Art. 63.

55 A legally established blockade must adhere to the requirements of declaration, notification, effectiveness and impartiality. See San Remo Manual, above note 13, Rules 93–95, 100; London Declaration, above note 1, Arts 2, 5, 8; Paris Declaration, above note 21.

56 1936 Procès-Verbal, above note 5.

57 London Treaty, above note 21, Art. 22 (emphasis added).

58 See 1936 Procès-Verbal, above note 5.

orders.[59] Its customary nature is also recognized in both the San Remo Manual and other academic manuals.[60]

This rule, however, must be understood in its proper context. The primary aim of any interaction between belligerent warship and merchant vessel was capture. Accordingly, belligerents were permitted to use only "a degree of force necessary to compel the neutral vessel to submit to visit and search" if it refused to do so.[61]

Importantly, the reference to "rendering [a vessel] incapable of navigation" as outlined in Article 22 did not denote an attack in the sense understood under the rules on the conduct of hostilities as codified in AP I since 1977. Rather, it referred to the use of forceful measures designed to halt the vessel's movement in order to enable its capture. Even the sinking of a vessel was conceived within a graduated enforcement framework: the belligerent was first obliged to attempt to stop and seize the vessel, with sinking reserved as a last resort (i.e., the most extreme step on an escalating continuum of prize options).

Hence, Article 32 of the 1913 Oxford Manual detailed the steps that a belligerent warship needed to undertake to compel a merchant vessel to stop, including firing a "charge of powder" and then firing rounds across its bow. The terms "persistent refusal to stop" and "active resistance to visit and search" are not defined, but it is clear from both the language of the Oxford Manual and academic commentary[62] that there were escalatory steps required before any decision could be made to sink the vessel or render it incapable of navigation.[63]

59 For example, this treaty rule finds wide expression in several State military manuals such as the German Handbook, above note 33, p. 168, para. 331 (referring to enemy merchant vessels); Australian Manual, above note 34, p. 6-10, paras 6.39 (referring to enemy merchant vessels), 6.41 (referring to neutral merchant vessels); UK Manual, above note 34, paras 13.41(e) (referring to enemy merchant vessels), 13.47(a) (referring to neutral merchant vessels); Norwegian Defence University College, *Manual of the Law of Armed Conflict*, Norwegian Armed Forces, 2025 (2025 Norwegian Manual), pp. 255–256, paras 11.41 (enemy merchant vessels), 11.42 (neutral merchant vessels); Navy Warfare Development Command, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, 2022 (US Commander's Handbook), § 8.6.2.2, p. 8-12.

60 See Newport Manual, above note 14, pp. 156–158; San Remo Manual, above note 13, Rules 60(a), 67(a).

61 R. Tucker, above note 4, p. 336. A similar understanding can be seen in Article 1 of the Havana Convention, above note 21.

62 For other academic commentary, see Harald Reason Pyke, *The Law of Contraband of War*, Clarendon Press, Oxford, 1915, p. 194; C. J. Colombos, above note 45, pp. 724–728; R. Tucker, above note 4, p. 336; George P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, Routledge, London, 1998, p. 533; Vaughan Lowe and Antonios Tzanakopoulos, "Ships, Visit and Search", *Max Planck Encyclopedia of Public International Law*, 2013, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e406.

63 Also noteworthy is Article 1 of the Havana Convention, above note 21, which also requires escalatory steps. The Convention remains in force today, though it has been ratified by only eight States and primarily applies to relations between several South American countries and the United States. Article 1 reads:

> Warships of the belligerents have the right to stop and visit on the high seas and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade. If the merchant ship does not heed the signal to stop, it may be pursued by the warship and stopped by force; outside of such a case the ship cannot be attacked unless, after being hailed, it fails to observe the instructions given it.

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In sum, the traditional law accepted that a belligerent would not incur responsibility for sinking or disabling a vessel – even one carrying passengers and crew – provided the vessel had persistently refused to stop upon being duly summoned or the crew had actively resisted, and that all prior, escalatory measures had been exhausted. Such action was lawful only when it was the last remaining means of prize law enforcement available.

A turning tide: AP I's impact on the traditional law of naval warfare

The 1974–77 Diplomatic Conference and other preparatory work

Throughout the various preparatory meetings for AP I involving governmental and other experts, as well as the 1974–77 Diplomatic Conference itself, divergent views emerged regarding the extent to which the Protocol should apply to naval warfare. A principal source of contention concerned the scope of the section establishing the general rules for the protection of civilians against the effects of hostilities (later codified as Part IV, Section I, Articles 48–67).

There was unanimous agreement that Part IV, Section I should at least apply to military operations on land and to operations from the sea and air against persons and objects on land, particularly bombardments.[64] Beyond this, disagreement arose. States with significant naval forces warned that attempting a revision of existing treaty and customary law of naval warfare would be dangerous.[65] They also warned that, because the preparatory work by government experts had not focused specifically on naval or aerial warfare, any action by the Diplomatic Conference – whether deliberate or inadvertent – that affected these rules could render this part of the new Protocol unacceptable to States.[66]

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64 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. 15, Federal Political Department, Bern, 1978 (Official Records Vol. 15), CDDH/III/78/Add.1, p. 255, available at: https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records_Vol-15/RC-records_Vol-15.pdf:

> The Working Group was unanimously of the view that Protocol I should at least cover military operations on land and military operations from the sea and air against persons and objects on land (notably in the form of bombardment) which affect civilians on land. Beyond that there was disagreement.

See also ICRC Commentary on the APs, above note 11, para. 1898:

> The provision of this paragraph has the advantage of clearly establishing the fact that attacks from the sea or from the air against objectives on land are subject to the restrictions and conditions imposed by [AP I]. It should be noted in passing that according to the Working Group which formulated the text of this provision, the expression "on land" in this context also applies to rivers, canals and lakes.

65 Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, p. 331.

66 *Ibid.* See also Official Records Vol. 15, above note 64, CDDH/215/Rev.1, p. 272, para. 44:

It was specifically noted by the UK representative that due to inconsistencies with instruments such as the 1930 London Treaty[67] and its 1936 Procès-Verbal,[68] as well as applicable customary international law, there was a "substantial contradiction" between the existing rules governing hostilities at sea and the proposed protections under AP I.[69] The UK representative noted that while more comprehensive protection might be afforded to merchant ships through a future change in the law, "a great deal of preparatory work would first be required to resolve the contradictions".[70] Similarly, the Finnish delegate observed that the

> contemporary rules of air and sea warfare were different from those of land warfare, especially where the protection of the civilian population was concerned, and the Conference was not in a position to alter them even if it found them unsatisfactory.[71]

When the ICRC prepared its 1973 draft to serve as a basis for discussions at the forthcoming Diplomatic Conference, it took note of the above constraints and the fact that its call some two decades earlier to examine the legal protection of civilian shipping during armed conflict at sea had gone unheeded by States.[72] As such, the ICRC's draft confined the application of Part IV, Section I to "any land, air, or sea warfare that may affect the civilian population, individual civilians, and civilian objects on land".[73]

In presenting that proposal, the ICRC implored that, although its draft addressed only civilians and civilian objects on land, if the Diplomatic Conference proved unable to make meaningful progress towards "resolving the problems of

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> There was almost complete agreement in the Working Group that it would be both difficult and undesirable in the time available to try to review and revise the law applicable to armed conflict at sea and in the air. It was also widely recognized that care should be taken not to change that body of law inadvertently through this paragraph.

67 London Treaty, above note 21.

68 1936 Procès-Verbal, above note 5.

69 See statement of Sir David Hughes-Morgan in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. 14, Federal Political Department, Bern, 1978 (Official Records Vol. 14), CDDH/III/SR.3, pp. 19–20, esp. paras 17–18.

70 *Ibid.*, CDDH/III/SR.3, para. 18.

71 *Ibid.*, CDDH/III/SR.4, p. 25, para. 11.

72 See ICRC, above note 10, pp. 53–55. In response to the suggestion by certain National Red Cross and Red Crescent Societies to explicitly exclude merchant ships from the list of military objectives, the ICRC noted it was

> of course aware of the important bearing of such suggestions on civil navigation and hence on the civilian population, but it considers that this question should be examined by more detailed studies which might be carried out by the experts of the States directly concerned.

73 See Article 44 (which later became Article 49 of AP I) of ICRC, *Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, Geneva, 1973, available at: https://library.icrc.org/library/docs/DOC/DOC_00089.pdf. This approach contrasted with other aspects of the Draft Protocol such as the section on "Methods and Means of Combat", which applies broadly to all military operations across all domains of warfare.

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humanitarian rules at sea and in the air, it would be desirable for it at least to adopt a resolution inviting parties to a conflict to apply those rules by analogy".[74]

Relevantly, several delegations – including some undertaking rapid expansion of their naval forces – disagreed with the circumscribed application as proposed in the ICRC's draft, and as such the matter was extensively debated within Committee III and its Working Group.[75] These delegations strongly preferred deleting the words "on land" in Article 49(3), arguing that Part IV, Section I of AP I should apply to all naval and aerial warfare to the extent that its provisions offered greater protection to civilians than existing rules of law – for example, in situations such as blockades and the sinking of merchant vessels which affect civilians at sea (including crews and passengers) and on land.[76] The delegations' aim in this regard was that protection under this section "would be as broad as possible, embracing the protection of the civilian population, individual civilians and civilian objects at sea and in the air".[77] Conversely, other delegates, particularly from the naval powers at the time, insisted on retaining the words "on land" to ensure that this section of AP I would not apply to operations such as blockades and attacks on merchant ships, which they contended were governed by separate legal regimes like the law of prize, under which the sub-regimes for blockade and visit and search operate.[78]

What eventually became Article 49(3)–(4) of AP I reflects this distinction by limiting the scope of Part IV, Section I (Articles 48–67) to naval warfare that may affect civilian populations, individual civilians, and civilian objects on land, while also preserving existing treaty and customary law rules designed to protect civilians and civilian objects at sea:

> 3. The Provisions of this Section 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.
>
> 4. The provisions of this Section are additional to the rules concerning humanitarian protection … in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the

74 Official Records Vol. 14, above note 69, CDDH/III/SR.2, p. 15, para. 11. For an interesting discussion on analogies between domains of warfare in the historical development of IHL more generally, see Pauline Lesaffre, "Analogies in the Historical Development of IHL (1864–2001)", *International Review of the Red Cross*, Vol. 107, No. 930, 2025.

75 Official Records Vol. 15, above note 64, CDDH/50/Rev.1, pp. 236, 255.

76 Official Records Vol. 15, above note 64, CDDH/50/Rev.1, p. 236, para. 21. See also Official Records Vol. 14, above note 69, CDDH/III/SR.2, pp. 15–16, CDDH/III/SR.3, pp. 20–24, and CDDH/III/SR.4, p. 27. Delegations that spoke in favour of deleting the "on land" limitation included Romania, the Syrian Arab Republic, the German Democratic Republic, India, Mongolia, the United Arab Emirates, Hungary, China, Sudan, Mexico and Albania.

77 Official Records Vol. 15, above note 64, CDDH/50/Rev.1, p. 236, para. 21.

78 See *ibid.*, CDDH/50/Rev.1, p. 236, para. 21; see also CDDH/IIII/78/Add. I, Annex I, pp. 257–258, for different State proposals.

> protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.[79]

As explained in the ICRC's 1987 Commentary on AP I Article 49,

> [i]n general the delegates at the Diplomatic Conference were guided by a concern not to undertake a revision of the rules applicable to armed conflict at sea or in the air. This is why the words "on land" were retained and a second sentence clearly indicating that the Protocol did not change international law applicable in such situations was added.
>
> This concern is understandable: after all, the conditions of sea warfare 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. …
>
> Admittedly both sea and air warfare are subject to restrictions imposed by treaties of general application … but there are hardly any specific rules relating to sea or air warfare, and insofar as they do exist, they are controversial or have fallen into disuse.[80]

Effect of the AP I Article 49(3) limitation

The retaining of the "on land" limitation in Article 49(3) of AP I means that Articles 48–67 do not apply (as a matter of treaty law) except in two situations: (1) sea or air warfare that may affect the civilian population, individual civilians, or the civilian population on land, and (2) attacks directed against objects on land.

Notably, Articles 48–67 of AP I deal mostly with rules specific to targeting and other aspects of the conduct of hostilities a number of which are considered to reflect customary international law today.[81] Such rules include, *inter alia*, rules

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79 Note that the authoritative French translation of Article 49(3)–(4) reads as follows:

> 3. Les dispositions de la présente Section s'appliquent à toute opération terrestre, aérienne ou navale pouvant affecter, sur terre, la population civile, les personnes civiles et les biens de caractère civil. Elles s'appliquent en outre à toutes les attaques navales ou aériennes dirigées contre des objectifs sur terre, mais n'affectent pas autrement les règles du droit international applicable dans les conflits armés sur mer ou dans les airs.
> 4. Les dispositions de la présente Section complètent les règles relatives à la protection humanitaire énoncées dans la IVe Convention, en particulier au Titre II, et dans les autres accords internationaux qui lient les Hautes Parties contractantes, ainsi que les autres règles du droit international relatives à la protection des civils et des biens de caractère civil contre les effets des hostilités sur terre, sur mer et dans les airs.

80 ICRC Commentary on the APs, above note 11, paras 1895–1897.

81 For example, according to the International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILA Study Group), it is widely accepted that the customary law rules governing the conduct of hostilities apply in all domains of warfare: land, air, sea, outer space and cyberspace. See ILA Study Group, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare", *International Law Studies*, Vol. 93, 2017, p. 325. A similar view is expressed in Harvard Program on Humanitarian Policy and Conflict Research, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013 (HPCR Manual), commentary to Rule 30, p. 142:

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stemming from the principles of distinction,[82] proportionality[83] and precaution,[84] and also rules on non-defended localities,[85] demilitarized zones[86] and civil defence.[87]

Effect of the AP I Article 49(4) "without prejudice" clause

Article 49(4) of AP I sought to clarify the relationship between Section I of Part IV and the pre-existing rules of customary and treaty law protecting civilians against the effects of hostilities at sea. Section I of Part IV "provides additional protections to supplement, but not replace, or diminish existing ones. It thus reaffirms and clarifies existing protections and creates some new ones."[88] This is an important consideration in the context of the protection of merchant vessels;[89] for instance, in its 1987 Commentary on Article 49 of AP I, the ICRC noted that

> [w]hile paragraph 3 seems to limit the prohibitions laid down in this Section to objectives on land, paragraph 4 leaves the applicability of both treaty rules and customary rules unimpaired, insofar as such rules are aimed at protecting civilians and civilian objects in air and sea warfare, and this paragraph even tends to supplement these rules. This aspect is confirmed by the provisions of Article 57 ("Precautions in attack"), of which paragraph 4 urges Parties to the conflict

> As a general principle, the same norms apply equally in all domains of warfare. It is true that Art. 49 (3) of AP/I and Art. 57(4) of AP/I imply some form of distinction between the conduct of military operations at sea or in the air compared to land. However, the Group of Experts reached the conclusion that, as a general principle, the same legal regime applies equally in all domains of warfare (land, sea or air) [footnotes omitted].

