

Use of Force in Hybrid Naval Warfare Contexts: Applicability of the Law Enforcement or Conduct of Hostilities Rules?

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Abstract

This chapter considers the use of force against or involving ships in so-called hybrid naval warfare contexts. It analyses when such use of force is governed by the more permissive conduct of hostilities rules of the law of naval warfare (LONW) rather than the more restrictive maritime law enforcement rules. The answer hinges on a three-pronged enquiry, starting with the rather obvious threshold question of whether the general situation of violence amounts to an armed conflict ('context applicability'). If so, it must be determined whether the incident features a sufficient nexus with it, since not every incident occurring in the geographical or temporal context of an armed conflict at sea is automatically governed by the LONW. If this is the case, it must in a third step be assessed whether the measure in question amounts to an attack, for only then will the LONW conduct of hostilities rules be applicable ('measure applicability'). The second and third prong of the applicability threshold have long been neglected in the law of armed conflict debate. Only recently has a theory of nexus been developed in an excellent study by Elvina Pothelet. However, her findings relate to the shore-based law of armed conflict and can thus not be transposed to the LONW without further ado because of the peculiar rules this old body of law comprises.

Keywords

use of force, conduct of hostilities, maritime law enforcement, law of naval warfare, law of armed conflict, hybrid warfare, nexus, threshold, applicability, material scope of application

1. Introduction: A Myriad of Thresholds Separating the Peacetime from the Wartime Legal Regime

Historically, international law rests on a rather categorical distinction between peace and war. Consequently, it offers a discrete set of rules for both states of affairs between nations: the law of peace and the law of war.¹ Today, it is widely accepted that these two bodies of law are not hermetically sealed off from each other but instead characterised by a certain degree of permeability.² The divide between war and peace has thus been watered down in contemporary

¹ Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' (2007) 23 *American University of International Law Review* 311, 316. Since the term 'law of war' is used here in contrast to the 'law of peace', it is understood broadly, not only including the *ius in bello* in the sense of the law of armed conflict (hereinafter LOAC) but also other bodies of law, notably prize law, the law of neutrality and the *ius ad bellum*. For a similarly broad definition, see, e.g., US, Department of Defense, Office of the General Counsel, *Department of Defense Law of War Manual* (June 2015, Updated July 2023) para 1.3.

² Evidence is abundant. Anecdotally, it may be pointed to the fact that even some of the LOAC rules apply in peacetime: Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd edn, Edward Elgar Publishing 2024) 205. As regards the maritime domain, the law of the sea is not entirely displaced once a situation amounts to an armed conflict, which triggers the applicability of the law of naval warfare (hereinafter LONW), but remains relevant in various respects. For example, the law of the

international law but has not become irrelevant. Indeed, various commentators stress its lasting significance.³ The distinction between the normal and exceptional condition in international affairs⁴ remains relevant because the concept of war, despite its archaic touch, continues to 'affect[...] the application of law'.⁵ Broadly speaking, the 'idea of war often operates to legitimate something that would otherwise be illegal'.⁶ The LOAC is paradigmatic in this regard as it allows under certain conditions to lawfully kill and destroy,⁷ thus making legal '[b]ehaviour that international law would ordinarily condemn and regard as impermissible'.⁸ In this sense, the rules belonging to the wartime paradigm are generally more permissive than those belonging to the peacetime regime.⁹

The vexing problem is that no single bright line separates the peacetime from the wartime legal regime. Instead, a myriad of thresholds defines the applicability of entire bodies of law or specific rules designed to govern matters pertaining to the exceptional state of affairs between nations. To begin with, there are the various thresholds belonging to the *ius ad bellum*: 'threat to the peace, breach of the peace, or act of aggression',¹⁰ 'use of force'¹¹ and 'armed attack'.¹² The list becomes even longer if we consider *ius in bello*-thresholds, such as 'declared war' and 'armed conflict'¹³ or 'attacks'.¹⁴ Treaties belonging to the law of neutrality refer to yet other thresholds to define their scope of application, notably 'naval war'¹⁵ and 'war on land'.¹⁶ Roaming the legal terrain where peace and war border each other thus implies passing different checkpoints at different places, each having its distinct, sometimes unclear, criteria for letting someone through – rather than crossing one official border check between peace and war by simply pulling one's passport. Overall, identifying the applicable law has become an intricate

sea rules defining the maritime zones are key to describing the regions of operations under the LONW; see, e.g., San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994) (hereinafter San Remo Manual), Part II.

³ See, e.g., Dino Kritsiotis, 'War and Armed Conflict' in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 5, writing that the 'fragmentation between war and peace' occurs at the 'very core' of international law, amounting to the '*summa divisio* of the discipline'; Aurel Sari, *Blurred Lines: Hybrid Threats and the Politics of International Law* (Hybrid CoE January 2018) 3, stating that 'the dividing line between peace and war remains key to the contemporary international legal system'.

⁴ Sari, *Blurred Lines* (n 3) 3.

⁵ Andrew Clapham, *War* (Oxford University Press 2021) Preface v.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Kritsiotis (n 3) 7.

⁹ See, e.g., Section 2.3 as regards the use of force specifically.

¹⁰ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 993 USTS 3 (hereinafter UN Charter), Art 39.

¹¹ *Ibid.*, Art 2(4).

¹² *Ibid.*, Art 51.

¹³ Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (hereinafter GC II), Art 2.

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (hereinafter AP I), Art 49.

¹⁵ Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910), title and preamble.

¹⁶ Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910), title and preamble.

and complex endeavour: not only has the number of thresholds multiplied in the post-World War II international legal order, but the meaning of most thresholds remains unclear, if not disputed.¹⁷

A hallmark of hybrid (naval) wars is that they are not only fought on land, sea and air but regularly extend to the information, cyber and – of importance here – legal domains.¹⁸ In the latter, where 'lawfare' is conducted,¹⁹ the exploitation of the complexity and uncertainty of legal thresholds separating the peacetime from the wartime legal rules is a common tactic.²⁰ Hybrid adversaries engage in conduct that either remains just below the thresholds triggering the more permissive wartime rules, or is hard to assess in terms of whether it reached a given threshold. This strips a law-compliant state – or one that exercises 'interpretive forbearance' and opts to apply the more restrictive peacetime rules despite the applicability of wartime rules²¹ – from the possibility of relying on the more permissive wartime rules. By 'instrumentalizing legal thresholds',²² hybrid adversaries thus create an 'asymmetrical legal environment' operating in their favour²³.

The following example, which pertains to one of the *ius ad bellum* thresholds, is instructive in this respect. According to Article 51 of the United Nations (hereinafter UN) Charter, the right to individual and collective self-defence is only triggered by an 'armed attack', a threshold which not every 'use of force' prohibited under Article 2(4) of the UN Charter fulfils.²⁴ These different thresholds – 'armed attack' and 'use of force' – create an 'operational sweet spot'²⁵ for a hybrid adversary. By using force that is prohibited by Article 2(4) of the UN Charter but does not meet the threshold of an armed attack, it denies the target state the possibility to forcibly respond in self-defence.²⁶ Similarly, the collective security guarantee of Article 5 of the North

¹⁷ See Aurel Sari, 'Hybrid Warfare, Law, and the Fulda Gap' in Winston S Williams and Christopher M Ford (eds.), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press 2018) 175-179.

¹⁸ See, e.g., Sari, *Blurred Lines* (n 3) 5, arguing that 'law is a domain of competition, just like the land, maritime, air, information and cyber domains are'.

¹⁹ See, e.g., Andres B Munoz Mosquera and Sascha Dov Bachmann, 'Lawfare in Hybrid Wars: The 21st Century Warfare' (2016) 7 *Journal of International Humanitarian Legal Studies* 63-87.

²⁰ Hitoshi Nasu, 'Challenges of Hybrid Warfare to the Implementation of International Humanitarian Law in the Asia-Pacific' in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds.), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press 2019) 230.

²¹ Rob McLaughlin, 'Anticipating Operational Naval Warfare Issues in International Humanitarian Law That May Arise in the Event of a Conflict in the South China Sea' in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds.), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press 2019) 710, uses this term to denote situations in which an incident at sea amounts to an armed conflict, and thus renders the LONW applicable, but in which the targeted state chooses, for political or diplomatic reasons, *not* to rely on the more permissive LONW authorisations and instead to respond to the incident by having recourse to the less far-reaching peacetime law authorisations.

²² Sari, *Hybrid Warfare* (n 17) 163; Alexander Lott, *Hybrid Threats and the Law of the Sea* (Brill Nijhoff 2022) 16 ('hybrid warfare takes advantage of the grey zone between the laws of peace and war').

²³ Sari, *Hybrid Warfare* (n 17) 163-164; see also Munoz Mosquera and Bachmann (n 19) 74.

²⁴ But note that the US conflates the notions of 'armed attack' and 'use of force', while acknowledging the differing view: US, Office of the General Counsel of the Department of Defense (n 1) para 1.11.5.2 (Use of Force Versus Armed Attack): 'The United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force. Others, however, would be inclined to draw more of a distinction between "armed attacks" and uses of force that do not give rise to the right to use force in self-defense.'

²⁵ Sari, *Hybrid Warfare* (n 17) 180.

²⁶ *Ibid*; see also Lott (n 22) 17-18, 23 and 245.

Atlantic Treaty Organization (hereinafter NATO) Treaty takes effect only if a member of the alliance becomes a victim of an 'armed attack'.²⁷ Using force that remains just below this intensity level, a hybrid adversary may advance its interest without risking a forcible response from NATO.²⁸

Of interest in this chapter are, however, not the *ius ad bellum* but rather the *ius in bello* thresholds, concretely the one triggering the applicability of the LONW – a set of rules specifically designed to regulate armed conflicts at sea. Incidents in various world regions make it rather plain that hybrid adversaries also understand how to exploit this threshold by engaging in conduct that is difficult to assess in terms of LONW applicability. The Kerch Strait incident is a case in point. It 'demonstrates how adept Russia is at exploiting the seam between the contending peacetime and wartime legal dimensions of the Crimea conflict',²⁹ notably cloaking the question of the applicable law in uncertainty.³⁰ Incidents involving the Chinese maritime militia are a further, notorious example where an adversary taps into the fine line separating tension and harassment subject to the peacetime rules from an incident qualifying as an armed conflict at sea and triggering the more permissive LOAC authorisations.³¹

It is against this background that the author of the present chapter has chosen to contribute with some reflections to the second research question underlying the present book: 'What is the threshold for the applicability of the law of naval warfare in situations that can be characterised as hybrid warfare and to what extent State practice shows that it is possible to apply such threshold?'³² Bearing in mind the word limit, the complexity of the enquiry, and the fact that the applicability questions *inter alia* depend on the rule(s) in question, a narrow focus has been chosen for this chapter. It considers the use of force against or involving ships in hybrid naval warfare contexts and analyses when such use of force is governed by the more permissive conduct of hostilities rules of the law of naval warfare (hereinafter LONW CoH rules)³³ rather than the more restrictive maritime law enforcement rules (hereinafter MLE rules).

To answer this question, the chapter proceeds as follows. After this introduction, it will be demonstrated that the decision to use force under MLE or LONW CoH rules is consequential.

