BEYOND WARSHIPS: INTEGRATING OTHER VESSELS INTO NAVAL OPERATIONS

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This Article takes a normative look into the current and potential future uses of non-warships in naval operations. Because only warships may conduct "belligerent acts," the central discussion of this Article is around vessel categorization and the definition of a "belligerent act," a definition that I argue is in flux given advancing technology and vessel capabilities. So long as a non-warship's actions do not rise to the level of "belligerent act," that vessel may provide support to a naval operation. This Article contributes to literature by proposing a means for states to assess whether a non-warship's actions rise to the level of "belligerent act" to utilize non-warships in line with international law. I also provide an alternative for states looking to protect merchant vessels during periods of armed conflict, bringing back letters of marque so private vessels can augment a state's navy, freeing up warships to fight. Throughout this Article, I draw upon the significant writing done surrounding private military companies' participation in land warfare as a means to predict the impact of increased non-warship participation in future naval operations.

INTRODUCTION

Civilian involvement in the military in both land and naval warfare is constantly evolving, from administrative and logistical support, to assistance during combat operations, to civilians considered directly participating in hostilities. Even before traditional navies, there were instances where civilians either chose to help a ruling government's fleet or were conscripted to provide assistance.[1] As technology, warfare, and states' militaries' roles in national

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[1] For example, the French use of privateers against British trade in 1700s and 1800s. *See, e.g.*, KATERINA GALANI & GELINA HARLAFTIS, NEW PERSPECTIVES ON THE GREEK WAR OF INDEPENDENCE 137 (Y. Cartledge & A. Varnava, eds., 2022). When Arab Muslims took over Egypt,

security evolve, so too have the roles of civilians. Civilians no longer simply work in production plants designing, manufacturing, and supplying the military. Civilians play more active roles in developing new technology, analyzing intelligence, and even advising commanders. As on land, in the maritime regime, even during peacetime, we see civilian vessels support state navies.

Much has been written about the impact that increased civilian participation has on land warfare and how it is changing the landscape of the laws of armed conflict. The maritime realm, however, brings a unique set of issues. The interdependence between states, combined with the increased global nature of maritime commerce and the evolving and escalating threats thereto, dictates that navies will increasingly rely on merchant vessels, or other non-warships, to provide assistance during naval operations. Vessel categorization will be critical in determining what privileges and immunities a specific ship enjoys. The concept of the belligerent act, a privilege granted only to warships is central to this categorization. Knowing what constitutes a belligerent act and what does not constitute a belligerent act is fundamental in determining what a vessel can, and cannot, do within the bounds of international law, while supporting naval operations. The unique maritime setting requires an in-depth exploration of historical precedent, along with recognition of evolving factors, to establish future civilian maritime roles in line with international law.

Throughout this Article, I will utilize current examples of civilian vessel integration into states' navies to illustrate potential areas of concern. Below are several examples I utilize throughout, each demonstrating a different form of non-warship integration into naval operations.

The BEHSHAD is a "general cargo vessel" owned by Rahbaran Omid Darya, an Iranian ship management company, but believed to be utilized by both Iran and the Houthis, a non-state actor.[2] In January 2024, after years in the Red Sea, the BEHSHAD moved to the Gulf of Aden and has since "followed an unorthodox, slow and meandering course around those waters close to the entrance to the Red Sea."[3] Iran claims that the BEHSHAD is involved in "combating piracy," but the vessel's move into the Gulf of Aden coincided with an increase in Houthi attacks on vessels in that area.[4] Following a reported U.S. cyber attack on the BEHSHAD, there was a period of relative calm, but, upon its

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they had no understanding of the sea, and utilized Egyptians, harnessing their maritime capabilities. Myriam Wissa, *The Conscription of Egyptian Christian Sailors in Medieval Muslim Naval Warfare: Taking the Long View*, 8 J. MIDDLE E. AFR. 397, 397–98 (2017).

[2] *Behshad*, BALTICSHIPPING.COM, https://bit.ly/3TYkbQW.

[3] Robert Wright, *The Mysterious Iranian Ship Accused of Lining Up the Next Houthi Targets*, FINANCIAL TIMES (Mar. 9, 2024), https://on.ft.com/3NiM5Da.