82 Basic rule on distinction (Art. 48), definition of attack (Art. 49(1)), definition of civilian and civilian population (Art. 50); prohibitions against acts of terror, indiscriminate attacks, reprisals against civilians; use of human shields, presumption of civilian status, notion of civilian direct participation in hostilities (Art. 51); definition of military objectives, prohibitions against reprisals on civilian objects, presumption of civilian object in case of doubt (Art. 52); protection of cultural objects (Art. 53); prohibition of starvation of civilians as a method of warfare, including protection of objects indispensable to the survival of the civilian population (Art. 54); protection of the natural environment (Art. 55, noting that Art. 35 remains applicable); protection of works and installations containing dangerous forces (Art. 56).

83 Obligation to refrain from disproportionate attacks (Arts 51(5)(b), 57(2)(a)(iii), 57(2)(b)).

84 Obligation to take all feasible precautions in attacks and against their effects (Arts 57(1)–(3), 58).

85 AP I, Art. 59.

86 *Ibid.*, Art. 60.

87 *Ibid.*, Arts 61–67. Increasingly, however, some are referring to the utility of the civil defence regime at sea. See e.g. Takei Tomohisa, "Safe Civilian Evacuation Requires a New Sign", *Proceedings: U.S. Naval Institute*, Vol. 150, No. 5, 2024, available at: www.usni.org/magazines/proceedings/2024/may.

88 M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 332:

> Paragraph 4 defines the relation of Section I of Part IV to the existing rules of customary and treaty law protecting civilians in time of armed conflict. This section provides additional protections to supplement, but not replace, or diminish existing ones. It thus reaffirms and clarifies existing protections and creates some new ones.

89 See, for example, ICRC Commentary on the APs, above note 11, paras 1903–1906; M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 332; William H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, pp. 81–82, 309–310.

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> to take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects in the conduct of military operations at sea or in the air.[90]

Despite this clarification, contemporary academic debate – and more importantly State practice – remains sparse concerning the precise interpretation and application of Article 49(4) of AP I, especially in the maritime context and in its relationship to Articles 49(3) and 57(4) of AP I (the latter of which is discussed in the next section). Greater clarity from States on this issue would therefore be highly desirable.

Article 57 of AP I: Precautions in the conduct of military operations at sea

Article 57 of AP I prescribes the legal requirements for precautions in attack.[91] It appears in Section I of Part IV of AP I and is therefore, following Article 49(3), generally considered not to apply to sea warfare not affecting civilians or civilian objects on land – at least as a matter of treaty law. The inclusion of paragraph 4 of Article 57, however, reflects a conscious decision by delegates at the Diplomatic Conference to preserve the relevance of pre-1977 precautionary obligations protecting civilians in the conduct of military operations at sea and in the air, notwithstanding these general limitations. As such, Article 57(4) is explicitly relevant to such military operations. It states that

> [i]n the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

This specific formulation is noteworthy in the naval warfare context, where many military operations do not amount to an "attack" in the technical legal sense under IHL as per Article 49(1) of AP I but nevertheless give rise to risk of harm to civilian

90 ICRC Commentary on the APs, above note 11, para. 1906.

91 Among these, the following measures must be taken:

> [T]hose who plan or decide upon an attack shall:
> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by provisions of this Protocol to attack them;
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
> AP I, Art. 57(2)(a)(i)–(iii). Note that the principle of proportionality in attack enunciated in subparagraph (iii) is repeated in Article 51(5), which designates attacks of the kind described in subparagraph (iii) as indiscriminate.

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lives and civilian objects.[92] For example, it has been suggested that the term "military operations" in the sense of Article 57(4) encompasses all acts associated with belligerent interference with enemy or neutral commerce, including capture, seizure, visit and search, destruction, pursuit of blockade runners, and other actions taken to enforce a naval blockade.[93]

Article 57(4) appears to set up a distinct precautionary standard due to its reference to "all reasonable" precautions, as opposed to the requirement to take "all feasible" precautions found elsewhere in Article 57. Shortly after its adoption, the authors of the original ICRC Commentary on AP I surmised that "reasonable" is "undoubtedly slightly different from and a little less far-reaching than the expression 'take all feasible precautions' used in paragraph 2", acknowledging that "as the nuance is tenuous, the purpose of the provision appears to be to reaffirm the rules that exist to protect civilians in such situations".[94] Beyond that, there was little articulation of the precise interpretation and application of Art 57(4) in the maritime context, and the ICRC Commentary considered it "regrettable" that the delegates at the Diplomatic Conference did not provide "practical examples" of what was in their contemplation at the time.[95]

This absence of guidance, in turn, gave rise – shortly after its adoption – to divergent scholarly views regarding the purpose and legal effect of Article 57(4). Some characterized the provision as primarily exhortatory and unnecessary, arguing that the provision itself has little, if any, independent legal effect because it merely restates existing pre-1977 law applicable to naval and air warfare rather than creating new obligations. In their view, Article 57(4) was included simply to "satisfy those delegations which felt uneasy about the limitation of the scope of this Section of Protocol I to the effects of attacks on objectives on land".[96] Professor Elmar Rauch (whose views are discussed in more detail below) argued that Article 57(4) was

92 In the ICRC's view, the term "military operations" encompasses "any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat" or "related to hostilities". On land, this includes, for example, ground operations in urban areas, establishment of military installations, defensive preparations, quartering of troops, and search operations. See ICRC Commentary in the APs, above note 11, p. 680, para. 2191, p. 617, para. 1936, and p. 600, para. 1875.

93 Elmar Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea : Repercussions on the Law of Naval Warfare: Report to the Committee for the Protection of Human Life in Armed Conflict of the International Society for Military Law and Law of War*, Duncker & Humblot, Berlin, 1984, p. 112.

94 ICRC Commentary in the APs, p. 688, para. 2230. Note that the ICRC's position on this point has evolved since 1994, as discussed later in this article.

95 *Ibid.*

96 M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 411:

> In view of the limitations of the scope of Section II of Part IV set forth in para. 3 of Art. 49, on the effect on the law applicable to armed conflict at sea or in the air, the only purpose served by para. 4 is to exhort the parties to comply with the accepted principle of those bodies of law relevant to the precautions which should be taken to avoid losses of civilian lives and damage to civilian objects The provision is not necessary and has little if any legal effect, but it tended to satisfy those delegations which felt uneasy about the limitation of the scope of this Section of Protocol I to the effects of attacks on objectives on land.

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"superfluous, unnecessary and confusing" and had "no legal effect at all".[97] He stated that no attempt should be made to reconcile it with the rest of the treaty, since it exemplifies "extremely bad draftsmanship" and creates a clear tension with Article 49(4).[98]

Others did not seem to agree entirely that Article 57(4) is completely without independent meaning and effect. For instance, a US government official reacting to such criticisms noted that the emphasis in Article 57(4) on precautionary measures in the conduct of military operations at sea is appropriate since "Art. 49 (3) does not include within the scope of Protocol I naval operations which have only an indirect effect on civilians on land".[99]

AP I rules with direct application to naval warfare

Despite the circumscribed scope of Part IV, Section I, other provisions of AP I outside Articles 48–67 remain applicable to armed conflict at sea by way of treaty law for States party to the Protocol. Many of these provisions are also considered to reflect customary international law.[100]

Take, for example, Part III on means and methods of warfare, which reaffirms the basic rule that the right of warring parties to choose their means or methods of warfare is not unlimited, and includes the prohibition against the employment of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury and unnecessary suffering.[101] Although the military objectives attacked during armed conflict at sea are primarily platforms, this prohibition nevertheless applies to protect individuals aboard those platforms. Moreover, means and methods of naval warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment are also prohibited.[102]

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97 E. Rauch, above note 93, p. 111. For a response, see Elmar Rauch, "Discussion Paper on the Law of Naval Warfare", *Military Law and the Law of War Review*, Vol. 26, No. 1–3, 1987, p. 63, reporting a US representative's reply to Rauch's questionnaire. In the reply, the representative notes disagreement with Rauch's assessment:

> We do not agree that Art. 57 (4) is completely without independent meaning and effect. Art. 49 (3) does not include within the scope of Protocol I naval operations which have only an indirect effect on civilians on land. Since Art. 49 (3) limits the impact of Part IV, Section I to naval operations which directly affect civilians or civilians objects on land, the emphasis in Art. 57 (4) on precautionary measures in the conduct of military operations at sea is appropriate.

98 *Ibid.*

99 *Ibid.*

100 For example, see ICRC Customary Law Study, above note 15.

101 AP I, Art. 35(2).

102 *Ibid.*, Art. 35(3). For a debate on "widespread, long-term and severe", see ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, Geneva, 2020, pp. 30–39, available at: www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf. See also International Law Commission, *Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with Commentaries*, 2022, pp. 140–143, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/8_7_2022.pdf.

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Part III also includes the obligation to review new weapons, means and methods of warfare to determine whether they would be prohibited by AP I or other rules of international law in all or some circumstances, and this prohibition applies equally to naval weapons, means or methods intended for use at sea.[103] The prohibition against perfidy,[104] which is especially important for the use of deception in naval warfare, likewise also applies at sea and must be read in conjunction with the rules on recognized emblems[105] and emblems of nationality (including the specific carve-out regarding the use of false flags in naval warfare).[106]

The denial of quarter – ordering that there will be no survivors, threatening the adversary with this or conducting hostilities on this basis – is also prohibited.[107] This obligation must indeed be read in conjunction with the Geneva Convention II (GC II) obligations requiring belligerents, after each engagement and without delay, to take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.[108]

Beyond Part III on means and methods of warfare, other rules of AP I are applicable and very relevant for naval warfare, including the revised and updated rules on humanitarian access.[109] These rules are especially important for the conduct of blockades and other blockade-like measures. In addition, the fundamental guarantees set out in AP I for persons in the hands of a party to the conflict apply equally in armed conflict at sea; at a minimum, these guarantees are likely applicable with respect to the crews of merchant vessels that find themselves in the power of a party to the conflict.[110] What is more, AP I defines key terms relevant to the wounded, sick and shipwrecked at sea[111] and extends the protection of GC II to all civilians who are wounded, sick or shipwrecked,[112] and to other medical ships and craft not mentioned in GC II.[113]

103 AP I, Art. 36.

104 *Ibid.*, Art. 37.

105 *Ibid.*, Art. 38.

106 *Ibid.*, Art. 39. Note that Article 49(3) of API provides that "[n]othing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable … to the use of flags in the conduct of armed conflict at sea". See, for example, Pornomo Rovan Astri Yoga and Lowell Bautista, "The Law of Perfidy and Ruses of War at Sea", *Journal of Conflict and Security Law*, Vol. 29, No. 3, 2024, available at: https://academic.oup.com/jcsl/article/29/3/375/7817905.

107 AP I, Art. 40.

108 GC II, Art. 18; AP I, Art. 8(a)–(b).

109 AP I, Art. 70.

110 *Ibid.*, Art. 75. Also note that the crew of merchant vessels of parties to the conflict are entitled to prisoner of war status if they do not benefit from more favourable treatment under international law: see GC II, Art. 13(5); and Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) Art. 4(A)(5). Alternatively, the option exists to be released upon making a formal promise in writing not to serve on an enemy ship during the war (i.e., the "parole" option): see Hague Convention XI, above note 21, Art. 5.

111 AP I, Art. 8.

112 *Ibid.*, Art. 22.

113 *Ibid.*, Art. 23.

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Finally, as noted in the previous section, Articles 48–67 of AP I apply to sea warfare that "may affect" the civilian population, individual civilians or civilian objects on land. To understand the scope of Article 49(3), key terms must be interpreted. For instance, the phrase "sea warfare" raises the question of whether it covers only attacks in the sense of Article 49(1), or also other naval operations.[114] Similarly, "may affect" prompts consideration of what type and likelihood of effects on civilians are legally relevant: for example, does it refer solely to effects which qualify as incidental loss of civilian life, injury to civilians or damage to civilian objects, or does it encompass effects that are broader?

In practice, the prevailing view amongst States and scholars suggests that Article 54 of AP I, which prohibits starvation of civilians as a method of warfare, applies to its full extent vis-à-vis naval operations that affect the civilian population on land, including blockades and blockade like measures[115] and, depending on how the category is defined, the interception of contraband.[116]

Some scholars have suggested that in addition to naval bombardment of land targets, Articles 48–67 of AP I would also apply "to naval operations in … close

114 In this context, it is useful to note that the authoritative French translation of Article 49(3) refers to "opération navale" rather than "sea warfare".

115 San Remo Manual, above note 13, explanation to Rule 102, pp. 179–180. See, for example, UK Foreign, Commonwealth and Development Office and UK Ministry of Defence, *Conflict, Hunger and International Humanitarian Law: A Practitioner's Legal Handbook*, 2025, available at: https://assets.publishing.service.gov.uk/media/681386adb0ef2c985052544f/Conflict_Hunger_and_International_Humanitarian_Law_A_Practitioners_Legal_Handbook.pdf; UK Manual, above note 34, para. 13.74; Bundesministerium der Verteidigung, *Law of Armed Conflict Manual*, ZDv 15/2, 2013 (German Manual), para. 1060; Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Levels*, National Defence Canada, 2001 (Canadian Manual), p. 8-10, para. 67; 2025 Norwegian Manual, above note 59, p. 259, para. 11.49; Sri Lanka Army Headquarters, *A Soldiers Guide to the Law of Armed Conflict*, 2003 (Sri Lanka Manual), p. 65; Philippe Frumer *et al., Manual de droit operationnel*, Ministere de la Defense, 2016 (Belgian Manual), p. 422, para. 10.9.4.3; New Zealand Defence Force, *Manual of Armed Forces Law*, Vol. 4: *Law of Armed Conflict*, 2nd ed., DM 69, 2017 (New Zealand Manual), p. 8-26, paras 8.8.26–8.8.27; Government Offices of Sweden, *Svensk manual i humanitär rätt m.m*, SOU 2010:72, 2010, p. 140; Jes Rynkeby Knudsen (ed.), *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, Danish Ministry of Defence and Defence Command Denmark, 2016 (corrected in 2020) (Danish Manual), pp. 596–597; HPCR Manual, above note 81, Rule 97, pp. 270–272; Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), Rule 197, pp. 459–460. See also UNSC Res. 2417, 24 May 2018; UNSC Res. 2573, 27 April 2021. For further discussion, see Henri Meyrowitz, "Le Protocole Additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime", *Revue Générale de Droit International Public*, Vol. 89, 1985, esp. Section III, pp. 276–380. See also T. Dannenbaum, above note 14. For an opposing view, see Phillip J. Drew, "Can We Starve the Civilians? Exploring the Dichotomy between the Traditional Law of Maritime Blockade and Humanitarian Initiatives", *International Law Studies*, Vol. 95, 2019.

116 See San Remo Manual, above note 13, Rule 150 (rule on contraband), as well as the discussions in Wolff Heintschel von Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare: Report, Commentaries and Proceedings of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Ruhr-Universität Bochum, 10–14 November 1989*, Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Vol. 7, 1991, p. 24. See also M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 380 fn. 10, in which he authors conclude the following: "Relief, however, is covered by Section II of Part IV. Accordingly, it modifies the law relevant to blockade and contraband by extending the types of supplies which cannot be considered to be contraband and by enlarging the class of persons for whom relief is intended." And see E. Rauch, above note 93, esp. pp. 95–101 (chapter on the control of contraband).

proximity to the coastline that may inflict harm to protected persons and objects on land".[117] This would not, however, include the "following operations if they are not anticipated to affect protected persons and objects on land: land-to-sea, sea-to-sea, air-to-sea, sea-to-air, and air-to-air".[118]

As the next section details, interpretive challenges surrounding Articles 49(3)–(4) and 57(4) of AP I emerged shortly after the Protocol's adoption and remained prominent during the drafting of the San Remo Manual in the late 1980s and early 1990s. Many of these questions remain unresolved today.