²⁷ North Atlantic Treaty (entered into force 24 August 1949) 34 UNTS 234 (NATO Treaty).

²⁸ Sari, *Blurred Lines* (n 3) 3; Sari, *Hybrid Warfare* (n 17) 186-187.

²⁹ James Kraska, 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?' (3 December 2018) EJIL: Talk!, available at <www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/> accessed 30 March 2024, 6.

³⁰ Kraska, *ibid.*, e.g., argues that the incident is governed by the LONW. By contrast, in *Three Ukrainian Naval Vessels (Ukraine v Russian Federation)* (Provisional Measures, Order of 25 May 2019), ITLOS Reports 2019, 283, the Tribunal understood the incident as one concerning the interpretation and application of the LOSC. But see Declaration of Judge Lijnzaad, *Three Ukrainian Naval Vessels (Ukraine v Russian Federation)* (Provisional Measures, Order of 25 May 2019), ITLOS Reports 2019, 330, in which she explains that she has voted for the Order, 'but with a certain reluctance as to the Tribunal's considerations about the law that may be applicable to this case' (para 1) and in which she expresses concerns 'whether the current matter is truly a dispute concerning the interpretation and application of the Convention, or whether other rules of international law, for which the Tribunal may not have jurisdiction, are at issue' (para 5), thus insinuating that the matter may be governed by the LONW.

³¹ See, e.g., McLaughlin, *South China Sea* (n 21) 707-710.

³² See the introductory chapter of the present book.

³³ On the exact scope of the present analysis and the fact that the term 'conduct of hostilities rules' is too broad in light of it but used for the sake of simplicity, see n 72.

While the principles limiting the use of force – necessity, proportionality and precaution – sound very similar under both sets of rules, their content is markedly different. As will be shown, the conditions for the lawfulness of the use of force are relatively more permissive under the LONW CoH rules (allowing for proactive, first resort use of force against legitimate targets) as compared to the MLE rules (allowing only for reactive, last resort use of force).³⁴ As a result, the question of the applicability of the LONW CoH versus MLE rules has 'a significant impact on the legality of the use of force under international law' (Section 2).³⁵

The chapter's core is devoted to the issue of thresholds, that is, to the question of when the LONW CoH rules are applicable to a given incident at sea involving the use of force. It is posited that answering it requires a three-prong enquiry, which starts with the rather obvious threshold question as to whether the general situation of violence in which the incident occurs amounts to an armed conflict. If so, the applicability of the entire LONW regime is, in principle, activated for a given context ('context applicability').³⁶ However, the analysis must not stop here since not every incident occurring in the geographical or temporal context of an armed conflict at sea is indeed covered by the LONW, but only those featuring a sufficient link – or nexus – with the armed conflict.³⁷ Neither shoplifting on dry land nor armed robbery at sea is, if unrelated to the armed conflict, governed by the LOAC and the LONW, respectively – which are bodies of law developed specifically to address the specificities of armed conflict and thus do not provide appropriate rules for issues beyond it.³⁸ Thus, the second threshold question is whether a specific incident features a sufficient nexus with the armed conflict at sea ('incident applicability').³⁹ If so, in a third step, it must be assessed whether the measure in question amounts to an attack, for only then will the LONW CoH rules be applicable⁴⁰ ('measure applicability'). Indeed, under the LONW, belligerent measures are not limited to attacks but may consist, for example, of control measures, such as the right of visit and search of neutral vessels or the right to inspect specially protected enemy vessels.⁴¹ Taking LONW measures that do not qualify as an attack may also imply the use of force, which is, however, not governed by the LONW CoH rules.⁴² In sum, the applicability of the LONW CoH rules requires that three

³⁴ In detail see Section 2.3.

³⁵ Elvina Pothelet, 'Searching for the "Nexus": A Proposal to Refine the Scope of Applicability of International Humanitarian Law and War Crimes Law' (PhD thesis, University of Geneva 2021) 369.

³⁶ Pothelet, *ibid* 13, uses the terms 'regime applicability', 'macro-applicability' and 'context applicability' to refer to the first threshold that must be met in order to apply the shore-based LOAC.

³⁷ For shore-based LOAC: see Sassòli, IHL 2024 (n 2) 220 in general; and Pothelet (n 35) 370-371 as regards use of force specifically.

³⁸ Sassòli, IHL 2024 (n 2) 220.

³⁹ In the context of shore-based LOAC, Pothelet (n 35) 13 refers to 'case applicability' or 'micro-applicability' to denote this second threshold.

⁴⁰ James Kraska and others, 'The Newport Manual on the Law of Naval Warfare' (2023) 101 *International Law Studies* 1, 130.

⁴¹ See San Remo Manual, Part V, entitled 'Measures Short of Attack: Interception, Visit, Search, Diversion and Capture'; Wolff Heintschel von Heinegg, 'The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities' (2016) 98 *International Review of the Red Cross* 229, 462; Kraska and others, Newport Manual (n 40) 37 and 131-132.

⁴² Gloria Gaggioli, 'The Use of Force in Armed Conflicts Conduct of Hostilities, Law Enforcement, and Self-Defense' in Winston S Williams and Christopher M Ford (eds.), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press 2018) 61, 69, referring to the example of blockade enforcement.

thresholds are met: The situation of violence must amount to an 'armed conflict', the incident provoking the use of force must feature the requisite 'nexus' with the armed conflict, and the forcible measure taken must amount to an 'attack' (Section 3).

In the next Section, it will be demonstrated that the doctrinal and practical debates so far have largely focused on whether a given situation of violence amounts to an armed conflict, forming the first threshold requirement. Even if these debates feature a palpable land bias, analyses of the notion of armed conflict at sea have become more frequent in recent years as there is a renewed interest in the LONW in light of actual and potential conflicts with a maritime dimension. By contrast, the second threshold requirement – the nexus – has received far less attention, even in the rich qualification debate centring around shore-based armed conflicts, which is surprising as the thorniest applicability issues arise at this very level.⁴³ In 2019, Marco Sassòli noted that 'the contours of the nexus requirement for the applicability of IHL [International Humanitarian Law] remain totally unexplored in IHL scholarship'.⁴⁴ Meanwhile, the excellent study of Elvina Pothelet has addressed this doctrinal gap in an important way⁴⁵ – yet only regarding the shore-based LOAC. It is posited and argued that due to the 'rule-exceptionalism' of the LONW – a term used by Rob McLaughlin to refer to rules of the LONW, which are peculiar in that they deviate from the LOAC as applicable on land⁴⁶ – the territorially informed findings regarding the nexus cannot be directly transposed to the LONW (Section 4).

In the final Section, it is concluded that there is a need to further explore and refine the threshold criteria for the applicability of the LONW and, specifically, to develop a maritime-specific theory of nexus (Section 5).

2. Applicability of MLE or LONW CoH Rules: A Consequential Decision

Under both the MLE and the LONW CoH rules,⁴⁷ the use of force is not prohibited but regulated. However, as will be shown in the following Section, the two sets of rules regulate it in markedly different ways.⁴⁸ Since the LONW CoH rules are generally more permissive than the MLE rules, the 'choice of the applicable paradigm may have significant legal and humanitarian consequences'.⁴⁹

⁴³ Pothelet (n 35) 4; she argues that this is a result of the fact that the LOAC applicability at the context-level is rather widely defined.

⁴⁴ Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 201.

⁴⁵ Pothelet (n 35); as per Sassòli, IHL 2024 (n 2) 222, she remains the 'scholar who most thoroughly analysed the nexus' so far.

⁴⁶ Robert McLaughlin, 'Active Resistance by Merchant Vessel Crews During International Armed Conflict is Not "Direct Participation in Hostilities"' (2022) 99 *International Law Studies* 284, 289; see also Sassòli, IHL 2024 (n 2) 430, referring to the 'the sometimes astonishing (...) rules' of the LONW; and Sassòli, IHL 2019 (n 44) 400, pointing to the 'distinctive features and surprising rules' of LONW when seen from the viewpoint of shore-based LOAC.

⁴⁷ This chapter rests on the idea that the use of force under international law is governed by only two paradigms, which are the MLE and LONW CoH rules, and that the use of force in self-defence is not a third paradigm comprising further authorisation; arguing this way Gaggioli (n 42) 105-106.

⁴⁸ Pothelet (n 35) 369.

⁴⁹ Nils Melzer and Etienne Kuster, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2016) 30.

2.1 Use of Force Under MLE Rules: Instances and Legal Framework

In a maritime law enforcement context, the projection of force may be necessary for various purposes, notably to compel a vessel to navigate to or away from a certain place; to stop and board it; to defend against suspects on board; or to seize, destroy and sink a ship.⁵⁰ The use of force in policing operations at sea is primarily governed by domestic law, notably administrative and criminal law,⁵¹ which has to comply with international law on the matter.

To identify international rules on the use of force in MLE operations, one intuitively turns to the law of the sea and, specifically, the United Nations Convention on the Law of the Sea (hereinafter LOSC).⁵² Yet, surprisingly, the 'Constitution for the Oceans' is silent on the matter,⁵³ as are most other treaties authorising enforcement measures against delinquent vessels. The 1995 Fish Stock Agreement⁵⁴ and the 2005 SUA Protocol⁵⁵ – and, on a regional level, the 1995 Agreement on Illicit Traffic by Sea of the Council of Europe⁵⁶ – are exceptions in this respect as they comprise provisions limiting the use of force. However, their respective scope of application remains narrow.⁵⁷ The UN Security Council Resolutions authorising enforcement measures against ships engaged in maritime crime equally lack explicit guidance on the use of force.⁵⁸ More recent resolutions, at least, tend to stipulate that 'applicable human rights law' must be observed when taking enforcement action at sea, thus indirectly constraining the use of force in MLE.⁵⁹

⁵⁰ Cameron Moore, 'The Use of Force' in Robin Warner and Stuart Kaye (eds.), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2015) 28.

⁵¹ Matteo Tondini, 'The Use of Force in the Course of Maritime Law Enforcement Operations' (2017) 4 *Journal on the Use of Force and International Law* 253, 255.

⁵² United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

⁵³ This was no oversight. Ivan Shearer, who attended the LOSC negotiations as a delegate, explains this gap by 'a disinclination' during the Third UN Conference on the Law of the Sea 'to discuss such distasteful matters' (Ivan Shearer, 'The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime' (1998) 71 *International Law Studies* 429, 440) and also by the prevailing perception among delegates that 'customary international law already governed the exercise of force' sufficiently (Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 341). On the latter argument, see also David H Anderson, 'Some Aspects of the Use of Force in Maritime Law Enforcement' in Nerina Boschiero and others (eds.), *International Courts and the Development of International Law* (TMC Asser Press 2013) 233, 234, who identifies policing at sea and the use of force as one of the matters not governed by the LOSC, which, according to its preamble, 'continue to be governed by the rules and principles of general international law'.

⁵⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3, Art 22(1)(f).

⁵⁵ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc. LEG/CONF.15/21, Art 8bis(9).

⁵⁶ Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (opened for signature 31 January 1995, entered into force 1 May 2000) CETS No. 156, Art 12(1)(d).

