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Active Resistance by Merchant Vessel Crews During International Armed Conflict is Not “Direct Participation in Hostilities”

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I. INTRODUCTION

Two decades of interpretive and operational grappling with the key law of armed conflict (LOAC) concept of civilians directly participating in hostilities (CDPH¹) has, in general, biased LOAC practitioners and scholars to assume that in dealing with maritime instances of conduct that would be characterizable as CDPH activity on land, we should follow the same analytical path at sea.² In addressing how to characterize the civilians in the *Mavi Marmara* in terms of LOAC applicable in international armed conflict at sea (the law of naval warfare—LoNW), for example, the Palmer Report agreed that the status of those detained in the operation properly “depends on their nationality, their function on board the captured ship and their personal involvement in hostilities during the enforcement of the blockade by the belligerent.”³ Both the Palmer Report and the International Criminal Court Office of the Prosecutor (ICC OTP) noted that the Turkel Commission had found that the participants in the flotilla were predominantly civilians, although both the Captain of the *Mavi Marmara* and the group who participated in the violence “were civilians taking a direct part in hostilities and therefore subject to targeting.”⁴ The ICC OTP likewise employed the CDPH

1. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 12 (2009) [hereinafter INTERPRETIVE GUIDANCE] (“Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations”); Rob McLaughlin, *Organised Armed Groups and Direct Participation in Hostilities*, in MILITARY LAW IN AUSTRALIA 190, 190–200 (Robin Creyke et al. eds., 2019).

2. See, e.g., Anthony Erman, *The Concept of Direct Participation in Hostilities in Naval Warfare*, in THE LAW OF NAVAL WARFARE 111, 113, 118–20, 122–26 (Dale Stephens & Matthew Stubbs eds., 2019) (although, as Erman observes, “Even if one accepts that the DPH rule is of equal application in naval warfare as it is in land (and air) warfare, it is clear that the content of the DPH Rule, outside of very straight-forward examples, can present substantial ambiguities. It is also fair to say that some of these ambiguities are unique to, and exacerbated by, the maritime domain.” *Id.* at 125).

3. Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident 96 (Sept. 2011), https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2235.pdf [hereinafter Palmer Report].

4. International Criminal Court Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report ¶ 45 (Nov. 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf); See also Palmer Report, *supra* note 3, at 34; 1 JACOB TURKEL ET AL., THE PUBLIC

assessment criteria, but ultimately concluded that: “Based on the information available, it does not appear that the passengers’ resistance to the [Israel Defense Forces] interception and boarding of the vessel amounts to taking a direct part in hostilities so as to deprive those particular passengers of their protected civilian status.”⁵

However, even this very general entertainment of the potential application of CDPH at sea is problematic, for as the history of the LoNW clearly attests, there are no “francs tireurs”⁶ amongst merchant mariner crews at sea.⁷ As J. A. Hall specifically observed in his second edition (1921) of *The Law of Naval Warfare*:

if the ship, in which the captured persons were serving, was a fleet-auxiliary or acting as such, as a transport or collier for the fleet, or resisted capture, or otherwise took part in hostilities, the officers and crew, whatever their nationality, are entitled to no greater privileges than those of ordinary prisoners of war; and the same must certainly apply in the case of defensively armed merchant ships, since they are intended to offer forcible resistance to capture, and in so doing undoubtedly take part in hostilities.⁸

And although Hall’s book was criticized at the time for not being sufficiently precise on matters associated with targeting undersea telegraph cables and infection of neutral goods by contraband where both are the property of the same owner,⁹ there was no demurrer from the validity of his assertion as to the status of resisting merchant mariner crews. Hall simply confirmed the orthodoxy that when (civilian) merchant mariner crews engage in hostilities at sea, they are to be treated upon capture in accordance with the prisoner of war (PW) regime and afforded a facsimile of combatant immunity

COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ¶¶ 195, 234, 239, 255 (2011), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf [hereinafter TURKEL REPORT].

5. International Criminal Court Office of the Prosecutor, *supra* note 4, ¶ 49.

6. “Free shooters,” a term that gained currency during the Franco-Prussian War of 1870–1871 for civilians not part of a *levée en masse* who carried out attacks against enemy military forces. See Bastian Scianna, *A Predisposition to Brutality?*, 30 SMALL WARS & INSURGENCIES 968, 969 (2019).

7. Noting, however, that hostilities by passengers are a different proposition and may be captured by a CDPH characterization. See *infra* Section IV(A).

8. J. A. HALL, *THE LAW OF NAVAL WARFARE* 123 (2d ed. 1921).

9. C. J. Colombos, *The Law of Naval Warfare*, 3 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW 357 (1921) (reviewing J. A. HALL, *THE LAW OF NAVAL WARFARE* (2d ed. 1921)).

for that conduct.¹⁰ That is, civilian merchant mariner crews directly participating in hostilities at sea are not liable to criminal prosecution for conduct otherwise compliant with the LoNW, in stark distinction from the way that CDPH ashore are liable to prosecution.

The muddling or non-recognition of LoNW rule exceptionalism on this matter is in part due to the fact that the LoNW has generally been the subject of intensely perishable attention. Lamenting the quick forgetfulness of States when a body of law is temporarily pushed from currency, Thomas Baty (in 1916) declared of knowledge of the LoNW at the fin de siècle: “Then came the Russo-Japanese War of 1904–5. It found an ignorant world, which had forgotten its rights.”¹¹

Yet despite a series of recent incidents and contexts where the application of the LoNW has been posited and indeed practiced—the sinking of the ROKS *Cheonan* in 2010,¹² the Gaza blockade and 2010 boarding of the *Mavi Marmara*,¹³ Libyan operations in 2011,¹⁴ and the Kerch Strait incident in 2018,¹⁵ to name a few—perhaps not much has changed; but it should. Operationalizing the “vessel first” status-based approach that underpins the LoNW requires conscious recognition—and placing to one side—of the interpretive and application biases that the past several decades of intensive land and air based LOAC-governed operations have bequeathed. The domain-based, specialized, and, in many respects, unique law that applies to naval warfare may appear archaic, but it is nevertheless operative. And some

10. See, e.g., Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 13(5), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II].

11. Thomas Baty, *Naval Warfare: Law and License*, 10 AMERICAN JOURNAL OF INTERNATIONAL LAW 42, 44 (1916).

12. International Criminal Court, Office of the Prosecutor, Situation in the Republic of Korea: Article 5 Report (June 2014).

13. Palmer Report, *supra* note 3; TURKEL REPORT, *supra* note 4.

14. Although, as with the second Gulf War in 2003, the application of the LoNW in relation to the Libya operation in 2011 was overlaid by a UN Chapter VII maritime sanctions enforcement authority. See MARTIN FINK, MARITIME INTERCEPTION AND THE LAW OF NAVAL OPERATIONS 41–42, 86 (2018); Martin Fink, *UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector*, 50 MILITARY LAW AND LAW OF WAR REVIEW 237 (2011).

15. Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), ITLOS Case No. 26, Order (May 25, 2019); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017–06, Award Concerning the Preliminary Objections of the Russian Federation (Perm. Ct. Arb. Feb. 21, 2020).

of its rules indicate real legal differences with LOAC applicable ashore. These differences hold concrete legal consequences for *jus in bello* at sea—the lawfulness of the false flag ruse,¹⁶ permissions in relation to private property,¹⁷ and the inapplicability of the CDPH construct to merchant mariner

16. See, e.g., International Committee of the Red Cross, Customary IHL, Rule 62, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule62 (last visited Apr. 13, 2022). The commentary to Rule 62 says “Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited.” It then notes the counter-vailing *lex specialis* rule applicable in LoNW: “Several manuals indicate that naval forces may fly enemy colours to deceive the enemy but must display their true colours prior to an actual armed engagement.” However, in relation to Rule 63 (“Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited”), the commentary is silent on the LoNW exception. Nonetheless, some national doctrine publications specifically recognize this exception as applicable to false flags generally—neutral or enemy—so long as the correct battle ensign is hoisted prior to engagement. See, e.g., NORWEGIAN MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 9.5, 9.27–9.28 (2013); NEW ZEALAND DEFENCE FORCE, DM 69 2d ed., 4 MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT ¶ 8.9.15 (2019) (“A warship may fly the flag of the opposing force or a neutral state to disguise its nationality provided that it displays its true colours before attack. The practical advantage of false flags is now greatly diminished as identification of warships based on the flag alone is now unlikely. Electronic support measures enable shore- and sea-based assets to identify targets at great distance.”). See also the list of traditional authorities cited in Chief of the Defense Force Commission of Inquiry, *The Loss of HMAS Sydney II: Vol I—Evidence and Conclusions* ¶¶ 1.19 (July 2009), <https://www.defence.gov.au/sydneyii/finalreport/> (Austl.).

17. There have been calls for reform to this aspect of LoNW rule-exceptionalism. See, e.g., Andrew Clapham, *Booty, Bounty, Blockade, and Prize: Time to Re-evaluate the Law*, 97 INTERNATIONAL LAW STUDIES 1200, 1263 (2021) (“recall that there is no right for a belligerent to capture on land private property belonging to enemy nationals. The time has come to reject the idea that enemy commercial maritime traffic is so essential to winning the war that it should be not only seized, but also condemned and permanently acquired by the seizing State.”). Nevertheless, that is not the *lex lata*, which is reflected in the following assertions from John Pomeroy and L. F. E. Goldie as to the applicable rule:

Undoubtedly private property is not so systematically taken and confiscated on land as on the sea. For this there are two reasons, the first found in considerations of policy, and the second in the nature of the element itself. The cruisers of a belligerent freely sail over the sea, meeting no obstacle, except an occasional hostile man-of-war; their course is open; they are invading no enemy soil.