Divergent interpretations of Articles 49 and 57(4) of AP I: Rauch versus Meyrowitz in the 1980s

The precise effect of AP I on the rules governing the conduct of hostilities at sea became the subject of debate shortly after the Protocol's adoption.[119] Notably, some scholars contended that despite the Diplomatic Conference's efforts to ensure that AP I would not inadvertently alter the "traditional" law of naval warfare, certain changes did occur, though opinions differed regarding the scope and significance of these changes.

At one end of the spectrum stood Dr Elmar Rauch, a leading proponent of the view that AP I had, albeit unintentionally, significantly altered the traditional law of naval warfare, including the law of blockade, contraband control, submarine warfare and naval mine warfare. In the early 1980s, Rauch ignited a provocative debate, much of which is detailed in a comprehensive report that he authored.[120] At the other end of the spectrum stood scholars such as Dr Henri Meyrowitz who firmly rejected Rauch's assertions.[121]

The mid-1980s scholarship of Rauch and Meyrowitz was both timely and influential. Their sharply contrasting views were a notable reference point shaping the debate and guiding experts attempting to reconcile the implications of AP I with the "traditional" law of naval warfare during the drafting of the original San Remo Manual. It is therefore useful to summarize their principal arguments before examining how the Manual ultimately addressed these issues.

117 See Newport Manual, above note 14, § 1.2.2, p. 7.

118 *Ibid*. See also M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 330: "Thus, it [Part IV, Section I of AP I] has no application to ship-to-ship or air-to-air combat, nor to attacks from the surface against aircraft in flight or attacks from land against ships at sea."

119 Examples of scholarship include Michael Bothe, "1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts", in Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, 1988, p. 760; Natalino Ronzitti, "The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision", in N. Ronzitti (ed.), *The Law of Naval Warfare*, above, pp. 32–35.

120 The report was commissioned by the Committee for the Protection of Human Life in Armed Conflicts of the International Society for Military Law and the Law of War. See E. Rauch, above note 93.

121 See H. Meyrowitz, above note 115, pp. 254–276. For a response by Elmar Rauch to Meyrowitz's paper, see Elmar Rauch, "Le droit contemporain de la guerre maritime: Quelques problèmes créés par le Protocole additionnel I de 1977", *Revue Générale de Droit International Public*, Vol. 89, 1985.

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Rauch's interpretation

Among Rauch's main concerns was that Article 49(3)–(4) of AP I was open to differing, even contradictory, interpretations.[122] He conceded that since the word "attack" is found in the title of the article and is a key term in this section – and Article 49 defines both the term and its scope – it might seem logical to begin interpretation with the final sentence of Article 49(3), despite the article's introductory wording.[123] From that perspective, and for the sake of consistency, the section's provisions would apply only to attacks launched from the sea against military objectives on land, leaving the existing rules of naval warfare intact.[124]

Rauch argued, however, that civilians are affected by far more than naval bombardment alone.[125] He observed that in both World Wars, the impact of bombardments was "rather negligible" compared with the effects of naval blockades and contraband control, which had far greater consequences for the daily lives of millions.[126] On this basis, he argued that the object and purpose of AP I – to enhance protection of the civilian population – required its provisions to be applied more broadly.[127] Rauch found support for this broader interpretation in the first sentence of Article 49(3), which refers to "sea warfare" rather than "attacks". He understood this to encompass all belligerent actions involving interference with neutral or enemy shipping, such as the capture, seizure or destruction of vessels or goods at sea, and blockade enforcement.[128] At the same time, "sea warfare", in his view, also included naval bombardments of military objectives on land, since these too could cause incidental harm to civilians.[129]

Rauch conceded that the Diplomatic Conference may have intended a narrower reading of the phrase "sea warfare which may affect the civilian population … on land" given the apparent illogic of extending "they further apply" to all attacks from the sea.[130] He remained, however, unconvinced by this reading. Even if the final sentence of Article 49(3) were, in his words, "a merely obscurantistic tautology", it does not explain why the caveat "but do not otherwise affect the rules of international law applicable in armed conflict at sea" is attached specifically to the part of the rule concerning attacks, rather than to the broader clause addressing the effects of sea warfare on civilians on land.[131] Rauch argued that even if the Working Group and Committee III appeared inclined to read the second sentence of Article 49(3) as merely clarifying the first sentence (i.e. limiting Section I of Part IV to naval

122 E. Rauch, above note 93, p. 57.
123 *Ibid.*, pp. 57–58.
124 *Ibid.*, p. 58.
125 *Ibid.*
126 *Ibid.*
127 *Ibid.*
128 *Ibid.*
129 *Ibid.*
130 *Ibid.*
131 *Ibid.*

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attacks on land-based targets), such an interpretation is untenable today, as it would be "tantamount to a treaty interpretation contralegem".[132]

Rauch argued that any coherent interpretation of Article 49 must reconcile the exception in the final sentence of paragraph 3 with the provisions of paragraph 4.[133] In this regard, he asserted that under the general principles of treaty interpretation, the *travaux préparatoires* cannot override the plain text of the article itself – particularly when a restrictive interpretation, grounded in preparatory work completed two years prior to adoption, would directly conflict with paragraph 4.[134] In his view, the 1936 Procès-Verbal was one treaty that contained important rules designed for humanitarian protection, meaning that they fell within Article 49(4) of AP I, and he asserted that the International Military Tribunal had confirmed the binding nature of these rules during the trial of Karl Dönitz.[135] On this basis, Rauch proposed the following construction of Article 49:

> Good faith interpretation, in accordance with the ordinary meaning to be given to the terms of Protocol I in their context and in the light of its object and purpose, suggests the following construction of Art. 49 of Protocol I: The provisions of Section I of Part IV
>
> – apply to all acts of naval warfare which may affect the civilian population, individual civilians or civilian objects on land, including attacks from the sea against military objectives on land and measures against the maritime commerce of the enemy whether under its own flag or under neutral flags;
>
> – apply to all other acts of naval warfare as far as the effects of hostilities on civilians and civilian objects on land, at sea, or in the air are concerned, as regulated by conventional or customary international humanitarian law, including collateral damage of operations against enemy warships and effects of belligerent acts against merchant ships;
>
> – do not affect other rules of naval warfare, including belligerent action against the enemy's fleet or other military objectives at sea or in the superjacent airspace and attacks from land against ships at sea or aircraft in the superjacent airspace.[136]

For Rauch, it was "beyond doubt" that Article 54 of AP I – which prohibits the starvation of civilians and relatedly protects objects indispensable to their survival – had modified the traditional rules of naval warfare.[137] Specifically, it rendered blockades aimed at starving civilians unlawful, broadened the categories of supplies exempt from being treated as contraband, prohibited the capture or destruction of enemy merchant vessels and their cargo when carrying goods essential for civilian survival,

132 *Ibid*., p. 66.

133 *Ibid*., pp. 59–60.

134 *Ibid*., p. 66.

135 See E. Rauch, above note 121, pp. 971–973.

136 E. Rauch, above note 93, p. 60.

137 *Ibid*., p. 94.

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and redefined unneutral service by stipulating that participation in, or acceptance of, convoys transporting such goods – whether directed by the enemy government or undertaken voluntarily – could no longer be regarded as a hostile or unfriendly act.[138]

As briefly mentioned earlier in this article, Rauch was rather critical of Article 57(4) of AP I, claiming that it was "superfluous, unnecessary and confusing" and had "no legal effect at all".[139] As noted above, he asserted that no attempt should be made to reconcile the article with the rest of the treaty, since it represented "extremely bad draftsmanship" and created an obvious tension with Article 49(4) of AP I:

> As far as the reasonable precautions are concerned, Art. 57 par. 4 requires them "in conformity with" the existing international law. There is only one interpretation admissible, i.e. to read this provision as a mere repetition of an existing body of law. But if this is the case, then we have an evident contradiction at hand between this stipulation and Art. 49 par. 4 which speaks of "additional" provisions to customary and conventional rules relating to the protection of civilians and civilian objects at sea. Normally, one would not expect a codification conference to draft rules which do not have a meaning of their own. And an additional treaty rule stands on its own, even if previous conventional rights and obligations are repealed. In contrast, the mere reference in Art. 57 par. 4 makes all precautionary measures dependent upon the law as it stood before 1977. It seems ludicrous to formally declare in the basic rule that all provisions of this Section are additional and at the same time couch the important stipulation that way.[140]

Rauch was also critical of Solf and other commentators for suggesting that Article 57(4) was included simply to "satisfy those delegations which felt uneasy about the limitations of the scope of this Section of Protocol I to the effects of attacks on objectives on land".[141] Rauch considered this to be a misguided explanation that contributed "not only to a wrong conception of Art. 49 par. 3 by some delegates at the Diplomatic Conference, but also to a complete neglect of Art. 49 par. 4",[142] which in his view affirmed the application of the 1936 Procès-Verbal. The paradox, in his view, was as follows:

> [A] meaningless provision was inserted (Art. 57 par. 4) in order to quiet concerns about the limited scope of another provision (Art. 49 par. 3) whereas the problem was addressed in quite an unlimited fashion in a different stipulation (Art. 49 par.

138 *Ibid.*; see particularly pp. 90–94 (on blockade), 99–101 (on contraband), 132 (on capture and destruction) and 134 (on unneutral service).

139 *Ibid.*, p. 111.

140 *Ibid.*, p. 110.

141 *Ibid.*, p. 111. See also M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 411. In relation to Article 57(4), the authors state that "[t]he provision is not necessary and has little if any legal effect, but it tended to satisfy those delegations which felt uneasy about the limitation of the scope of this Section of Protocol I to the effects of attacks on objectives on land."

142 E. Rauch, above note 93, p. 111.

4) which should have calmed down any uneasiness about the scope of application of Protocol I with respect to naval warfare.[143]

Meyrowitz's interpretation

Scholars such as Dr Henri Meyrowitz firmly rejected arguments like Rauch's that Article 49(3) had inadvertently and fundamentally changed the traditional law of naval warfare.[144] Meyrowitz also disagreed with Rauch's claim that Article 49(4) implied a reaffirmation, in its entirety, of the 1936 Procès-Verbal. Although Meyrowiz acknowledged that AP I reinforced humanitarian protections – especially regarding starvation and humanitarian relief – he disagreed with Rauch as to the extent to which Articles 54(1) and 70 modified the rules relating to blockade, prize law and contraband.

First, Meyrowitz argued that Article 49(3) is not an independent provision but merely refers back to the rules contained in the relevant section of AP I.[145] In Meyrowitz's view, with the exception of Article 54(1), the provisions of this section of AP I do not apply to naval warfare. While Article 70 – like Article 54(1) – has effectively modified certain traditional rules concerning blockades, contraband, booty and capture, it does not alter the underlying principle that this section of AP I remains inapplicable to naval operations.[146]

Second, Meyrowitz posited that a strict literal interpretation of Article 49 produces an obscure and absurd result – namely, the overhaul ("renversement") of the law of naval warfare.[147] Accordingly, he argued that the recourse to the preparatory works is necessary to interpret the provision in accordance with the Vienna Convention on the Law of Treaties.[148]

Third, Meyrowitz asserted that the phrase "may affect" in Article 49(3) is overly broad and too vague, rendering it an inadequate criterion for determining the application of Section I of Part IV of AP I to the full range of maritime warfare activities.[149] While the second sentence of the provision could, in theory, operate independently, Meyrowitz contended that this would only be relevant in exceptional cases.[150] One such case involves a lawful attack – land, air or naval – against an object at sea that incidentally harms civilians or damages civilian objects on land, in which case Article 51(5)(b) would apply.[151] Another example is an attack on a lawful military objective such as a large oil tanker, in geographical conditions such

143 *Ibid.*

144 See H. Meyrowitz, above note 115, pp. 254–276.

145 *Ibid.*, p. 248.

146 *Ibid.*, pp. 248–249.

147 *Ibid.*, p. 249.

148 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 32.

149 See H. Meyrowitz, above note 115, pp. 251–252.

150 *Ibid.*, p. 251.

151 *Ibid.*, pp. 252–253.

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that the attack would cause, on land, "non-traumatic" indirect harm to the civilian population, for instance through environmental damage affecting public health or survival, as addressed in Article 55(1).[152]

Meyrowitz critiqued Rauch's broader interpretation of "sea warfare",[153] which encompasses both violent acts (such as attacks and destruction causing physical ("traumatic") harm, including death, injury or destruction) and non-violent actions (such as prize measures, blockades, contraband control and the capture of vessels) which may affect civilians on land through indirect, "non-traumatic" effects (such as economic deprivation affecting civilian survival).[154] He argued that AP I already permits violent acts capable of causing serious "non-traumatic effects" for civilians, even absent "traumatic effects". As illustrations, he cited attacks on oil installations or measures intended to deprive the civilian population of fuel and petroleum essential for transport, agriculture and the food industry.[155]

In sum, with respect to Article 49(3), Meyrowitz argued that a single sentence in a multilateral convention cannot transform an entire body of customary international law – especially where it implies a complete overhaul that the AP I drafters explicitly sought to avoid.[156] In his view, a fundamental distinction between the laws of land and naval warfare persists. The latter has historically regulated not only hostilities against enemy warships, but also interactions with enemy and neutral merchant shipping and maritime commerce more broadly. It has given rise to a distinct set of institutions that are unknown in land warfare: visit and search, capture, prize, blockade and contraband control. According to Meyrowitz, one cannot simply transpose the rules developed for land warfare into the maritime sphere.[157]

With regard to Article 49(4), Meyrowitz challenged Rauch's assertion that the phrase "other international agreements" should be read as encompassing, *inter alia*, the 1936 Procès-Verbal, and that the instrument is thereby implicitly confirmed by AP I.[158] In Meyrowitz's view, Article 49(4) cannot be interpreted as reviving or restoring treaties that have fallen into desuetude or that have been overtaken by subsequent State practice – circumstances he believed accurately described the status of the 1936 Procès-Verbal, which in his view had been distorted by the conduct of belligerents during the Second World War.[159]

In response to Meyrowitz's and others' critiques of Rauch's broad reading of Article 49, Rauch acknowledged that in his comprehensive report he had "tried to walk the fine line between being thought-provoking and provocative".[160]

152 *Ibid.*, p. 253.

153 Or "operation navale" as per the authoritative French treaty text.

154 *Ibid.*, pp. 248–249.

155 However, it must be noted that nowadays the prevailing view is that fuel and petroleum essential for transport (at least civilian transport), agriculture and the food industry do not provide an effective contribution to military action and are therefore not military objectives within the meaning of IHL.

156 See H. Meyrowitz, above note 115, pp. 248–254.

157 *Ibid.*, pp. 248–254.

158 *Ibid.*, pp. 282–283.

159 *Ibid.*; see also pp. 290–294.