⁵⁷ The provisions only apply if enforcement measures authorised in the respective treaty against suspects engaging in offences defined in the respective treaty are taken.

⁵⁸ E.g., resolutions on piracy and armed robbery at sea, human trafficking and smuggling of migrants, and the enforcement of embargos relating to arms, weapons of mass destruction and other objects.

⁵⁹ Anna Petrig, 'The Role Accorded to Human Rights in Security Council Maritime Resolutions' in Kiara Neri (ed.), *Le Conseil de sécurité des Nations Unies et la mer - The United Nations Security Council and the Sea* (Editoriale Scientifica 2018) 51-53 (initial silence on the compliance of enforcement measures with IHRL), 53-55 (mooring authorised enforcement powers to IHRL) and 69 (summary).

In light of this, it is mainly in international human rights law (hereinafter IHRL) rather than in the law of the sea or transnational maritime criminal law where limitations of the use of force are to be found.⁶⁰ The right to life, enshrined in all major universal and regional IHRL treaties and amounting to customary international law,⁶¹ is of primordial importance in this respect.⁶² The case law of the European Court of Human Rights (hereinafter ECtHR) on the right to life and use of force and related doctrine is an extremely rich source. While most cases indeed relate to policing on land, and may thus not necessarily be transposable one-to-one to policing at sea with its distinct features,⁶³ the body of maritime-specific case law on the use of force is slowly growing.⁶⁴ This IHRL-specific case law is supplemented by judicial pronouncement on the use of force by courts and tribunals belonging to the LOSC dispute settlement mechanisms. The International Tribunal for the Law of the Sea (hereinafter ITLOS), in its seminal *M/V 'Saiga' (No. 2)* case, generically referred to 'international law' as a source from which it inferred the principles on the use of force in MLE,⁶⁵ rather than to IHRL.⁶⁶ Yet, there is a high degree of convergence regarding the substance of the principles on the use of force, which are necessity, proportionality, and precaution,⁶⁷ as developed by courts and tribunals deciding IHRL and LOSC disputes, respectively. These principles, which apply regardless of the maritime zone in

⁶⁰ On the important role IHRL plays in light of the relative silence of the law of the sea and transnational maritime criminal law on the protection of suspects at sea, see Anna Petrig, 'Human Rights and Law Enforcement at Sea' in Ruxandra-Laura Boşilcă, Susana Ferreira and Barry J Ryan (eds.), *Routledge Handbook of Maritime Security* (Routledge 2022) 153-164.

⁶¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 6; Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) CETS No. 5, Art 2; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 4; American Convention on Human Rights 'Pact of San José', Costa Rica (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 4.

⁶² Efthymios D Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)' (2015) 2 *The Journal of Territorial and Maritime Studies* 119, 134. Limits on the use of force do not only flow from the right to life but also from the right to property; the latter is, however, less discussed in doctrine.

⁶³ On the differences see Tondini (n 51) 254 and 259.

⁶⁴ See most recently ECtHR, *L'affaire Alkhatib et autres c. Grèce* (Judgment) 16 January 2024.

⁶⁵ Which is applicable by virtue of the LOSC, Art 293.

⁶⁶ *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Reports (1999) 10, para 155. In light of this, Tullio Scovazzi, 'ITLOS and Jurisdiction over Ships' in Henrik Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 382-404, 395, suggested that 'Perhaps the ITLOS, making a step further, could have pointed out that the relevant rules of customary international law are found in international human rights law, and in particular in the rules on the human right to life.' In *The Arctic Sunrise Arbitration*, PCA Case No 2014-02, Award on the Merits, 14 August 2015, para 198, the Tribunal held that it may, 'pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, (...) in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons' (emphasis added); at stake in this case was, however, not the right to life, but other rights, notably the right to liberty.

⁶⁷ For a shore-based context, see Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life the Role of the Human Rights Council*, Academy In-Brief No. 6 (Geneva Academy of International Humanitarian Law and Human Rights 2016) 6; for the maritime context, see Tondini (n 51) 266. The terminology to denote the first two principles is not always consistent; 'necessity' is sometimes referred to as 'unavoidability' and 'proportionate' as 'reasonable and necessary' (see, e.g., *M/V 'SAIGA' (No. 2)* (n 66) para 155). However, the content is similar; see, e.g., Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 281, arguing that the words 'the minimum reasonably necessary' and 'proportionate' essentially denote the same standard.

which force is used during policing operations,⁶⁸ will be explained and contrasted to the similarly named principles under the LONW CoH rules once we have contextualised the latter.

2.2 Use of Force Under the LONW CoH Rules: Instances and Legal Framework

The LONW rests on three pillars. The first consists of the LOAC rules, which can be split into those regulating the conduct of hostilities at sea (in this chapter referred to as the LONW CoH rules) and those protecting certain persons at sea;⁶⁹ the second is prize law; and the third is maritime neutrality law.⁷⁰ As the present chapter focuses on the use of force as part of hostilities at sea, only the first pillar of the LONW is relevant. Within it, the analysis is limited to the CoH rules relevant for attacks against targets on, under and above the sea, at the exclusion of rules governing attacks from the sea against targets on land.⁷¹ Although too broad a term in light of the limited scope of the present analysis, we refer to these rules as LONW 'conduct of hostilities' rules (LONW CoH).⁷²

The applicability of the century-old 1907 Hague Conventions to targeting *at sea*, in addition to targeting objectives on land *from the sea*,⁷³ and the LONW rules' applicability in the present time,⁷⁴ are issues that must not be answered for the present chapter. This is because there is a 'general agreement that the basic principles underlying contemporary international humanitarian law [on the conduct of hostilities on shore] are equally applicable'⁷⁵ to the conduct of hostilities at sea as a matter of customary international law.⁷⁶ Indeed, the principles of distinction, proportionality and precaution apply as such across warfighting domains, including

⁶⁸ Tondini (n 51) 256.

⁶⁹ In the San Remo Manual, they are referred to as 'international humanitarian law', see Rule 13(a).

⁷⁰ Kraska and others, Newport Manual (n 40) 1 and 84.

⁷¹ The rules applying to 'attacks from the sea (...) against objectives on land' are excluded as shore-based LOAC rules apply to them; this accrues from AP I, Art 49(3) and customary international law; see Sassòli, IHL 2024 (n 2) 431.

⁷² The term 'conduct of hostilities' is too broad in light of the scope of the present chapter for several reasons. First, CoH rules not only comprise targeting law (methods) but also weapons law (means) (Sassòli, IHL 2024 (n 2) 31), which is not analysed here. Second, CoH rules govern all methods and means of warfare, also those not amounting to an attack; starvation, e.g., declaring and establishing a blockade under the LONW does not by itself constitute an attack (Kraska and others, Newport Manual (n 40) 131); this chapter, however, only deals with attacks. Third, the CoH rules also cover attacks from the sea of targets on land, which are excluded here. Nevertheless, the term 'conduct of hostilities rules' (CoH rules) is used in the present chapter; not only for the sake of simplicity, but also because it is common in practice and doctrine to contrast the 'law enforcement paradigm' with the 'conduct of hostilities paradigm'; see, e.g., Gloria Gaggioli, *Expert Meeting: The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (International Committee of the Red Cross 2013).

⁷³ On this distinction and the respective applicable sources, see Kraska and others, Newport Manual (n 40) 134.

⁷⁴ See, e.g., Sassòli, IHL 2024 (n 2) 432, stating that with the exception of the GC II, 'treaties applicable to naval warfare are more than 100 years old, and it is not clear whether their rules still apply'.

⁷⁵ Wolff Heintschel von Heinegg, 'Maritime Warfare' in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 150, opening phrase of 'Section 3. The Legal Framework Applicable to the Conduct of Hostilities at Sea', 'A. Basic principles applicable to naval warfare'.

⁷⁶ This also accrues from the San Remo Manual, see, e.g., Rule 38 (no unlimited right to choose methods and means of warfare), Rule 39 (principle of distinction), Rule 40 (definition of military objective), Rule 41 (attacks must be limited to military objectives), Rule 42 (superfluous injury/unnecessary suffering; prohibition of indiscriminate attacks), Rule 43 (no quarter), Rule 46 (precautions/proportionality in attack).

at sea.⁷⁷ Yet, this should not belie the fact that some major legal differences exist between land and naval warfare. A notable difference for the present chapter is that the LONW CoH rules are platform-centric rather than person-centric.⁷⁸ While under land-based CoH rules, the *person's* status or conduct is crucial in determining whether he or she is a legitimate target, in the LONW, the status and conduct of the *vessel* is generally decisive – the person disappears behind the ship, so to speak.⁷⁹ Later in this chapter, we will dive deeper into this 'rule-exceptionalism' – or 'distinctive features and surprising rules'⁸⁰ – of the LONW.

2.3 Principles Governing the Use of Force: Similar Names, Different Content

The principles governing the use of force sound quite similar under both the MLE and LONW CoH paradigms. Yet, as will be demonstrated in the following, their content differs considerably.⁸¹

Our analysis starts with the principle of necessity, which operates differently under the two paradigms. Under the law enforcement paradigm, 'absolute' or 'strict' necessity has three main facets. First, the use of force must be a last resort (*ultima ratio*); force must only be applied when 'strictly necessary'⁸² or 'strictly unavoidable'⁸³. Use of force must thus remain 'exceptional'⁸⁴ and officials must, as far as possible, apply non-violent means to achieve compliance,⁸⁵ such as 'persuasion, negotiation, and mediation, backed by the inherent authority of a law enforcement official who is acting on behalf of the state'⁸⁶. Second, force must only be used to pursue a legitimate aim, namely 'in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape'.⁸⁷ Third, where the use of force is unavoidable, only the minimum amount necessary must be used. Therefore, even a potentially violent suspect must, whenever this is reasonably possible, be arrested rather than killed,⁸⁸ and the amount of

⁷⁷ Sassòli, IHL 2024 (n 2) 431, stating that distinction, proportionality and precaution 'largely apply, with some particularities, to naval warfare'; see also Kraska and others, Newport Manual (n 40) 86 (distinction and proportionality; but note that they understand proportionality as a 'basic rule' of the LONW rather than a principle) and 156 (precaution).

⁷⁸ Kraska and others, Newport Manual (n 40) 84.

⁷⁹ McLaughlin, DPH (n 46) 291, writes on merchant mariners specifically that they 'are generally tarred with the status brush of their vessel, as opposed to their status being determined based on their individually attributed conduct'.

⁸⁰ Sassòli, IHL 2019 (n 44) 400.

⁸¹ Gaggioli (n 42) 69.

⁸² Code of Conduct for Law Enforcement Officials (adopted by General Assembly Resolution 34/169 of 17 December 1979) (hereinafter UN Code of Conduct for Law Enforcement Officials), Art 3.

⁸³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders) ST/HR/1/Rev.6 (Vol. I/Part 1) 351 (hereinafter Basic Principles on the Use of Force), Principle 9.

⁸⁴ UN Code of Conduct for Law Enforcement Officials, Art 3, Commentary.

⁸⁵ Basic Principles on the Use of Force, Principle 4.

