SECTION 1 INTRODUCTION

Despite the fact that individual criminal responsibility for serious violations of international humanitarian law is nowadays firmly established, especially after the “revolution” of the 1990s with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and subsequently, the International Criminal Court (ICC), it is not the same with war crimes during armed conflict at sea. Someone interested in the case-law regarding such crimes has to go as far back as the Nuremberg trials in order to find a case regarding the conduct of hostilities at sea. The absence of criminal proceedings seems to go hand in hand with the fact that the legal regulation of naval warfare has hardly been a priority for the international community. As Roach observes “[t]here is virtually no modern treaty law governing the use of force in naval warfare”\(^1\). If it were not for the San Remo Manual, it would be easy to conclude that international humanitarian law regarding naval warfare had been frozen in the interwar period.

The absence of serious interest in naval warfare may be due to the simple fact that major naval powers are not anymore conducting warfare operations; or at least, that is what they claim. Naval warfare is squeezed between action in “self-defence” and “law enforcement operations”. On the one hand, the relation between *jus ad bellum* and *jus in bello* in the context of naval operations is not well defined, with self-defence serving as a panacea for military action, displacing regulation of

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the conduct of hostilities. A perfect example where *jus ad bellum* has almost replaced the traditional *jus in bello* as a source of justification can be found in the context of the belligerent right of visit. On the other hand, modern naval operations are primarily focused on the enforcement of public order at sea. Navies’ modern role is to conduct Maritime Interdiction Operations (MIOs), fighting, for example, piracy, combating drug-trafficking, dealing with migrant smuggling and enforcing Security Council resolutions. Only when the fleets are performing their traditional activity, war-fighting, does the issue of war crimes, and their subsequent penal repression, arise.

The criminalization of the commitment of certain war-time acts has proved to be a very complicated process, in which the “role of national or international courts [has been] conspicuously crucial”\(^4\). The courts have to give precise content to the customary rules and to clarify treaties in order to reach the legal precision that is required by criminal law. This extraordinary role of the tribunals has instigated the criticism of judicial activism and “judge-made” law. Others observe, paraphrasing Clausewitz, that “it is hard to avoid thinking that law is also the continuation of war by other means”\(^5\). The latter remark, despite the fact that it is strongly reminiscent of the cliche of “victor’s justice”, implies that there are also other interests served with the personification of responsibility for atrocities during armed conflicts. In any case, there are compelling reasons for the perpetrators of war crimes to face justice. In spite of the catharsis resulting from the criminal proceedings, naval warfare seems to remain immune from the hegemonic aspiration of international criminal law to punish war criminals.

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2. As A. V. Lowe argues

> “in essence, there appear to be two almost entirely distinct bodies of law and principle — the traditional laws of war and neutrality, and ‘Charter’ rules on self-defence — which may be used as criteria of legality, neither of which is clearly established in international law to the exclusion of the other” (A. V. Lowe, “Self-defence at Sea”, in W. E. Butler (ed.), *The Non-Use of Force in International Law*, Kluwer Academic Publishers, Dordrecht, 1989, p. 185, at p. 199).

3. As Papastavridis observes “[t]here are abundant examples of conflicts where the belligerent right of visit has been employed under the guise of self-defence, while very few where it has been invoked *eo nomine*”; E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Oxford, Hart Publishing, 2013, at p. 100.


The aim of this chapter is to highlight the shortcomings of the concept of “war crimes” in naval warfare. The main obstacles, which prevent the criminalization process, are firstly the difficulty of accepting the existence of an “armed conflict” in the maritime milieu, secondly the underdevelopment of the law regulating naval warfare, and finally the intrinsic limitations in the symbiotic relationship between International Criminal Law (ICL) and International Humanitarian Law (IHL). They both negatively affect the legal evaluation of real-time operations, as will become evident later from the analysis of the Mavi Marmara incident in 2010.

SECTION 2  EXISTENCE OF AN “ARMED CONFLICT”

War crimes can only exist in the context of an armed conflict. A prerequisite for the applicability of international humanitarian law, and subsequently for individual criminal responsibility for its violation, is the existence of an armed conflict, whether international or non-international. The determination of its existence is a rather perplexing issue especially in the maritime environment.

What is an “armed conflict” is not defined in the Geneva Conventions, in which the term acquired for first time legal significance, or in any other instrument of international humanitarian law. The “omission . . . was apparently deliberate, since it was hoped that this term would continue to be purely factual and not become laden with legal technicalities as did the definition of war”.

The ICTY in the Tadić case dealt with the existence of an “armed conflict” both of an international and a non-international character, and created a precedence which was generally followed in the jurisprudence of the international criminal courts during the last two decades. According to the Appeals Chamber of the Tribunal “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed

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6. The criminalization of atrocities in non-international armed conflicts was not accepted until the establishment of ICTY and ICTR in the 1990s and their subsequent jurisprudence. Moreover, as Meron observes, it was asserted that “the normative customary law rules applicable in non-international armed conflicts do not encompass the criminal element of war crimes”. For more details see Theodor Meron, “International Criminalization of Internal Atrocities” 89 Am. J. Int’l L. (1995), 554, at 559.

7. The introduction of the term served the purpose of the applicability of international humanitarian law without the existence of a formal state of war.

groups or between such groups within a State”\(^9\). The decision seems to treat differently international and non-international armed conflicts. Whereas any armed confrontation between two States does suffice for the former, as regards the latter two cumulative criteria must be met: that of organization and more significantly that of a minimum intensity. But subsequently, in the same paragraph of the judgment, the Appeals Chamber changes direction significantly, and takes a different approach, by applying the intensity criterion both to international and non-international armed conflicts:

“Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict . . . These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups.”\(^{10}\)

Unfortunately, this confusion is intensified by the different approaches found in legal scholarship.

The ICRC, the organization which is generally regarded as the “guardian” of the Geneva Conventions, accepts a very low threshold regarding the existence of an international armed conflict:

“A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a ‘police action’, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict . . .”\(^{11}\)

The International Law Association (ILA) in its Final Report on the Meaning of Armed Conflict in International Law takes a diametrically different approach:

\(^{9\text{. }}\)Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.  
\(^{10\text{. }}\)Ibid.  
\(^{11\text{. }}\)Jean S. Pictet (ed.), The Geneva Conventions of 12 August 1949 Commentary — Volume I, International Committee of the Red Cross, Geneva, 1952, at 32 (emphasis added). The ICRC remains constant in this position. In an opinion paper titled “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” of March 2008, published in ICRC website (http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf, visited 4 September 2012), it is stated that “An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation” and confirms this view with reference to the Pictet’s Commentary mentioned above.
“As a matter of customary international law a situation of armed conflict depends on the satisfaction of two essential minimum criteria, namely: a. the existence of organized armed groups [and] b. engaged in fighting of some intensity.”

The first requirement obviously exists in an international armed conflict, being a confrontation between armed forces of different States. The criterion of a minimum intensity is the one that creates the major difference with the ICRC’s approach.

This view, requiring a rather high threshold to qualify a clash as an armed conflict, was not left unchallenged by ICRC, which explicitly mentioned political considerations as a reason for raising the threshold for admitting the existence of an armed conflict:

“[T]he absence of a requirement of threshold of intensity for the triggering of an IAC should be maintained because it helps avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of given situation . . . The fact that a state does not, for political or other reasons, explicitly refer to the existence of an IAC in a particular situation does not prevent its being legally classified as such.”