John Pomeroy, *The Law of Maritime Warfare, as It Affects the Belligerents*, 114 NORTH AMERICAN REVIEW 376, 394 (1872).

In Anglo-American treatises on the laws of war, booty is limited to war matériel and resources of military use that are captured on the battlefield on land, or are publicly owned

crews being but three examples. At a time when the potential for significant international armed conflict at sea is perhaps more heightened than at any time since 2003,¹⁸ it is vital that lessons learned from shore-focused LOAC-based operations over the last twenty years should not be inappropriately applied to operations at sea. Of these inappropriate lessons, the assumed applicability of the CDPH construct at sea is arguably the most fundamental and problematic.

This article explores the reasons for, and consequences of, this particular instance of LoNW rule-exceptionalism in relation to status allocation within the broader regime of LOAC. The aim is to reinforce the orthodoxy in respect of enemy merchant mariner crews, but also to reach some clarity as regards the two “hard” cases that attend this rule exceptionalism: neutral merchant mariner crews in neutral merchant vessels that actively resist or conduct hostilities and civilian passengers in both enemy and neutral merchant vessels who actively resist or conduct hostilities. To this end, Part II outlines some essential contextual and historical background as to why the risk of misapplication of general LOAC appreciations as to CDPH carries actual risk and is more than merely a concern as to methodological purity and interpretive fidelity. Following this, Part III provides a short assessment of the current state of the applicable law, emphasizing that the rule-exceptionalism of the LoNW in relation to the status of actively resisting merchant mariner crews has not in general been overtaken by post-1949 developments in LOAC. This is nowhere more clearly evident than in the rule-set concerning the entitlement to PW status of enemy merchant mariners in ships that resist belligerent rights, or even engage in hostilities. With these fundamental elements of background and context thus established, Part IV then provides analysis of the two “hard” cases of distinction where the application of the

property in occupied territory and so are acquired in the course of land warfare. In the context of maritime warfare, there are two categories of property rights in captured enemy ships. Neither of these, in Anglo-American usage, carries any appellation of “booty.”

L. F. E. Goldie, *The Gladisch Committee on the Law of Naval Warfare: A German Effort to Develop International Law During World War II*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 746, 747 (1991) (book review) (footnote omitted).

18. As Dale Stephens and Matt Stubbs have observed: “Clearly articulating the rules of international law applicable to naval conflict is more relevant now than in living memory, with rising naval tensions in the South China Sea constantly in the news, and great power naval rivalries brewing in both the Indian and Pacific Oceans.” Dale Stephens & Matthew Stubbs, *The Law of Naval Warfare—Timeless Rules, Modern Challenges*, in THE LAW OF NAVAL WARFARE 1 (Dale Stephens & Matthew Stubbs eds., 2019).

CDPH concept at sea has been perhaps less clear: resisting or hostile neutral merchant mariners in neutral merchant vessels and resisting or hostile passengers. Part V concludes.

II. BACKGROUND

In order to reach a conclusion as to the hard cases regarding status allocations for actively resisting civilian passengers in both enemy and neutral merchant vessels, and actively resisting neutral merchant mariner crews in neutral merchant vessels, it is necessary to examine three elements of contextual background. These elements seek to explain why there is real risk in getting the answers to these questions wrong. The first background question to ask is whether, and why, this is a question of relevance for today; the second is to ask whether the need to make these distinctions is one that will, as a practical matter, ever potentially arise; and the third is to recount an iconic instance—the trial of Captain Fryatt—where ignoring this rule-exceptionalism as to the status to be afforded merchant mariner crews manifested in extreme consequences—Captain Fryatt’s execution—followed by outcry and clear reaffirmation of the orthodox rule.

A. *Why is This an Issue?*

Any discussion of the legitimacy of rule-exceptionalism in the LoNW must begin from the simple fact that the methodology for determining LOAC status at sea is not identical to that applied in LOAC ashore. As a result, operationalizing the LoNW’s contextualized rule nuance is essential so that “shore”-based interpretations of critical LOAC concepts such as CDPH do not inappropriately colonize the LoNW. There are three reasons this fundamental difference in methodology between the LOAC applicable at sea and the LOAC applicable on land casts such a long shadow over LoNW interpretation and application of status to civilian conduct.

The first reason for this difference in approach is that the LoNW is concerned prima facie with the conduct and status of platforms rather than people. In the *Report of the Committee of Examination on Crews of Enemy Merchant Ships Captured by a Belligerent*, delivered to a plenary session of the 1907 Hague Conference, it was reaffirmed that:

In present international practice, the men, the officers, and the captain composing the crew of a captured enemy merchant ship are treated as

prisoners of war. *The right of capture is, in a manner, applied to the crew as well as to the ship itself*, often without endeavouring to distinguish between neutral subjects and enemy subjects.¹⁹

This means that merchant mariners are generally tarred with the status brush of their vessel, as opposed to their status being determined based on their individually attributed conduct. Or put another way, merchant mariners share the rights and liabilities that attend their vessel's status. For example, a belligerent auxiliary vessel is generally commanded and crewed by civilian mariners, although some auxiliaries carry detachments of armed forces personnel for specific tasks such as operating specialized communications and cryptological equipment.²⁰ However, because an auxiliary vessel is *ab initio* a military objective in the same way that a warship is a military objective,²¹ the civilian crew in that auxiliary share the liability to capture and attack that their platform's status brings. The civilian crew are not considered collateral damage—while embarked they are targetable with, and share the fate of, their ship just as a naval crew would.

The second reason for this difference is the practical policy concerns that originally animated the evolution of the legal rule that *enemy* merchant vessel crews that fall into the hands of the adversary are not beholden to any CDPH typology or consequences, because treating these crews as PW is sufficient to achieve the traditional underpinning State interest. At first the concern

19. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, 3 THE CONFERENCE OF 1907, at 1012 (James Scott Brown et al. eds., 1921) [hereinafter PROCEEDINGS OF THE HAGUE PEACE CONFERENCES].

20. For example, *USNS Bowditch* is a U.S. Military Sealift Command auxiliary vessel with a civilian mariner crew of twenty-four and a military crew of twenty-seven. Military Sealift Command, Oceanographic Survey Ships, <https://www.msc.usff.navy.mil/Ships/Ship-Inventory/Oceanographic-Survey-Ship/> (last visited Apr. 11, 2022). *USNS Bowditch* was involved in the December 2016 South China Sea incident where one of its autonomous gliders (an underwater hydrographic and oceanographic data collection system) was taken from the water by a Chinese Navy vessel. Julian Borger, *Chinese Warship Seizes US Underwater Drone in International Waters*, THE GUARDIAN (last modified Nov. 28, 2017), <https://www.theguardian.com/world/2016/dec/16/china-seizes-us-underwater-drone-south-china-sea>. The glider—which is sovereign immune U.S. equipment—was returned by China a few days later. Mark Katkov, *China Returns US Navy Drone Seized in South China Sea*, NATIONAL PUBLIC RADIO (Dec. 20, 2016), <https://www.npr.org/sections/thetwo-way/2016/12/20/506256081/china-returns-u-s-navy-drone-seized-in-south-china-sea>.

21. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA r. 40, 65 (Louise Doswald Beck ed., 1995); U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDT PUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.2.5 (2017).

was, in short, to permit “the capturing belligerent to weaken the power of the enemy by depriving him of effective forces intended, more or less, to serve on war-ships.”²² As R. G. Marsden observed in 1909: “The records throw little light upon the treatment which prisoners captured in prizes received. . . . Prisoners brought to England were not to be set at liberty, for fear of their furnishing information to the enemy.”²³ The right to treat enemy merchant mariners as PW—who could then be held until the conclusion of the hostilities—was thus not simply about the quirks and reciprocity of maritime custom; it also had the important practical strategic purpose of reducing the adversary’s access to a vital national wartime resource: seafarers. Indeed, in his analysis of the diplomatic negotiations preceding the 1856 Paris Declaration, C. I. Hamilton describes how Palmerston wondered whether enemy merchant mariners could simply be declared “contraband,” seized, and detained indefinitely, so as to remove them from the enemy’s arsenal.²⁴ Furthermore, this interest remained adequately served by allocation of PW status even where the enemy merchant vessel resisted belligerent visit and search, diversion, capture, or attack. There was no need to resort to criminal prosecution of such conduct, and consequently there were (and remain) no *francs tireurs* (today, CDPH) amongst enemy merchant vessel crews. They are entitled to PW status even though they are—on a land-based LOAC view—civilians who engage in hostilities against the enemy warships seeking to interdict them.

This position is of long provenance. In 1854, during the Crimean War, the Queen of the United Kingdom and the King of France issued combined *Instructions to the Commanders of Ships of War*.²⁵ The instructions clearly expressed the position:

Art. VI. You are not to consider as prisoners of war, and you will give free permission to land, to all women, children, and persons not belonging

22. PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, *supra* note 19, at 1012.

23. R. G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 24 ENGLISH HISTORICAL REVIEW 675, 697 (1909).

24. C. I. Hamilton, *Anglo-French Seapower and the Declaration of Paris*, 4 INTERNATIONAL HISTORY REVIEW 166, 186–87 (1982).