⁸⁶ Casey-Maslen (n 67) 7.

⁸⁷ Basic Principles on the Use of Force, Principle 9.

⁸⁸ Casey-Maslen (n 67) 7-8.

force 'must be in keeping with the level of resistance offered'.⁸⁹ This essentially calls for a graduated law enforcement response.⁹⁰

The applicability of the principle of necessity, including the aforesaid three elements, to maritime law enforcement has been confirmed by international courts and tribunals, notably by the ITLOS in the *M/V 'Saiga' (No. 2)* case. Concerning the use of force to obtain the arrest of suspects on board a ship used for the commission of a crime – a legitimate aim provided a respective enforcement authorisation exists under international law⁹¹ – the Tribunal held that 'international law (...) requires that the use of force must be avoided as far as possible',⁹² which testifies to the *ultima ratio* character of the use of force at sea.⁹³ ITLOS further affirmed the need for a graduated law enforcement response by stating that '[t]he normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognised signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.'⁹⁴

Under the conduct of hostilities paradigm, by contrast, the use of force against lawful targets is presumed. In land warfare, it is not prohibited to use lethal force as a first resort based on the status (e.g. a combatant) or conduct of the person (e.g. a civilian directly participating in hostilities), even if these persons do not pose an imminent threat to life at the moment of the attack.⁹⁵ In the conduct of hostilities at sea, it is equally permissible to use force as a first resort. In addition, the following rule exceptionalism under the LONW accentuates the difference between the law enforcement and conduct of hostilities paradigms: the LONW is, as mentioned, concerned with the 'conduct and status of platforms rather than people'.⁹⁶ For the assessment of which targets are lawful, this implies that it is not the status or conduct of persons on board a vessel but rather the status and conduct of the vessel as such that is generally decisive. If the vessel is a military objective,⁹⁷ it can be lawfully attacked; the principle of distinction as applied to the conduct of hostilities at sea does not account for civilians on board.⁹⁸ Under the LONW CoH rules, persons on board a ship share, as a rule, the fate of the vessel.

⁸⁹ IACtHR, *Nadege Dorzema et al v Dominican Republic* (Judgment) 24 October 2012, para 85(iii).

⁹⁰ Gaggioli (n 42) 70.

⁹¹ See *Arctic Sunrise Arbitration* (n 66) para 222, where the Tribunal makes the lawfulness of a MLE measure dependent on the availability of a legal basis in international law and the respect of the principles of necessity and proportionality.

⁹² *M/V 'SAIGA' (No. 2)* (n 66) para 155.

⁹³ This accrues from a joint reading of *ibid* paras 155 and 156.

⁹⁴ *Ibid* para 156.

⁹⁵ ICRC, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (expert meeting report prepared and edited by Gloria Gaggioli; International Committee of the Red Cross November 2013) 8.

⁹⁶ McLaughlin, DPH (n 46) 290; see also 291; Kraska and others, Newport Manual (n 40) 92.

⁹⁷ Which vessels qualify as military objectives is not discussed here; but see the relevant rules in the San Remo Manual, e.g., Rule 40 (general definition of a military objective), Rule 51 (hospital ships) and Rule 60 (enemy merchant vessels).

⁹⁸ Kraska and others, Newport Manual (n 40) 92; consequently, civilians on board a targetable platform are not considered collateral damage and are not considered in the assessment of the proportionality of the attack; see below n 108.

To sum up, key differences exist under the MLE and LONW CoH paradigms as regards the question of whether force can be lawfully used. In MLE, this is only permissible as a last resort and in a reactive way, for example, to arrest a person suspected of having committed or about to commit a maritime crime or in a situation of self-defence or defence of others arising during the boarding of a suspect ship. In assessing whether force can be used, the person against whom force is displayed is in the focus, and lawfulness depends on whether a concrete and imminent risk for the life and limb of others emanates from the targeted person. By contrast, under the CoH paradigm, force can be used as a first resort and proactively if the target is a lawful one. In assessing the latter, it is not the person but rather the vessel on board which the person finds himself or herself, which is generally determinative.⁹⁹

With this, we turn to the principle of proportionality, the content of which also differs under the two paradigms despite being labelled similarly. In the law enforcement context, the proportionality principle requires balancing the risk posed by the individual to enforcers and others with the potential harm done to that individual and bystanders.¹⁰⁰ Essentially, the principle 'protects the lives of everyone'.¹⁰¹ Further, it requires a 'strict' assessment, meaning that if the suspect is not posing an imminent threat of death or serious injury, the use of (potentially) lethal force is disproportionate; moreover, death or injury of bystanders must be avoided as far as possible.¹⁰² The principle of proportionality applies to both policing on land and at sea.¹⁰³

Under the conduct of hostilities paradigm, the principle of proportionality protects surrounding civilians and civilian objects – rather than the target per se as would be the case under the law enforcement paradigm – from injury and damage that is excessive in relation to the concrete and direct military advantage.¹⁰⁴ The risk of excessive collateral damage resulting from hostilities at sea is generally much lower than the one emanating from attacks against targets on land, where the presence of civilian persons and objects is much more likely,¹⁰⁵ especially in urban areas where warfare is increasingly conducted¹⁰⁶. In addition to this factual difference between shore and sea, there is also a legal one. As per the traditional view, under the platform- rather than person-centric LONW CoH rules,¹⁰⁷ the crew and companies of a targetable vessel do not need to be subjected to any proportionality assessment, even if all or some of them are civilians.¹⁰⁸ In other words, '[t]he civilian crew are not considered collateral damage – while

⁹⁹ On the differences between reactive use of force under MLE and proactive use of force under LONW CoH authorisations at the example of the Houthi rebel violence in the Red Sea, see Rob McLaughlin, 'Houthi Operations in the Red Sea and LOAC?' (*Lieber Institute West Point*, 8 January 2024) <<https://lieber.westpoint.edu/houthi-operations-red-sea-loac/>> accessed 30 March 2024.

¹⁰⁰ ICRC, *The Use of Force* (n 95) 8.

¹⁰¹ Gaggioli (n 42) 70.

¹⁰² *Ibid* 67 and 70.

¹⁰³ On the applicability at sea, see *Arctic Sunrise Arbitration* (n 66) para 222.

¹⁰⁴ ICRC, *The Use of Force* (n 95) 8. As per Kraska and others, *Newport Manual* (n 40) 154, the content of AP I, Art 51(5)(b) – a provision governing land-based attacks and attacks from the sea against targets on land – also applies to attacks at sea as a matter of customary international law.

¹⁰⁵ Kraska and others, *Newport Manual* (n 40) 154; but see 154-155 for real-life examples where collateral damage has been caused in the context of the conduct of hostilities at sea (whether it has been excessive is not assessed).

¹⁰⁶ Sassòli, *IHL 2024* (n 2) 389-390.

¹⁰⁷ See above n 78 and 96 and respective text.

¹⁰⁸ Kraska and others, *Newport Manual* (n 40) 154; McLaughlin, *DPH* (n 46) 291.

embarked they are targetable with, and share the fate of, their ship just as a naval crew would'.¹⁰⁹ Whether the principle of proportionality applies at least to passengers on board a merchant vessel liable to attack remains a controversial issue.¹¹⁰

This brief comparison evidences the marked differences between the principle of proportionality under the MLE and LONW CoH paradigms, respectively. Under the MLE rules, it protects everyone's life, including the life of the person against whom force may be used. Persons are at the very core of the assessment of whether the use of force is proportionate. Under the LONW CoH rules, by contrast, the target as such is not covered by the principle; what is more, civilian persons on board a targetable vessel are generally not considered in the proportionality assessment.

Finally, there are also notable differences regarding the principle of precaution. Under the law enforcement paradigm, all precautions must be taken to avoid the use of force as such.¹¹¹ This principle 'acts as a precursor to the principles of necessity and proportionality'¹¹² and aims at minimising, to the greatest extent possible, injury or death. This aim can notably be realised by adopting an adequate legal and administrative framework governing the use of force; training officials in the use of non-lethal methods to accomplish their goals; equipping them with means that allow for a differentiated use of force; and planning and controlling law enforcement operations in a way that preserves the right to life to the greatest extent possible.¹¹³ The applicability of this principle to enforcement operations taking place at sea has most recently been confirmed by the ECtHR.¹¹⁴

Under the LONW CoH rules, the principle of precaution does not require one to avoid the use of force as such to the greatest extent possible but merely to avoid excessive incidental civilian harm and injury. The principle is thus geared towards target verification and identification as well as avoidance of excessive incidental harm.¹¹⁵ Whether under the LONW CoH rules, the more or less demanding standard (all 'feasible' versus all 'reasonable' measures that must be taken) applies,¹¹⁶ can be left open for present purposes, for it accrues sufficiently from the above that the principle of proportionality has a different content under the MLE and LONW CoH rules.

In conclusion, even though the principles governing the use of force are labelled similarly under the law enforcement and conduct of hostilities paradigms, this cursory overview has demonstrated that they considerably differ in content both as regards the actual use of force and

¹⁰⁹ McLaughlin, DPH (n 46) 291.

¹¹⁰ Kraska and others, Newport Manual (n 40) 155.

¹¹¹ Gaggioli (n 42) 70-71.

¹¹² Casey-Maslen (n 67) 9.

¹¹³ ICRC, The Use of Force (n 95) 43.

¹¹⁴ *L'affaire Alkhatib et autres c. Grèce* (n 64) paras 126 ff and 133 ff.

¹¹⁵ See AP I, Art 57(4); San Remo Manual, Rule 46 and related commentary in Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) 123-124.

¹¹⁶ The San Remo Manual, Rule 46 adopts the 'feasible' standard; see on this Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) 123-124. Kraska and others, Newport Manual (n 40) 158, argue for the 'reasonable'-standard.

preventive measures to take.¹¹⁷ Broadly speaking, the MLE paradigm is, compared with the LONW CoH paradigm, not only more person-centric but also more restrictive¹¹⁸. This is not surprising because, as mentioned earlier, the applicability of the LOAC makes certain conduct that is normally outlawed perfectly lawful. The use of deadly force is paradigmatic in this respect. It confirms Clapham's observation that 'the concept of war affects the application of law' and that '[t]he idea of war often operates to legitimate something that would otherwise be illegal'.¹¹⁹ In light of this, the determination that a given use of force against a ship is not governed by the MLE but rather by the LONW CoH rules is consequential.¹²⁰ At the same time, deciding whether the LONW CoH rules are applicable to a given incident – which involves a three-prong enquiry to which we turn next – is not easy at all.¹²¹

3. The Applicability of the LONW: A Three-Prong Enquiry

As posited in the introduction, a three-prong enquiry is necessary to determine whether the LONW CoH rules are applicable to an incident involving the use of force at sea.¹²² First, it must be ascertained whether the situation of violence, in which an incident involving a ship occurs, or an isolated incident at sea, amounts to an armed conflict. If so, the LONW regime is applicable as such to this situation (context applicability). Second, the LONW does not govern all events occurring in this context but only those featuring a sufficient link with the armed conflict in question. In other words, a nexus must exist between an incident involving a ship and the armed conflict (incident applicability). Third, only if the measure taken against the ship qualifies as an attack in the sense of the LONW will the LONW CoH rules discussed above be applicable (measure applicability). If all three thresholds, discussed in the following Section, are met, the use of force against or involving ships is governed by the more permissive LONW CoH rules rather than the MLE rules.