On the other hand, the ICRC’s approach is evidently fraught with policy considerations. The very low threshold accepted by the organization aims at the encouragement of the wider possible applicability of international humanitarian law, so as O’Connell argues “the ICRC position is based on policy rather than, perhaps, its view of what the Conventions require as a matter of law”.

The question of the threshold, above which an international armed conflict does exist, is of great significance in the context of the operations at sea. The issue is more acute in trying to distinguish between law enforcement operations at sea and naval warfare. As has been mentioned in the Introduction, most navies are engaged nowadays in the former


14. Mary Ellen O’Connell, “Defining Armed Conflict”, 13 J. Conflict and Security Law (2008), 393, at 397). It is significant to underscore that O’Connell was the Chairperson of the ILA Committee that drafted the Report mentioned supra footnote 12.
rather than the latter. But in many instances it is very difficult to draw a line between law enforcement and military operations, especially in the case where the “police action” is conducted against a “violator”, which is a foreign State’s naval vessel.

This is a frequent phenomenon, since most of the maritime space has not been delimited. In sharp contrast with what is occurring on land, where the territorial jurisdictional allocation is firmly established and undisputed, numerous maritime boundaries are contested. The expansion of coastal States’ jurisdiction after the World War II has significantly contributed to this result, creating the need for a great number of delimitations of maritime zones between opposing or adjacent States, affected by treaty or judicial decision.

The determination of the existence of an armed conflict is significant for defining the legal paradigm that is applicable in each situation. There are no easy answers to the problem. To paraphrase Kwast, on the one hand, if a low threshold for the application of international humanitarian law is accepted, this might lead jus in bello to cover minor incidents that occur worldwide every day. On the other hand, if the concept of “police force” is defined too broadly, it might create a large and dangerous gap in the applicability of a very serious branch of international law.

It is difficult to extrapolate clear-cut answers from State practice in the maritime milieu. Although States were in most cases unwilling to

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15. Many international relations analysts believe that this trend is going to continue in the years to come. Ollivant, for example, referring to the US Navy predicts that “the most likely future involves the Navy more or less peaceably patrolling the seas” (Douglas A. Ollivant, “Go Army, Beat Navy. Forget Ships and Drones. The Future of War Is Still on Land”, 28 September 2012, available in Foreign Policy website, http://www.foreignpolicy.com/articles/2012/09/28/go_army_beat_navy, visited 1st October 2012).
16. Or in the case of dispute, there is at least a State which has a de facto control of the territory.
17. The two paradigms are not mutually exclusive but may overlap.
accept that they were engaged in armed conflict, they were eager to
demand the protection accorded by international humanitarian law to the
victims of these minor engagements. For example, when the Iranians in
2007 detained the crew of a British naval unit, allegedly within Iranian
territorial waters, although none of the parties in the engagement
invoked the existence of an armed conflict, the spokesperson for the
British Prime Minister claimed that the appearance of the sailors on the
Iranian television was in violation of the Third Geneva Convention.19

The blurring of the lines between “police action” and armed conflict
exists also in situations where the application of the law enforcement
paradigm seems straightforward, because these do not involve con-
frontation between naval units of various States. In the context of the
anti-piracy operations taking place at the Horn of Africa, although it is
generally accepted that the pirates are criminals and not combatants20,
the Detention Standard Operating Procedure (SOP) of the European
Naval Operation “EUNAVFOR Atalanta”, stipulates that the ICRC
should be informed when suspects are detained by EUNAVFOR Units,
and should be granted access to them while they are detained21. More-
over, the UN Security Council, in resolution 1851, while authorizing
land-operations on Somali soil for the first time, embraced the possibil-
ity that international humanitarian law could be applicable in the
context of anti-piracy operations. Although the reference to that body of
law is maybe made out of the desire of the Council to emphasize the
cautions under which such operations should be conducted, only two
legal explanations seem possible regarding the applicability of interna-
tional humanitarian law:

“On the one hand, third states co-operating with the TFG in
Somalia — as Resolution 1851 explicitly requests — could
become parties to the existing conflict there simply by collaborat-
ing with an entity that is already party to an ongoing non-interna-
tional armed conflict. On the other hand, Resolution 1851 could be

Sailors a Gray Area in Application of Geneva Conventions”, San Francisco
What-law-did-Tehran-break-Capture-of-British-2576880.php, visited 1 Septem-
ber 2012.


21. SOP Legal 001 dated 26 March 2009 (on file with the author). Although
the provision in the SOP regarding the ICRC is maybe driven by political con-
siderations, the involvement of the principal organization ensuring humanitarian
protection and assistance for victims of war and armed violence highlights the
absence of a sharp distinction between the concept of armed conflict on the one
hand, and the law enforcement operations on the other.
read in such a way that the counterpiracy operations in and of themselves — independently of the ongoing conflict in Somalia — could eventually reach the threshold of a non-international armed conflict, thereby triggering the application of IHL.”

In another rather different approach, it is submitted that the distinction to be drawn should not be between law enforcement operations and situations of armed conflict but between low intensity hostilities and full-scale war. The quest of a different legal regime applicable to limited hostilities creates a rupture in the armed conflict paradigm and virtually integrates law intensity conflicts within the law enforcement paradigm, highlighting the blurring of the lines between the two paradigms.

Regarding the existence of a non-international armed conflict, there is a general agreement about the requirements of the organization of the rival groups and intensity of the fighting, as they were set by the Tadić Appeals Champers judgment. But there is a need to distinguish between internal armed conflicts and cases of lesser violence. Jus in bello interno is not applicable in cases of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.

Although it is rather


23. This is the approach of O’Connell, one of the most eminent experts in the law of naval warfare. For example, in assessing how international law affects naval planning, he observes, equating law enforcement action with restricted warfare, that “[i]n conditions of limited hostilities, or ‘police actions’ — which are the most likely naval operations of the immediate future — the situation clearly depends on the restrictions which the international community has succeeded in building into the exercise of seapower” (D. P. O’Connell, “International Law and Contemporary Naval Operations”, 44 Brit. YB Int’l L. (1970), 19, at 59).


25. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1 (2). This provision is repeated verbatim in the ICC Statute, Articles 8 (2) (d) and 8 (2) (f). In the same Article 8 (2) (f), it is added that the provision regarding war crimes during internal armed conflicts “applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”. The influence of the “Tadić formula” in the wording of this provision is apparent. For an analysis of this provision and the significance of the distinction between “protracted armed violence” of the Tadić decision and “protracted armed conflict” of Article 8 (2) (f) of the ICC Statute see Anthony Cullen, “The Parameters of Internal Armed Conflict in International Humanitarian Law”, 12 U. Miami Int’l & Comp. L. Rev. (2004), 189, at 206.
difficult nowadays to envisage an internal armed conflict with a dominant naval dimension, because of the peculiarities of naval warfare, the issue is far from theoretical, as the *Mavi Marmara* incident has clearly illustrated.