25. Instructions to the Commanders of Ships of War belonging to Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and to His Majesty the Emperor of the French, Annex to the Convention between Great Britain and France signed at London, May 10, 1854, *reprinted in* THOMAS E. HOLLAND, A MANUAL OF NAVAL PRIZE LAW 123 (1888) (these instructions were related to the UK-France Declaration to the Neutrals).

to the military or maritime profession who shall be found on board the captured vessels.

...

You will treat as prisoners of war all persons whatever who may be found on board the Enemy's vessels, with the [above] exceptions.²⁶

The infamous First World War trial of Captain Charles Fryatt is the iconic case on point. Charles Fryatt was a British merchant marine captain who followed British Admiralty instructions to merchant vessels to ram German U-boats if the opportunity arose. He was captured by the Germans, tried for war crimes, and executed (this case is discussed in Section II(C) below). Fryatt's trial ruptured the accepted LoNW rule-set and generated significant outcry precisely because it was such a clear abrogation of the long-standing rule that captured enemy merchant mariners be treated as PW, even if their ship had resisted belligerent operations or taken part in hostilities. Indeed, the innovation introduced in 1907 Hague (XI) Articles 5–8—allowing parole for enemy merchant mariners and neutral merchant mariners serving in enemy merchant vessels, as an alternative to internment as a PW—is expressly stated as applying only if their merchant vessel *did not* take part in hostilities. That is, if their merchant vessel *did* take part in hostilities, then this innovative option of parole would be forfeited and the normal status of PW would continue to be applied. We will return to this in Section III(B) below in terms of the continued application of this special rule to civilian merchant marine crews that actively resist the exercise of belligerent rights by the enemy.

The second concern served by crystalizing this difference in treatment of actively resisting enemy merchant mariner civilians at sea as compared with francs tireurs ashore—that is, as PW, not CDPH—was to give some effect to a longstanding empathy for the deleterious position of enemy merchant mariners. The argument—reiterated during the 1907 Hague Convention—runs along the following lines: Merchant mariners have to go to sea in ships to earn their living—that is their trade. During war, States often compel civilian merchant mariners to continue serving at sea in the merchant marine as they provide a critical national capability. When at sea during armed conflict, these crews are liable to capture and attack on account of their vessels and cargo, as opposed to anything they individually do. (Indeed, as a point of comparison, it has been estimated that during the Second World War,

26. *Id.* at 125. See also Hamilton, *supra* note 24, at 167.

“the chance of being killed was four times greater in the merchant marine than in the armed forces.”²⁷) Consequently, their participation in hostilities and exposure to the high likelihood of death at sea was not really a matter of choice in the way that is for francs tireurs ashore. Therefore, the adversary ought to treat them to some extent as pressed rather than condemnable civilians. Consequently, they are entitled, as a minimum, to PW status even where their ship has resisted belligerent interdiction, and if their ship has not resisted, then the option of repatriation may be available—so long as they undertake not to serve at sea in vessels supporting military operations for the rest of the war. If paroled and repatriated, these merchant mariners should be allowed to continue serving at sea to earn a living—as this is their trade—but it must be in fishing vessels, search and rescue vessels, humanitarian vessels, and other vessels that do not contribute to belligerent military operations. Consequently, it was improper to ask paroled enemy merchant seamen to pledge not to serve in an enemy hull, but it was acceptable to seek a pledge not to serve in enemy belligerent forces.²⁸ This practice was extensively employed by the United States during its neutrality in the First World War, although its liability to abuse was a matter of diplomatic concern and correspondence between the United States and German governments at the time.²⁹

The third reason for this difference is the “comparative antiquity” of, and “penury of binding legal instruments”³⁰ that underpins some LoNW rule-exceptionalism. As Steven Haines has observed, most LoNW treaty law emerged between 1856 (the Paris Declaration) and 1936 (the London Protocol on Submarine Warfare), with the bulk of the instrumental law being settled at the Hague Conference of 1907.³¹ Consequently, there is a recurrent modern risk—which the transferral of general LOAC conceptions of CDPH into LoNW indicates—that this historically nuanced rule set will be perceived as archaic and unfit for modern purposes. As Haines continues, the danger is that some rule-exceptional elements of the LoNW “will, as a

27. Allan Arnold, Book Review, 2 *INTERNATIONAL JOURNAL OF MARITIME HISTORY* 286 (1990) (reviewing CHARLES DANA GIBSON, *MERCHANTMAN? OR SHIP OF WAR* (1986)).

28. *PROCEEDINGS OF THE HAGUE PEACE CONFERENCES*, *supra* note 19, at 947–48.

29. James Brown Scott, *The Escape of Paroled Members of the Crews of Interned Cruisers in the United States*, 10 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 877, 879–82 (1916).

30. GEORGE POLITAKIS, *MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY* 9 (1988).

31. Steven Haines, *War at Sea: Nineteenth-Century Laws for Twenty-First Century Wars?*, 98 *INTERNATIONAL REVIEW OF THE RED CROSS* 419, 433–34 (2016).

consequence, simply be ignored and brought into disrepute,” thereby introducing “a serious risk that the entire body of that law could be undermined.”³²

There has, of course, been significant progress in this vital adaptation project, of which the 1995 San Remo Manual is perhaps the most important exemplar.³³ However, as the San Remo Manual itself proves, the LoNW’s rule- and source-antiquity continues to cast a long shadow, with some scholars still concerned that the need for additional progressive development of the LoNW remains pressing.³⁴ Nevertheless, the law is the law and looking forward with respect to evolving LoNW challenges, States, scholars, and commanders need to avoid the understandable instinctive, but domain-insensitive, tendency to first look sideways to more modern shore-based interpretations and concepts. Instead, it is necessary to first look backwards in order to see what has been forgotten within the LoNW lane, in order to proceed on the basis of old, but well-developed LoNW, rather than seek to apply sometimes ill-suited land-centric LOAC concepts and approaches. Indeed, as the examples and issues below illustrate, looking sideways (to the LOAC on land) rather than backwards to the LoNW for inspiration will likely exacerbate confusion. Attempting to understand ships and other unique aspects of LoNW status assessment with a terrestrially informed approach to LOAC can lead to mistakes in interpretation and application. Where this occurs, the inevitable outcome is greater operational confusion and dissent rather than clarity.

B. *The Challenge of Correlate Acts, But Different Characterizations*

Thus far, the argument has focused on why—as a matter of law—it is important to avoid in the LoNW the ostensibly obvious (and admittedly seductive) wider analogy to CDPH on land, including the much-debated and unresolved challenge of the “revolving door” that accompanies this debate

32. *Id.* at 440.

33. See, e.g., Wolff Heintschel von Heinegg, *The San Remo Manual—History, Methodology and Future Application*, in *THE LAW OF NAVAL WARFARE* 11 (Dale Stephens & Matthew Stubbs eds., 2019).

34. Haines, *supra* note 31, at 446 (“The result today, however, is that the rules reflected in the [San Remo Manual], in looking backwards to the past rather than at the present or even the future, now risk being ignored or even held in contempt if they prove unworkable when needed most. That would be most unfortunate.”); David Letts, *International Law and Armed Conflicts at Sea: The San Remo Manual—Now is the Time for a LOTE!*, 1 AUSTRALIAN NAVAL REVIEW 57 (2020).

ashore.³⁵ The next question, consequently, is whether there is really any actual overlap in terms of discrete conduct at sea and ashore, such that the maintenance of this rule-exceptionalism is a practical rather than merely theoretical necessity. First, LoNW indicators of merchant vessel delinquency or auxiliary conduct are not in all cases readily assimilable to indicators of CDPH conduct as employed ashore. At sea, for example, refusing to heave-to when approached by a warship for visit and search to check for contraband goods can render a merchant vessel liable to attack.³⁶ There is no contraband regime ashore. Simply being in possession of goods susceptible to military use in a terrestrial area of operations does not mean a belligerent may seek to seize them with a view to condemning them in prize to his or her own use, and treat the civilian carrying them as liable to attack if they refuse to stop and hand them over.³⁷

Similarly, merely being in a vehicle convoy that is under the direction and protection of the adversary's military force is not a sufficient basis to attack civilian vehicles. However, merely sailing under enemy convoy—regardless of whether the vessel is carrying contraband or military materials—is sufficient to render a merchant vessel liable to attack.³⁸ Attempting to breach a blockade also renders a merchant vessel liable to attack; not on the basis of self-defense, but simply because this is a positive LoNW attack authorization. By contrast, attempting to run a checkpoint ashore may create suspicions as to CDPH status, but is as equally likely to be dealt with as an incident of immediate personal or unit self-defence.³⁹ The iconic case in point as to the human risk of inappropriate colonization of a specialist LoNW rule by a

35. INTERPRETIVE GUIDANCE, *supra* note 1, at 70 (“the ‘revolving door’ of civilian protection is an integral part, not a malfunction, of IHL”).

36. SAN REMO MANUAL, *supra* note 21, r. 60(g) (“otherwise making an effective contribution to military action, e.g., carrying military materials”).