[4] *Id*.

return to the Gulf of Aden, reports show another increase in targeted Houthi attacks.[5]

The second example involves the People's Republic of China's (P.R.C.) "maritime militia." This "militia" operates in the South China Sea and consists largely of two types of vessels, Maritime Militia Fishing Vessels (MMFVs) and Spratly Backbone Fishing Vessels (SBFVs).[6] While the SBFVs are intended to provide a greater degree of deniability for the P.R.C., the two subsets largely function in a similar manner. Both play a role in defending Chinese national sovereignty and maintaining a "charge to assist the PLA [People's Liberation Army] in combat if required."[7] China has been operating its maritime militia since as far back as 1974, when the militia was used during an operation to seize the western Paracel Islands.[8] These vessels operate in a "legal gray zone" where their conduct obfuscates their status, potentially leading to concerns regarding their targeting and eligibility for prisoner of war (POW) status in any future hostilities.[9]

Finally, in March of 2022, it was reported that the United States deployed three "spy ships" into "sensitive waters near China."[10] The ships were deployed to increase both "submarine and anti-submarine warfare capabilities" against China.[11] The three vessels are civilian, manned, and naval auxiliary vessels, referred to as United States Naval Ships (USNS), *not* commissioned warships.[12] The three ships were deployed to conduct underwater probing and reconnaissance following the USS CONNECTICUT's collision with an uncharted seamount in October, 2021, in the South China Sea.[13]

This Article will analyze non-warship integration into naval operations through the framework of vessel categorization and the definition of belligerent acts. Ultimately, I intend to provide a means for states to assess their current uses of non-warships so that they may ascertain future uses of non-warships and appropriate responses to other states' use of non-warships.

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[5] *Id*.
[6] MMFVs are fishing vessels "using funds dedicated to maritime militia affairs," while SBFVs are "a subset of domestic fishing vessels" meeting minimum requirements to operate in the Spratly Islands in support of the Chinese government. GREGORY B. POLING ET AL., PULLING BACK THE CURTAIN ON CHINA'S MARITIME MILITIA 12–13 (Center for Strategic & International Studies Nov. 2021).
[7] *Id*. at 13.
[8] *Id*. at 3.
[9] *Id*. at 14.
[10] Liu Xuanzun, *US Navy Deploys 3 Spy Ships Near China at Once 'in Support of Submarine Warfare,'* GLOBAL TIMES (Mar. 24, 2022, 6:26 PM), https://bit.ly/3U124tz.
[11] *Id*.
[12] *Id*. *See also Ship Naming in the United States Navy*, NAVAL HIST. & HERITAGE COMMAND (Apr. 23, 2019, 2:56 PM), https://bit.ly/4gWWIZX.
[13] Xuanzun, *supra* note 10.

This Article is divided into six parts. I begin in Part I with a review of the history of civilian vessel and naval auxiliary participation in naval operations, introducing the concept of prize law and privateering. In Part II, I discuss vessel categorization, exploring the different categories and privileges and immunities for each. In Part III, I discuss the current wide-ranging definition of belligerent acts and propose a methodology to assist states in determining the boundaries for lawful conduct. Part IV consists of a normative look at how international law applies differently in maritime versus land warfare. Part V introduces a potential alternative to current vessel categorization by exploring bringing back letters of marque and reprisal (hereinafter letters of marque) as a means to sidestep the question of belligerent acts, and investigates the potential pitfalls and areas of concern inherent in this approach. I also suggest the concept of private vessels providing escort services, permitting defensive responses to active threats. Part VI provides a discussion of the varying strategic and political considerations states will need to bear in mind when determining how to use non-warships, comparing literature on the use of Professional Military Companies (PMCs) in the land warfare realm. Finally, I conclude by providing a look to the future and how vessel categorization and a changing definition of belligerent acts could impact the future of non-warship integration into state naval operations.