In view of the present author, it would be more apt to adopt another approach, i.e. to focus on the mode of the conduct of the opposing forces in relation to human rights law and especially the right to life as the decisive criterion for determining whether an armed conflict exists, international or non-international. The difference between a law enforcement operation and an armed conflict lies in the *modus operandi* of the fighting forces. In the context of police actions, Governments tend to use minimum force in order to arrest the suspected criminals, while respecting their right to life. On the other hand, during armed conflicts the need to overwhelm the adversary gives more latitude in the use of force, allowing for casualties even among the civilians, if they are not disproportionate to the concrete and direct military advantage anticipated. It is always a possibility that a limited law enforcement action escalates in a situation of an armed conflict. Real life situations are usually not crystal clear and grey areas should be expected. This notwithstanding, the actual behaviour of the adversaries is the best indicator of which paradigm, the law enforcement or the armed conflict, is relevant. But even in cases where the application of the latter is straightforward, another hindrance arises: that of law regulating the conduct of naval warfare.

**SECTION 3 REGULATING THE NAVAL WARFARE**

Developing law regulating the execution of naval warfare has not been the first priority of the international community especially after World War II. On the one hand, there has not been a feeling of urgency in the need to clarify and develop the legal framework of naval warfare. On the other, it would have been meaningless to adopt legal rules without the consent of the major naval powers. The demise of the significance of the humanitarian law concerning naval warfare is reflected in the writings of the international law scholars. Whereas the older books treat in a balanced manner the law of the sea during peacetime and the law of naval warfare, the more contemporary writings almost ignore the latter. The underdevelopment of this branch of inter-

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national humanitarian law is at odds with the overdevelopment of the law governing land warfare. Although the idea that all forms of warfare must be subject to the same body of law is gaining acceptance\(^{28}\), the current development of international humanitarian law leaves much to be desired in order to reach this ideal concept.

The basic treaty law regulating naval warfare is limited to the following: (i) the dated VII, VIII, IX, XI and XIII Hague Conventions of 1907, which, although they set out the basic principles in this regard, they have not incorporated the technological, political and legal developments of the last century; (ii) the Geneva Convention II of 1949\(^{29}\) and (iii) the Procès-verbal of 6 November 1936 relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930.

The Diplomatic Conference that led to the adoption of the two 1977 Additional Protocols to the 1949 Geneva Conventions decided not to address the regulation of naval warfare\(^{30}\). The unfortunate consequence is that “there is still no comprehensive treaty governing naval warfare”\(^{31}\).

That being the case, the law of naval warfare is mainly of a customary nature. Many treaty instruments, like the London Declaration of 1909, are regarded to be declaratory of existing customary law. The major problem regarding the customary humanitarian law is the difficulty of finding evidence of custom in an armed conflict, especially in the maritime environment\(^{32}\). Moreover, there always exists a possibility to


\(^{29}\) These above-mentioned conventions deal with the following issues:

(a) Hague Convention VII: The Conversion of Merchant Ships into War-Ships.
(b) Hague Convention VIII: The Laying of Automatic Submarine Contact Mines.
(c) Hague Convention IX: Bombardment by Naval Forces in Time of War.
(d) Hague Convention XI: Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War.
(f) Geneva Convention II: For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

\(^{30}\) Ashley Roach, supra footnote 1, at 384.


\(^{32}\) Various reasons contribute to this effect, for example the exceptional circumstances under which humanitarian law is applicable and the prohibitive nature of its norms. See Sonja Boelaert-Suominen, “Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?”, 5 J. Conflict & Sec. L. (2000), 63, at 66.
accept norms as customary law, ignoring the absence of concrete State practice, in order to enhance the applicability of the noble and humanizing principles of *jus in bello*. In humanitarian law “the ‘ought’ merges with the ‘is’, the *lex ferenda* is confused with the *lex lata*”\(^3\). In any case, without judicial decisions clarifying its content, international law of armed conflict remains in an amorphous status, rendering it almost impossible to reach a common understanding of its exact contours. In this context, it is rather regrettable that authors of the recent study of the ICRC regarding the customary humanitarian law “decided not to research customary law applicable to naval warfare”\(^3\).

It is rather exaggerative yet true that the word chaos has been frequently used to describe the condition of the law of naval warfare\(^3\). This has a profound impact on criminalization of violations of the law. As Ronzitti avers,

> “[t]he crisis of the law of naval warfare has rendered less certain the content of the rules by which belligerents are to abide . . . In effect, a theory of crimes of war . . . cannot be properly elaborated, unless there is a common agreement on the content of the rules and the importance of the values they embody”\(^3\).

In order to fill this regulatory gap, a group of specialists in international law and naval experts drafted the renowned 1994 San Remo Manual\(^3\), which purports to provide a contemporary restatement of international humanitarian law regulating naval warfare, including some provisions which might be considered to be a progressive development of it. The Manual was met with widespread acceptance and has strongly influenced many national manuals on the law of armed conflict. Still, its extensive reliance on Additional Protocol I has been severely criticized as reflecting a less rigorous approach to customary international

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34. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law — Volume 1: Rules*, Cambridge University Press, Cambridge, 2005, at p. xxx. The rationale behind this decision is that the law of naval warfare was the subject of a major restatement, namely the San Remo Manual. This position is not easily defensible, taking into account that there are serious reservations regarding the Manual’s approach to customary international law (see infra).


law. In any case, the San Remo Manual is a non-binding instrument and its impact on the planning and execution of naval operations remains to be proven.

The equivocal status of the law of naval warfare is perfectly illustrated by the example of the ambiguities related to the application of the principle of distinction, in the context of naval warfare.

The principle of distinction, which is characterized by the International Court of Justice as cardinal, fundamental and intransgressible, is an excellent example illustrating the problems of the law of naval warfare. In accordance with the principle

"the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".

It could be expected that in the maritime environment, where naval vessels can easily be distinguished from merchant ships, the application of the principle of distinction would have been straightforward. Unfortunately, in the context of naval warfare the application of the principle is much more difficult than in land warfare.

Instrumental for the application of the principle of distinction is the definition of the military objective. According to the definition given in the Additional Protocol I, military objectives

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

This definition is widely accepted and many international law experts regard it as reflecting customary law. The main problem is that this definition is not applicable in the context of naval warfare. Or to be more accurate, it applies only "to all attacks from the sea . . . against objectives on land but do not otherwise affect the rules of international

41. Ibid., Article 52 (2).
law applicable in armed conflict at sea or in the air”43. The San Remo Manual, after extensive debate44, adopted the definition of Additional Protocol I, incorporating into the law of naval warfare the developments of regulation in the context of land warfare, despite the fact that the Protocol is not applicable as such in the conflicts at sea. Obviously, this is not the final word on the issue and the perplexing question concerning which objects cannot be lawfully attacked at sea has yet to be solved.

The economic dimension of naval warfare, namely the vital contribution of merchant ships to the war effort of the belligerents, has made it difficult to articulate a comprehensive approach regarding which merchant ships are civilian objects and thus immune from attack. The United States, for example, a major naval power indeed, adopts a wider approach concerning military objectives: for an object to qualify as a military objective, it does not need to make an effective contribution to military action. It suffices just to “effectively contribute to the enemy’s war-fighting or war-sustaining capability”45. Some naval experts and international law scholars subscribe to the same view. For example, Fenrick argues that

“[t]he primary legal criterion for determining whether or not a merchant vessel is a legitimate military objective should be a functional one based on the task the merchant vessel is employed on at the time the targeting decision is made”46.