3.1 Context-Applicability: Existence of an Armed Conflict

The LONW in its entirety – meaning all three pillars, which are the LOAC rules, prize law and maritime neutrality law – only applies if a situation of violence reaches the threshold of an international armed conflict (hereinafter IAC).¹²³ The first pillar of the LONW, the LOAC rules, even apply in non-international armed conflict (hereinafter NIAC), which is not the case for the other two pillars.¹²⁴ However, NIACs will not be considered any further here.

¹¹⁷ In addition, major differences exist in terms of obligations that apply after the execution of an operation involving force, notably regarding the obligation to conduct an effective investigation; see ICRC, *The Use of Force* (n 95) 49-51.

¹¹⁸ Gaggioli (n 42) 65.

¹¹⁹ Clapham (n 5) Preface v.

¹²⁰ ICRC, *The Use of Force* (n 95) 1.

¹²¹ Confirming the intricate nature of the threshold question: ICRC, *The Use of Force* (n 95) 1.

¹²² See above text relating to n 36-42.

¹²³ Kraska and others, *Newport Manual* (n 40) 18. Similarly to the shore-based LOAC rules (see above n 2), some of the LONW LOAC-rules already apply in peacetime; see ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea* (Cambridge University Press 2017), Art 2, paras 221-222. Since we are only concerned with the first pillar, the LOAC rules, where the threshold of IAC seems to be widely accepted, the position of some states that maritime neutrality law only applies in case of (declared) war is not further discussed here; see on this Kraska and others, *Newport Manual* (n 40) 19.

¹²⁴ Kraska and others, *Newport Manual* (n 40) 18.

Treaty law does not offer a definition of the concept of IAC. The Second Geneva Convention of 1949, for instance, solely refers to an 'armed conflict which may arise between two or more of the High Contracting Parties', that is, between two or more states. Absent a definition in law, the legal contours of the concept have been sketched out by state practice, doctrine and judicial interpretation.¹²⁵ As regards the latter, the definition of the ICTY provided in the *Tadić* case has become the one generally recognised as authoritative,¹²⁶ including in the context of IACs with a maritime dimension¹²⁷. As per the *Tadić* case, 'an [international] armed conflict exists whenever there is a resort to armed force between States'.¹²⁸ In light of the tendency of hybrid adversaries to deny the existence of an IAC and/or their involvement in such,¹²⁹ it is important to remember that the determination of whether this threshold is met does not depend on the views of the parties involved, but solely on the prevailing facts on the ground.¹³⁰

The first element of the *Tadić* IAC definition – 'between States' – requires that the resort to armed force involves two or more states.¹³¹ While a plurality of actors is necessary, the definition covers not only the situation where the use of force by one state is met with armed resistance by the targeted state but also the unilateral use of force to which, for whatever reason, no forcible response follows.¹³² Further, it does not matter whether *de jure* organs (be it the navy, the coast guard or any other state organ) or *de facto* organs use force; even the conduct of private persons is covered if the state exercises overall control over the non-state actors in question.¹³³ The force must not be directed against another state's armed forces; rather, it suffices that its territory (including its territorial or archipelagic waters), population, or military or civilian infrastructure comes under attack.¹³⁴ Yet, it remains unclear whether the use of force against a merchant ship qualifies as a use of force against the flag state if the incident does not happen in that state's territorial or archipelagic waters.¹³⁵

The second element of the *Tadić* IAC definition – 'resort to armed force' – covers the use of any means or method having the potential to cause death, injury, physical damage, or destruction, including those specific to the maritime context, such as the use of torpedoes, naval

¹²⁵ ICRC-Commentary GC II (n 123), Art 2, paras 239-240.

¹²⁶ This has been affirmed, e.g., in ICC, The Office of the Prosecutor, *Situation in the Republic of Korea: Article 5 Report* (June 2014) n 23.

¹²⁷ ICC, *Situation in the Republic of South Korea* (n 126) n 43; ICRC-Commentary GC II (n 123), Art 2, para 240; Kraska and others, *Newport Manual* (n 40) 20.

¹²⁸ *Prosecutor v. Tadic* (Decision) ICTY-94-1 (2 October 1995) para 70.

¹²⁹ Lott (n 22) 23; Borys Kormych and Tetyana Malyarenko, 'From Gray Zone to Conventional Warfare: The Russia-Ukraine Conflict in the *Black Sea*' (2022) 34(7) *Small Wars & Insurgencies* 1, 19.

¹³⁰ ICRC-Commentary GC II (n 123), Art 2, paras 233-235; Kraska and others, *Newport Manual* (n 40) 20.

¹³¹ *Ibid.*, paras 241-243.

¹³² *Ibid.*, para 245; Kraska and others, *Newport Manual* (n 40) 21.

¹³³ Kraska and others, *Newport Manual* (n 40) 22-23.

¹³⁴ ICRC-Commentary GC II (n 123), Art 2, para 246.

¹³⁵ Kraska and others, *Newport Manual* (n 40) 24. For a discussion of whether this scenario could amount to an 'armed attack' in the meaning of the UN Charter, Art 51, see Martin Fink, 'Protecting Commercial Shipping with Strikes into Yemen: Do Attacks Against Merchant Shipping Trigger the Right of Self-Defence?' (26 January 2024) EJIL: Talk!, available at <www.ejiltalk.org/protecting-commercial-shipping-with-strikes-into-yemen-do-attacks-against-merchant-shipping-trigger-the-right-of-self-defence/> accessed 30 March 2024. If so, the threshold of IAC is generally fulfilled (see McLaughlin, *South China Sea* (n 21) 707); but it may even be fulfilled if the threshold of an 'armed attack' is not reached.

mines and unmanned vessel or the establishment of a naval blockade.¹³⁶ Importantly, it is not required that harm actually results from resorting to the armed force.¹³⁷ Further, per the prevailing view, there is no intensity requirement, that is, 'no element of scale'¹³⁸ applying for so long as there is a resort to armed force between states. To use the words of Pictet, '[i]t makes no difference how long the conflict lasts, or how much slaughter takes place'.¹³⁹ Indeed, in the maritime context, it is not unusual to see 'short, sharp, localised and "done" in a day' IACs.¹⁴⁰ The sinking of the *Cheonan*, a South Korean warship, by a torpedo launched from a North Korean submarine on 26 March 2010, which resulted in the death of nearly fifty navy sailors, is a classic example.¹⁴¹

Whether the *Tadić* definition of the IAC – 'resort to armed force between States' – is fulfilled in a given case tends to be a rather straightforward determination if traditional actors, means, and methods are involved, that is if naval forces confront each other. Yet, determining whether certain conduct reaches the threshold of an IAC becomes an intricate task if states rely on proxies to engage in aggressive or physically coercive action against another state's ship; deploy non-naval vessels to do so; and/or rely on non-traditional means and methods to engage in violent acts – which are the very hallmark of hybrid naval wars.¹⁴² In the South China Sea, for instance, confrontations involving ostensibly 'civilian' ships, most notably fishing vessels, are not a rare occurrence.¹⁴³ Relying on proxies, such as 'maritime militias', provides the hybrid adversary with 'an effective attribution veil'¹⁴⁴ because it will often be difficult to demonstrate that they are either *de facto* state organs or private actors acting under the overall control of a state. This, however, is necessary because only the use of force attributable to a state can trigger an IAC.¹⁴⁵

The focus so far has been on temporally and geographically limited incidents at sea *triggering* the existence of an IAC. In these cases, the difficulty lies in drawing the, sometimes fine, line between harassment and tension on the one hand and a resort to armed force by a state amounting to an IAC on the other. However, there is also the situation where an IAC undisputedly *exists* and in the context of which an incident at sea occurs. The Kerch Strait

¹³⁶ Kraska and others, Newport Manual (n 40) 21.

¹³⁷ Ibid.

¹³⁸ ICC, Situation in the Republic of South Korea (n 126), paras 10 and 45.

¹³⁹ Jean Pictet (ed.), *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea* (International Committee of the Red Cross 1960) 28.

¹⁴⁰ McLaughlin, South China Sea (n 21) 703.

¹⁴¹ ICC, Situation in the Republic of South Korea (n 126), para 7. See McLaughlin, South China Sea (n 21) 703, for two further examples of one-day IACs at sea, which both took place in 1998, one involving the US and Iran, the other China and Vietnam.

¹⁴² On the use of non-traditional actors, means and methods, and the ensuing difficulties for determining whether an armed conflict exists, see Heintschel von Heinegg, Conflict Classification (n 41) 452-453 (in general); Lott (n 22) 20 (regarding contexts of hybrid naval warfare); and McLaughlin, South China Sea (n 21) 707-710 (regarding the South China Sea region specifically).

¹⁴³ McLaughlin, South China Sea (n 21) 704 and 716.

¹⁴⁴ Ibid 706; this is just one advantage of this tactic, for others see 705-706: deploying large numbers of 'civilian' vessels makes it more difficult for the adversary to maintain situational awareness; is a very cheap force multiplier; and obfuscates the status of these vessels under the LOAC, creating uncertainty as to whether they are lawful targets.

¹⁴⁵ See Nasu (n 20) 225.

incident would belong to this latter scenario. While in the first scenario, the context- and incident-applicability collapse (if the incident at sea amounts to an IAC and triggers the applicability of the LONW, it *per se* features a sufficient nexus with the armed conflict), it must for the latter situation be established that the incident features a sufficient link with the IAC for it to be governed by the LONW. This nexus requirement is discussed next.

3.2 Incident-Applicability: Nexus Between Use of Force Incident and Armed Conflict

Suppose a given situation amounts to an armed conflict, through which the regime of the LONW becomes applicable as such. In that case, a question arises as to which events – here, which incidents involving the use of force against ships – are governed by the LONW CoH rules rather than the MLE rules. As mentioned earlier, the LONW does not govern all acts occurring in the spatio-temporal framework of an armed conflict but only those featuring a sufficient link – or *nexus* – with it.¹⁴⁶

Sometimes, it is obvious that there is a sufficient nexus between a particular incident and an armed conflict.¹⁴⁷ For example, in the ongoing IAC between the Russian Federation and Ukraine, the sinking of a Russian warship by a Ukrainian naval drone is an incident involving the use of force against a ship where the nexus between the conduct and the conflict seems palpably obvious.¹⁴⁸ Sometimes, it is equally obvious that incidents involving the use of force against ships do *not* feature a nexus with an armed conflict raging in the respective region. For example, in 2010–2011, violence against merchant ships in the form of hijackings was thriving off the coast of Somalia. Although Somalia was experiencing several armed conflicts during these years, there was general agreement that these incidents were not acts of war but criminal acts qualifying as armed robbery at sea or piracy, and thus to be met by a law enforcement response subject to the MLE rules on the use of force.¹⁴⁹

¹⁴⁶ Elvina Pothelet, 'Life in Rebel Territory: Is Everything War?' (20 May 2020) Armed Groups and International Law, available at <www.armedgroups-internationallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war/> accessed 30 March 2024; Pothelet (n 35) 5; Sassòli, IHL 2024 (n 2) 220; see also text belonging to n 39.