160 E. Rauch, above note 97, p. 34.

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He emphasized that the "manifold problems" created by AP I are persistent and "can't be swept under the carpet", and that legal difficulties cannot be resolved by ignoring established rules of treaty interpretation.[161] Recognizing the complexity of the issues at hand, he noted that multiple, sometimes contradictory views regarding the interpretation of Article 49 of AP I are valid, as illustrated by Meyrowitz.[162]

Opening Pandora's box at sea: Unresolved interpretive challenges in AP I

Many of the questions that were first raised by Rauch regarding the construction of Article 49(3)–(4) of AP I, including as regards its relationship with Article 57(4), remain unresolved and would most certainly benefit from further clarification, particularly by States. How should Article 49(3) be understood today in light of modern naval capabilities and civilian reliance on maritime trade? Relatedly, which types of naval operations are likely to affect civilians on land, and what kinds of effects are legally relevant? The rationale for explicitly addressing military operations at sea in Article 57(4), given its placement in Section I, also warrants closer examination, as do the legal consequences of Article 57(4) in connection with Article 49(3)–(4). Finally, considering Article 49(4), it remains necessary to clarify which precautions from the traditional law of naval warfare – such as those discussed earlier in this paper – continue to apply at sea, particularly with respect to merchant vessels.

Unsurprisingly, Rauch was critical of the Diplomatic Conference for having

> opened a Pandora's box of difficulties for the rules and customs of naval warfare. It can only be hoped that the lacunae and ambiguities … will not have to be ironed out by State practice, i.e., by actual combat at sea. The battle should be fought with pencil and ink among those in charge of translating Protocol I … into understandable guidelines and clear advice for the seagoing officer. In doing so, they will have to avoid both extremes, adopting neither the "warmonger approach" nor the overambitious and exaggerated humanitarianism, in order to achieve a delicate balance of accommodation between military needs and humanitarian considerations.[163]

Ultimately, it was the Group of Experts responsible for drafting the original San Remo Manual that undertook the painstaking task of reconciling developments in instruments such as AP I with the traditional law of naval warfare, striving to balance military necessity with humanitarian considerations. Given the intrinsic uncertainties and interpretive difficulties at the time, their efforts to translate new AP I concepts into practical guidance for naval operators and their lawyers were

161 *Ibid.*

162 *Ibid.*

163 E. Rauch, above note 93, p. 164.

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both impressive and commendable – even if at times not entirely conclusive, as will be made clear in the next section.

The San Remo Manual: Harmonizing AP I targeting rules with the traditional law of naval warfare, and implications for practice

The Group of Experts preparing the San Remo Manual confronted the relationship between AP I and the traditional law of naval warfare directly at the 1989 Bochum Round Table, which focused on "The Military Objective and the Principle of Distinction in the Law of Naval Warfare". The central question was whether, and to what extent, the rules on the principle of distinction – particularly the relatively new "military objective" concept in Article 52 of AP I – could be transposed to the maritime domain.

In his comprehensive report, Rapporteur Commander William Fenrick of the Canadian Ministry of Defence examined the historical background, relevant treaty law and relevant State practice, and offered several recommendations on the way forward.[164] He observed that the proper interpretation of Article 49(3) of AP I – particularly the meaning of the expression "may affect the civilian population, individual civilians or civilian objects on land" – was contentious.[165] In his view, Part IV, Section I clearly regulated naval shore bombardment conducted by ships or aircraft; by contrast, attacks against objects on or under the sea would not have a direct effect on the civilian population on land.[166]

Fenrick did nevertheless specify Article 54 of AP I as one provision in this section that "might have an impact, after a fashion, on naval targeting",[167] and suggested that it could require "consideration of traditional commerce interdiction measures such as blockade and contraband".[168] He argued that

> Art 54(1) [of AP I] would prohibit a naval blockade to prevent the import of foodstuffs in order to hasten the end of an armed conflict through starvation of the civilian population. Further objects indispensable to the survival of the civilian population must not be declared or treated as conditional contraband even if they are used by the enemy in direct support of military action, provided that their seizure and condemnation may leave the civilian population with such inadequate supplies as to cause its starvation or force its movement. …As a result of Art. 54, it may be necessary for parties to Protocol I to exempt from attack ships known to be carrying exclusively objects indispensable to the survival of

164 For an article based on the report submitted by the rapporteur, see William J. Fenrick, "Legal Aspects of Targeting in the Law of Naval Warfare", *Canadian Yearbook of International Law/Annuaire Canadien de Droit International*, Vol. 29, 1992, pp. 238–282.

165 W. H. von Heinegg (ed.), above note 116, p. 24.

166 *Ibid.*

167 *Ibid.*

168 *Ibid.*

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> the civilian population even if such ships breach a blockade or are so unwise as to refuse to stop for visit and search.[169]

More broadly, Fenrick proposed that although most of Part IV, Section I of AP I was "not, strictly speaking, applicable to the targeting of objects on, over or under the seas, it does contain some concepts and texts which might eventually be considered suitable for incorporation in the law of naval warfare".[170] In particular, he highlighted the definition of military objective in Article 52(2) and the principle of proportionality embedded in Articles 51 and 57.[171]

These questions were carried forward at the 1990 Toulon Round Table on Methods and Means of Combat in Naval Warfare.[172] At Toulon, the discussion shifted from the conceptual scope of AP I to the practical implications of applying its rules to traditional naval warfare means and methods. Participants examined the extent of convergence and divergence between land and naval warfare and considered which, if any, aspects of AP I on precautions and proportionality were suitable for incorporation into the new San Remo Manual.

A central focus of discussions was the degree of alignment between land and naval targeting rules. Rapporteur G. J. F. van Hegelsom from the Netherlands Ministry of Defence's Directorate of Legal Affairs presented an introductory report which, among other things, recalled the debates sparked by Rauch and Meryowitz. Hegelsom observed that previous discussions of the Group of Experts in both Madrid and Bochum had demonstrated that "the distinction between land warfare and naval warfare is not as stringent as the eminent lawyer [Meyrowitz] suggests".[173] Specifically, Hegelsom noted that

> although the provisions of that section [Part IV, Section I] were developed with only land warfare in mind and therefore presented some interpretational difficulties if applied to naval warfare, the absolute character of the distinction advocated by Meyrowitz was not warranted: the standards underlying the regulation of belligerent behaviour were a codification of customary law and therefore were already applicable in naval warfare. Moreover, the provisional concluding document of the Bochum Round Table relies heavily on the provisions of Additional Protocol I in assessing the roles of the principle of distinction and of the military objective in armed conflict at sea.
>
> …

169 *Ibid.*

170 *Ibid.*, pp. 24–25.

171 *Ibid.*

172 See Wolff Heintschel von Heinegg (ed.), *Methods and Means of Combat in Naval Warfare: Report and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Institut Méditerranéen d'Études Stratégiques, Université de Toulon et du Var, 19–23 October 1990*, Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Vol. 8, 1992.

173 See the debate between Meyrowitz and Rauch in H. Meyrowitz, above note 121, pp. 254–276.

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> Although the maritime environment may have specific characteristics which should be taken into account when developing modern rules of naval warfare, it is submitted that the absolute distinction advocated by Meyrowitz should not be accepted. General principles and codified customary law as adopted in Additional Protocol I provide useful guidelines for the identification of rules applicable to naval warfare.[174]

Since the experts concluded that certain land targeting concepts could be transposed to the maritime domain, the next section examines how the Group of Experts sought to harmonize core AP I concepts on the conduct of hostilities – particularly the definitions of military objective, precautions in attack and proportionality – with the traditional law of naval warfare, as well as the practical implications of this harmonization and the questions that remain unresolved today.

The San Remo Manual's fusing of traditional naval warfare targeting rules with the "new" AP I concept of military objective

After extensive debate in Bochum, the experts concluded that the foundational IHL principle of distinction and the concept of military objective, as codified in AP I, are applicable in naval warfare. They reaffirmed the obligation to distinguish between civilians and combatants, and between civilian objects and military objectives, and that attacks are to be strictly limited to military objectives.[175] Following the Rapporteur's suggestion, they agreed that Article 52 of AP I was suitable for incorporation. Much of the subsequent discussion in Bochum then appeared to focus on specific vessels exempt from attack, as well as the circumstances under which merchant vessels – both enemy and neutral – may qualify as a military objective or otherwise be attacked.

Consequently, the San Remo Manual adopted Rule 40, which reflects verbatim the two-pronged test – both cumulative and temporal – set out in Article 52(2) of AP I for determining what qualifies as a military objective.[176] San Remo Manual Rules 60 ("Enemy Merchant Vessels")[177] and 67 ("Neutral Merchant

174 W. H. von Heinegg (ed.), above note 172, pp. 9–10.

175 See, for example, San Remo Manual, above note 13, Rule 41: "Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document."

176 *Ibid.*, Rule 40:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

177 *Ibid.*, Rule 60 (emphasis added):

> The following activities *may* render enemy merchant vessels military objectives:
> (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
> (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;

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Vessels")[178] then provided so-called domain-specific circumstances in which certain conduct by enemy and neutral merchant vessels *may* satisfy the military objective criteria. These domain-specific rules were adopted with the intention to "limit the lawfulness of attacks to merchant vessels which directly help the military action of the enemy".[179] This decision to incorporate the concept of military objective was taken despite the prevailing view at the time that, under treaty law, it did not formally apply to naval warfare lacking effects on civilians or civilian objects ashore, at least for States Parties to AP I by virtue of Article 49(3).[180]

Relatedly, it is noteworthy that the experts decided to expressly incorporate the presumption of civilian status in cases of doubt reflected in AP I.[181] Although formulated in the context of exempt vessels and aircraft, the inclusion of this rule reaffirmed the importance of directing attacks against vessels only where there is concrete evidence demonstrating that they are making an effective contribution to the enemy's military action.

In effect, the San Remo Manual fused "traditional" law of naval warfare rules governing the use of force against vessels with what was at the time the "new" military objective concept from Article 52 of AP I. However, this integration was not entirely conclusive – understandably, given the complex and unresolved debates at the Bochum Round Table, particularly concerning the legal basis for attacks against (especially neutral) merchant vessels.[182]

(c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
(d) sailing under convoy of enemy warships or military aircraft;
(e) refusing an order to stop or actively resisting visit, search or capture;
(f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as chaff; or
(g) otherwise making an effective contribution to military action, e.g., carrying military materials.

178 *Ibid*., Rule 67 (emphasis added):

Merchant vessels flying the flag of neutral States may not be attacked unless they:
(a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
(b) engage in belligerent acts on behalf of the enemy;
(c) act as auxiliaries to the enemy s armed forces;
(d) are incorporated into or assist the enemy s intelligence system;
(e) sail under convoy of enemy warships or military aircraft; or
(f) otherwise make an effective contribution to the enemy s military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

179 *Ibid*., explanation on p. 68.

180 Please refer to the section on "Effect of the AP I Article 49(3) Limitation" above.

181 See *ibid*., Rule 58, which reflects AP I, Art. 52(3).

182 There appears to be a lack of internal consistency in the San Remo Manual's approach to this novel use of "military objective" when it comes to neutral merchant vessels. The Manual acknowledges in the explanation to Rule 67 that "the definition of military objectives did not apply to the legal relationship between belligerent and neutrals" (p. 157, para. 67.7), and Rule 67 therefore does not use that term (for comparison, see Rules 59–60 on enemy merchant vessels). Yet even though Rule 41 requires that "attacks shall be

In relation to enemy belligerent warships and the modern concept of auxiliary vessels,[183] for example, application of the "military objective" criteria in Article 52(2) of AP I appears straightforward. By their "nature" or "use", such vessels make an effective contribution to the enemy's military action, and an attack against them may reasonably be expected to offer a definite military advantage, assuming that the temporal requirement of "in the circumstances ruling at the time" is also satisfied.

Meanwhile, enemy and neutral merchant vessels that are "taking a direct part in hostilities"[184] or engaging in other forms of unneutral service – traditionally subject to capture, or in exceptional cases, to attack when direct engagement with belligerent forces is more grave – are now generally regarded under modern law as "effectively contributing to the military action" of a belligerent. Consequently, they may be treated as military objectives as per the Article 52(2) criteria and are therefore subject to the fundamental rules of precaution and proportionality in attack.[185] There is little discussion of this transition in most manuals, though the English version of the German Handbook helpfully notes:

> Today there is agreement that the prohibition of attacks on enemy merchant vessels and enemy aircraft does not apply if they are effectively contributing to the enemy's military activities and their destruction or neutralization by other means constitutes a definite military advantage in the circumstances ruling at the time. Therefore, the definition of military objectives is applied to these vehicles too.[186]

The legacy of Article 22 of the 1936 London Procès-Verbal

While many forms of unneutral service can be easily mapped onto the framework of Article 52(2) of AP I, the historical legacy of Article 22 of the 1936 Procès-Verbal

limited strictly to military objectives", and neutral merchant vessels apparently can never be such, Rule 67 lists numerous situations in which neutral merchant vessels may be attacked. In this regard, some State military manuals have adapted the San Remo Manual language. See e.g. Steven Haines, "The United Kingdom's Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared", *Israel Yearbook on Human Rights*, Vol. 36, 2006, pp. 108–109: "The UK Manual expands the introduction to [San Remo Manual] Article 67, dealing with neutral merchant vessels, thus: 'Merchant vessels flying the flag of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances become military objectives if they: …'". See UK Manual, above note 34, para. 13.47.

183 As defined in the San Remo Manual, above note 13, Rule 13(h). See also P. R. A. Yoga, above note 31.

184 For an explanation of the concept of direct participation in hostilities in relation to vessels, see above note 18.

185 Norwegian Defence University College, *Manual of the Law of Armed Conflict*, Norwegian Armed Forces, 2013 (2013 Norwegian Manual), pp. 227–228, paras 10.34–10.36; 2025 Norwegian Manual, above note 59, paras 11.39–11.40, 11.42; Australian Manual, above note 34, pp. 6-9–6-10, paras 6.37, 6.39, 6.41; UK Manual, above note 34, p. 360, para. 13.41, and p. 361, para. 13.47; German Handbook, above note 33, pp. 168–169, paras 332–333; Danish Manual, above note 115, § 4.5.2.3, pp. 588–589 (enemy merchant vessels) and § 4.5.2.4, p. 589 (neutral merchant vessels).

186 German Handbook, above note 33, p. 168, para. 332.

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complicates the picture.[187] Article 22 permits a belligerent warship to employ graduated force against a merchant vessel that persistently refuses an order to stop or actively resists visit and search, including, if necessary, rendering it incapable of navigation or sinking it. The provision remains in force for fifty-one States (including several naval powers) and finds expression in state military manuals[188] as well as the San Remo Manual and more recent *Newport Manual on the Law of Naval Warfare* (Newport Manual).[189]

This legacy authority predates the modern AP I concept of "military objective" and operates on a different logic. Under Article 22 of the 1936 Procès-Verbal, force is triggered by the refusal to stop or active resistance rather than verified contribution to the enemy's military action or the anticipated advantage to be gained from attacking a fleeing or resisting ship. In these circumstances, such assessments can only ever be speculative. Target verification in the sense contemplated by the principle of precautions in attack will often be impossible as a belligerent cannot be expected to have sufficient knowledge of a vessel's purpose, use or cargo; indeed, the very purpose of visit and search is to resolve such uncertainty. In such cases, there is at most a reasonable suspicion that the vessel is carrying contraband, or conjecture regarding the reasons for a breach or attempted breach of a blockade (i.e., San Remo Manual Rule 67(a)). Nonetheless, as an expression of the traditional law of naval warfare, the entitlement to use force in these circumstances is generally considered to remain valid. For example, the 2013 Norwegian Manual justifies this approach by stating: "The reason the merchant vessel must then be regarded as a lawful target is that it is impossible to check whether it is carrying contraband, participating in hostilities etc."[190]

Structural ambiguity between Rules 40–41 and Rules 60 and 67 of the San Remo Manual

While it was understood that vessels resisting visit, search or capture would not qualify as military objectives *strictu sensu*,[191] the experts nevertheless chose to fuse the traditional law of naval warfare basis to use force against merchant vessels with the AP I concept of "military objective", resulting in a formulation in the San Remo Manual that retains considerable textual ambiguity. This is particularly evident when San Remo Manual Rules 40 and 41 – reflecting the two-part definition of military

187 See 1936 Procès-Verbal, above note 5.

188 See above note 59.

189 See Newport Manual, above note 14, pp. 156–158; San Remo Manual, above note 13, Rules 60(a), 67(a).

190 See Norwegian Defence University College, *Manual of the Law of Armed Conflict*, Norwegian Armed Forces, 2013 (2018 English-language edition) (Norwegian Manual (2018 English Edition)), paras 10.35 (enemy merchant vessels), 10.36 (neutral merchant vessels). See also 2013 Norwegian Manual, above note 185, paras 10.35–10.36. This view is further reaffirmed in the 2025 Norwegian Manual, above note 59, paras 11.41 (enemy merchant vessels) and 11.42 (neutral merchant vessels): "Grunnen til at handelsfartøyet da er å anse som et lovlig mål, er at det er umulig å kontrollere om fartøyet frakter kontrabande, deltar i fiendtlighetene eller liknende."