This legal approach was used in order to legitimize the indiscriminate Iraqi attacks during the first Gulf War, or the Gulf Tanker War, in sharp contrast with the evaluation of the Iranian attacks. This approach to the identification of the military objective in naval warfare, which Politakis calls the “functional approach”47, is too vague and ill-defined, placing almost no restriction on the destruction of merchant ships simply because they are engaged in the enemy’s commerce. The widening of the scope of the notion of military objective, giving a carte blanche to the targeting of merchant vessels, is situated in the apologetic extreme of the spectrum of international law48, and can hardly promote a compre-

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43. Supra footnote 40, Article 49 (3).
44. Supra footnote 37, Article 40, at p. 114.
hensive approach of the notion of military objectives in all types of warfare. These definitional ambiguities are not, however, the only obstacle for the regulation of targeting during war at sea.

A unique feature of war at sea is the capacity for arming merchant vessels and the latitude of the permissible ruses of war. These characteristics of naval warfare give a further blow to the principle of distinction. The experience of the two World Wars illustrates the lawlessness that can ensue from their effects. So long as the enemies’ merchant marines are armed\(^{49}\), a thorny question arises: at which point can a vessel be considered as participating in the hostilities and thus lawfully attacked? In accordance with the traditional approach the decisive criterion was the type of armament. Defensive armament could not alter the legal status of the enemy merchant vessels as civilian objects\(^{50}\). The merchant ships liable to seizure could defend themselves and even seize the attacking warship\(^{51}\). But without an attack, a merchant vessel of a belligerent could not participate in the hostilities.

With the gradual evolution of weaponry systems, it became obvious that it was difficult to draw a line between defensive and offensive armament. That is why the “concept of defensively armed merchant vessels is an anachronism”\(^{52}\). The San Remo Manual focuses on the ability of the armament of the merchant vessel to inflict damage on a warship. Thus, only deflective systems are allowed and individual weapons exclusively for the defence of personnel\(^{53}\). It seems that the modern approach to the armament of merchant ships allows only for

\(^{49}\) Converting merchant ships into warships is not addressed here. It suffices, for the purposes of this chapter, to underline that the issue remains a controversial one, especially as regards when and where the conversion can be effected and if the converted into warship merchant vessel can be reconverted again before the cessation of the hostilities. For more see Yoram Dinstein, “The Laws of War at Sea”, 10 *IYHR* (1980), 38, at 58.


\(^{51}\) *Ibid.*, at p. 266.


“soft kill” defensive weapon systems, such as chaffs, flares, and decoys, whereas the “hard kill” systems, physically interacting with the target, is doubtful if they meet the requirements of the Manual. If the Manual’s approach is adhered to, it will work against the assumption of armed merchant marine, which resulted in unrestricted warfare during the World Wars. Besides the arming of merchant vessels, the permissible ruses of war in the context of naval warfare enhance the difficulty to distinguish between civilian objects and military objectives.

Using ruses of war is a permissible method of warfare in both the land and the naval context, and should be distinguished from perfidious acts, that is, acts specifically planned to invite the confidence of the adversary in order to betray it subsequently, which are prohibited. It is not generally easy to distinguish between permissible ruses and prohibited perfidy. The issue is more controversial in the context of naval warfare. The old rule of allowing the use of false flag during armed conflicts at sea is still applicable, as it is clearly stipulated in the relevant articles of Additional Protocol I. Moreover, law of naval warfare allows the disguise of warships as merchant vessels, compromising in a very serious aspect the application of the distinction principle. The only requirement for the warship is to reveal her true identity only just before launching the attack, thus at a time when the disguise is useless. The important issue, in the view of the present writer, is not whether the false flag rule is sanctioned or just tolerated. In any case, modern weapons reduce the operational value of flying a false flag. The vital issue is that the anachronistic view that naval warfare is not subject to the same rules as warfare on land is perpetuated. Another aspect of the same approach regards the usage of exclusion zones during armed conflicts at sea, which creates more problems in applying the principle of distinction.

The wide adoption of war zones during armed conflict at sea and the “rights” claimed by the belligerents inside such zones is a reality difficult to reconcile with international humanitarian law. The free-fire policy within the zones is in sharp contrast with the principle of distinction. Scholars have expressed a wide variety of approaches regarding their legality covering the whole spectrum of positions: from absolute condemnation to whole-hearted approval. Some scholars argue that regarding this issue “the law is in a state of flux and because the perceived legitimacy or illegitimacy of particular uses of exclusion zones will

54. For an operational approach of the delineation between ruses and perfidy at sea see Mary Hall, “False Colors and Dummy Ships: The use of Ruse in Naval Warfare”, XLII Naval War College Review Number 3 (1989), 52.
55. Supra footnote 40, Articles 39 (3) and 37 (1) (d).
depend to a considerable extent on the context of the conflict in which they are used”. Others propose, the difficult to define, criterion of reasonableness to access the legality of the zones.

Even the San Remo Manual does not take a clear-cut position perpetuating the existence of “grey area” in this aspect. Although the drafters of the Manual seemingly adopted a firm stance against the use of such zones, they later compromised their position by acknowledging the fact that parties to the conflict “might be more likely to do certain things in a zone than outside of a zone, particularly if the zone is created for defensive purposes”.

For present purposes, the most interesting justification for the employment of fire-at-sight zones is based on the UN Charter. *Jus ad bellum* is used to legitimize the adoption of the zones, displacing *jus in bello*. This was readily illustrated by the legal arguments used to justify the adoption of the British Total Exclusion Zone (TEZ) during the Falklands Conflict. This zone was proclaimed as a free-fire zone, based on the right of self-defence in accordance with Article 51 of UN Charter:

“The legality of the TEZ avoided the necessity for determining whether any ship or aircraft in the area in fact presented an immediate threat to the task force . . . All unauthorized ships and aircraft in the zone were deemed to be threatening and so liable to attack in self-defence.”

The UN Charter is used in order to offer legitimacy in practices of dubious legality, if not patently unlawful under humanitarian law, actually rendering the distinction principle simply a euphemism. More interestingly, when in the context of the same conflict the British submarine *Conqueror* sank the Argentinean warship *General Belgrano* outside the TEZ, traditional *jus in bello* arguments were put forward for justification, *Belgrano* being a lawful military target.

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57. For an excellent criticism of this approach and a general analysis of reasonableness in international law see George Politakis, *supra* footnote 47, at p. 145.
60. For this trend see *supra* footnote 2.
61. See for example Wolff Heintschell Von Heinegg, “War Zones”, in R. Wolfrum, *supra* footnote 53, Vol. X, at p. 768. This flip-flop approach or forum shopping seems to accommodate a more “realistic” approach to international law and the dictates of power politics.
The difficulties concerning the application of the principle of distinction are characteristic of the current development of the international humanitarian law regulating naval warfare. This situation is even more perplexing in situations of non-international armed conflicts (NIAC) at sea.