¹⁴⁷ See Pothelet (n 35) 4 who argues in a land-based context, that the applicability of the LOAC to specific events is not always 'open to doubt' and that there are 'many events related to the core of the conflict that are unmistakably covered' by the LOAC.

¹⁴⁸ In recent months, Ukraine has sunk several Russian warships using the Magura V5, a relatively small, uncrewed, remote-controlled boat with a reach of 800 km and capable of carrying a payload of 250 kg; see Abdusalil Abdurasulov, 'Ukraine War: The Sea Drones Keeping Russia's Warships at Bay' (*BBC*, 12 March 2024) <www.bbc.com/news/world-europe-68528761> accessed 30 March 2024; Abdusalil Abdurasulov, 'Ukraine War: The Sea Drones Keeping Russia's Warships at Bay' (*BBC*, 12 March 2024) <www.bbc.com/news/world-europe-68528761> accessed 30 March 2024; and Pjotr Sauer, 'Russia Reportedly Fires Navy Chief After Ukraine's Attacks on Black Sea Fleet' (*The Guardian*, 13 March 2024) <www.theguardian.com/world/2024/mar/13/russia-reportedly-fires-navy-chief-attacks-black-sea-fleet-ukraine> accessed 30 March 2024.

¹⁴⁹ Even in this clear situation, there was initially a moment of confusion about the applicable legal framework. In one of its first resolutions authorising enforcement measures to counter armed robbery at sea and piracy, the UN Security Council decided that the authorised measures 'shall be undertaken consistent with applicable international humanitarian and human rights law' (UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851 para 6). The reference to 'international humanitarian law' (i.e., LOAC) raised some doubts about the applicable legal framework. However, the words 'as applicable' suggest that the UN Security Council did not declare the LOAC to be, in fact, applicable but rather referred to its potential applicability. For a detailed analysis on why the LOAC is not applicable in countering Somali-based piracy at sea and on land, see Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press 2011) 132–136.

While many cases are clear-cut, there are also borderline cases. Particularly in hybrid naval war contexts, events occur that – at least at first glance – do not relate ‘to the core of the conflict’¹⁵⁰ but rather appear peripheral to it. In such cases, therefore, it is difficult to determine whether these events are sufficiently connected with the surrounding conflict in order to be governed by the LONW.¹⁵¹ The Kerch Strait incident, which happened in 2018 and thus at a time when an IAC between the Russian Federation and Ukraine existed, is paradigmatic in this regard. To this day, it is controversially discussed as to whether the incident features a sufficient link with the armed conflict that would subject it to the LONW.¹⁵² Equally difficult to assess are the acts of violence committed by Houthi rebels since 2017, such as the use of remote-controlled crafts filled with explosives to inflict harm on other ships. Whether these are criminal acts,¹⁵³ or whether (some of them) are acts of war governed by the LONW because they have a sufficient nexus with an armed conflict is an intricate question.¹⁵⁴

Despite the importance of the concept of nexus in determining whether borderline incidents have a close enough link with an armed conflict and are thus subjected to the LOAC, it has remained under-researched and under-theorised in LOAC doctrine.¹⁵⁵ Commentators, state practice, and international bodies have occasionally mentioned the nexus requirement.¹⁵⁶ Most often, this has occurred in the context of the use of force, that is, as a criterion for distinguishing acts of hostilities subject to the LOAC from other uses of force.¹⁵⁷ For the longest time, however, the concept existed as ‘a logical intuition more than a strictly defined legal requirement’.¹⁵⁸ It was not until Pothelet’s study that the concept of nexus was elevated from an ‘intuitive idea’¹⁵⁹ to a legal concept with fairly clear contours.¹⁶⁰

In her study, she first *conceptualises* the nexus, clarifying that it is a legal requirement for the LOAC applicability. She further considers how it relates to the war crimes jurisprudence (where nexus considerations are part and parcel of the doctrinal discussion) and how it fits into the overall framework governing the applicability of the LOAC.¹⁶¹ In essence, she argues that the

¹⁵⁰ Pothelet (n 35) 4.

¹⁵¹ See above n 20-23 on how hybrid adversaries deliberately engage in conduct that is just below a certain threshold (here: the applicability of the LONW to a given incident) or is difficult to assess in terms of whether it has reached it.

¹⁵² See n 30 above.

¹⁵³ The use of remotely controlled rather than crewed vessels to inflict harm to other ships complicates the assessment of whether these acts constitute piracy or SUA offences; see on this Anna Petrig, ‘Autonomous Offender Ships and International Maritime Security Law’ in Henrik Ringbom, Erik Røsæg and Trond Solvang (eds.), *Autonomous Ships and the Law* (Routledge 2021) 23-55.

¹⁵⁴ On whether an armed conflict between Houthis and other states (e.g., Israel) can be construed at all, see McLaughlin, Houthi Operations (n 99). Even if there is one or several armed conflicts, it must be determined for each incident whether it features a sufficient link with an armed conflict.

¹⁵⁵ See Pothelet (n 35) 92 and 497.

¹⁵⁶ For an overview of mentions of the nexus as a condition for the applicability of the LOAC, see *ibid* 99-102; for an overview of commentators who invoke the nexus as a limiting factor in the context of a broad interpretation of the geographical scope of applicability of the LOAC, see 102-109.

¹⁵⁷ *Ibid* 99-100.

¹⁵⁸ *Ibid* 108.

¹⁵⁹ *Ibid* 99.

¹⁶⁰ See also n 45 on the fact that Pothelet’s study remains the only in-depth analysis of the nexus to date; Sassòli, IHL 2024 (n 2) 222 states that the several pages he devotes to the concept of nexus in his latest LOAC treatise ‘are nearly exclusively based’ on Pothelet’s findings.

¹⁶¹ Pothelet (n 35) Part I.

nexus is neither an additional nor an alternative requirement to the LOAC applicability. Instead, it is an aspect of the five applicability criteria for the LOAC, namely, that an event is only governed by the LOAC if it falls within its material, geographical, temporal as well as the active and passive personal scope of application.¹⁶² Since the scope of application differs from rule to rule, there is not one single nexus, but the definition of the nexus requirements depends on the rule in question.¹⁶³ However, this does not lead to a hyper-fragmentation of the conditions of LOAC applicability, as there are, according to Pothelet, two 'dominant' types of nexus: the passive personal and the material. This follows from the object and purpose of the LOAC rules, which is either to protect conflict-affected persons (passive personal nexus: a link between a person in need of protection and an armed conflict) or to regulate conflict-related conduct (material nexus: a link between the conduct in question and an armed conflict), or a combination thereof.¹⁶⁴ Of our interest is the material nexus since we enquire into the question of when an incident involving the use of force against a ship – and thus a certain conduct – is sufficiently linked to an armed conflict to warrant the applicability of the LONW CoH rules rather than the MLE rules.

Building on this conceptualisation, Pothelet then *defined* the content of the nexus for selected sets of rules,¹⁶⁵ including the CoH rules¹⁶⁶. Her excellent and detailed analysis of the nexus, as a requisite to render the CoH rules applicable to a particular incident involving the use of force, relates to land-based LOAC.¹⁶⁷ However, due to the LONW 'rule-exceptionalism', shore-based interpretations of LOAC concepts cannot necessarily be transposed to the LONW.¹⁶⁸ As will be shown in Section 4, this holds (at least in part) true for the definition of the nexus as a prerequisite to render the CoH rules applicable to a particular incident of use of force. Before discussing this specific aspect of the 'incident applicability' of the LONW, we briefly present the third and final threshold requirement, 'measure applicability'.

3.3 Measure-Applicability: Measure Amounts to an Attack

Even if the LONW is applicable as such to a given situation of violence because it amounts to an armed conflict (context applicability) and a specific incident occurring in this context features a sufficient link with the surrounding conflict and is thus governed by the LONW (incident applicability), the LONW CoH rules are only applicable if the measure taken against the ship amounts to an attack (measure applicability).¹⁶⁹ The fact that the CoH rules apply only to attacks also holds true for shore-based CoH rules.¹⁷⁰

¹⁶² Ibid 123, 163-164, 174-175 and 500; see also Sassòli, IHL 2024 (n 2) 221.

¹⁶³ Pothelet (n 35) 173-174; Pothelet, *Life in Rebel Territory* (n 146).

¹⁶⁴ Pothelet (n 35) 175-176 and 501-503.

¹⁶⁵ Ibid Part II.

¹⁶⁶ Ibid Chapter 5.

¹⁶⁷ Ibid Chapter 5, Section III.

¹⁶⁸ Arguing in this way in the context of the land-based concept of 'direct participation in hostilities', which cannot be imported into the LONW: McLaughlin, DPH (n 46) 290.

¹⁶⁹ See also above text belonging to n 40-42.

¹⁷⁰ Sassòli, IHL 2024 (n 2) 375.

Under the LONW, belligerent measures are not limited to attacks. Attacks are indeed just one of the belligerent acts that the LONW foresees.¹⁷¹ Next to the right to conduct hostilities,¹⁷² the LONW authorises a series of other measures against ships and their crew.¹⁷³ According to the Newport Manual, they include 'the right to visit, search, and diversion of enemy and neutral vessels; the right of capture; the right to inspect specially protected enemy vessels (e.g., hospital ships); the right to control neutral vessels (...) in the immediate vicinity of naval operations; the right to establish and enforce a blockade; the right to establish and enforce exclusion zones; the right to demand the surrender of enemy military personnel; and the right to undertake convoy operations'.¹⁷⁴ Taking these measures may also necessitate the use of force. However, since these measures do not qualify as attacks, the use of force is not governed by the CoH rules, which apply only to attacks.¹⁷⁵ And the LONW rules are silent on the type and amount of force that may be used in such situations – as is the case with the land-based LOAC rules, which provide for the use of force outside the context of hostilities.¹⁷⁶ Broadly speaking, the standard is similar to the MLE standard and, thus, less permissive than the LONW CoH standard.¹⁷⁷

While it is clear that the LONW CoH rules only apply to attacks, determining whether a concrete measure amounts to an attack involves at least two difficulties. First, there is no treaty law definition of the concept of 'attack' in the LONW, unlike for attacks conducted on or against targets on land.¹⁷⁸ And, as we will see in short, the definitions offered in soft law instruments and doctrine differ from each other with regard to key aspects.¹⁷⁹ Second, we have seen that belligerent measures other than attacks regularly consist of control measures. While taking these measures as such does not amount to an attack, a ship resisting them may be lawfully attacked. For instance, the declaration, establishment and enforcement of a blockade does not amount to an attack; however, a vessel resisting blockade enforcement measures can be lawfully attacked.¹⁸⁰ To provide another example, visit, search and capture under prize law do not constitute an attack. However, if the vessel subjected to these measures offers a certain degree of resistance, it becomes liable to attack.¹⁸¹ The crucial question then becomes what type of resistance turns the vessel into a military objective and allows the belligerent, which initially

¹⁷¹ Heintschel von Heinegg, Conflict Classification (n 41) 462.