191 San Remo Manual, above note 13, para. 60.6.

objectives in Article 52 of AP I and the requirement that attacks be strictly limited to military objectives – are read alongside the conduct-based categories set out in Rules 60 ("Enemy Merchant Vessels") and 67 ("Neutral Merchant Vessels"). At least two interpretations seem possible:

- **Interpretation 1:** On one view, San Remo Manual Rules 60 and 67 operate as independent and supplementary grounds for attack under the rules governing the conduct of hostilities at sea. This approach effectively imports traditional grounds for using force during prize-law enforcement against merchant vessels alongside the AP I Article 52 framework. Applying this view, it is arguable that including San Remo Manual Rule 40 effectively broadened the traditional grounds for attacking merchant vessels that existed prior to AP I, despite historical caution in the "traditional" law against attacking both enemy and neutral merchant ships rather than merely capturing them, except for when they are performing "grave acts" of unneutral service.[192]
- **Interpretation 2:** Alternatively, San Remo Manual Rules 60 and 67 may be understood as merely identifying situations in which a vessel *may* qualify as a military objective, without dispensing with the two-part test in San Remo Manual Rule 40 and Article 52 of AP I.

As drafted, the current structure of the San Remo Manual tends to support the second reading. The repeated renvoi to Rule 40, before and after the conduct-based lists, seems structurally significant;[193] it signals that all attacks, including those against vessels which refuse to stop or actively resist, remain subject to the two-part military objective test – namely, that they make an effective contribution to military action and that their destruction offers a definite military advantage in the circumstances ruling at the time.

The language of San Remo Manual Rule 60 is also noteworthy. It states that specified conduct "may render" a vessel a military objective, without necessarily implying automatic targetability. It seems that Rules 59 and 61 still demand a contextual assessment consistent with Rule 40; meanwhile, Rule 67 is framed in protective terms stating that a neutral merchant vessel "may not be attacked unless" certain conditions are met. When read alongside Rule 68 (which makes a renvoi to Rule 40), a literal interpretation might suggest that Rule 67 imposes cumulative or limiting conditions. Under this reading, a neutral vessel would need to satisfy both the specific criteria listed in Rule 67 *and* the general definition of a military objective under Rule 40 (as reinforced by Rule 68), rather than Rule 67 serving as a set of illustrative examples akin to Rule 60.

192 See the section "Main Rules" above.

193 See San Remo Manual, above note 13, Rules 59, 61, 68.

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National military manuals and academic manuals since publication of the San Remo Manual

A cursory review of military and academic manuals does not necessarily resolve these ambiguities. A few illustrative, non-exhaustive examples are provided below.

The 2025 Norwegian Manual tends to support the first interpretation. It states that the reason why a merchant vessel which sails in convoy under the protection of enemy warships or enemy aircraft is regarded as a lawful target is because by sailing under the protection of enemy warships, it clearly demonstrates that active resistance will be made against visit, search or capture.[194] Similarly, the US Manual specifies that enemy merchant vessels will constitute a military objective that can be attacked with or without prior warning, in circumstances such as persistently refusing to stop when duly summoned or actively resisting visit, search or capture.[195] Of note also, the US Manual asserts that merchant vessels which constitute military objectives are not considered to be merchant vessels in the sense of the 1936 Procès-Verbal rule.[196]

Interestingly, the New Zealand Manual, in the context of blockade enforcement, explicitly treats clear resistance against interception and capture as satisfying the AP I Article 52 test, reasoning that the destruction of such vessels provides a definite military advantage by preserving the effectiveness of the blockade.[197] The Manual goes on to assert, however, that the fact that a vessel is liable to attack does not necessarily justify an attack likely to cause it to be sunk, destroyed or severely

194 See 2025 Norwegian Manual, above note 59, pp. 255–256, para. 11.41:

> Følgende er eksempler på aktiviteter som kan føre til at et fiendtlig handelsfartøy mister sin beskyttelse og utgjør et lovlig mål. … Handelsfartøyet seiler i konvoi under beskyttelse av fiendtlige krigsfartøy eller fiendtlige luftfartøy. Grunnen til at handelsfartøyet da er å anse som et lovlig mål, er at det ved å seile under beskyttelse av fiendtlige krigsfartøy åpenbart viser at det vil gjøres aktiv motstand mot visitasjon, ransaking eller oppbringelse.

English translation (via DeepL): The following are examples of activities that may cause an enemy merchant vessel to lose its protection and become a lawful target.

> … The merchant vessel is sailing in a convoy under the protection of enemy warships or enemy aircraft. The reason the merchant vessel is then to be regarded as a lawful target is that, by sailing under the protection of enemy warships, it clearly demonstrates that it will actively resist boarding, search, or capture.

195 See US Department of Defense, *Department of Defence Law of War Manual*, Office of General Council, 2015 (updated in July 2023) (US Manual), § 13.5.2.

196 *Ibid.*

197 For example, in the context of blockade enforcement, see New Zealand Manual, above note 115, para. 10.5.6:

> A vessel that refuses to stop or clearly resists visit, search or capture after a prior warning becomes a military objective and may … be attacked. … An act of clear resistance against interception or capture is to be considered an effective contribution to enemy military action. Hence such vessels and aircraft lose their civilian status and become legitimate military objectives, whose destruction or damage offers a definite military advantage because the effectiveness of the blockade is preserved. Any such attack on a vessel or aircraft must be carried out in accordance with the basic rules of naval warfare, for example, as regards to distinction and proportionality.

damaged. The principle of proportionality still applies, and in most cases it will be sufficient to disable the vessel or (where possible) board it – by force if necessary.[198]

By contrast, the second interpretation appears to be supported by States such as the UK and Denmark. For example, the UK Manual adapts the conduct-specific factors by expanding the *chapeau* in San Remo Manual Rules 60 and 67 as follows (emphasis added):[199]

- Paragraph 13.41 (adapting Rule 60) states: "The following activities may, *depending on the circumstances*, render enemy merchant vessels military objectives: …".
- Paragraph 13.47 (adapting Rule 67) similarly begins: "Merchant vessels flying the flag of neutral states *may only be attacked if they fall within the definition of military objectives.* They may, *depending on the circumstances*, become military objectives if they …".

Similarly, the Danish Manual provides a non-exhaustive list of activities that may render enemy and neutral merchant vessels military objectives, mirroring San Remo Manual Rules 60 and 67, but also makes a renvoi back to its own general chapter on "Military Objectives" applicable across all domains, stating that

> even though participation in these activities would render a vessel a military objective in the vast majority of cases, it must always be determined by an assessment of the specific circumstances, whether the criteria applicable to military objectives as set forth in Chapter 8 ["Military Objectives"] are met.[200]

198 *Ibid*., para. 10.5.7–10.5.8. It is less clear whether, in this context, the New Zealand Manual refers to a form of proportionality akin to that applied in law enforcement/prize enforcement, or to proportionality as understood in the conduct of hostilities. See relevant paragraphs below.

> 10.5.7 The fact that a vessel is liable to attack does not necessarily justify an attack likely to cause it to be sunk, destroyed or severely damaged. The principles of proportionality still apply. In most cases, it will be sufficient to disable the vessel or (where possible) board it – by force if necessary.
> 10.5.8 No attack is to be made upon a civilian ship by a New Zealand force without the express authority of [the Chief of Defence Force]. If authority is given, the commander of the New Zealand force is to ensure that:
> a. at least one prior warning is given to the vessel,
> b. civilians who are not directly participating in hostilities are not deliberately targeted,
> c. the attack is conducted in a way to cause the least possible incidental civilian loss of life or injury and the least possible incidental damage to civilian property, and
> d. the attack is only conducted if the direct and concrete military advantage outweighs possible incidental civilian loss of life or injury and incidental damage to civilian property.

199 See S. Haines, above note 182, pp. 98, 108–109: "The UK Manual expands the introduction to [San Remo Manual] Article 67, dealing with neutral merchant vessels, thus: 'Merchant vessels flying the flag of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances become military objectives if they …'". See UK Manual, para. 13.47 (neutral merchant vessels); see also para. 13.41 (enemy merchant vessels).

200 Danish Manual, above note 115, §§ 4.5.2.3 (enemy merchant vessels), 4.5.2.4 (neutral merchant vessels), pp. 588–590.

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The Central African Republic (CAR) Manual adopts a similar approach, stating that only vessels qualifying as military objectives may be attacked. However, it then introduces its examples with the wording "À titre indicatif, on citera", which translates roughly as "By way of indication" or "By way of example". Unlike the San Remo Manual, it does not provide an extensive list of illustrative cases. Instead, it limits itself to four examples: vessels sailing in convoy, vessels transporting goods of military importance, vessels carrying members of the enemy's armed forces, and vessels breaching a blockade.[201] The Manual then goes on to clarify that nevertheless, in case of doubt, a ship may be intercepted and searched in order to determine its status; if it refuses to stop or resists visit and search, it may be destroyed after prior warning.[202] Togo's military manual adopts a similar approach.[203]

The Sri Lankan Manual largely reflects the language and approach of the San Remo Manual. For example, it first states that "[e]nemy merchant vessels *may only* be attacked if they are military objectives",[204] mirroring Rule 59 of the San Remo Manual. In the following paragraph, the Sri Lankan Manual incorporates the Rule 40 test for determining military objectives and then closely reproduces Rule 60. Manuals from Türkiye, Peru, Belgium and Russia adopt very similar approaches to Sri Lanka.[205] Although all of these manuals assert that a merchant vessel must qualify as a military objective within the meaning of IHL before it may be attacked, they provide no further clarification or explanation beyond this.

Although civil aircraft rules in the San Remo Manual fall outside the scope of our article, they are instructive. In general, attacks against civil aircraft – enemy[206] or neutral[207] – must satisfy the military objective definition under San Remo Manual Rule 40 and Article 52(2) of AP I. Some San Remo Manual provisions (Rules 63(d)–(e) and 70(a)) suggest that attacks may be permitted under aerial-domain-specific circumstances even when the full two-part test cannot be satisfied.[208] The

201 CAR, Ministere De La Defense, Forces Armees Centrafricaines, *Le droit de la guerre*, Fasicule No. II, 1999 (CAR Manual), p. 8.

202 *Ibid.*

203 Republic of Togo, Ministere de la Defense et des Anciens Combattants, Forces Armees Togolais, *Le droit international humanitaire*, Fasicule No. II, 2002 (Togo Manual), p. 10.

204 Sri Lanka Manual, above note 115, p. 63 (emphasis added).

205 Turkish General Staff Ankara, *Guide to the Law of Armed Conflict of Armed Forces*, Partnership for Peace Training Center Command, 2001 (Turkish Manual) p. 121; Peruvian Ministry of Defence, *International Humanitarian Law Manual for the Armed Forces* (adopted by Ministerial Decision No. 1394-2004-DE/CCFFAA/CDIH-FFAA), 2004, paras 130 (enemy merchant vessels), 131 (neutral merchant vessels); Belgian Manual, above note 115, paras 10.8.4 (enemy merchant vessels), 10.8.6 (neutral merchant vessels); Ministry of Defence of the Russian Rederation, *Manual on International Humanitarian Law for the Armed Forces of the Russian Federation*, 2001, paras 115–116, 126.

206 For enemy civil aircraft, see San Remo Manual, above note 13, Rules 62–64.

207 For neutral civil aircraft, see *ibid.*, Rules 70–71.

208 *Ibid.*, Rules 63, 70:

> 63. The following activities may render enemy civil aircraft military objectives:
> …
> (d) flying under the protection of accompanying enemy warships or military aircraft;
> (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire

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HPCR Manual on International Law Applicable to Air and Missile Warfare (HPCR Manual) builds on this approach but goes further by emphasizing that the list of example circumstances in which a civil aircraft[209] or civil airliner[210] may qualify as a military objective are merely illustrative rather than exhaustive.[211] Even when an example applies, such aircraft do not automatically become military objectives unless they satisfy the two-part AP I Article 52 test.[212] This approach lends support to the second interpretation described above.

In the present authors' view, even if the second interpretation is accepted – namely, that San Remo Manual Rules 60 and 67 identify when a vessel may, depending on the circumstances, qualify as a military objective, without overriding the two-part test in Rule 40 and AP I Article 52 – this does not preclude actions (other

control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft[.]

…

70. Civil aircraft bearing the marks of neutral States may not be attacked unless they:

(a) are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible[.]

209 The HPCR Manual, above note 81, Rule 27, states as follows:

Without prejudice to Sections I, J and L of this Manual, the following activities may render any other enemy aircraft a military objective:

(a) Engaging in hostile actions in support of the enemy, e.g. intercepting or attacking other aircraft; attacking persons or objects on land or sea; being used as a means of attack; engaging in electronic warfare; or providing targeting information to enemy forces.

(b) Facilitating the military actions of the enemy's armed forces, e.g., transporting troops, carrying military materials, or refuelling military aircraft.

(c) Being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions.

(d) Refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or clearly resisting interception.

(e) Otherwise making an effective contribution to military action.

210 The HPCR Manual, *ibid*., Rule 63, states as follows:

Subject to Rule 68, activities such as any of the following may render a civilian airliner a military objective:

(a) Being on the ground in a military airfield of the enemy in circumstances which make that aircraft a military objective.
(b) Engaging in hostile actions in support of the enemy, e.g. intercepting or attacking other aircraft; attacking persons or objects on land or sea; being used as a means of attack; engaging in electronic warfare; or providing targeting information to enemy forces.
(c) Facilitating the military actions of the enemy's armed forces, e.g. transporting troops, carrying military materials, or refuelling military aircraft.
(d) Being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions.
(e) Refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or clearly resisting interception.
(f) Otherwise making an effective contribution to military action.

211 *Ibid*., commentary to Rule 63, paras 63.2–63.3, p. 190.

212 *Ibid.*

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than attack) against non-compliant vessels that do not satisfy the AP I Article 52 test. Such actions must, however, rest on a separate legal basis. That basis is to be found in earlier treaty and customary law, including the 1936 Procès-Verbal.[213] As mentioned earlier, that earlier treaty and customary law emphasizes the use of escalated force to secure capture, which remains the primary objective; authority to sink a merchant vessel that cannot be captured must therefore remain exceptional and narrowly confined.[214]

Use of force against non-compliant merchant vessels: Hostilities or prize law enforcement?