Although States were unwilling to subject International Armed Conflicts (IACs) and Non-International Armed Conflicts (NIACs) to the same, treaty-based legal regime, the tendency during the last 20 years is to bridge the regulatory gap of NIACs through customary international law. It is observed that there exists a widespread tendency to apply the rules regulating IACs to NIACs, by the acceptance of the existence of customary law. This convergence, which is driven by judicial decisions, is reflected in the ICRC study regarding customary international humanitarian law. Out of the 161 identified customary rules, 142 rules are equally applicable in both IACs and NIACs. The extent to which this convergence is relevant to armed conflicts at sea was not addressed in the ICRC study, because of the drafting of the San Remo Manual. But the latter leaves also the question open:

“[A]lthough the provisions of this Manual are primarily meant to apply to international armed conflict at sea, this has intentionally not been expressly indicated . . . in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.”

As a result, it is unfortunate that the international humanitarian law governing NIACs at sea remains rather obscure. In more detail, the wording of the drafters of the San Remo Manual (“not to dissuade the implementation”) is disquieting as regards the legal obligation to apply

62. Earlier, States were unwilling to accept the existence of customary law regulating NIACs. For example, during the negotiations that resulted in the Additional Protocol II “[i]t was apparently felt that the regulation of non-international armed conflicts was too recent a matter for state practice to have sufficiently developed in this field” (Commentary to the Additional Protocol II, published at ICRC website, http://www.icrc.org/ihl.nsf/COM/475-760002?OpenDocument, visited 5 September 2012).

63. The issue identified supra regarding the pressure enforced by the humanitarian principles in the customary law norm creating procedure is enhanced in the context of NIACs, due to the minimal treaty law regulation of such conflicts. For the issue of judge-made law see infra.

64. See supra footnote 34.


66. See supra footnote 34.

67. See supra footnote 37, at p. 73.
the rules of the Manual during NIACs in toto. According to the traditional approach, in the case of “recognized belligerency”\(^68\) or “wars of national liberation”\(^69\) the full body of law of naval warfare is applicable. On the one hand, the applicability in NIACs of the rules of IACs regulating the methods and means of warfare, the special protection of persons and objects, the target discrimination and the measures short of attack against the ships of the conflicting parties do not raise serious legal questions. On the other hand, there are divergent views regarding the rights of the belligerents against the vessels of third States in the context of NIACs on the high seas\(^70\).

Some scholars argue that in the context of NIACs no party to the conflict has the right to interfere with third parties’ ships on the high seas\(^71\). There is, however, a contrary view that there should be no difference between IACs and NIACs on the actions that may be adopted against vessels flying the flag of a neutral State\(^72\). Between these two extremes, there seems to be a more pragmatic view which links the existence of belligerent rights against neutral vessels on the high seas with the intensity of the conflict\(^73\). It is doubtful whether such a schism between the law regulating limited and unrestricted armed conflicts can be accepted. The drafters of the San Remo Manual have not endorsed the notion of limited warfare, even though elements of this concept can be found in the articles and the commentary describing the relation between armed conflicts and the law of self-defence, especially the impact of the con-

\(^68\) It is doubtful whether the belligerency doctrine has survived in contemporary international law. “The doctrine has declined to the point where recognition of belligerency is almost unknown today” according to the UK Manual (UK MOD, The Joint Service Manual of the Law of Armed Conflict (JSP 383), 2004, at p. 384, para. 15.1.2). Despite this fact, the doctrine has served as a starting point for the idea that internal conflicts are not immune from international law. See Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, Cambridge University Press, Cambridge, 2010, at p. 23.

\(^69\) As a consequence of Article 1 (4) of Additional Protocol I.


\(^71\) Natalino Ronzitti, supra footnote 36, at p. 12.


\(^73\) D. P. O’Connell introduced the concept of limited warfare, which is subject to different laws insulating high seas from belligerent acts. (See, for example, D. P. O’Connell, The Influence of Law on Sea Power, Manchester University Press, Manchester, 1975, at p. 114 and also supra footnote 23).
cepts of necessity and proportionality on a tactical level. In any case, there are occasions of high intensity NIACs during which the international community acquiesced in belligerent measures against neutral shipping on the high seas, such as the blockades during the US Civil War and the Israel-Hezbollah conflict of 2006. As it is observed “[t]he right of states to implement measures against neutral vessels in NIACs is thus at best an unsettled question”.

The law governing IACs and NIACs at sea has many “gray areas”. Without the clarification of the applicable law, it is difficult to elaborate a coherent theory of war crimes at sea. On the other hand, the experience of the 1990s with the establishment of the ICTY, the ICTR and finally the ICC clearly shows that the judicial oversight of the conduct of hostilities sheds light on the obscurities surrounding the applicable law. The ambition of the rule of law to regulate every aspect of human life is clearly illustrated in the symbiotic relationship between international criminal law and international humanitarian law.

SECTION 4 CRIMINALIZATION OF VIOLATIONS OF IHL

The relationship between IHL and ICL is twofold: on the one hand, IHL provides the substantive rules for ICL regarding war crimes. On the other, not only is ICL one of the most effective means to implement IHL, but also the jurisprudence of national and international tribunals has contributed to the clarification of the rules of IHL and even their development. As of today, the relationship between IHL and ICL is best characterized as synthesis between the two branches of international law.

Which rules of IHL create individual criminal responsibility is not a straightforward issue. Not every violation of the laws of war amounts to

74. See supra footnote 37, at p. 75.
a war crime, as it was, erroneously, contended in the past. War crimes are violations of the laws and customs applicable in armed conflict, to which international law attaches individual criminal responsibility. As Abi-Saab clarifies,

“[I]n fact, for a violation of a rule *jus in bello* to produce the special legal effect of entailing the criminal responsibility of the individual who commits it, one should prove not only the existence of the violated rule in international law, but also the parallel existence of a secondary rule, usually a customary one, ascribing to the former rule this special legal effect in case of violation.”

This secondary rule is the decisive criterion of whether to accept a war crime and not of how “grave” or “serious” the violation of international humanitarian law is, as it is generally accepted. Following the same reasoning and trying to distinguish between the original technical concept of “grave breaches” and “war crimes”, Oberg emphasizes that “war crimes consist of secondary rules of international criminal law that attach criminal sanctions to breaches of primary rules of international humanitarian law”. In any case, the courts have a unique role either in identifying the existence of the secondary rule or in defining which violations are serious, and thus creating individual criminal responsibility.

The courts’ role is not limited to the determination of the existence of the secondary rule criminalizing the violation. The judiciary, especially of the ICTY and ICTR, had an unparalleled impact on the development of IHL. The definition of “armed conflict”, the expansion of the concept of “protected persons” based not on nationality but on ethnicity, the establishment of individual criminal responsibility for violations of IHL during internal conflicts, the incorporation of war crimes not previously elaborated in IHL, and finally the clarification of the content of existing crimes can be enumerated as the significant contributions of the international tribunals to the advancement of IHL.

The above-mentioned impact upon IHL would have been impossible without the display of remarkable judicial creativity. The extent of the judicial dynamism has led some commentators to even speak about the


“reinvention” of war crimes by the international criminal tribunals. “There is little doubt that the judicial creativity . . . in the area of war crimes has amounted to judicial law-making” 81. The “vehicle” to achieve the development of IHL was customary law.