37. Indeed, the rules around dealing with private property at sea and ashore are quite different.

38. SAN REMO MANUAL, *supra* note 21, r. 60(d) (“sailing under convoy of enemy warships or military aircraft”).

39. *See, e.g.*, Jaloud v. Netherlands, App. No. 47708/08, Judgment, 2014-VI EUR. CT. H.R. 229, ¶ 44 (Nov. 20, 2014); Erica Gaston, *Soldier Self-Defense Symposium: The View from the Ground—Emerging State Practice on Individual and Unit Self-Defense*, OPINIO JURIS (May 2, 2019), <http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/>.

more general LOAC sensibility, as noted above, is the German trial and execution of Charles Fryatt during the First World War.⁴⁰

C. *The Case of Captain Fryatt*

Charles Fryatt—a merchant mariner and master of the British merchant vessel *SS Brussels*—was captured, tried, and executed by the German Navy in 1916. His offence was that on March 20, 1915 (and in accordance with British Admiralty instructions to merchant masters⁴¹), he attempted to ram a German U-boat as it sought to stop and capture his vessel. He was convicted of being, in essence, a *francs tireur* at sea. James Brown Scott, commenting at the time upon this case, specifically noted that Hans Wehberg’s contemporary treatise on the *Law of Maritime Warfare* (1915) “calls attention to the differences between the laws of land and maritime warfare, and states the confusion which results if they be not kept separate and distinct.”⁴² In particular, Scott continues, Wehberg “illustrates this point by saying that it would be unjustifiable to say that armed resistance by non-combatants was excluded in maritime warfare because it was not permitted in land warfare.”⁴³ In “rejecting the applicability of the principles of land warfare to naval warfare,” Scott observed, Wehberg simply “reprobate[ed] the tendency of theorists to decide special cases by general principles to which they do not apply.”⁴⁴ Contemporaneously, Edwin Maxey similarly recognized the distinction to be drawn between the LOAC on land and the LoNW at sea:

Under international law, the crew of a merchant vessel has the right to resist an unlawful attack by an enemy warship and has a legal right to capture or sink the warship if it can. By making such an attempt, the members of the crew become combatants and subject themselves to the risk of being sunk or captured; but in case they are captured, they are legally entitled to

40. There were a number of news articles on the centenary of Captain Fryatt’s execution. See, e.g., Laurence Cawley & Stuart Woodward, *Charles Fryatt: The Man Executed for Ramming a U-Boat*, BBC (July 16, 2016), <https://www.bbc.com/news/uk-england-esssex-36745439>; Stephen Twigge, *Captain Fryatt: Forgotten Martyr of the First World War*, THE NATIONAL ARCHIVES (July 27, 2016), <https://blog.nationalarchives.gov.uk/captain-fryatt-forgotten-martyr-first-world-war/>.

41. See, e.g., ARCHIBALD HURD, 2 THE MERCHANT NAVY, chap. 15 (1924).

42. James Brown Scott, *The Execution of Captain Fryatt*, 10 AMERICAN JOURNAL OF INTERNATIONAL LAW 865, 870 (1916).

43. *Id.*

44. *Id.* at 871.

being treated as prisoners of war. The chances of being sunk are such that a merchant vessel will not often assume the risks of resisting capture by an enemy warship. But if its crew choose to assume the risks, those risks are determined by international law.⁴⁵

Germany's application of the shore-based concept of franc tireur to a merchant mariner was widely and roundly condemned both at the time and immediately after the war.⁴⁶ It was reprised during the Second World War when concerns as to German interpretations of the LoNW (or perhaps, more correctly, concerns at indications of potential German non-compliance with the LoNW) once again surfaced.⁴⁷ This reaction indicates two important things for our current inquiry. First, it provides a clear instance of both condemned non-application of, and consequent re-affirmation of, the

45. Edwin Maxey, *The Execution of Captain Fryatt*, 37 CANADIAN LAW TIMES 456, 458 (1917).

46. This condemnation was official, scholarly, and public. See, e.g., Arthur Balfour, *Jutland and the Turn of the Tide*, 4 CURRENT HISTORY 1134, 1135 (Sept. 1916), calling Fryatt's execution "judicial murder" (Balfour at this time was First Lord of the Admiralty); William Hartwell, *The Murder of Captain Fryatt: Official Report by His First Officer*, NEW YORK TIMES CURRENT HISTORY, Oct. 1918, at 116, 118; Alfred Turner, *The Murder of Captain Fryatt*, THE SATURDAY REVIEW, Aug. 5, 1916, at 131, labelling the execution as murder but advocating against any reprisals against German PW; Arthur Kuhn, *The Laws of War and the Future*, 30 INTERNATIONAL LAW ASSOCIATION CONFERENCE REPORT 173, 186 (1921) ("Now, though the armament of the submarines may not be heavier than the merchantman's, still they are better prepared for fight, and the end will be that in nine cases out of ten the merchant ship will be destroyed and part of the crew uselessly killed, and the captain and officers treated as privateers, like Captain Fryatt"). More viscerally, Sir Arthur Conan Doyle, in an intemperate letter to THE TIMES, apparently recommended that "When Captain Fryatt was murdered we should have executed two [German PW] submarine captains," a recommendation that retired Admiral Penrose Fitzgerald advised against. Penrose Fitzgerald, *Letter to the Editor: Reprisals*, THE SATURDAY REVIEW, June 22, 1918, at 556. See also the strong views expressed in letters to editors. Theodore Blathwayt, *Letter to the Editor: Punishment Due to the Germans*, THE SATURDAY REVIEW, Sept. 9, 1916, at 250; Alfred Turner, *Letter to the Editor: The Fall of Falkenhayn*, THE SATURDAY REVIEW, Sept. 30, 1916, at 319; John Fraser, *Letter to the Editor: Sinking of Hospital Ships*, THE SATURDAY REVIEW, Feb. 17, 1917, at 157; Stephen Coleridge, *Letter to the Editor: Lord Lansdowne's Letter*, THE SATURDAY REVIEW, Dec. 8, 1917, at 460. See also, Daniel Segesser, *Unlawful Warfare is Uncivilised: The International Debate on the Punishment of War Crimes, 1872–1918*, 14 EUROPEAN REVIEW OF HISTORY 215, 220 (2007).

47. Lord Cave, *Address to the Grotius Society on War Crimes and Their Punishment*, 8 TRANSACTIONS OF THE GROTIUS SOCIETY xix, xxxviii–xl (1922); Lord Chancellor Caldecote, *Speech Given to the Public General Meeting Held in the Hall of the Honourable Society of Gray's Inn, April 10 1940*, 26 TRANSACTIONS OF THE GROTIUS SOCIETY xliii, xlix–l (1940).

exceptionalist rule applicable within the LoNW in relation to the status and treatment consequences of merchant mariner conduct. Second, it confirms the content of that exceptionalist rule insofar as clearly stating that the general LOAC CDPH rule does not apply to merchant mariner crews at sea.

III. SO, WHAT IS THE LAW?

The Fryatt case took place more than one hundred years ago. The question as to whether it remains relevant to the interpretation and application of this specialized situation at sea must therefore depend upon subsequent developments in the LoNW. A brief examination of these subsequent developments confirms that the general rule as to enemy merchant mariner crews remains unchanged.

A. The Post-1949 Situation

1. 1949 Geneva Convention II and 1977 Additional Protocol I

The protective scope of 1949 Geneva Convention II as elaborated in Article 13 includes “(5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.”⁴⁸ The key instance of the “more favourable treatment” available is that relating to parole as set out in 1907 Hague Convention (VII)⁴⁹ and reiterated in Article 16. According to that Article, the captor can

48. Geneva Convention II, *supra* note 10, arts. 13(5), 16. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, 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 ¶ 1500 (2017) [hereinafter COMMENTARY ON THE SECOND GENEVA CONVENTION] (“Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law which provides that certain merchant seamen must not be made prisoners of war. They must, however, be respected, collected and cared for in accordance with the Second Convention.”).

49. Convention No. VII Relating to the Conversion of Merchant Ships into War-ships arts. 5–8, Oct 18, 1907, 205 Consol. T.S. 319.

decide, according to circumstances, whether it is expedient to hold them, or to convey them to . . . a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.”⁵⁰

Articles 43–45 of the 1977 Additional Protocol I elaborate and update elements of the 1949 Geneva Conventions I–III PW regime. The key additional consequence is that Article 43(3) and Article 44(8) work together to expand the concept of armed forces entitled to PW status to include paramilitary and armed law enforcement agencies incorporated into the armed forces.⁵¹ This addition is relevant to naval warfare.

2. National Doctrine

National doctrine manuals generally reflect these rules—either by drawing language direct from manuals such as the San Remo Manual,⁵² or through direct reference to applicable treaties and customary international law. Examples of the latter include the doctrinal LOAC manuals of the United States, Norway, and Denmark (although the latter tends to focus upon enemy merchant mariners).⁵³

3. San Remo Manual 1995

The San Remo Manual closely coheres to and reflects these rules. Rule 165 on entitlement of *enemy nationals* at sea to PW status includes the following categories:

50. Geneva Convention II, *supra* note 10, art. 16.

51. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 43(3), 44(8), June 8, 1977, 1125 U.N.T.S. 3.

52. As with the UK. *See* UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 13.119.1, 13.120 (2004) (drawing directly from the SAN REMO MANUAL, *supra* note 21, r. 165, 166).