Uncertainty remains as to how States interpret and apply both treaty and customary rules derived from the principle of distinction, particularly in relation to merchant vessels. Today, the term "military objective" (whether understood in its AP I Article 52 sense, or in its much narrower pre-1977 sense under the traditional law of naval warfare) is generally invoked to satisfy distinction requirements prior to launching an attack.

Where a vessel qualifies as a military objective under Article 52 of AP I and Rule 40 of the San Remo Manual, it may be subject to "attack" within the contemporary meaning of IHL and subject to the conduct of hostilities paradigm. The San Remo Manual identifies certain conduct that may, depending on circumstances, satisfy this test: engaging in belligerent acts on behalf of the enemy (Rules 60(a) and 67(b)), being incorporated into the enemy's intelligence-gathering system (Rules 60(c) and 67(d)), or otherwise making an effective contribution to military action, such as by transporting military materials (Rules 60(g) and 67(f)). However, State practice provides scant guidance on the threshold of conduct required; for example, it seems highly unlikely that a merchant vessel merely reporting the sighting or movements of belligerent vessels or aircraft that it happens to encounter while engaged in normal operations would, by those actions alone, qualify as being part of

213 See 1936 Procès-verbal, above note 5. See also Article 1(1) of the Havana Convention, above note 21, which similarly provides that if a merchant vessel fails to heed a signal to stop, it may be pursued by the warship and stopped by force.

214 See also Newport Manual, above note 14, §§ 9.9, 9.11, pp. 190–191, which also reflects this escalation model.

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the enemy's intelligence-gathering system,[215] but there is little clear State affirmation on where the line should be drawn.

Even greater uncertainty arises where force is employed against a vessel that does not meet the Article 52 definition but persistently refuses to stop or actively resists visit and search under the traditional law of naval warfare. Should the use of force against such vessels properly be understood as an "attack" under the rules governing the conduct of hostilities or as an enforcement action under prize law? Without clarity on such foundational issues, there are some conceptual and practical challenges regarding the implementation of proportionality and precautions in attack that are likely to endure (see next section).

Another unresolved question that would benefit from further clarification by States concerns what conduct amounts to "persistent refusal to stop", "intentional and clear resistance" or "active resistance" in the context of contemporary naval warfare. Overt acts such as a merchant ship firing at or ramming a pursuing belligerent warship (as occurred during the Second World War) or firing upon a blockading force would clearly qualify.[216] Likewise, enemy merchant vessels "sailing under the convoy of enemy warships or military aircraft" are said to indicate that active resistance will be made against visit, search or capture.[217] However, questions arise regarding how this concept translates to today's maritime operating environment, especially when compared with historical practice.[218] For example, according to New Zealand, "clear resistance" means that the "the ship acts in a manner that has, or may have, an impeding effect on the intercepting forces. A mere change of course to escape is not sufficient."[219] Beyond such cases, contemporary State practice seems to offer little clarity.

215 San Remo Manual, above note 13, explanation to Rule 67, para. 67.26:

> Subparagraph 67(d) must be interpreted strictly. In most conflicts merchant vessels do not become military objectives subject to attack on sight merely because they have instructions to report the sighting of vessels or aircraft of the adverse party which they come across while engaged in normal commercial operations. Merchant vessels may, however, become subject to attack on sight if they are employed primarily for intelligence-gathering purposes and have special communications or detection equipment and personnel on board. For example, during the Falklands conflict, British forces attacked and sank the Argentine fishing trawler Narwal which was repeatedly engaged in reporting the location of British warships and which had an Argentine naval detachment on board. In the Nuremberg Judgment, the fact that British armed merchant vessels were given standing orders to report the sighting of enemy vessels or aircraft was only one of the factors which led the Tribunal to decide that the German forces were not prohibited from attacking them on sight.

216 Newport Manual, above note 14, §§ 9.11, pp. 191–192.

217 See San Remo Manual, above note 13, explanation to Rule 107; and see the quotation from the 2025 Norwegian Manual at above note 194.

218 See San Remo Manual, above note 13, Rules 60(d)–67(e). See also, for example, Paul Kemp, *Convoy Protection: The Defence of Seaborne Trade*, Arms and Armour, London, 1993; Thomas J. Cutler, "The Key Role of the Convoys", *Naval History Magazine*, Vol. 34, No. 4, 2020; Robert McLaughlin, "Technology-Based Challenges to the Law Applicable to Trade Interdiction during Armed Conflict at Sea: The Law of Naval Warfare and Convoy Operations", *International Law Studies*, Vol. 108, 2026.

219 New Zealand Manual, above note 115, para. 10.5.6. A similar view on escaping a blockade is taken by the Newport Manual, above note 14, § 9.11, pp. 191–192.

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As evidenced from the above, many contemporary military manuals and expert bodies, following the San Remo Manual, assume that any use of force at sea against merchant vessels which actively resist or persistently refuse to stop must fit within an AP I targeting framework while at the same time emphasizing escalatory force logic.[220] However, the present authors contend that framing prize-law enforcement through the lens of AP I targeting law may be misplaced. Under contemporary IHL, a merchant vessel that does not meet the definition of a military objective cannot lawfully be "attacked", although traditional prize law provides a lawful framework for graduated enforcement. Conflating these paradigms affects practical application of core obligations including target verification, proportionality and precautionary measures (some of which are further discussed below). A more coherent approach situates such operations within a distinct enforcement logic rooted in prize law: an historic, escalatory framework designed to compel compliance, not to destroy enemy military objectives at the first instance.

Closely connected is the question of boarding operations against merchant vessels that encounter armed resistance from either the crew or passengers.[221] When naval forces respond to such resistance, does the conduct of hostilities paradigm apply, or does something akin to a law enforcement paradigm govern the use of force and subsequent detention?[222] State manuals generally do not address this issue, though such questions were considered in the various inquiries that were produced in relation to the 31 May 2010 Gaza flotilla incident as well as by the International Criminal Court prosecutor at the time – albeit with contrasting findings.[223]

220 See e.g. New Zealand Manual, above note 115, paras 10.5.6–10.5.8.

221 See e.g. Robert McLaughlin, "Active Resistance by Merchant Vessel Crews during International Armed Conflict Is Not 'Direct Participation in Hostilities'", *International Law Studies*, Vol. 99, 2022; Anthony Erman, "The Concept of Direct Participation in Hostilities in Naval Warfare", in D. Stephens and M. Stubbs (eds), above note 14. This issue is also relevant in non-international armed conflict, but that is outside the scope of this paper.

222 Another question that has been raised in the academic domain concerns *how* to treat civilian mariner crew and command of unmanned warships or autonomous auxiliary vessels who may be located ashore at control stations for the purposes of both the use of force and detention. See e.g. Robert McLaughlin, "Some Issues in the Law Concerning Naval Auxiliaries" *EJIL: Talk!*, 13 February 2025, available at: www.ejiltalk.org/some-issues-in-the-law-concerning-naval-auxiliaries/.

223 See Geoffrey Palmer *et al.*, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Gaza Flotilla Incident*, September 2011, available at: https://digitallibrary.un.org/record/720841?ln=en&v=pdf; Jacob Türkel *et al.*, *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission Report*, Part 1, January 2010, available at www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf; Republic of Türkiye, *Report of the National Commission of Inquiry into the Israeli Attack on the Humanitarian Aid Flotilla to Gaza on 31 May 2010*, February 2011; UN Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, UN Doc. A/HRC/15/21, September 2010, available at: https://docs.un.org/en/A/HRC/15/21, International Criminal Court, Office of the Prosecutor, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014, available at: www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf.

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The San Remo Manual's import of land-based requirements from Article 57 of AP I

With respect to precautions at sea, Rapporteur Hegelsom recommended at the Toulon Round Table that the Group of Experts adopt the standards set out in Article 57 of AP I, notwithstanding their technical inapplicability as a matter of treaty law. He stated:

> Belligerents should take reasonable precautions to ascertain whether they are attacking a legitimate military objective and whether the attack will not entail collateral damage which is excessive in relation to the concrete and direct military advantage anticipated. … Paragraph 2 of Article 57 of Additional Protocol I would seem a sound precedent for precautionary measures.
>
> …
>
> In light of the concern not to unduly venture in the law of naval warfare but still wishing to retain precautionary measures in naval warfare, the delegates at the Diplomatic Conference added a special paragraph to the Article [Article 57(4)], explicitly meant for naval and aerial warfare:
>
> …
>
> Doctrine would seem to be unanimous with respect to the thesis that Article 57(4) is merely declaratory and does not have any practical effect on the law of naval warfare. Is there a great difference between the obligations under paragraph 2 and paragraph 4 in practice? Up till now, no commentaries have addressed this issue. Upon closer analysis and bearing in mind the findings of the Bochum table with regard to the principle of distinction, one may effectively wonder whether there has been a specific reason, save for the general feeling mentioned above that the Diplomatic Conference did not wish to amend the law of naval warfare unintentionally, for the inclusion of paragraph 4. The declarations made by several countries upon ratification of Additional Protocol I with regard to the terms "military advantage", "feasible", and the responsibility of commanders in attack, would however also be useful in the naval environment.[224]

Following discussion, the Group of Experts agreed with Hegelsom's recommendation to use Article 57 of AP I as the basis for precautions in attack, aligning with Fenrick's earlier suggestion at Bochum the previous year. Accordingly, Rule 46 of the San Remo Manual invokes a "simplified" version of Article 57(2), using the "all feasible" and "everything feasible" wording, and imposes obligations with respect to target verification, choice of means and methods, and conducting proportionality assessments during attacks.[225]

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224 See W. H. von Heinegg (ed.), above note 172.

225 San Remo Manual, above note 13, Rule 46:

> With respect to attacks, the following precautions shall be taken:

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The difficulty in clearly defining what maritime forces must do to uphold the rules stemming from the principles of precaution and proportionality was something discussed during the original process and is understandable given the complex realities at sea. Today's merchant vessels can carry up to 20,000 containers – often with the specific details of the cargo being unknown even to the ship's master – and may enter operational areas with limited warning and incomplete information available to the belligerent as to their cargo and intent. These conditions pose significant risks to civilian shipping and create acute operational dilemmas for naval forces. Such realities appear to have driven the development of the rules of naval warfare along a different path than those governing land warfare, and consequently, applying land-based precautionary criteria in a maritime context can present distinct and complex challenges.

National military manuals and academic manuals since publication of the San Remo Manual

Despite these complexities, Rule 46 of the San Remo Manual (reflective largely of Article 57 AP I) reflects the understanding that proportionality and precautions must be observed in maritime warfare, affirming that the core protective aims of AP I extend beyond the land domain.

In the years since the adoption of the San Remo Manual, numerous States have continued to reaffirm the importance of the Rule 46 (reflecting Article 57) precautions in attack and proportionality rules underscoring a crucial principle that even in circumstances where certain AP I treaty rules governing the conduct of hostilities may be formally inapplicable to naval hostilities which do not affect civilians on land, the underlying rules continue to shape the conduct of hostilities at sea.

As to which standard (i.e., "all reasonable" or "all feasible") for precautions in attack at sea applies, similar to Rapporteur Hegelsom, the ICRC's current legal position is that the distinction between "all reasonable" and "all feasible" is so highly nuanced as to be of little practical relevance, and the applicable legal regime is operationally the same. Similar views have been expressed by other expert bodies such as the International Law Association Study Group on the Conduct of Hostilities in the

(a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
(b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
(c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; and
(d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which world be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

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21st Century (ILA Study Group)[226] and the authors of the HPCR Manual[227] and the *Tallinn Manual 2.0 on the International Law applicable to Cyber Operations* (Tallinn Manual 2.0).[228]

A handful of State military manuals also seem to share a similar view. For example, the UK Manual, in its "Maritime Warfare" chapter, closely follows Rule 46 of the San Remo Manual in its section on "Precautions in Attack".[229]

Similarly, the 2013 edition of the Norwegian Manual notes that "the rules presented in other chapters of this manual also apply to maritime operations, in particular the rules on the conduct of attacks"; as a result, the Manual does not elaborate on precautions within its naval warfare chapter. Nevertheless, the Manual includes two relevant references that align with the wording of Article 57: the requirement that "all feasible precautions shall be taken to avoid or reduce incidental injury or damage to civilians and civilian objects",[230] and the obligation "to take all feasible precautions to verify that a vessel is a lawful target".[231]

The Danish Manual notes that "[a]s regards attacks on objectives at sea or in the air, AP I merely states that the parties must take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects", explicitly referencing Article 57(4) of AP I. In explaining the practical application of this provision, the Danish Manual makes express reference to Rule 46 of the San Remo Manual, highlighting the requirement to take "all feasible" measures/precautions and directing

226 For example, the ILA Study Group has affirmed that customary law rules apply uniformly across all domains, establishing the current standard as one of "all feasible precautions":

> The principal legal regime governing precautions in attack during an international armed conflict is laid out in Art. 57 AP I. As mentioned above, the customary law rules governing the conduct of hostilities are applicable in all domains of warfare. To the extent that Art. 57(4) AP I had imposed through the use of the term "reasonable" a standard "a little less far-reaching" than "all feasible precautions", the customary rules pertaining to precautions in attack today impose the requirement of taking all feasible precautions in all domains of warfare.

ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, Final Report, 2017, p. 37 (footnotes omitted), available at: www.ila-hq.org/en_GB/documents/ila-final-report-25-june-2017.

227 See the quotation from the HPCR Manual at above note 81.

228 The authors of the first Tallinn Manual included a line on the distinction between "reasonable" and "all feasible precautions", but in the updated Tallinn Manual 2.0, the authors deleted this line. Instead, they quoted Article 49(3) of AP I and subsequently stated: "The International Group of Experts agreed that despite this apparent limitation, State practice was such that the principles expressed in this Section, to the extent they reflect customary international law, generally apply to attacks to or from the land or outer space, at sea, or in the air." Accordingly, the Manual applies the standards of AP I in the relevant rules, including requirements such as the obligation to take "all feasible" precautions. See Michael N. Schmitt (ed.), *Tallinn Manual on the International Law applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, pp. 166–167; Tallinn Manual 2.0, above note 115, p. 415.

229 UK Manual, above note 34, para. 13.32.

230 Norwegian Manual (2018 English Edition), above note 190, para. 10.33. See also 2013 Norwegian Manual, above note 185, para. 10.33; 2025 Norwegian Manual, above note 59, para. 11.38.

231 Norwegian Manual (2018 English Edition), above note 190, para. 10.48: "Nevertheless, the parties are obliged to take all feasible precautions to verify that a vessel is a lawful target." See also 2013 Norwegian Manual (2013), above note 185, para. 10.48; 2025 Norwegian Manual, above note 59, para. 11.55: "Partene er likevel forpliktet til å gjøre det som er praktisk mulig for å verifisere at fartøyet er et lovlig mål."

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readers to the San Remo Manual's general chapter on "Military Objectives", which elaborates on what it means in practice to "do everything feasible".[232]

Some States assert that land-based rules on proportionality and precautions apply at sea without explaining their practical application, even as they acknowledge that the maritime context may differ. Such an approach seems to be the one taken by the Canadian Manual, the New Zealand Manual, the Turkish Manual, the Togo Manual, and the CAR Manual.[233] Of note, however, Togo and the CAR's manuals both emphasize that attacks against merchant ships and civilian aircraft without military significance must be avoided.[234] The New Zealand Manual states that "[a]ll orders of this manual apply with necessary modifications to armed conflict in the maritime or air environments",[235] but while it references "necessary modification", Chapter 10 (titled "Further Rules in the Maritime and Air Environment") does not appear to indicate that such modifications affect the application of precautionary measures.