I. History of Civilian Vessels and Naval Auxiliaries in Naval Operations

The use of naval auxiliaries, merchant vessels, and civilian mariners during conflict can be traced back to medieval times.[14] While the concept of "armed conflict" did not exist in a traditional sense, both civilian mariners and their merchant vessels were used in naval battles, whether voluntarily or through conscription.[15]

A. Prize Law and Privateering

Prior to the Paris Declaration of 1856, states with smaller navies relied heavily on privateers as a means of supplementing their navies.[16] Privateers were privately-owned vessels outfitted as warships and authorized by a state to interfere with enemy shipping at sea.[17] Privateers were commonly authorized through letters of marque, which generally included an expectation that they would conform to international law regarding naval warfare.[18] Privateers received

[14] *See* Galani & Harlaftis, *supra* note 1.
[15] *See, e.g.*, Wissa, *supra* note 1, at 397–98.
[16] David J. Bederman, *Privateering*, *in* Oxford Public International Law (Oxford Univ. Press 2023).
[17] *Id*.
[18] *Id*. *See also* William M. Marine, The British Invasion of Maryland 1812-1815 at 17–18 (Louis Henry Dielman et al. eds., 1913).

commissions and were regulated by domestic laws within the state issuing their letters of marque.[19] This method offered states a means of "plausible deniability" if the privateers violated the letters of marque, by violating international law or any other terms of the letters.[20] States utilized privateers to quickly and efficiently wage economic war without building up a navy.[21]

Privateers who captured enemy vessels were subject to prize law, a concept that does not exist in land warfare.[22] Prize law is only applicable to civilian objects and legalizes "the capture and seizure of third parties' private property during armed conflict."[23] Prize law requires that any captured vessel be adjudicated by a domestic prize court as part of a condemnation proceeding.[24]

In Europe, French privateers in a concept known as "*guerre de course*," captured hundreds of British ships, deeply impacting British commerce, most heavily between 1689 and 1815.[25] The Greeks also utilized privateers during the Greek War of Independence, primarily for naval blockades in the Ionian and Aegean seas.[26] The United States heavily utilized privateers during the War of 1812, due to its navy's much smaller composition relative to the United Kingdom.[27] Privateers were critical to U.S. success, capturing between 1,200 and 2,000 British merchant vessels during the war.[28]

Privateering ceased after the Paris Declaration of 1856, and many in the international community feel it is now prohibited as a matter of customary international law.[29] The reasons for privateering's decline are manifold, including:

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[19] Bederman, *supra* note 16.
[20] *Id*.
[21] Alexander Tabarrok & Alex Nowrasteh, *Privateers! Their History and Future*, 2 FLETCHER SEC. REV. 55, 56, 60 (2015).
[22] *See* Marcel Schulz, *Prize Law and Contraband in Modern Naval Warfare*, *in* OPERATIONAL LAW IN INTERNATIONAL STRAITS AND CURRENT MARITIME SECURITY CHALLENGES 211, 219 (J. Schildknect et al. eds, 2018).
[23] *Id*.
[24] These proceedings are governed by the domestic law of the state. James Kraska et al., *Newport Manual on the Law of Naval Warfare*, 101 INT'L L. STUD. 1, 160–62 (2023).
[25] GALANI & HARLAFTIS, *supra* note 1, at 137.
[26] *Id*. at 138.
[27] Bederman, *supra* note 16; Frederick C. Leiner, *Yes, Privateers Mattered*, U.S. NAVAL INST.: NAVAL HIST. MAG. (Mar. 2014), https://bit.ly/3Btlvof.
[28] Leiner, *supra* note 27 ("Privateering drew on the resources of the civilian world, and without calling upon a beleaguered and insolvent government for funds or direction, privateers allowed the profit-making motive, and the mass of American people, to be harnessed to the war effort.").
[29] While the United States is not a signatory to the Paris Declaration, U.S. law criminalizes arming or outfitting a private "vessel of war" or serving on privateers. Kraska et al., *supra* note 24, at 48; Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, *reprinted in* 1 AMERICAN J. OF INT'L L. SUPP. 89 (1907) [hereinafter Paris Declaration]. *But see*, Brandon Schwartz, *U.S. Privateering is Legal*, U.S. NAVAL INST.: PROC. (Apr. 2020), https://bit.ly/3TYSvv6 ("[T]he United States can respond by noting that historical U.S.