53. *See* COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 21, ¶ 7.10.2 (neutral merchant mariners); DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS ¶ 5.1.3.7.2 (2016) (regarding crews in enemy merchant vessels); NORWEGIAN MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT ¶ 6.13 (2013).

(d) crew members of enemy merchant vessels or civil aircraft not exempt from capture, unless they benefit from more favourable treatment under other provisions of international law; or

(e) crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy, or served as an auxiliary for the enemy.⁵⁴

Similarly, Rule 166, dealing with neutral nationals at sea, provides that those neutral nationals

who are members of the crew of enemy or neutral merchant vessels or civil aircraft are to be released and may not be made prisoners of war unless the vessel or aircraft has committed an act covered by paragraphs 60, 63 [acts rendering an enemy merchant vessel or civil aircraft a military objective], 67 or 70 [acts that make neutral merchant vessels and civil aircraft liable to attack], or the member of the crew has personally committed an act of hostility against the captor.⁵⁵

Again, this distillation simply reflects the law as it is.

B. Actively Resisting—And Even Hostile—Enemy Merchant Vessel Crews are to be Paroled or Made PW Upon Capture, But are Not to be Treated as CDPH

Under the LoNW applicable in an international armed conflict, the crew of an actively resisting or even hostile enemy merchant vessel are to be treated as PW unless a more favorable status is available. That is, merchant mariner crews in enemy merchant vessels are not CDPH even where they resist the exercise of belligerent rights or engage in hostile acts against belligerent warships and auxiliaries.⁵⁶ A recent elaboration of the (timeless, rather than archaic) logic behind this inclusion of resisting and hostile enemy merchant

54. SAN REMO MANUAL, *supra* note 21, r. 165.

55. *Id.* r. 166(c).

56. Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War arts. 5–8, Oct 18, 1907, 36 Stat. 2396, T.S. No. 544 [hereinafter Hague Convention XI]. Caution must be exercised in interpreting Article 8 (“The provisions of the three preceding articles do not apply to ships taking part in the hostilities”); Article 8 does not mean that crews of enemy merchant vessels that have engaged in hostilities are not entitled to PW status and treatment; rather it means that they are not entitled to the Article 5 freedom (if a national of a neutral state) or the Articles 6–7 alternative of “parole.” That is, they are PW because they have forfeited the right to be accorded the greater freedoms available in accordance with Articles 5–7.

vessel crews within the PW scheme rather than the CDPH scheme is provided by Marcel Schulz:

it is accepted in customary international law that enemy merchant vessels are under no obligation to submit to visit and search, which makes perfect sense due to the fact that visit and search are the first steps towards capture. An enemy vessel may refuse visit and search and defend itself against the attempt with any means. If possible, it may even sink the attacker or capture it. On the other side of the coin, enemy merchant vessels that continuously and deliberately resist have to accept the consequences of their resistance, which is condemnation of the vessel and cargo. Furthermore, the vessel becomes a legitimate military target and may therefore be destroyed without any prior warning.⁵⁷

As will be evident from the analysis thus far, the orthodoxy of this rule simply cannot be disputed. As noted, it was referenced in instructions applied during the Crimean War. Thomas Holland's distillation of the rule as it existed in 1888 was that "The Commander should detain any Enemy Vessel which he may meet with, whatever are the ports between which she is trading. Her Officers and Crew are Prisoners of War."⁵⁸ The U.S. Naval War Code of 1901, Article 11, asserted:

The personnel of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses or as prisoners of war, when by training or enrolment they are immediately available for the

57. Marcel Schulz, *Prize Law and Contraband in Modern Naval Warfare*, in OPERATIONAL LAW IN INTERNATIONAL STRAITS AND CURRENT MARITIME SECURITY CHALLENGES 211, 226–27 (Jörg Schildknecht et al. eds., 2018); see also Wolff Heintschel von Heinegg, *Maritime Warfare*, in OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 145, 154 (Andrew Clapham et al. eds., 2014) ("The crews of captured or destroyed enemy warships, auxiliary vessels, and military aircraft are entitled to prisoner of war status").

58. Holland, *supra* note 25 at 6–7. Enemy vessels were defined as follows:

19. The Commander will be justified in treating as an Enemy Vessel:
 1. Any Vessel under the Flag and Pass of the Enemy Government.
 2. Any Vessel sailing under a Licence of the Enemy Government.
 3. Any Vessel owned in whole or in part by an Enemy, as hereinafter defined.
 4. Any Vessel apparently owned by a British, Allied or Neutral subject, as hereinafter defined . . . if such person has acquired the ownership by a Transfer from an Enemy made after the Vessel had started upon the Voyage during which she is met with, and has not yet actually taken possession of her.

naval service of the enemy, or they may be released from detention or confinement.⁵⁹

Woolsey's comment on this innovation simply proves the orthodox nature of the default rule regarding making enemy merchant mariners PW: "Here the question is whether individuals in the crew of an enemy merchantman can be properly held as prisoners, as the code permits. *The present usage of naval warfare undoubtedly allows this, and does not condition it, as the code does.*"⁶⁰

The negotiations at, and results of, the 1907 Hague Conference further reinforce this orthodoxy. Hague Convention XI is implicitly clear that the customarily correct status to apply to enemy merchant mariner crews is PW, although it adds the further possibility of parole in certain situations.⁶¹ This additional option was introduced as an alternative to PW treatment for some neutrals, and also envisaged parole for enemy merchant marine officers and captains, although not for enemy merchant crews. However, this innovation specifically provided that the option of freedom for neutrals, and parole for enemy merchant mariner officers, was not available if the vessel had taken part in hostilities.⁶² In these situations, the default rule applies—these crews (regardless of individual crew member nationality as enemy or neutral) are made PW. That is, their conduct is that of the vessel, and therefore is not to be assessed in accordance with CDPH criteria; nor are they *prima facie* liable to CDPH consequences. "Whether a ship is peacefully engaged in a commercial enterprise or participating in the hostilities is a question of fact, which it seemed to be impossible to reduce to a fixed rule,"⁶³ the Conference delegations concluded; so, the traditional rule—with some introduced mitigations for neutrals and certain enemy merchant marine officers—remained as it was:

It must . . . be recalled here that the treatment of the crews of captured enemy merchant ships is governed by a special project. According to the last project upon which the committee of examination decided, these crews shall not be made prisoners of war, unless the vessel has taken part in the

59. CHARLES H. STOCKTON, A NAVAL WAR CODE art. 11 (1900) (Stockton's Code was issued by the Dep't of the Navy as General Orders No. 551 on June 27, 1900).

60. Theodore S. Woolsey, *The Naval War Code*, 1 COLUMBIA LAW REVIEW 298, 304 (1901) (emphasis added).

61. PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, *supra* note 19, at 947–51; Hague Convention XI, *supra* note 56, art. 6.

62. Hague Convention XI, *supra* note 56, art. 8.

63. PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, *supra* note 19, at 1014.

hostilities, or unless, except in the case of the neutral members of the crew, not including the officers, the promise mentioned in this project was refused.⁶⁴

Another venue for reaffirmation of the rule was the general debate at the Conference regarding the treatment and liabilities of fishing vessels, which included a proposal by Serbia that if such vessels take part in hostilities, “but conceal their true character,” they should be “treated in the same way as persons on land who take part in hostilities without being belligerents.”⁶⁵ This was clearly an invocation of CDPH, or “francs tireurs at sea” in the language of the time, and it was rejected. Similarly, the Portuguese proposition at the Conference regarding exemption from capture of coastal fishing vessels in light of the new rules on freedom or parole for certain classes of captured merchant crews is also illustrative of the general rejection of a place for CDPH-like assessments at sea. The Portuguese proposal was that:

This exemption ceases to apply whenever there is reason to suspect any participation in hostilities, such as refusal to obey the injunctions of a belligerent forbidding temporarily their approaching a certain zone, transportation of contraband, espionage, the fact of being armed or of having on board apparatus or signals which are not in use amongst fishermen.⁶⁶

That is, this proposal would have seen these acts, which would generally be characterized as CDPH ashore, render the vessel subject to capture as an enemy merchant vessel, and its crew liable to treatment as captured enemy merchant vessel crew; that is, as PW.

Another context in which this matter was ventilated during the 1907 Hague Conference was the report of the specialist committee assigned the task of analyzing the proposed Regulations Respecting the Laws and

64. *See id.* at 1031. This discussion arose out of an assessment provided to the 1907 Conference Plenary in relation to the applicability or otherwise of the 1899 Hague Regulations on land warfare to naval warfare. This was a specifically directed task assigned to the Fourth Committee. *Id.* at 1133 (setting out the Martens-formulated questionnaire of specific issues to be addressed, and questions to be answered, by the Fourth Committee). The specific question at issue was Question XIV in relation to the Chapter II PW regime. *See also id.* at 1156–58 (regarding various proposals on updating the legal status, rights, and liabilities of crews of captured enemy merchant vessels). All take PW as the default regime but aim to lessen the severity of this customary rule by offering parole for enemy merchant masters, and freedom for neutrals who are members of enemy merchant vessel crews. *Id.*

65. *Id.* at 976–77.

66. *Id.* at 1160.