¹⁷² On the fact that the concept of 'conduct of hostilities' is broader than that of 'attacks', see n 72.

¹⁷³ See San Remo Manual, Part V, entitled 'Measures Short of Attack: Interception, Visit, Search, Diversion and Capture'; Kraska and others, Newport Manual (n 40) 37 and 131-132.

¹⁷⁴ Kraska and others, Newport Manual (n 40) 37.

¹⁷⁵ Gaggioli (n 42) 69 while referring to the example of blockade enforcement.

¹⁷⁶ On LOAC rules on the use of force outside hostilities, see Pothelet (n 35) 373-376; an example is the duty of the occupying power to maintain public order and safety, which implies that it may use force to enforce the law.

¹⁷⁷ While some commentators argue that, in such cases, the law enforcement rules (as shaped by IHRL) as such govern the use of force, the interaction between IHRL and LOAC may be more complex. For example, it may be argued that the respective LOAC rules on the use of force outside the conduct of hostilities must be interpreted in light of IHRL (systemic integration), which leads to a similar result in terms of the applicable standard (one akin to the law enforcement standard) but differs methodologically and in terms of accountability. See Pothelet (n 35) 375-376 for an interesting discussion of this issue, which cannot be developed further here given the limited word count.

¹⁷⁸ API, Art 49(1).

¹⁷⁹ See below Section 4.2.

¹⁸⁰ Kraska and others, Newport Manual (n 40) 131.

¹⁸¹ Ibid 132.

solely engaged in LONW control measures, to attack a neutral or enemy vessel – in which case the use of force is subject to the much more permissible LONW CoH rules.

To denote this threshold, the San Remo Manual refers variedly to 'actively resisting visit, search or capture',¹⁸² to 'intentionally and clearly resist visit, search or capture',¹⁸³ and to 'clearly resist capture'.¹⁸⁴ Whether these different wordings imply different standards is not explained in the Manual's commentary. The Newport Manual does not provide much guidance either on when the threshold of 'active resistance' is crossed; it solely states that the determination 'is a question of fact in each circumstance'.¹⁸⁵ Given the consequential nature of the decision of whether a belligerent is authorised to engage in an attack and thus to rely on the permissive CoH rules, the determination should be governed by precise criteria allowing for a principled approach.

The circumstances that render a vessel liable to attack – namely, actively resisting control measures – would not turn an object in land warfare into a military one. As Sassòli puts it, 'those circumstances could at best raise suspicion and may justify the use of force according to a law enforcement paradigm'.¹⁸⁶ This is a further LONW 'rule-exceptionalism' that makes it hard – if not impossible – to transfer land-based theories in relation to the applicability of the CoH rules to the maritime context. This problem will be explained further in the next Section.

4. Nexus for CoH Rules: LONW 'Rule Exceptionalism' Does not Allow Transposing Shore-Based Theories

The nexus requirement has received hardly any attention in the LONW doctrine. By contrast, for shore-based LOAC rules, the study of Pothelet offers rather detailed guidance on how the use of force must be linked to an ongoing armed conflict to justify the applicability of the CoH rules.¹⁸⁷ However, the criteria to distinguish an act of hostility that renders the CoH rules applicable from another type of use of force are hardly transposable to the naval warfare context because of the specificities and exceptional rules of the LONW. This will be demonstrated in this Section. First, it will be explained that the war crimes jurisprudence already provides limited guidance for determining the applicability of CoH rules ashore, but even less for the LONW CoH rules. Second, it will be shown that the notion of attack is key to determining the material scope of applicability – and thus the nexus – of the CoH rules on land. Yet, for the LONW CoH rules, this concept does not have the same guiding function because there is neither a uniform definition of it nor a clear understanding of when a belligerent can engage in an attack. Third, we will see that on land, the concept of direct participation in hostilities (hereinafter DPH) – in particular, one of its definitional elements, the belligerent nexus – has clarified when a forcible act amounts to a hostile act. However, in the vessel-centric rather than person-centric LONW, the notion of DPH geared towards a person's conduct is misplaced and

¹⁸² San Remo Manual, Rule 60(e) applying to enemy merchant vessels.

¹⁸³ Ibid, Rule 67(a) applying to neutral merchant vessels.

¹⁸⁴ Ibid, Rule 98 applying to merchant vessels suspected of breaching a blockade.

¹⁸⁵ Kraska and others, Newport Manual (n 40) 174; anecdotally, they state that '[f]iring upon the blockade force or continuing to attempt to breach the blockade' and 'attempting to ram an enforcing belligerent warship' amount to active resistance.

¹⁸⁶ Sassòli, IHL 2024 (n 2) 437.

¹⁸⁷ Pothelet (n 35) Chapter 5, Section III.

largely inapplicable. Overall, the terrestrially informed definition of the nexus for the CoH rules is hardly helpful for determining the applicability of the LONW CoH rules.

4.1 War Crimes Nexus: Exceedingly Low Threshold and Missing Maritime Dimension

We have seen that two dominant types of nexus requirements exist for determining the LOAC applicability: the passive personal nexus (designating the link between a person in need of protection and an armed conflict) and the material nexus (describing the link between a particular conduct and an armed conflict). For CoH rules, the latter type of nexus is relevant.¹⁸⁸ Since war crimes courts have understood the nexus as a link between a conduct and a conflict,¹⁸⁹ and because the LOAC nexus is identical to the war crimes nexus¹⁹⁰, it is possible to rely on the war crimes case law for defining the LOAC nexus.¹⁹¹ As regards the war crimes jurisprudence, the ICTY's definition of the nexus in the *Kunarac* case has been widely endorsed by domestic and international courts alike and has become the most authoritative one.¹⁹²

The ICTY has described the nexus in the following terms in the *Kunarac* case: '[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. (...) The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed *or* the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.'¹⁹³ Essentially, a conduct is sufficiently linked with a conflict – and thus governed by the LOAC – if the conduct either serves a conflict-related *purpose* (the perpetrator 'acted in furtherance of' the conflict) or if, at least, the conduct is *enabled* by the conflict (the perpetrator 'acted under the guise of' the conflict).¹⁹⁴

The latter nexus-test sets the bar 'exceedingly low'.¹⁹⁵ It is essentially enough that the conflict creates the conditions making the conduct possible, that is, that the conflict 'has an impact on the actual occurrence of the conduct rather than on the reason why it occurred'.¹⁹⁶ The 'conduct enabled by the conflict'-test is satisfied if the conflict offers the means (such as weapons or means of coercion), the opportunity or simply a facilitative environment to engage in the conduct in question.¹⁹⁷ The latter refers to situations where, as a result of the conflict, security

¹⁸⁸ See above text belonging to n 161-164; *ibid* 256 and 502.

¹⁸⁹ *Ibid* 502.

¹⁹⁰ *Ibid* 499.

¹⁹¹ *Ibid* 502.

¹⁹² *Ibid*; for her detailed analysis of the war crimes jurisprudence on the nexus before and after the *Kunarac* case, see Chapter 4, Section B.

¹⁹³ *Prosecutor v. Kunarac, Kovac and Vukovic* (Judgment) ICTY-96-23 & 23/1-A (12 June 2002) para 58 (emphasis added to point to the disjunctive nature of the test: the conflict providing the purpose is only one possibility to pass the nexus test).

¹⁹⁴ See Pothelet (n 35) 256 noting that these two tests reflect the war crimes jurisprudence more generally (with variations in detail, of course).

¹⁹⁵ *Ibid* 219, 225, 256, 471 and 502.

¹⁹⁶ *Ibid* 274.

¹⁹⁷ *Ibid* 275-276.

has been undermined and law enforcement is weak or non-existent, possibly coupled with an increased social acceptance of violence and crime.¹⁹⁸ If it indeed sufficed to establish a nexus (and thus the LOAC applicability) if the perpetrator was able to commit the crime because of a conflict-related enforcement vacuum and situation of lawlessness, a great deal of maritime crime, which often thrives in waters adjacent to conflict-affected regions, would routinely turn into acts of war. The *modus operandi* of Somali-based pirates, for instance, was possible but for the enforcement gap, which resulted from the armed conflict waged in the country for decades. Indeed, hijacking ships and anchoring them in Somali ports until ransom is paid is only possible in a 'facilitative environment', that is, one where no effective port authorities, coast guard or navy prevent and suppress such conduct. The link between the conduct and the conflict is far too tenuous to warrant the applicability of the CoH rules – both on land and at sea, and the 'conduct enabled by the conflict'-test of the *Kunarac* case should be rejected.¹⁹⁹

Instead, one should rely on the second, more demanding *Kunarac* nexus test – the one requiring that the conduct serves a conflict-related purpose – to establish the applicability of the CoH rules. The purpose of the conduct is the reason *why* the person engages in the conduct; the aim, objective or goal one seeks to achieve with his or her conduct.²⁰⁰ A conduct is 'conflict-related' if, in the context of a conflict, it aims at serving a belligerent to the detriment of its adversary.²⁰¹ Essentially, in the *Kunarac* case language, the 'perpetrator acted in furtherance of' the armed conflict.²⁰² Thereby, the conduct can either aim at harming the adversary (hostile conduct) or at supporting a belligerent's own capacity to overcome its adversary (favourable conduct).²⁰³

For some types of LOAC rules, the war crimes jurisprudence offers useful guidance for establishing when particular conduct features a conflict-related purpose; this is, for instance, the case for the rules protecting persons in the power of the enemy from certain treatment. However, as regards CoH rules, this jurisprudence is much less developed,²⁰⁴ and, consequently, provides relatively little guidance.²⁰⁵ For the naval context, the war crimes jurisprudence is an even less valuable source. While the concept of war crimes is not foreign to the LONW²⁰⁶ – among the war crimes likely to occur at sea are serious violations of CoH rules (such as an attack of a protected vessel)²⁰⁷ – it is embryonic compared to the land. There are no clearly defined offence definitions²⁰⁸ and – except for cases relating to events during or before World War II –

¹⁹⁸ Ibid 285.

¹⁹⁹ For the land, see ibid 502-503, who argues that the test would lead to absurd results; e.g., a 'civilian taking advantage of the chaotic security situation created by the conflict to kill his neighbour' would pass the test and not commit an ordinary murder but a war crime.

²⁰⁰ See ibid 258-260 where she explains the difference between purpose and intent.

²⁰¹ Ibid 286, 326, 482 and 503.

²⁰² *Prosecutor v. Kunarac, Kovac and Vukovic* (Judgment) ICTY-96-23 & 23/1-A (12 June 2002) para 58.

²⁰³ Pothelet (n 35) 262.

²⁰⁴ That there is much less case law on CoH rules has to do with the 'particular difficulties' to establish violations of targeting law (CoH rules); it is comparatively easier to establish violations of rule protecting people in the power of the enemy: see Sassòli, IHL 2024 (n 2) 29-30.

²⁰⁵ Pothelet (n 35) 295 and 368.