It is beyond the scope of the present work to analyse the formulation of customary law in public international law. Just for a brief analysis, two are the classical elements of the customary norm, the objective one, namely State practice, and the subjective one, that is, opinio juris sive necessitatis. Regarding the first element, it is accepted that the State practice needs not to be absolutely uniform 82. Another crucial issue regarding the objective element is how much time is needed to elapse for the practice to acquire customary status. As the ICJ has held, extensive practice can lead to the formation of a customary rule, even in a short period of time 83. The subjective element, that the States act in a certain way because they believe they have a legal obligation to do so, is very difficult to discern. The motives of State action could be just political, without any legal connotation. Therefore, the ICJ’s basic way to assert the subjective element was to base opinio juris on extensive State practice 84. In just a minority of cases, the Court adopted a strict approach requiring specific proof of the opinio juris 85, and then only to deny the existence of a customary rule 86.

The most practical way to determine whether a specific practice is performed out of legal obligation is the official pronouncement of one State’s opinion regarding what the content of the law is. This is why the

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82. “State practice, including that of States whose interests are specially affected, should [be] both extensive and virtually uniform.” (North Sea Continental Shelf cases, Judgment of 20 February 1969, ICJ Reports 1969, at p. 43, para. 74).

83. “Passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.” (Ibid.)

84. As Kirgis analyses the two elements of custom are in equilibrium. When one element is scarce, it can be substituted by the other, if the existence of it is in abundance (Frederic Kirgis, “Custom on a Sliding Scale”, 81 Am. J. Int’l L. (1987), 146, at 147).


86. In this way the Court found a way to escape from the paradox identified by Thirlway regarding international customary law: “[H]ow can a practice develop into a customary rule if States have to believe that a rule already exists before their acts of practice can be significant for the creation of the rule?” (Hugh Thirlway, “The Sources of International Law”, in Malcolm D. Evans (ed.), International Law, Oxford University Press, Oxford, 2010, p. 95, at p. 102).
military manuals are cited by Brownlie as material sources of custom. But he does not leave this statement unqualified. He adds that “obviously the value of these sources varies and much depends on the circumstances”. There are many caveats regarding the value of the manuals as evidence of customary international law. As is observed, “we should at the very least be extremely cautious about how we approach military manuals as a source, or as an expression of a source, of customary international law”. Leaving aside the issues related to the issuing authority and its purpose, there are conflicting views regarding the elements of customary international law, both the objective and the subjective one, as reflected in the manual.

The International Tribunal for the former Yugoslavia (ICTY) cited military manuals as indicia of States’ practice, taking into account the difficulties related with ascertaining it in the theatre of military operations. This is also the position taken by the drafters of the ICRC study on customary international law and of the San Remo Manual. On the contrary, there is the view that manuals represent the subjective element of customary law. Others take a more balanced approach by avoiding clarifying which element of customary law is illuminated by military manuals. The issue is actually one of appraising the significance of battlefield actions on the one hand, and official statements on the other, in determining State practice. Although the former may have preponderance in shaping State practice, this does not exclude the possibility

87. “A material source of law is simply the place... in which the terms of the rule are set out... In identifying a material source no account need be taken of the legal authority of the textual instrument.” (Ibid, at p. 96.) Other important functions of military manuals are firstly the dissemination of IHL and secondly its development as part of the “international lawmaking process” (W. Michael Reisman and William K. Leitzau, “Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict”, in Horace W. Robertson, The Law of Naval Operations, International Law Studies, Naval War College, Newport Rhode Island, 1991, p. 1.
88. See supra footnote 85, at p. 6.
90. See supra footnote 9, para. 99.
91. See supra footnote 34, at p. xxxii.
92. See supra footnote 37, at p. 67.
94. “At the highest level, national manuals provide evidence of state practice and opinio juris in relation to the states by whom they are issued.” (Charles Garraway, “Military Manuals, Operational Law and the Regulatory Framework of Armed Forces”, supra footnote 89, p. 45, at p. 46).
of asserting the objective element from the national military manuals. In any case, the whole issue bolsters the thesis that the two elements of customary international law are closely intertwined, giving to the judiciary latitude in shaping it.

The plasticity of international customary law was an essential precondition to the judicial creativity regarding IHL. The thorniest question is whether the judiciary has gone beyond the allowable limits, if any, during administering justice for alleged war crimes. On the one hand, judicial law-making can hardly be reconciled with legal positivism. On the other, common law legal systems are familiar with this judicial dynamism, which has been held to be compatible with the European Convention on Human Rights.

As far as the methodology of the tribunals is concerned, suffice it to mention that, in the context of IHL, it has not been easy to discern the classical elements of the customary norm. There were “efforts to anchor this normative process in earlier case law, such as post-World War II decisions, and a range of eclectic sources such as the work of International Law Commission, military manuals and Security Council debates”\(^\text{96}\). The judges were ready to accept that the humanitarian considerations that characterize IHL exerted pressure for the creation of customary law, even when they had to ignore or downplay contrary States’ practice.

“As judges, scholars, governments, and nongovernmental organizations are often prepared to accept a rather large gap between practice and the norms concerned without questioning their binding character.”\(^\text{97}\)

As the ICTY accepted in the Kupreškić case, ruling on the prohibition of reprisals against civilians during NIACs, “[because of] the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged”\(^\text{98}\). This approach is explained by Kirgis, who states that “when issues of armed force are involved, it may well be that the need for stability explains an international decision maker’s primary reliance on normative words rather than on a combination of words and consistent deeds”\(^\text{99}\).

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99. Frederic Kirgis, supra footnote 84.
It is clear that despite the great effort by the judges to anchor their dynamism in the traditional customary law elements, it is not easy to find a consistent methodology in their approach. That is why there are proposals that “customary international law in the context of international criminal law means something different than customary international law in the context of traditional public international law”\(^{100}\). Besides the problems already mentioned related to the criminalization process and the content of the criminal rules, another less controversial issue is the jurisdiction over war crimes.

Notwithstanding the fact that every State has an interest in prosecuting war crimes\(^{101}\), there is no specific treaty provision regulating the conduct of hostilities which establishes universal jurisdiction over them. For example, the provisions of the 1949 Geneva Conventions’ provisions refer only to the *aut dedere aut judicare* principle, which is applicable for the grave breaches of the conventions specifically enumerated in them. Moreover, “[c]ustomary international law as reflected by the practice of states does not . . . mean that universal jurisdiction has been applied in national prosecutions” in the judgment of such an expert as Bassiouni\(^{102}\). Academics’ and experts’ writings have been decisive in the recognition of universal jurisdiction over war crimes, as the same writer observes\(^{103}\). It is obvious that this treaty-based “quasi universal” jurisdiction, due to the universal ratification of the Geneva Conventions, transforms the permissive character of universal jurisdiction into an obligatory one, at least for the grave breaches\(^{104}\). For the rest of the war crimes, the jurisdictional issues remain muddy.

In accordance with the ICRC study on customary international law,

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\(^{100}\) See *supra* footnote 96, at p. 101.

\(^{101}\) For an excellent overview regarding the criteria that a crime must meet in order to be subject to universal jurisdiction, see James Paul Benoît, “The Evolution of Universal Jurisdiction over War Crimes”, 53 *Naval L. Rev.* (2006), 259, at 262.