Customs of War on Land (which became the Annex to Hague 1907 Convention (IV) relating to the Laws and Customs of War on Land). The purpose of this examination was to ascertain which of the Annex's provisions might have relevance for the proposed naval warfare conventions. The committee's assessment was that "[i]nasmuch as in the present state of affairs there can be no further thought of irregular hostilities on the seas, the considerations which prompted Article 1 do not appear to be applicable to naval warfare."⁶⁷ The 1955 U.S. Navy's *Law of Naval Warfare* publication was admirably clear and concise:

The officers and crew of captured enemy merchant vessels and aircraft may be made prisoners of war. . . . The officers and crew who are nationals of a neutral State normally are not made prisoners of war. However, if they participate in any acts of resistance against a captor, they may be treated as prisoners of war.⁶⁸

This denial by implication of any role for CDPH assessments of enemy merchant mariner conduct (and also, as clear in the extract immediately above, neutral merchant mariner conduct) is thus fundamental to the LoNW.

IV. THE REMAINING UNCERTAINTIES?

It would seem abundantly clear that the historical and current law on the status to be assigned captured enemy civilian merchant mariner crews who actively resist, or even engage in hostilities against, adversary warships and auxiliaries is unchanged. They are to be made PW, unless the captor decides to offer the more advantageous option of parole. This leaves only two groups potentially encountered in merchant vessels at sea whose treatment status must be determined if they engage in active resistance or hostilities: civilian passengers in enemy or neutral merchant vessels; and neutral civilian merchant mariner crews in neutral merchant vessels. Of course, in situations where civilian passengers and neutral merchant mariner crews do not take part in active resistance or hostilities, then their status simply remains that of civilian.

67. *Id.* at 1037.

68. DEPARTMENT OF THE NAVY, NWIP 10-2, LAW OF NAVAL WARFARE ¶ 512 (1955).

A. *Uncertainty No.1: Actively Resisting or Hostile Civilian Passengers and CDPH at Sea*

The first point of departure between treatment of civilian passengers and crew is that civilian passengers are *not* crew. Therefore, civilian passengers in either an enemy or neutral merchant vessel who personally take a direct part in hostilities—for example by attacking a naval boarding team—are not covered by the status of the crew as derived from the status of the vessel. They are not PW as a consequence of the ship-crew status nexus, and such passengers are thus liable to treatment as CDPH. As Wolff Heintschel von Heinegg has observed of such passengers, they

are subject to the discipline of the captor. Passengers who are nationals of a neutral state will be released unless they have directly taken part in the hostilities, actively resisted capture, or if they had been employed in the service of the enemy. In such cases they will also become prisoners of war.⁶⁹

The assertion that such hostilities-perpetrating civilian passengers might be CDPH is most recently expressed in analyses of the *Mavi Marmara* incident, which also incidentally reinforces that this situation will most likely only ever be discernible during boarding operations, or where the passengers take control of the vessel and then use it to participate in hostilities. During the Israel Defense Forces' boarding of the *Mavi Marmara* in 2010, activist passengers of a Turkish nongovernmental organization (IHH) (rather than crew) used force against the boarding team members. The Turkel Commission, appointed by the Israeli government to investigate the incident, concluded that the proper assessment regime to apply to the conduct of these passengers was CDPH,⁷⁰ presumably as a matter of law, with all of the criminal liabilities that can attend CDPH conduct given that a criminal

69. Heintschel von Heinegg, *Maritime Warfare*, *supra* note 57, at 171.

70. TURKEL REPORT, *supra* note 4, ¶ 201 (“Based on the criteria established in the *Targeted Killings* case, the Commission concludes that the IHH activists who participated in violence on the *Mavi Marmara* were direct participants in hostilities. In addition, it should be noted that the Commission would have reached the same conclusion by applying the standards set out in the ICRC *DPH Interpretive Guidance on the Notion of Direct Participation in Hostilities*.”).

investigation was commenced (although it was ultimately discontinued).⁷¹ And whilst there have been objections to the characterization of these particular IHH passengers as CDPH, there has not been any fundamental rejection of the general principle of potential applicability of the CDPH scheme. Amichai Cohen and Yuval Shany, for example, observed of the Turkel Commission's findings: "The most dramatic finding of the Commission in this regard is that the IHH group of passengers on the Mavi Marmara who violently resisted the [Israel Defense Forces] raid have become civilians taking a direct part in hostilities, and were thus legitimate military targets."⁷² However, Cohen and Shany did not object to the application of this assessment scheme to passengers in general; they objected that it was not fulfilled in this case, arguing instead that

civilians situated on the battlefield or in close proximity thereto would not be regarded as taking direct part in the hostilities even if they act violently against soldiers belonging to one of the parties, as long as that their acts are not ostensibly part of the opposition's military campaign and do not arise in themselves to the level of intensity characterizing armed conflicts (A comparable, though perhaps not identical approach insisting on a "belligerent nexus" can be found in the ICRC Interpretive Guidance on Direct Participation in Hostilities (DPH)).⁷³

That is, they don't disagree that CDPH might apply to passengers; they disagree that in this case CDPH was established, due to the absence of the necessary "belligerent nexus." Similarly, as noted previously, the ICC Office of the Prosecutor Report also considered the CDPH regime as potentially applicable in relation to the passengers, but likewise found that it was not made out in this particular situation.⁷⁴

71. *Id.* ¶ 113 ("Subsequently, the participants of the flotilla were transferred to several prisons where they were detained. On June 2, 2010, after the Attorney-General decided to terminate the criminal investigation that he had ordered on June 1, 2010, and after the approval of the Supreme Court was given in this regard, the participants were taken to Ben-Gurion Airport and flown to the countries from which the flotilla set sail.")

72. Amichai Cohen & Yuval Shany, *The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks*, EJIL:TALK (Jan. 28, 2011), <https://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/>.

73. *Id.*

74. International Criminal Court Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report, at 27 (¶ 49) (Nov. 6, 2014).

B. *Uncertainty No. 2: Actively Resisting or Hostile Neutral Merchant Vessel Crews*

In contrast to the legitimacy of assessing active resistance or hostilities perpetrated by civilian passengers at sea by reference to the CDPH scheme, it is not legitimate to apply this scheme to actively resisting or even hostile neutral merchant mariner crews in neutral merchant vessels. Where these crews submit to belligerent rights, they remain civilians. This is the clear implication evident in 1949 Geneva Convention II (for example, Article 13), being that although neutral merchant mariners are entitled to the protections of that Convention insofar as they are sick, wounded, or shipwrecked, when they fall into the hands of a belligerent, they are normally to be treated in accordance with 1949 Geneva Convention IV—that is, as civilians. The ICRC has observed that “there is no requirement in Article 13 that a person be in enemy hands in order to be covered by the Second Convention,”⁷⁵ and that “The crews of neutral merchant vessels and civilian aircraft are not protected by the Second Convention, but they may be protected by the Fourth Convention.”⁷⁶ This of course makes absolute sense—their vessel, carrying the nationality of its neutral flag State that is not a party to the conflict, has no “enemy.” Where a neutral merchant mariner crew (via their neutral merchant vessel) has engaged in a “one time” resistance such as initially fleeing after being called upon to heave to for boarding, they also remain civilians. This is also reflected in the customary rule that:

If the neutral adventurer evades the hostile cruisers, and gets his contraband to its intended purchaser, all risk and liability are ended. He is in no way responsible for that act, even though he should be overhauled on the return or another voyage; and this simple fact shows, conclusively, that his proceeding is not, in any true sense of the term, illegal.⁷⁷

Early codified support for this approach to dealing with resisting neutral merchant vessels is found in the relevant Russian Instructions on Procedure in Stopping, Examining, and Detaining, and also in Bringing in and Handing Over Captured Vessels and Cargoes (1900)⁷⁸—authorized under Article 26

75. COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 48, ¶ 1485.

76. *Id.* ¶ 1500.

77. John Pomeroy, *The Law of Maritime Warfare, as It Affects the Belligerents*, 114 NORTH AMERICAN REVIEW 376, 381 (1872).

78. *See* 1 RUSSIAN AND JAPANESE PRIZE CASES app. B (C. J. E. Hurst & F. E. Bray eds., 1912).

of the Russian Regulations relating to Naval Prizes (1895).⁷⁹ These provisions specified only that the delinquent neutral merchant vessel could be fired upon (and in some situations sunk or destroyed), detained, and ultimately condemned in prize.⁸⁰ (In relation to the crew, however, the Instructions on Procedure record only that “all persons on board who have been detained for the elucidation of the case” are to be handed to the local naval authority upon arrival in port.⁸¹) There is no article that speaks of any liability to legal process beyond being a witness in the subsequent prize proceedings. This seems to be congruent with the fact that neither the Prize Regulations nor the Instructions on Procedure drew a distinction between the crews of the submitting and the resisting neutral merchant vessels.