According to the authors of the Newport Manual, "[t]he standard of 'reasonable' precautions in attack at sea under Article 57(4) AP I suggests that it is a lower bar to attack than the 'feasible' precautions for attacks on land".[236] In a separate article, one of the Newport Manual's lead authors suggests possible substantive obligations under this provision in the context of naval warfare:

> Reasonable precautions at sea might include such tactics as: (a) issuing warnings through radio communication or visual signals before engaging a suspicious vessel; (b) diverting suspect vessels away from conflict areas through the establishment of maritime zones or when setting a naval blockade; (c) conducting boarding operations before escalating to the use of force against a suspected ship; or (d) postponing or aborting an attack if civilian small craft or neutral vessels unexpectedly enter the engagement zone.[237]

Proportionality and precautions in attack regarding vessels at sea: Who and what must be taken into account?

A major area of ambiguity concerns whether proportionality and precautions in attack must account for persons and objects on board a vessel that qualifies as a "military objective" under the San Remo Manual (Rule 40/AP I Article 52).

232 See Danish Manual, above note 115, § 4.5.3, pp. 590–591.

233 New Zealand Manual, above note 115, para. 10.2.6; Canadian Manual, above note 115, para. 825; Turkish Manual, above note 205, p. 121.

234 Togo Manual, above note 203, pp. 9–10; CAR Manual, above note 201, p. 7.

235 New Zealand Manual, above note 115, p. 10-4, para. 10.2.6.

236 Newport Manual, above note 14, p. 173.

237 James Kraska, "Distinction, Proportionality, and Precautions in Attacks at Sea in the New Era of the Law of Naval Warfare", *Chicago Journal of International Law*, Vol. 26, No. 1, 2025, p. 401, available at: https://cjil.uchicago.edu/print-archive/distinction-proportionality-and-precautions-attacks-sea-new-era-law-naval-warfare.

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San Remo Manual Rule 46(a)–(b) focuses on the identification of civilian objects "present in an area of attack" and limiting attacks to "military objectives", while Rule 46(c)–(d) outlines the obligation to avoid or at least minimize "collateral casualties"[238] and the prohibition against disproportionate attacks. Paragraph 46.5 of the San Remo Manual commentary (known as the "explanation") illustrates this point through the sinking of the passenger liner *Lusitania*, which, despite carrying a significant cargo of munitions, resulted in the deaths of 1,198 passengers and crew – a loss retrospectively deemed disproportionate by the Group of Experts.[239] This example suggests that persons and objects on board a vessel – even one qualifying as a military objective – must be taken into account in proportionality assessments. At the same time, passenger liners have generally been treated as a special class of "exempt vessel" requiring a more comprehensive proportionality analysis, although the San Remo Manual does not explicitly explain this reasoning.

It is reasonable to ask whether passenger liners are the only vessels that merit such special consideration. The records of the Diplomatic Conference and the original 1987 ICRC Commentary on AP I provide little guidance on these questions, particularly when compared with scenarios involving incidental effects on people and objects near vessels under attack. For example, with respect to Article 57(4), the ICRC Commentary notes:

> [O]ne could conceive that hostilities between adverse fleets could endanger the civilian population, with or without the intervention of the airforce, because missiles could miss their target or civilian ships or aircraft could get mixed up in the battle. Similarly, fighting between adverse military aircraft could have incidental repercussions on the civilian population – for example, when a crippled aircraft crashes. It should be noted that "all reasonable precautions" must be taken, which is undoubtedly slightly different from and a little less far-reaching than the expression "take all feasible precautions", used in paragraph 2. As the nuance is tenuous, the purpose of the provision appears to be to reaffirm the rules that exist to protect civilians in such situations.[240]

National military manuals and outputs of expert bodies since the publication of the San Remo Manual

Of those national military manuals that contain dedicated chapters on law of naval warfare issues reviewed by the authors, most do not provide much detail in terms of who and what must be considered for the purposes of proportionality and precautions in attack at sea.

238 See San Remo Manual, above note 13, Rule 13(c): "'collateral casualties' or 'collateral damage' means the loss of life of, or injury to civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives".

239 See *ibid.*, p. 124, para. 46.5.

240 ICRC Commentary on the APs, above note 11, para. 2230.

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A small number – including the Norwegian Manual,[241] the Danish Manual[242] and the US *Commander's Handbook on the Law of Naval Operations* (US Commander's Handbook) – appear to consider that a "vessel-based construct" applies generally to attacks against military objectives at sea. In this regard, precautions are directed primarily at minimizing harm to other vessels and objects in the surrounding area rather than to persons or objects aboard the target vessel itself.[243] The US Commander's Handbook provides that[244]

> [b]ecause the primary military objectives at sea are vessels, and the principle of proportionality is applied using a vessel-based construct, absent particular information, naval commanders are not generally required to conduct an individualized proportionality assessment of embarked personnel on the vessel once it has been deemed a lawful military objective.[245]

That said, it is noteworthy that the US Commander's Handbook states that a more detailed proportionality assessment may be required where the commander has "particular information".[246] Both the Handbook and the US Manual also note that precautions must be taken to protect civilian workers on board a vessel which is a military objective, and that such workers must be considered in a proportionality analysis (including where it is a warship).[247] These latter statements seem to suggest that, in the US view, not everything or everyone on board a vessel that qualifies as a military objective automatically assumes the vessel's legal status.

The Danish Manual states that those who plan an attack must

> take all feasible measures to gather information which will assist in determining whether or not vessels or objects which are not military objectives are present in

241 2025 Norwegian Manual, above note 59, pp. 254–255, para. 11.38.

242 Danish Manual, above note 115, § 4.5, pp. 583–584 (emphasis in original):

> As already mentioned, the general principles and rules of IHL also apply to naval warfare – in particular, the principles of distinction and proportionality (see Chapter 4). Therefore, the rights and obligations of the various actors and the identification of military objectives at sea follow the rules set out in Chapter 5 and Chapter 8, respectively. The right to conduct hostilities in connection with naval warfare depends on the status of the *vessel*, i.e., the category to which it belongs, not on the status of the crew on board even though these two aspects are obviously closely connected. Moreover, the character and conduct of a vessel determine whether it constitutes a military objective just as loss of protection against attack will likewise be based on the conduct of the vessel**.** *Hence, the rules on naval warfare are characterised by their focus on the status, rights, and obligations of the vessels involved***.** In this regard, the rules differ from general IHL pursuant to which the actors of the armed conflict are individuals and the rules regulate actions vis-à-vis individuals and objects of the adversary. The focus of the rules on vessels as opposed to individuals is well-founded since it will often be impossible for the adversary to conduct an individual assessment of a vessel's crew members and their conduct.

243 Danish Manual, above note 115, § 4.5.3, pp. 590–591; US Commander's Handbook, above note 59, p. 5-4, § 5.3.3.

244 U.S. Commander's Handbook, above note 59, p. 8-5, § 8.3.2.

245 *Ibid.*

246 *Ibid.*, § 5.3.3, p. 5-4, and § 8.3.2, p. 8-5.

247 *Ibid.*, § 8.3.2, p. 8-5; US Manual, above note 195, pp. 275–277, § 5.12.3.3.

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> an area of attack [aligning with the San Remo Manual]. In practice, this entails a requirement to do what is feasible to compile a thorough situational analysis, particularly in coastal or other areas with heavy sea and/or air traffic.[248]

The Danish Manual does not appear to mention civilians or cargo aboard vessels under attack. This could suggest that only other ships and aircraft need to be considered in proportionality assessments, or alternatively, it may reflect a practical focus on the situations most likely to pose most risk to civilians.

In a section of the 2025 Norwegian Manual on "Target Selection in Maritime Operations", it is noted that while the relevant rules are largely the same as for land operations, their application at sea can present unique challenges. The Manual further asserts that some rules have traditionally differed – and continue to differ – between the two domains.[249] Concerning attacks against vessels that qualify as lawful targets – whether warships, auxiliary vessels, or enemy merchant ships meeting the criteria for lawful military targets[250] – the vessel itself is the target, and there is no tradition of separating crew from vessel when assessing whether the vessel may be attacked, as is the case for land operations. Moreover, the rules on civilians directly participating in hostilities do not apply in operations that do not involve land.[251]

248 Danish Manual, above note 115, § 4.5.3.

249 2025 Norwegian Manual, above note 59, pp. 254–255, para. 11.38 (emphasis added):

> ll maktbruk må være militært nødvendig. I tillegg må angrep være rettet mot lovlige mål, og alle praktiske forholdsregler skal tas for å unngå eller minske utilsiktet skade på sivile personer og objekter. Selv om reglene stort sett er de samme, kan anvendelsen av dem by på andre utfordringer i maritime operasjoner enn for eksempel i landoperasjoner. I tillegg er det noen områder hvor krigføringsreglene for maritime operasjoner tradisjonelt og fortsatt er ulike de mer generelle landkrigsreglene. *Dette gjelder spesielt at det ikke er krav til å skille mellom fartøy og mannskap ved angrep på fartøy som er lovlige mål, uavhengig av om det for eksempel er sivile eller sårede om bord. I tillegg kommer reglene om siviles direkte deltakelse i fiendtligheter ikke til anvendelse i operasjoner som ikke involverer land* (se punkt 11.39).

English translation (via DeepL.com):

> Any use of force must be militarily necessary. In addition, attacks must be directed against lawful targets, and all feasible precautions must be taken to avoid or minimize incidental harm to civilians and civilian objects. Although the rules are largely the same, their application in maritime operations may present different challenges than, for example, in land operations. In addition, there are some areas where the rules of engagement for maritime operations have traditionally differed – and continue to differ – from the more general rules of land warfare. *This applies in particular to the fact that there is no requirement to distinguish between vessels and their crews when attacking vessels that are lawful targets, regardless of whether, for example, there are civilians or wounded persons on board. Furthermore, the rules regarding the direct participation of civilians in hostilities do not apply in operations that do not involve land* (see paragraph 11.39).

250 *Ibid.*, paras 11.39–11.40. Note that when referring to lawful military targets in the maritime domain, the Norwegian Manual references back to the general chapter on military objectives (Chap. 8). Specifically, paragraph 8.4 of the 2025 Manual, titled "Objects that Are Lawful Targets", outlines the military objective test drawn directly from Article 52 of AP I and customary IHL, without further elaboration.

251 *Ibid.*, para. 11.66 (emphasis added):

> Særlig om sivile besetningsmedlemmer på krigsskip
>
> …
>
> 11.66 Reglene om sivile personers tap av beskyttelse ved direkte deltakelse i fiendtligheter gjelder primært for angrep på mål på land eller andre operasjoner som påvirker sivilbefolkningen, sivile enkeltpersoner, eller sivile objekter på land. Videre er det ved angrep på fartøy ikke tradisjon for å skille mellom mannskap

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Accordingly, in Norway's view the status of persons on board the vessel, whether combatants or civilians or other non-combatants, is not relevant for assessing the legality of attacking the vessel.[252]

What remains unclear from the three examples above is whether these States regard the "vessel-based approach" as a matter of law, or merely as a matter of operational practice. In other words, is it a legal principle that persons and objects on board assume the status of the vessel, or is it instead a practical reality – for example, that the presence of civilians on a warship or auxiliary vessel is generally not treated as excessive in a proportionality assessment, and that few, if any, feasible precautions can be taken to avoid harming them?

Other national military manuals, however, appear to suggest a different approach. In the French Manual's section addressing restrictions on the conduct of hostilities specific to the maritime domain, the emphasis on the use of force is not just vessel-based but also on the protection of persons.[253] Meanwhile, the New Zealand Manual mandates that

> [n]o attack is to be made upon a civilian ship by a New Zealand force without the express authority of [the Chief of Defence Force]. If authority is given, the commander of the New Zealand force is to ensure that:
> a. at least one prior warning is given to the vessel,
> b. civilians who are not directly participating in hostilities are not deliberately targeted,
> c. the attack is conducted in a way to cause the least possible incidental civilian loss of life or injury and the least possible incidental damage to civilian property, and
> d. the attack is only conducted if the direct and concrete military advantage outweighs possible incidental civilian loss of life or injury and incidental damage to civilian property.[254]

> og fartøyet (se punkt 11.39). *Hvorvidt sivile besetningsmedlemmer utfører handlinger som utgjør direkte deltakelse i fiendtligheter er derfor mindre aktuelt mens de er på fartøyet og motstanderen ikke er i stand til å identifisere enkeltindivider.*

English translation (via DeepL.com):

> Specifically regarding civilian crew members on warships
> …
> 11.66 The rules regarding the loss of protection by civilians due to direct participation in hostilities apply primarily to attacks on land targets or other operations that affect the civilian population, individual civilians, or civilian objects on land. Furthermore, in attacks on vessels, there is no tradition of distinguishing between the crew and the vessel (see paragraph 11.39). *Whether civilian crew members perform acts constituting direct participation in hostilities is therefore less relevant while they are on the vessel and the adversary is unable to identify individual persons.*

252 *Ibid*., para. 11.40.

253 French Ministry of Armed Forces, *Manual of the Law of Military Operations*, Legal Affairs Directorate and Joint Defence Staff, 2022, § 1.2.2.1, p. 233.

254 New Zealand Manual, above note 115, para. 10.5.8.

Many State manuals consider passenger liners, specifically, as vessels exempt from attack "when engaged only in carrying civilian passengers"[255] and not when "being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refus[ing] to respond to the directions of the intercepting warship or military aircraft".[256] Regarding whether passengers on a passenger liner must be included in the proportionality analysis, the limited number of military manuals that address naval warfare are largely silent on the issue. At least one manual, however, appears to suggest that those passengers are relevant considerations:

> If a civilian passenger vessel constitutes a military objective and thus is liable to attack, any attack must comply with other applicable rules related to attacks.
>
> In particular, attacks against civilian passenger vessels engaged in passenger service must comply with the requirement that the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, must not be excessive in relation to the concrete and direct military advantage expected to be gained.[257]

It is also noteworthy that, in their commentary to Article 12(4) of AP I,[258] Bothe, Partsch and Solf argue that the principle of proportionality permits the targeting of a warship even if it contains a sickbay, notwithstanding the obligation to respect and protect medical units. This reasoning suggests that those authors did not adopt a strict vessel-based approach as a matter of law – at least not with respect to wounded and sick combatants. If people and objects aboard a vessel automatically assumed the vessel's legal status, there would be no need to invoke proportionality to justify incidental harm to a medical unit located on a warship.[259] As the authors explain, the principle of proportionality

> is not restricted to the question of the protection of the civilian population for which it has now been codified by Part IV of Protocol I. An obvious example that medical units cannot be exempted by law from suffering collateral damage is the existence of sickbays on men of war. If it were inadmissible to subject medical units to collateral damage, no attempt to sink a warship with a sickbay aboard would be permissible.[260]

The ICRC's 1987 Commentary on AP I acknowledged that "[a]t sea, civilians on board warships run the risks to which such ships are exposed. If they are on board

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255 See, for example, UK Manual, above note 34, p. 357, para. 13.33; New Zealand Manual, above note 115, para. 10.4.1(g).