\(^{104}\) Some claim that there is a two-way relationship between universal jurisdiction and the obligation to prosecute or extradite. For example, in a different context, that of piracy, Chicca claims that universal jurisdiction may create an obligation to extradite or prosecute, due to an emerging customary nature of the *aut dedere aut judicare* principle in relation to piracy, despite the non-universal membership to the SUA Convention. For an elaborate analysis see Matteo Del Chicca, “Universal Jurisdiction as Obligation to Prosecute or Extradite”, 11 *WMU J. Maritime Affairs* (2012), 83, at 91.
“States have the right to vest universal jurisdiction in their national courts over war crimes” \(^{105}\).

By contrast, the United States maintains that State practice does not support the contention that under customary international law other war crimes, except grave breaches, carry permissive universal jurisdiction \(^{106}\).

As has been already mentioned, real life cases regarding criminal trials for punishment of the perpetrators of war crimes during armed conflicts at sea are rather rare and they concern attacks against protected persons at sea. In *The Llandovery Castle* case the German Reichsgericht in Liepzig found the accused guilty for opening fire on lifeboats of a torpedoed hospital ship \(^{107}\). The *Peleus* trial dealt with the elimination of the shipwrecked survivors of *Peleus* by members of the crew of the German U-Boat 852, during World War II. The British Military Court at Hamburg found the accused guilty and rejected the plea of superior orders and the defence of military necessity \(^{108}\).

The most famous case, however, where the content of the law regulating naval warfare came at the forefront, was adjudicated by the International Military Tribunal in Nuremberg, with the charges against Admirals Doenitz and Raeder. The accused were acquitted for unrestricted submarine warfare against enemy merchant ships in view of their armament and although they were found guilty regarding the attacks on neutral merchant vessels, the Tribunal did not take into account their conviction in assessing the sentences.

More recently in the *Miodrag Jokic* case, the ICTY dealt with the naval bombardment of Dubrovnik in contravention of the rules protecting cultural objects.

**SECTION 5  THE MAVI MARMARA INCIDENT**

The *Mavi Marmara* incident is the best example to illustrate the previously indentified issues concerning the application of the concept of war crimes in the context of maritime operations. It is beyond the scope of the present chapter to narrate the events of 31 May 2010 concerning the interception by Israeli forces of the flotilla bound for Gaza, which resulted in the death of nine people, and has already

\(^{105}\) See *supra* footnote 34, at p. 604 (Rule 157).


\(^{107}\) The main points of the judgment are available at http://www.gwpda.org/ naval/lcastl12.htm, visited 20 August 2012.

been extensively dealt with\textsuperscript{109}. This section will focus more on the serious legal issues that this incident raised in relation to the above discussion over the concept of war crimes in the naval warfare.

Firstly, the issue of the determination of the applicable international law paradigm, which governed the conduct of the Israel Defense Forces: the various commissions that dealt with the matter oscillated between the law enforcement and the armed conflict paradigm. In accordance with the Turkish Report, the armed conflict paradigm had no application in the incident; therefore the interception should have been evaluated by the law enforcement paradigm\textsuperscript{110}. In sharp contrast, the Turkel Report and the Palmer Report gave pre-eminence to the armed conflict paradigm and the naval blockade\textsuperscript{111}.

The selection of the pertinent international law paradigm has inevitable repercussions on the manner of the enforcement action of the naval forces. The mainstream approach is that “under the laws of peace or war much the same standards should be considered to apply”\textsuperscript{112}. According to this approach, the standard established by ITLOS in the \textit{M/V “Saiga” (\textsuperscript{2})} case\textsuperscript{113} should, by analogy, apply to wartime...
operations. This approach is tacitly adopted in the Turkish Report\textsuperscript{114} and implied in the Palmer Report\textsuperscript{115}. Even if the factual circumstances of the \textit{Mavi Marmara} incident invite the convergence of the law enforcement and the armed conflict paradigms regarding the applicable standards for the execution of the boarding operation, this approach cannot be generalized. Wartime operations usually allow for a more rapid escalation of force. Enforcing a blockade is a military operation conducted in a war environment, where the naval unit enforcing the blockade has to deal with various threats. The \textit{modus operandi} of such an operation cannot be equated with the way a “police operation” is enforced. In any case, a ship attempting to breach a blockade becomes a military target liable to attack, subject of course to the principles of necessity and proportionality governing the conduct of hostilities. This is not to say that the “\textit{Saiga}” standard is rendered useless. It is that the necessity to use force must be evaluated in accordance with \textit{jus in bello}, and the, sometimes inevitable, civilian life losses in accordance with the principles of distinction and proportionality. This reasoning is followed by the Turkel Report\textsuperscript{116}, although it is difficult to reconcile the military realities of the specific operation with the rapid escalation of the force used by the Israelis.

The incident also highlighted the underdevelopment of the laws governing armed conflicts at sea. The immaturity of the laws regulating naval warfare, compared with the laws of land warfare, has already been analysed. Another serious question is whether the bridging of the regulatory gap between IACs and NIACs in land warfare has been equally followed in naval warfare. Taking into account the existing state of the law, it had to be expected that diametrically different legal approaches would have been adopted regarding the evaluation of the incident. The Turkish Report concludes that naval blockades are applicable only in IACs\textsuperscript{117}. Belligerent rights against neutral shipping cannot be exercised on the high seas during NIACs. Indeed, this approach is supported by eminent academics\textsuperscript{118}. Furthermore the Turkish approach continues that because of the non-international character of the conflict between Israel and Hamas the blockade of the Gaza Strip is violating international law\textsuperscript{119}.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} Turkish Report, at p. 86.
\item \textsuperscript{115} Palmer Report, paras. 104-133, at pp. 51-61.
\item \textsuperscript{116} Turkel Report, paras. 178-179, at pp. 223-224.
\item \textsuperscript{117} Turkish Report, at pp. 60-62.
\item \textsuperscript{118} See supra footnote 71.
\item \textsuperscript{119} Turkish Report, at p. 63.
\end{itemize}
\end{footnotesize}
The Turkel Report adopts a diametrically opposite legal evaluation which has also basis in legal theory. Blockade is available both in IACs and NIACs. Despite the fact that the Turkel Commission classifies the conflict between Israel and Hamas as an international one, it continues that the difficulty in characterizing modern armed conflicts as IACs or NIACs, on the one hand, and the tendency to bridge the regulatory gap between IACs and NIACs, on the other, allows it to conjecture that

“it is likely there will be a willingness on the part of courts and other bodies to recognize that the rules governing the imposition and enforcement of a naval blockade are applicable to non-international armed conflicts”.

The Palmer Report dismisses entirely the availability of blockades in NIACs. Considering, without, however, sufficient legal analysis the conflict as an international one, it concludes that the blockade was in conformity with international law. The FFM Report does not deal with the question of the classification of the conflict or whether blockade is an available method of warfare during NIACs. It holds that it is illegal, because “it inflicts disproportionate damage on the civilian population” and “amounts to collective punishment in violation of Israel’s obligations under international humanitarian law”.