This codification was then reflected in the *Hipsang* case, heard by a Russian Prize Court case from the Russo-Japanese War, in which a neutral (British) merchant mariner crew were simply released to make their own way to their intended destination, in the same way as any other neutral merchant vessel crew whose vessel had been detained or sunk. This case concerned the British steamer *Hipsang*, which was interdicted by a Russian Destroyer (*Rastoropnii*) on July 16, 1904.⁸² The case was heard in the Libau Prize Court and affirmed in the Russian Supreme Prize Court. This case was the subject of British objections, but the relevant facts before the Prize Court appear to have been that upon being ordered to stop for inspection, *Hipsang* fled. The steamer then continued to flee even after receiving shots ahead of the bow and then taking some direct fire. The steamer then hove to, but as the Russian warship approached *Hipsang* it received small arms fire from *Hipsang*—later alleged to have been the master firing his pistol at the warship. The *Hipsang* then attempted to ram the Russian warship and was shortly thereafter sunk by torpedo. Although some of the crew drowned, the majority were recovered and taken to Port Arthur. However, this neutral merchant mariner crew, who had served in a neutral merchant vessel that had actively resisted the Russian warship (by fleeing), and indeed had then engaged in hostile conduct against that warship (by firing small arms—which the Prize Court appeared to have called a crime⁸³—and attempting to ram), were not

79. *See id.* app. A.

80. *Id.* app. B, arts. 3, 10, 36(2).

81. *Id.* app. B, cl. 43.

82. *See The “Hipsang,” in id.* at 21.

83. *Id.* at 32 (In relation to the British master’s denial of having fired at the Russian warship, the Prize Court noted that “It would be very strange to expect that those who had fired at the Russian commander should acknowledge their crime”).

prosecuted for this conduct. Rather, on August 2, 1904, the crew were released to make their own way to their original destination port, doing so by hiring a barge and sailing it to that port.

This affirmation of the PW vice CDPH status of resisting or hostile neutral merchant mariner crews was then further elaborated by A. Pearce Higgins in his account of the 1909 London Declaration negotiations, where he describes two levels of unneutral service. The first is encapsulated in Article 45 of the Declaration as “contraband”-equivalent level of condemnation for “the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy,” where “the vessel does not lose her neutral character and has a full claim to the rights enjoyed by neutral vessels.”⁸⁴ Pearce Higgins distinguishes this class of unneutral service from the more serious types which result in assimilation to “enemy character” by emphasizing that in this lesser, contraband, circumstance, “the vessel has performed but a single service; she has been employed to carry certain people, or transmit certain intelligence; she is not continuously in the service of the enemy.”⁸⁵ A neutral vessel rendering this type of unneutral service can only be captured during the voyage in which that unneutral service is being rendered. “Once that voyage is finished, all is over, in the sense that she may not be captured for having rendered the [single] service in question.”⁸⁶ Pearce Higgins observed that this is the same principle as applies in the case of contraband.⁸⁷ In relation to an “attempt at flight” by a neutral merchant vessel summoned to heave to for visit and search, and which ultimately does submit to visit and search, Pearce Higgins is clear that a single incident of such conduct entails no consequences beyond those that flow in relation to whether the vessel is or is not carrying contraband: “she will suffer the consequences of her infraction of neutrality [carrying contraband], but . . . she will not undergo any punishment for her attempt at flight.”⁸⁸

The second category Pearce Higgins analyzes is represented by the Article 46 “more serious cases,” where the delinquent neutral merchant vessel is assimilated to “an enemy merchant vessel, which entails certain consequences,” including that “the rule governing [limiting] the destruction of neutral prizes does not apply to the vessel . . . as she has become an enemy

84. A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES* 593 (1909).

85. *Id.* at 594.

86. *Id.*

87. *Id.*

88. *Id.* at 608.

vessel.”⁸⁹ This category covers situations where the active resistance of a neutral merchant mariner crew goes beyond a single instance, or even rises to the level of paralleling enemy warship or auxiliary conduct; in these situations, these crews are to be treated as PW, not as CDPH. This is because their vessel has taken on enemy character and the crew is thus treated as an enemy merchant mariner crew. However, Pearce Higgins’ second category of more serious cases is in effect two categories: (1) The vessel takes a direct part in hostilities; and (2) the non-DPH category of neutral merchant vessels where the vessel is under the orders or control of an agent placed on board by the enemy Government or is chartered by the enemy government; or is carrying enemy troops or transmitting intelligence in the enemy’s interest. Nevertheless, in both of these second category (Article 46) cases, the delinquent neutral merchant vessel is to be assimilated to an enemy merchant vessel.⁹⁰ Pearce Higgins combines the two by asserting that “if any forcible resistance is made to any legitimate action by the [belligerent] cruiser,” then the vessel has committed “an act of hostility” and will be treated as an enemy merchant vessel.⁹¹ If this reference to “hostility” is read as a reference to direct participation in hostilities, then this is a broader conception of DPH at sea than that of Robert Tucker, and covers conduct which is not—at its core—related to support for enemy military operations (as it is in Tucker’s analysis). It is therefore likely that Pearce Higgins did not mean DPH here, as he was clearly speaking of resistance, not proactive DPH. Either way, however, there is nothing in his commentary to indicate that the neutral merchant mariner crew of such a vessel will be treated as anything other than repatriatable neutral civilians or PW; there is no indication of any option to treat the resisting crew as CDPH. Similarly—albeit more narrowly—Hall observed in his 1924 second edition of *Law of Naval Warfare*, that while a “neutral merchant ship, which transmits information to the enemy or is likely to do so is, as will be shown later, in some cases liable to capture and condemnation for unneutral service . . . there does not appear to be any case of the persons on board, who were engaged on this business, being treated as spies.”⁹² The essence of this approach is that the neutral merchant vessel engaged in this incident of “unneutral service” is subject to capture—and potentially to attack—but the neutral merchant mariner crew are not treated as spies and thus have not forfeited their entitlement to PW status.

89. *Id.* at 595–96.

90. *Id.*

91. *Id.* at 608.

92. Hall, *supra* note 8, at 124.

In a further refinement, Robert Tucker in 1955 described three levels of resistance to belligerent operations that are quite similar to those elaborated by Pearce Higgins. The first of Tucker's categories is acts of unneutral service by a neutral merchant vessel and crew resulting in liability to the same treatment as enemy warships and auxiliaries, where "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."⁹³ This situation clearly addresses a neutral vessel's direct participation in hostilities, and it presages PW status for the neutral merchant mariner crew as if the vessel were an enemy vessel: "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."⁹⁴ The types of conduct that may lead to this categorization are described in the appendix to Tucker's *The Law of War and Neutrality at Sea* as "taking a direct part in hostilities" and acting "in any capacity" as an auxiliary.⁹⁵

The second category of unneutral service that might be rendered by a neutral merchant vessel and crew is acts that result in liability to the same treatment as enemy merchant vessels. The difference between assimilation as an enemy warship or auxiliary, and assimilation to an enemy merchant vessel is that

in the former category the identification extends to the belligerent's armed forces and to his military operations at sea, whereas in the present category this is not the case. Although acquiring enemy character because operating directly under enemy orders or control, such neutral merchant vessels must not be attacked and destroyed at sight so long as they remain clear of all participation in, or direct support of, combat operations.⁹⁶

93. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INTERNATIONAL LAW STUDIES 1, 321 (1955).

94. *Id.* at 318–19.

95. *Id.* at 394–95 ("Neutral merchant vessels and aircraft acquire enemy character and are liable to the same treatment as *enemy warships and military aircraft* (see paragraph 503a [which deals with destruction and capture of enemy warships and military aircraft]) when engaging in the following acts: 1. Taking a direct part in the hostilities on the side of an enemy; 2. Acting in any capacity as a naval or military auxiliary to an enemy's armed forces." (footnote omitted)).

96. *Id.* at 322.

In his appendix, Tucker elaborates on two specific situations where a neutral merchant vessel would be liable to characterization as an enemy merchant vessel rather than an enemy warship or auxiliary: “Operating directly under enemy control, orders, charter, employment, or direction,” and “Resisting an attempt to establish identity, including visit and search.”⁹⁷ Of this latter situation, he observes that of the “ways by which neutral merchant vessels may attempt to frustrate a belligerent in the lawful exercise of belligerent rights . . . [r]esistance to visit and search is the most serious act of this group, and its performance by neutral merchant vessels results in enemy character.”⁹⁸

Tucker’s third category is acts of unneutral service by a neutral merchant vessel and crew that result only in liability to seizure. This lowest category of unneutral service by a neutral merchant vessel does not result in any assimilation to enemy character. Tucker asserts that:

A neutral merchant vessel may aid a belligerent by the performance of acts that result in no greater a degree of identification with the belligerent than is involved in the normal case of contraband carriage. It is therefore important to distinguish not only between the nature of the services performed on behalf of an enemy but also between the varying degrees of identification with an enemy that may be involved quite apart from the specific services.⁹⁹

For example, “carriage of certain persons or dispatches may be undertaken in much the same manner as the carriage of contraband, that is without implying a direct control by—or a close relationship with—the belligerent.”¹⁰⁰ The appendix to Tucker’s *The Law of War and Neutrality at Sea* elaborates further. At paragraph 503d, for example, he lists actions that render a neutral merchant vessel liable to seizure for unneutral service, but not characterization as an enemy warship, auxiliary, or merchant vessel, including: “3. Carrying personnel in the military or public service of an enemy. 4.

97. *Id.* at 395 (“501(b). Neutral merchant vessels and aircraft acquire enemy character and are liable to the same treatment as *enemy merchant vessels and aircraft* (see paragraph 503b [which deals with capture and destruction of enemy merchant vessels and aircraft]) when engaging in the following acts: 1. Operating directly under enemy control, orders, charter, employment, or direction; 2. Resisting an attempt to establish identity, including visit and search.” (footnote omitted)).