²⁰⁶ See, e.g., Kraska and others, Newport Manual (n 40) 12-17 discussing war crimes at sea.

²⁰⁷ Ibid 13.

²⁰⁸ As per Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Martinus Nijhoff Publishers 1988) 2 the absence of elaborated secondary rules has to do with the fact that the content of the primary rules is not sufficiently clear: 'The crisis of the law of naval warfare has

jurisprudence in relation to hostilities at sea is virtually non-existent.²⁰⁹ The land-based case law pertaining to CoH rules, in turn, cannot necessarily be transposed to the sea as the LONW CoH rules differ in various ways from those relevant to land-based targeting.²¹⁰ As a result, certain conduct that amounts to a war crime in land warfare would not be unlawful under the LONW.²¹¹

Overall, the war crimes jurisprudence is of limited usefulness for defining the nexus for the CoH rules on land because of the exceedingly low threshold of the 'conduct enabled by the conflict'-test of the *Kunarac* case and the relatively little case law concretising for the CoH rules when conduct has a conflict-related purpose. These reasons hold even more true for the CoH rules under the LONW. In light of the limited value of the war crimes case law, Pothélet argues that the better source for guidance on the nexus for CoH rules is the LOAC treaty rules – most notably the notion of attack, which defines the material scope of applicability (and thus the nexus) for the CoH rules.²¹² However, as alluded to earlier and explained further below, the notion of attack is not very well delineated in the LONW and may thus not offer the same guidance in determining the nexus.

4.2 Notion of Attack: Different and Unclear Meaning in the LONW

We have seen that the tightest form of nexus between a conduct and a conflict exists when the former serves a conflict-related purpose. This implies that a use of force is only governed by the CoH rules if its purpose is conflict-related, that is, if it aims at harming the enemy.²¹³ That attacks serve a conflict-related purpose is intuitive – they are neither a side effect nor incidental to a conflict, but rather the 'essence of warfare' and thus intrinsically linked with it.²¹⁴ This intuition is confirmed by treaty law; Article 49(1) of Additional Protocol I states that an attack 'means acts of violence against the adversary, whether in offence or in defence'.

According to Pothélet, the use of the term 'adversary' in the definition of attack is crucial as it emphasises that its target is the adverse party to the conflict. If a belligerent uses force, what matters is that the target was attacked *because* it is associated with the enemy; it is the very affiliation of the target with the adversary that motivates the use of force. The 'wording chosen for this definition strongly suggests that the *purpose* of an attack is to aim at, to harm the enemy in the conflict'.²¹⁵ If conduct aims at harming the enemy, the purpose of the conduct is conflict-related, and the more demanding form of nexus of the *Kunarac* test is fulfilled.

rendered less certain the content of rules by which belligerents are to abide. This is a critical issue which makes it difficult to develop an up-to-date doctrine on sanctions for breaches of the law of naval warfare. In effect, a theory of crimes of war and reprisals cannot be properly elaborated, unless there is a common agreement on the content of the rules and the importance of the values they embody.'

²⁰⁹ As most cases pertained to targeting of objects on land from sea; see, e.g., the ICTY's cases on the shelling of the old town of Dubrovnik, which was partly done from sea: *Prosecutor v. Pavle Strugar* (Judgement) IT-01-42-T (31 January 2005) paras 49, 62 and 66.

²¹⁰ See Section 2.2.

²¹¹ Kraska and others, Newport Manual (n 40) 14.

²¹² Pothélet (n 35) 295 and 368.

²¹³ See text relating to n 200-203; *ibid* 382.

²¹⁴ *Ibid* 385.

²¹⁵ *Ibid* 383.

However, in the LONW, the authoritative definition of the term 'attack' lacks precisely this element. According to Rule 13(b) of the San Remo Manual, 'attack means an act of violence, whether in offence or in defence'. Hence, there is no mention that the act must be directed 'against the adversary' – which is no oversight but rather due to the LONW 'rule-exceptionalism' explained above: while in land warfare, acts of violence are only carried out against the enemy, in naval warfare it is, in limited situations, lawful to carry out acts of violence against neutral ships, notably if they actively resist control measures authorised under the LONW.²¹⁶ It has already been mentioned that there is uncertainty as to what kind and level of resistance of a ship turns it into a military objective, thus clearing the way for subjecting it to an attack.²¹⁷ Not only this but also the fact that some authors define the attack similarly to Article 49(1) AP I²¹⁸ – according to which it must be directed 'against the adversary' – blurs the notion of attack under the LONW.

Overall, the notion of attack provides clear guidance on the applicability of the shore-based CoH rules. The same cannot be said for the LONW, as the concept of attack lacks clear contours.

4.3 Belligerent Nexus of DPH Test: A Concept Foreign to the LONW

To buttress her finding that the nexus requirement for the LOAC CoH rules consists of a conflict-related purpose, Pothelet relies on the concept of DPH, or rather, how it is interpreted.²¹⁹ The notion is helpful because acts amounting to DPH are a form of acts of hostilities; thus, the concept of DPH also, to some extent, clarifies what an act of hostility is. Lawyers who interpreted the notion of DPH thus contributed to answering the question of when the use of force is sufficiently connected to an armed conflict to amount to an act of hostility and thus being governed by the CoH rules.²²⁰

Despite the central place of the concept of DPH in LOAC,²²¹ it is not defined in treaty law. Rather, it has been interpreted through doctrine and practice, notably by the ICRC. According to the latter, an act qualifies as DPH if it crosses a certain threshold of harm, is causal for the harm and features a 'belligerent nexus', meaning that 'the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'.²²² We will not dive any deeper into that notion because – unlike in a land-based setting – it is not a valuable source to define when a use of force amounts to an act of hostility. This is due to the simple fact that the concept of DPH is foreign to the LONW, which is another LONW 'rule-exceptionalism'. This is mainly due to the fact that the LONW is vessel-centric rather than person-centric.²²³ It is not the conduct of members of the civilian crew of

²¹⁶ See text relating to n 180-181.

²¹⁷ See above 182-185.

²¹⁸ Kraska and others, Newport Manual (n 40) 131 state: 'For purposes of the law of naval warfare, an attack is an act of violence against the adversary, whether in offense or defense.'

²¹⁹ Pothelet (n 35) 385.

²²⁰ Ibid.

²²¹ Civilians are protected from attacks 'unless and for such time as they take a direct part in hostilities': AP I, Art 51(3).

²²² ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities (report written by Nils Melzer; International Committee of the Red Cross May 2009) 46.

²²³ For a comprehensive analysis on why active resistance by merchant vessel crews in IACs does not constitute DPH (except, arguably, for passengers on board merchant vessels), see McLaughlin, DPH (n 46).

merchant ships that matters, but rather the conduct of the vessel.²²⁴ Active resistance by merchant vessel crew is not DPH; in case of capture, they are generally accorded prisoner of war status and are not prosecuted for the fact of offering resistance or even engaging in hostile acts.²²⁵

This is a further example demonstrating that the most valuable sources for clarifying the nexus requirement in the context of land-based CoH rules cannot necessarily be imported into the LONW because of the specificities of its CoH rules. This is not surprising if we remember that the definition of the nexus is rule-dependent.²²⁶ Since the LONW CoH rules differ from the shore-based CoH rules, we must not rely on terrestrially informed definitions of the nexus but rather elaborate a maritime-specific theory of when the use of force has a conflict-related purpose and is thus governed by the LONW CoH rules. Only this way will the threshold of applicability of the LONW CoH rules become clearer.

5. Conclusion: Clarifying Rigid Legal Thresholds to Respond to Fluid Threats

This chapter contributed with reflections to the second research question underlying the present book: 'What is the threshold for the applicability of the law of naval warfare in situations that can be characterised as hybrid warfare and to what extent State practice shows that it is possible to apply such threshold?' The answer to this question proved more complex than anticipated for the following reasons.

First, there is not one single threshold for the applicability of the LONW. Rather, the scope of applicability must be defined for each rule – or set of rules – separately. It is against this background that a narrow focus has been chosen for this chapter, solely enquiring into the applicability of the LONW CoH rules to incidents involving ships.

Second, other than often assumed, the applicability question is not solved by determining that a certain situation of violence amounts to an armed conflict. Crossing this threshold only means that the LOAC is applicable as such to a given context ('context-applicability'). Yet, not every event occurring in the geographical-temporal context of an armed conflict is indeed governed by the LOAC, but only events sufficiently linked with it. Therefore, it is necessary to answer a second threshold question, namely whether the incident in question features a sufficient nexus in order to be governed by the LONW ('incident applicability').²²⁷ But we cannot stop there. The LONW foresees the use of force outside hostilities (e.g., in the course of control measures), which is not governed by the CoH rules. Hence, we must, in a third and final step, ascertain whether the specific use of force amounts to an attack, which triggers the applicability of the LONW CoH rules ('measure applicability').

²²⁴ See text relating to n 180-186 on *vessel* actively resisting control measures of the LONW, which renders the *vessel* liable to attack; see also text relating to n 98 on the fact that the principle of distinction under the LONW CoH rules does not account for civilian on board and n 108 on the fact that the principle of proportionality does not apply to civilian crew (but arguably to passengers).

²²⁵ McLaughlin, DPH (n 46) 305 (regarding enemy civilian merchant mariners) and 317 (regarding neutral civilian merchant mariners).

²²⁶ See text relating to n 163.

²²⁷ In the situation where an incident involving a ship *triggers* the IAC, the context- and incident-applicability collapse; see final paragraph of Section 3.1.

Third, none of the three key notions of this three-prong enquiry – armed conflict, nexus and attack – features clear contours. While the notion of 'armed conflict at sea' has received some more attention in recent years, the nexus has been widely neglected and the notion of attack has not been sufficiently scrutinised either.

Fourth and finally, the notion of nexus has – including for the CoH rules – recently been explored in an in-depth study by Pothelet, which greatly added to the clarification of the notion. However, due to the LONW 'rule-exceptionalism', the analysis pertaining to shore-based LOAC cannot be transposed as such to the LONW CoH rules.

In light of this, the question of the threshold for the LONW applicability cannot be conclusively answered here. Rather, further research is necessary to clarify this consequential threshold question. However, at least one thing can be said with certainty: the threshold for the applicability of the more permissive LONW CoH rules, rather than the MLE rules, is – and should remain – the same for all incidents involving ships, whether occurring in a so-called hybrid naval warfare context or not. While the concept of hybrid naval warfare is a useful analytical lens to understand the phenomenon of 'a combination of regular and irregular military operations, with the addition of non-military means, aiming at influencing the adversary's mind',²²⁸ it also carries a certain risk. At the very beginning of this chapter, we argued that the 'idea of war often operates to legitimate something that would otherwise be illegal'.²²⁹ The fact that the notion of 'hybrid naval war' invokes this very idea of war could be wrongly used to legitimise the recourse to the more permissive LONW CoH rules, even if inapplicable in a given case. Whether the LONW CoH rules govern an incident at sea is, and must remain, a matter of legal thresholds – and not a matter of rhetoric.

²²⁸ This is how the term 'hybrid warfare' is understood in the present book; see Chapter 1.

²²⁹ Clapham (n 5) Preface v.