These assertions, especially the latter one, prompt the question of the impact of the humanitarian principles on the traditional law of blockade. The traditional customary requirements for a lawful imposition of blockade, namely notification, effectiveness and impartiality, do not provide for any sanction on the lawfulness of a blockade based on the humanitarian impact upon the blockaded population. Contemporary development of humanitarian law, however, could not ignore the effect of the blockades on the civilian population. The San Remo Manual seems to modernize the law applicable to blockades, emphasizing the humanitarian principles that the traditional paradigm did not accommodate. The inability of the traditional approach to meet the current legal stan-

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120. See supra footnote 72.
121. Turkel Report, para. 42, at p. 49.
122. As it is explicitly stated in the report “[t]oo much legal analysis threatens to produce political paralysis” (Palmer Report, para. 15, at p. 10) and also “[i]n this context, the debate on Gaza’s status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum” (Palmer Report, para. 73, at p. 41).
123. Palmer Report, para. 73, at p. 41.
125. FFM Report, paras. 54, at p. 13.
126. Especially Articles 54 and 70 of Additional Protocol I
127. Articles 102 to 104 of the Manual.
The Turkel Report, which emphasized the traditional requirements, extensively analyzed the humanitarian obligations of Israel, basing its analysis on the provisions of the San Remo Manual, taking a more conservative approach than the FFM Report regarding the impact of the humanitarian considerations on the assessment of the blockade. Suffice it here to highlight the different analysis of the proportionality principle. As is observed in the Turkel Report, the current development of humanitarian law calls for a disproportionality test, requiring the damage to be excessive related to the military advantage anticipated. The FFM Report concludes that the damage is disproportionate without assessing whether it is excessive or not. Moreover, the Turkel Report adopts a restrictive interpretation of the notion of collective punishment, in sharp contrast with the FFM Report. The Turkish Report held that the Israeli blockade violates the principle of proportionality, reaching the conclusion that the damage to the civilian population caused by the blockade is excessive and constitutes collective punishment. The Palmer Report, on the other hand, admits that the imposition of a blockade would be illegal if it was intended to collectively punish the civilian population or if it violated the proportionality principle. Nevertheless, it finds that these conditions are not met in the present case.

It is obvious that the law of blockade is in a state of flux. The traditional paradigm is unable to meet the contemporary requirements of humanitarian law; it has to be enriched with the humanitarian principles. The question is whether the law will adopt the progressive approach of the FFM Report and the Turkish Report, on the one hand, or the more restrictive approach of the Turkel Report on the other. Taking into account the scant practice regarding naval blockades and the absence of treaty-based law, it is impossible to draw definite conclusions, without any judicial decision clarifying the exact content of the customary law.

128. Turkel Report, paras 57-60, at pp. 61-64.
129. Turkel Report, paras. 75-97, at pp. 82-102.
131. FFM Report, supra footnote 124.
133. FFM Report, supra footnote 125.
134. Turkish Report, Conclusions Nos. 38 and 39, at p. 116.
136. For an extensive analysis of the issues related to the traditional technical requirements of the law of blockade vis-à-vis the modern approach that encompasses also humanitarian considerations see Martin David Fink, “Contemporary Views on the Lawfulness of Naval Blockades”, Aegean Rev. Law Sea (2011), 191.
It is not surprising that the differences in evaluating the substantive law that regulated the incident prompted different reactions on the issue of individual criminal responsibility. According to the Turkel Report, the naval blockade itself and the actions taken to enforce it were found to be legal\(^\text{137}\). The FFM Report, in sharp contrast with the previous assessment, argues for the commission of war crimes, namely willful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health against the passengers of the flotilla, who are characterized as civilians. Article 147 of the Fourth Geneva Convention regarding its “grave breaches” serves as the legal basis for the alleged crimes\(^\text{138}\). In this specific point, it is interesting that the FFM Report, as already noted, does not analyse whether the conflict between Israel and Hamas is classified as IAC or NIAC. Taking into account that “grave breaches” are committed only during IACs\(^\text{139}\), it may be inferred that the Mission regards the conflict to be an international one.

Additionally, there is no analysis in the Report of the characterization of the passengers of the flotilla as civilians. Even if it is assumed that the passengers were civilians, it is doubtful whether the Fourth Geneva Convention is applicable in this case, taking into account that it was intended to protect only enemy nationals within the national territory of the adverse party. The Palmer Report concludes that “the loss of life and injuries resulting from the use of force by Israeli forces during the take-over of the ‘Mavi Marmara’ was unacceptable”, but refrained from characterizing Israeli actions as war crimes\(^\text{140}\). As is obvious, different legal evaluations of the interception of the flotilla resulted in divergent approaches regarding the potential commitment of war crimes by the Israeli forces.

SECTION 6 CONCLUSION

Undoubtedly, the current development of IHL regulating armed conflicts at sea and concomitantly its enforcement through

\(^{137}\) Turkel Report, para. 255, at pp. 278-279. Interesting is the distinction made in the report regarding the passengers on board \textit{Mavi Marmara}. The report distinguishes between the IHH activists and the rest of the passengers, characterized as civilians, who did not confront the Israeli forces that took over the ship. The above-mentioned passengers, according to the report, did not take direct part in the hostilities, despite the fact that they voluntarily participated in an attempt to breach a blockade (whether lawfully or unlawfully established), an assertion that it is arguable.

\(^{138}\) FFM Report, paras. 65, 182 and 265 at pp. 15, 40 and 53 respectively.

\(^{139}\) For the relation between grave breaches and internal armed conflicts, see Lindsay Moir, “Grave Breaches and Internal Armed Conflicts”, \textit{7 JICJ} (2009), 763.

\(^{140}\) Palmer Report, para. 134, at p. 61.
ICL leaves much to be desired. Although this is an unfortunate situation, taking into account that our civilization cannot tolerate the existence of aspects of human life that are not regulated sufficiently by law, it does have positive aspects. The modern maritime environment and the focus of most of the navies to the enforcement of public order at sea have reduced dramatically the pressure to shed light over the “gray areas” of IHL, as, for example, armed conflicts at sea. This has rendered insignificant any need for instituting criminal procedures against its violations. In sharp contrast with the atrocities that took place in the context of land warfare during the 1990s, and fuelled the rapid change of IHL and ICL concerning this aspect of conflict, seas remained relative calm.

This does not mean that the potential application of IHL concerning naval warfare is not relevant. As the Mavi Marmara incident corroborated, there are still cases which raise thorny questions regarding the law of war at sea. As long as naval warfare remains a possible method of warfare, the need for its regulation will be essential for the international community. Any meaningful attempt to address the gaps of the relevant law must obtain the consent of the major naval powers. This notwithstanding, such a development does not appear possible. Progress regarding regulation of naval warfare has always followed major conflicts in order to remedy the abuses that occurred during them. Let’s hope that there will not be such a need again.

Postscript

After the completion of the first draft of this chapter, an interesting development took place regarding the Mavi Marmara incident. On 14 May 2013 the Union of the Comoros, flag State of the Mavi Marmara, referred the interception of the flotilla by Israeli forces to the ICC. Subsequently, the Office of the Prosecutor announced that it is conducting a preliminary examination in order to establish whether the criteria for opening an investigation are met.

From the standpoint of the present writer, the referral is significant because it is partly based on the allegation that the Israeli forces committed war crimes when they encountered the flotilla. Although the fate of the legal action of the island nation is uncertain, for legal as well as political reasons, the referral brings to the forefront the potential commission of war crimes at sea, and serves as a stimulus for the international community to tackle the weaknesses of the war crimes concept in naval warfare, as already identified in the chapter.