98. *Id.* at 401 n.7.

99. *Id.* at 324.

100. *Id.* at 324.

Transmitting information in the interest of an enemy.”¹⁰¹ The reason is that these acts of unneutral service “imply neither a direct belligerent control over, nor a close belligerent relation with, neutral merchant vessels and aircraft. By custom, vessels performing these acts, though not acquiring enemy character, are liable to capture.”¹⁰² Two other actions on Tucker’s list are also of this nature: “5. Avoiding an attempt to establish identity, including visit and search,” and “6. Presenting irregular or fraudulent papers; lacking necessary papers; destroying, defacing, or concealing papers.”¹⁰³ A final example of this unneutral conduct rendering a neutral merchant vessel liable to seizure, but not characterization as an enemy vessel, is in the appendix at paragraph 503d: “7. Violating regulations established by a belligerent within the immediate area of naval operations.”¹⁰⁴

In summary, Tucker’s elaboration of the orthodox approach was that:

Unless the neutral nationals serving as officers and crew of neutral vessels have taken a direct part in the hostilities they may not be treated as prisoners of war. Nor is there any justification for placing the personnel of neutral prizes under any special restraint, unless this is shown to be necessary for the security of the prize crew. The captor may request the master and crew to assist him in navigating the prize into port, though he cannot compel them to render any assistance. And if not temporarily detained as witnesses in prize court proceedings the personnel of neutral prizes must be released at the earliest possible time by the belligerent undertaking capture.¹⁰⁵

In terms of more recent national doctrine, the most fully elaborated scheme is that contained in U.S. doctrine. The U.S. Navy’s 1955 *Law of Naval Warfare Manual* tends to follow the Tucker analysis and reflects this three-category assessment scheme,¹⁰⁶ as does the current U.S. Navy’s *Commander’s Handbook*, with one minor amendment (see below). This doctrine provides

101. *Id.* at 398.

102. *Id.* at 401 n.6.

103. *Id.* at 398.

104. *Id.* The relevant definition of “immediate area of naval operations” is at ¶ 430b of Tucker’s appendix (“The Immediate Area of Naval Operations. Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. Neutral vessels and aircraft which fail to comply with a belligerent’s orders expose themselves to the risk of being fired upon. Such vessels and aircraft are also liable to capture.” *Id.* at 383 (cross-references and footnote omitted)).

105. *Id.* at 347 (footnote omitted).

106. LAW OF NAVAL WARFARE, *supra* note 68, ¶ 513 & n.40.

that where the neutral merchant vessel has “assumed the character of enemy warships” (Tucker’s first category), the consequence for the neutral merchant mariner crew is PW status:

7.10.2 Personnel of Captured Neutral Vessels and Aircraft

... If, however, the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or had served in any way as a naval or military auxiliary for the enemy, they thereby assumed the character of enemy warships or military aircraft and, upon capture, their officers and crew may be held as POWs.¹⁰⁷

This is of course entirely consistent with the normal rule in the LoNW that the crew should take on the status of the platform. Consequently, the post-capture status of the neutral merchant crew of a neutral merchant vessel which adopts enemy character through conduct equated with that of an enemy warship or auxiliary is PW status.

U.S. doctrine also distinguishes, as Tucker does, between unneutral service at the level of direct participation in hostilities that leads to assimilation with an enemy warship or auxiliary (in which case the neutral merchant mariner crew may be made PW), and the “lesser” situation where a neutral merchant vessel merely takes on “enemy merchant vessel character” by its (unneutral, but not DPH) conduct. The U.S. doctrine describes this as follows:

7.5.2 Acquiring the Character of an Enemy Merchant Vessel or Civil Aircraft

Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy merchant vessels or civil aircraft when engaged in either of the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction
2. Resisting an attempt to establish identity, including resisting visit and search.¹⁰⁸

In this case, the first part of paragraph 7.10.2 in the *Commander’s Handbook* then becomes relevant:

107. THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 21, ¶ 7.10.2.

108. *Id.* ¶ 7.5.2.

7.10.2 Personnel of Captured Neutral Vessels and Aircraft

The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral State do not become POWs and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft that assumed the character of enemy merchant vessels or aircraft by operating under enemy control or resisting visit and search [being the two situations noted in paragraph 7.5.2].¹⁰⁹

This is where the U.S. doctrine appears to partially depart from the general rule that crew status follows vessel status. This is because the normal rule for the crew of an enemy merchant vessel is that they are to be given parole—thus the U.S. doctrine’s requirement that the neutral merchant mariner crew of a neutral merchant vessel which has rendered non-DPH unneutral service be repatriated is generally consistent with the general rule for enemy merchant mariners. However, if the parole option is forfeited by vessel conduct, in the case of an enemy merchant vessel, the enemy merchant mariner crew are made PW. It is this second element of the normal rule that is not followed in U.S. doctrine because a neutral merchant vessel’s engagement in the two forms of conduct noted above still does not result in forfeiture of the repatriation (parole) obligation. The U.S. doctrine is clear on this: “the officers and crews of *neutral vessels and aircraft that assumed the character of enemy merchant vessels* or aircraft by operating under enemy control or resisting visit and search” are subject to the same rule as that for crews of non-resisting or controlled neutral merchant vessels, who “*do not become POWs and must be repatriated* as soon as circumstances reasonably permit.”¹¹⁰

Consequently, the regular LoNW rule applicable to the neutral merchant vessel crews of neutral merchant vessels that have become liable to capture for carrying contraband or breaching a blockade is also applicable in this situation; the neutral merchant mariner crew are (non-DPH) civilians and are to be repatriated. There is no evidence that this assessment scheme should be considered as having been overtaken by the evolution of any new rule set that authorizes application of the CDPH assessment scheme to

109. *Id.* ¶ 7.10.2.

110. *Id.* (emphasis added).

neutral merchant mariner crews.¹¹¹ In the light of this assessment, whilst one can only affirm the probity of the application of the CDPH scheme to hostilities-perpetrating civilian passengers in the *Mavi Marmara* incident (although one may dispute if it was sufficiently made out), it is difficult to agree with the finding of the Turkel Commission that the master of *Mavi Marmara* was also a CDPH.¹¹² This conclusion is not warranted insofar as it carries with it any implication that the master was liable to be treated as a criminal and denied PW status. The LoNW is clear: neutral merchant vessel masters and crews who have conducted their vessel in a manner that makes them liable to capture, diversion, destruction, or attack, are *prima facie* still treated as PW, not as CDPH.

V. CONCLUSIONS?

As William Miller described in 1986:

The basic ingredient [underlying the traditional law of naval warfare is] a political need to limit the conflict both as to area and as to participants, and . . . it is clear that the great bulk of the rules which we call rules of naval warfare really involve this limitation and with it the belligerent neutral relationship.¹¹³

This is as true of the approach taken to post-capture characterization and status of merchant vessel crews in the LoNW as it is for other LoNW rule sets on visit and search, contraband, and attack. That is, the LoNW seeks to maintain consistency in treatment of, and allocation of status to, merchant mariners by leveraging and prioritizing the conduct and status of their vessel.

111. See, e.g., Heintschel von Heinegg, *Maritime Warfare*, *supra* note 57, at 180 (“The crews of captured neutral vessels and aircraft, who are nationals of a neutral state, must be released and repatriated as soon as possible. If, however, the vessel qualifies as a lawful target, the neutral crew will be made prisoners of war.”).

112. TURKEL REPORT, *supra* note 4, ¶ 202 (“Finally, the status of the captain and crew will be examined. Merchant crews have enjoyed a somewhat unique status under international humanitarian law. However, depending upon their actions, the captain and crew of a neutral merchant vessel can be considered to have taken a direct part in hostilities.”). See also *id.* ¶ 203 (“The captain’s acts point to an integrated role in the IHH efforts to oppose the Israeli boarding of the vessel. As a result, the Commission finds that the captain of the *Mavi Marmara* was an active participant in the attempts to obstruct the Israeli boarding operations and, therefore, he was a direct participant in hostilities.”).

113. William Miller, *Law of Naval Warfare*, 62 INTERNATIONAL LAW STUDIES 263, 269 (1986).

This is not the same approach as ashore, and indeed adopting the land-centric approach to CDPH would prove incredibly difficult in that it would create contradictions between the status of the vessel and its crew. Adopting this approach would also in practice create a form of collective guilt or responsibility for the vessel's actions amongst individual crew members with very different levels of knowledge (if any) and influence over the conduct of the vessel—the apprentice stoker doing temperature rounds in the machinery spaces, who knows nothing of what was happening on the bridge, and the master who directed the vessel's conduct, for example. A CDPH-informed approach of differentiating between the status of the crew (but not passengers) and their vessel, or between crew members from the same vessel, for the purposes of characterization for post-capture treatment is simply not an approach supported by the corpus or history of the LoNW. Nor, indeed, would evidence collection to support such hair-splitting be generally feasible, as introducing a shore-based conception of CDPH implies access to information related to the internal operations of the vessel which will in almost all situations remain opaque to the capturing warship. This is why the crews of merchant vessels have consistently been considered as tarred by the status, conduct, and consequences attributable to their vessel. And although there is a formal textual lacuna in the LoNW as to the status to be afforded to actively resisting neutral merchant vessel crews specifically, that the answer is not CDPH has been consistently reinforced and reiterated in both doctrine and practice.