256 US Commander's Handbook, above note 59, § 8.6.3.2, p. 8-14.

257 See US Manual, above note 195, § 13.5.2.1.

258 AP I, Art 12(4):

> Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

259 M. Bothe, K. J. Partsch and W. A. Solf, above note 65, p. 128.

260 *Ibid.*

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enemy merchant ships, their fate will depend on the nature of these vessels."[261] Relevantly though, the ICRC's recently updated Commentary on GC II clarifies the organization's view that the presence of not only civilians but also wounded, sick and/or shipwrecked persons on board vessels is still a relevant consideration for both proportionality and precautions in attack:

> Accordingly, the presence of wounded, sick or shipwrecked members of the armed forces in the vicinity of a military objective is to be taken into consideration when carrying out a proportionality assessment prior to an attack. In addition, and on the basis of the same rationale, an attacker must take all feasible precautions in relation not only to civilians but also to wounded, sick and/or shipwrecked members of the armed forces, to protect them from direct attack and collateral damage. *It may be difficult for the opponent to know whether an enemy warship also carries wounded and sick persons, unless that fact has been communicated. That difficulty, however, does not release a Party from its obligations to respect the rules on distinction, proportionality and precautions in attacks.*[262]

Meanwhile, the Newport Manual adopts the "vessel-based construct" model seemingly reflected in the Danish Manual, the Norwegian Manual and the US Commander's Handbook:

> The law of land warfare focuses on the regulation of the conduct of hostilities and on the protection of victims, civilians, and civilian objects. By contrast, the law of naval warfare is more concerned with the status of objects and platforms, such as ships and aircraft, and the regulation of the exercise of belligerent rights by or against those platforms. Moreover, the principles and rules on targeting at sea will predominantly apply to attacks against objects, that is, platforms such as ships and aircraft, not the individuals who are operating or otherwise on board the platforms.[263]

The Newport Manual authors then appear to subsequently clarify that proportionality applies only to surrounding civilian objects at sea and not to the persons or cargo on the intended targeted platform:

> As with other AP I targeting rules, Article 51(5)(b) is not applicable at sea even for States party to AP I. Nonetheless, the rule reflects customary international law that attacks on land and at sea must not be disproportionate. Applying the prohibition of excessive collateral damage at sea often involves different factual considerations than on land. In the case of targeting an enemy military objective at sea, the risk of collateral damage to surrounding civilian objects is unlikely or much lower than in a targeting action on land.

261 ICRC Commentary on the APs, above note 11, para. 1903.

262 ICRC Commentary on GC II, above note 26, para. 1403 (emphasis added).

263 Newport Manual, above note 14, p. 2.

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> Under the law of naval warfare, the crews or ship's companies of targetable enemy platforms (such as warships and auxiliaries) need not be subject to any proportionality assessment even where some or all of them are civilians. Nonetheless, naval commanders must still be reasonably satisfied that any attack they launch will not cause excessive collateral damage to civilian objects in the vicinity or injury to civilians external to the enemy warship.[264]

On this basis, the Newport Manual has little difficulty dealing with the question of enemy warships and auxiliaries (even if they have some civilian crew members). However, its consideration of proportionately does not squarely address the question of targeting a merchant vessel in all circumstances and finds that "[i]t is an unsettled issue whether the passengers on board a merchant vessel that is liable to attack must be taken into consideration in a collateral damage assessment".[265]

Issues requiring further State clarification on precautions and proportionality at sea

As regards attacks directed at or incidentally harming vessels at sea, the foregoing analysis reveals several unresolved questions concerning the interpretation and application of proportionality and precautions in attack:

- What is the correct legal standard governing precautions in naval operations – i.e., "all feasible precautions" or "all reasonable precautions" – and is there a meaningful legal or operational distinction between these formulations?
- Further, which precautionary measures derived from the traditional law of naval warfare or other legal regimes remain relevant to contemporary maritime operations, particularly in relation to merchant vessels?
- Specifically, how do States interpret and apply proportionality in attacks directed against merchant vessels? When are proportionality assessments required, and to what extent are they identical to, analogous with, or distinct from proportionality assessments on land or in other domains?
- Must proportionality assessments consider only civilian vessels and objects in the vicinity of the target, or must they also account for the civilian crew, passengers, other protected persons and cargo aboard the vessel itself?
- Is it legally correct to treat persons – whether civilians or other protected persons such as wounded, sick, shipwrecked or detained combatants – and objects aboard a vessel as automatically assuming the vessel's status as a matter of law? Or is the so-called vessel-based construct better understood as a matter of operational practice, reflecting practical realities, for example that civilians are

264 *Ibid.*, pp. 168–169.
265 *Ibid.*, p. 169.

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rarely present in large numbers on warships or auxiliary vessels, that such vessels often represent high-value military objectives during hostilities, and that in many cases few feasible precautions may be available to mitigate harm to those on board?

Clarifying protections for merchant ships in contemporary naval warfare

Transformation of the maritime domain

Since early naval warfare treaties, AP I and the 1994 San Remo Manual, significant developments have transformed the maritime domain. Today, naval combat reaches far beyond the waves, with operations extending into outer space, cyberspace and the electromagnetic spectrum. Navies can strike across vast distances with stealth and long-range weapons, operating in contested littorals where sea, air, land, cyber, and outer space converge. The threats are real and varied: unmanned maritime systems, aerial drones, precision missiles, swarming fast-attack craft, seabed warfare, naval mines. Naval warfare today is faster, more complex, and far more dangerous – and it is multi-domain by design.

Most naval warfare happens in international waters beyond the sovereignty of any single neutral State, but these spaces are far from empty; they are busy, crowded, alive with activity. Countless actors operate there every day, and most are neutral, completely unconnected to the fight. Moreover, today more than ever, the oceans remain a shared commons and their importance to all of us cannot be overstated.

When conflict erupts at sea, it affects far more than the belligerents. It touches trade, food, energy, communications, migration, leisure and a myriad of other global human activities. Tens of millions of people depend on the sea for food, whether through fishing or aquaculture, feeding millions more around the world. It powers our energy systems, from oil and gas to offshore wind and emerging green technologies. Our communications, too, run through the ocean, with almost all global data travelling via submarine cables. Beneath the waves lie rare metals essential to the technologies we use every day. The seas also support human mobility, both out of necessity and for leisure – some 20 million Americans cruise each year alone.[266] The ocean sustains life itself, producing roughly half the world's oxygen,[267] and of course facilitates global trade.

Few sectors are as exposed to global conflict as civilian shipping. For centuries, merchant vessels have borne the brunt of naval warfare, and civilian crews

266 Dori Saltzmann, "AAA Projects Record-Breaking Number of U.S. Cruisers in 2025, 2026", *Travel Market Report*, 21 October 2025, available at: www.travelmarketreport.com/cruises/articles/aaa-projects-record-breaking-number-of-u-s-cruisers-in-2025-2026.

267 National Ocean Service, National Oceanic and Atmospheric Administration, "How Much Oxygen Comes from the Ocean?", available at: https://oceanservice.noaa.gov/facts/ocean-oxygen.html.

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have often faced the highest risks. Merchant shipping today looks nothing like it did at the end of the Second World War. Global trade is now faster, deeply interconnected, and essential to everyday life in ways that the traditional law of naval warfare simply never imagined.[268]

Today, more than 80% of global trade by volume is transported via sea.[269] Modern shipping underpins the global economy, driven by innovations in containerization, specialized vessels and digital technologies. At the start of 2025, the global merchant fleet comprised around 112,500 vessels (including cargo- and non-cargo-carrying ships) of at least 100 gross tons registered in over 150 nations.[270] There were nearly 2 million merchant seafarers,[271] with several million more individuals working on fishing fleets.[272]

Concurrently, the nature of merchant shipping has evolved considerably: vessels, crews, ownership structures, flags and cargoes are now far more complex and less closely tied to any single nation-State. Civilian seafarers – frequently unconnected to any belligerent party – face increased risks of harm during military operations. In 1945, merchant ships were usually crewed and flagged by the same country, carrying cargo tied to that nation, whereas today, the world's largest container ship is Swiss-owned, Liberian-flagged, operated by a multinational crew, and can carry more than 24,000 standard 20-foot containers bound for markets across the globe.[273] Nearly three quarters of the global fleet sail under flags different from the nationality of their owners, making flag alone an unreliable way to distinguish enemy from neutral vessels.[274]

Warfare at sea deeply affects civilians on land. Given international trade's heavy dependence on maritime routes, even brief disruptions at critical maritime

268 See also Abby Zeith, "Waging Warfare at Sea: How Exceptional Is the Maritime Domain Today?" *Humanitarian Law and Policy Blog*, 10 February 2026, available at: https://blogs.icrc.org/law-and-policy/2026/02/10/waging-warfare-at-sea-how-exceptional-is-the-maritime-domain-today/; André Smit and Kelisiana Thynne, "The Humanity Compass: Navigating the Protection of Civilians in Naval Warfare", *Humanitarian Law and Policy Blog*, 28 October 2025, available at: https://blogs.icrc.org/law-and-policy/2025/10/28/the-humanity-compass-navigating-the-protection-of-civilians-in-naval-warfare/.

269 United Nations Conference on Trade and Development (UNCTAD), "Maritime Trade under Pressure – Growth Set to Stall in 2025", 24 September 2025, available at: https://unctad.org/news/maritime-trade-under-pressure-growth-set-stall-2025.

270 UNCTAD, "Maritime and Other Transport: Data Insights", *UNCTAD Data Hub*, 2025, available at: https://unctadstat.unctad.org/insights/theme/243.

271 International Chamber of Shipping, "Shipping and World Trade: Global Supply and Demand for Seafarers", available at: www.ics-shipping.org/shipping-fact/shipping-and-world-trade-global-supply-and-demand-for-seafarers/.

272 United Nations Food and Agriculture Organization, *The State of the World's Fisheries and Aquaculture 2022: Towards Blue Transformation*, Rome, 2022, available at: https://openknowledge.fao.org/items/11a4abd8-4e09-4bef-9c12-900fb4605a02.

273 Peter Nilson, "The Top 10 Largest Container Ships in the World", *Ship Technology*, 4 April 2024, available at: www.ship-technology.com/features/the-top-10-largest-container-ships-in-the-world/.

274 UNCTAD, *2025 Review of Maritime Transport: Staying the Course in Turbulent Waters*, Geneva, 2025, p. 52, Table II.3, available at: https://unctad.org/system/files/official-document/rmt2025_en.pdf; UNCTAD, *2024 Review of Maritime Transport: Navigating Maritime Chokepoints*, Geneva, 2024, p. 50, available at: https://unctad.org/system/files/official-document/rmt2024ch2_en.pdf.

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choke points can have profound consequences globally. Accordingly, maintaining open sea lines of communication remains essential to ensure the uninterrupted delivery of food and other essential goods to civilian populations – yet modern means and methods of naval warfare make safe passage harder than ever. Conflict at sea is truly multidimensional: merchant ships can be targeted at long range with increased precision and destructive force, while tactics involving deception, signature management and interference with navigation put civilian mariners at risk, leaving global commerce hanging in the balance.

At the heart of this are ordinary seafarers – the people who keep the world moving yet remain largely invisible. Every missile, drone, naval mine or voyage carrying risky cargo puts their lives at risk. Front lines cut through shipping routes and ports, leading to longer voyages or crews trapped in ports, increased dangers, and the constant strain of navigating war zones – all to sustain the supply chains on which civilians on land depend.

Setting aside the legal and moral debates over the acceptability of such conduct today,[275] even if economic warfare at sea were to re-emerge on the scale seen in past conflicts, future naval campaigns would be radically different. The sheer scale and configuration of modern container ships would seem to make searches for contraband impossible once the vessels are at sea,[276] and with long-range weapons, stealth, and unmanned systems, measures to ensure respect for the law – built for another era – must be carefully adapted to uphold the protection that the law offers to merchant ships and seafarers in the reality of the modern maritime domain.

Yet, even as the need to ensure both legal and practical protection for merchant vessels becomes increasingly vital, such considerations must be viewed in the context of long-standing practice. Historically, warring parties have relied on merchant shipping to sustain military operations, primarily for transport, logistical support and at times direct participation in hostilities, but also for the conduct of search and rescue.[277] These are practices that are all likely to persist in future conflicts at sea, particularly those at scale.[278]

The challenge, therefore, is to ensure the protection of merchant vessels and their cargo, crews and passengers – and the populations that depend upon them – while contending with the harsh realities of modern naval warfare.

275 See, for example, Andrew Clapham, "Booty, Bounty, Blockade and Prize: Time to Reevaluate the Law", *International Law Studies*, Vol. 97, 2021, available at: https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2984&context=ils; and see the interview with Andrew Clapham in this issue of the *Review*: "Prize Law: Unjustifiable in the Twenty-First Century? Interview with Professor Andrew Clapham", *International Review of the Red Cross*, Vol. 108, No. 931, 2026.

276 Steven Haines, "War at Sea: Nineteenth-Century Laws for Twenty-First Century Wars?", *International Review of the Red Cross*, Vol. 98, No. 2, 2016, available at: https://international-review.icrc.org/sites/default/files/irc98_4.pdf.

277 See, for example, R. McLaughlin, above note 19.

278 See Abby Zeith and Lakmini Seneviratne, "Reducing the Human Cost of Large-Scale Military Operations", in D. Guilfoyle and J. Maddocks (eds), above note 19.

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The need to integrate carefully humanitarian protections into modern restatements of the international law applicable to armed conflict at sea

Modern restatements of the law applicable to armed conflict at sea have increasingly incorporated the standards, civilian protections, and framework for targeting applicable to land warfare, including the use of "military objective" terminology found in Article 52(2) of AP I. This incorporation persists notwithstanding the interpretive uncertainty surrounding the application of Article 49(3)–(4) of AP I in modern conflicts, and despite the continued recognition of traditional belligerent rights exercisable at sea which are not always easily reconcilable with AP I rules.

As has been demonstrated in this article, the traditional law of naval warfare was focused principally upon capturing enemy and neutral merchant ships. While the traditional law allowed belligerents a qualified right to attack such vessels, the circumstances were narrow and required very direct integration into the opposing belligerent's warfighting capacity. The right to use force to stop (and possibly ultimately sink) vessels whose conduct fell within qualified forms of resistance to visit and search or breaching a blockade was based upon an escalation of force, hence giving fair warning and opportunity for the merchant ship to submit to capture.

In addition, the requirement in Article 57(4) of AP I to "take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects" in the conduct of military operations at sea has not found very expansive definition in State military manuals. Although it has been suggested the "reasonable precautions" standard in the context of attacks at sea should theoretically be less stringent than the "feasible precautions" standard on land, numerous States, the ICRC and various scholars today assert that the same land-based standard reflected in Article 57 simply applies in all contexts. Even those who consider that a different standard applies have not clarified what such a different standard would mean in practice.

Some questions remain about the operation of proportionality requirements when directing attacks against vessels, and in particular the regard that must be given to non-combatant individuals and civilian objects on board when a vessel qualifies as a lawful target. When it comes to factoring in persons on board a vessel that is to be attacked (perhaps in circumstances where a commander has "particular information" as to the passengers onboard), it would seem that Article 49(4) would have some application, though there is little discussion of this in State military manuals.

The divergent path between the traditional law of naval warfare and land-based IHL is a function of the historical development of the law of naval warfare, but is also said to reflect the realities of fighting at sea and the economic warfare aspect of the law of naval warfare. In line with the development of IHL since the Second World War, the contemporary law of naval warfare ought to reflect a more humanitarian perspective and a lower level of tolerance to civilian harm. However, as has been argued in this paper, this must be done in a clear way which is capable of consistent, practical operation.

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