(1) states' improved ability to collect tax revenue and thus fund a navy, (2) technological improvements making privateering less effective, and (3) misalignment between the state's national interests and the privateer's incentives, threatening national security, among other issues.[30] In the U.S., less opposition to a standing army and navy served as a fourth reason for privateering's decline.[31] While privateering was essentially outlawed in 1856, the concept of prize law is still a valid means of preventing free movement during periods of armed conflict.[32]

B. The World Wars

Prior to World War I, leading naval powers met at The Hague to agree upon rules of warfare.[33] The meetings resulted in the Hague Conventions, a series of documents outlining, inter alia, the current laws of naval warfare. [34] A later meeting in London produced the London Declaration of 1909, although the London Declaration was never ratified by any signatories.[35] Both Allied and Central Powers relied on maritime transportation to obtain access to resupply resources during World War I.[36] As a result, both sides brought the war to the sea, and did not restrict themselves to targeting warships, largely disregarding

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rejection of the prohibition blocked a general customary prohibition from forming under the doctrine of specially affected states . . . . Even if a general custom has formed, the United States can argue that it has reserved a dormant right to privateer through the persistent objector rule."); Mark Cancian & Brandon Schwartz, *Unleash the Privateers!*, U.S. NAVAL INST.: PROC. (Apr. 2020), https://bit.ly/3XSMmBT ("[D]espite pervasive myths to the contrary, U.S. privateering is not prohibited by U.S. or international law.").

[30] We still see the misalignment between a state's national interests and privateer's incentives in PMCs today. *See, e.g.*, Tabarrok & Nowrasteh, *supra* note 21, at 6–7.

[31] Tabarrok & Nowrasteh, *supra* note 21, at 6–7.

[32] Wissa, *supra* note 1, at 213–14. However, President McKinley made a statement that the United States would no longer participate in the letters of marque practice and the United States has not issued a letter of marque since the introduction of the Paris Declaration. *See* Kraska et al., *supra* note 24, at 48.

[33] Michael J. Crawford, *The U.S. Understanding of the Laws of Naval Warfare in the 18th and 19th Centuries*, NAVAL HISTORY & HERITAGE COMMAND (Sep. 10, 2019, 12:42 PM), https://bit.ly/4gXfBw8.

[34] Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305 [hereinafter Hague VI]; Convention No. VII Relating to the Conversion of Merchant Ships into War-ships, Oct. 18, 1907, 205 Consol. T.S. 319 [hereinafter Hague VII]; Convention No. IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542 [hereinafter Hague IX]; Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, T.S. No. 544 [hereinafter Hague XI]; Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545 [hereinafter Hague XIII].

[35] *Declaration of London*, 15 INT'L L. STUD. 93, 93 (1915).

[36] Michael B. Miller, *Sea Transport and Supply*, INT'L ENCYCLOPEDIA OF THE FIRST WORLD WAR, https://bit.ly/4fcRGqT [hereinafter Miller, *Sea Transport and Supply*].

agreements made at The Hague.[37] Additionally, the United States' intervention into the war in 1917 required it to ship both supplies and approximately two million men into the European theater.[38] The Allied Powers also utilized blockades and blacklists in an effort to deny the Central Powers access to resources.[39]

While still technically governed by the Hague Conventions, World War II saw a rise in the use and targeting of merchant vessels.[40] The United States, Japan, and other belligerents recognized that merchant ships functionally served as warships and were subject to international rules of law and warfare.[41] By early October 1939, the Germans issued an order to attack all enemy merchant ships without warning.[42] Both sides then engaged in the same "unrestricted submarine warfare" that had been condemned by the United States during World War I.[43]

C. Post-World Wars

After World War II, the ratification of the Geneva Conventions increased protections for civilians, including within the context of naval warfare.[44] However, there is still evidence that merchant vessels remain involved in assisting their flag states to varying degrees.[45] For example, the United Nations (U.N.) intercepted several Democratic Republic of Korea deep-sea fishing vessels equipped with radio transmitters, and where appropriate, gave those captured POW status.[46]

This integration brought naval warfare to its current state, with specific limitations on non-warships and actions warships can take against non-warships. However, through technological advances, changing international relations, and the increased involvement of "proxies," these norms are shifting. Given the

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[37] Eric W. Osborne, *Naval Warfare*, INT'L ENCYCLOPEDIA FIRST WORLD WAR, https://bit.ly/3TYxUqK.
[38] Miller, *Sea Transport and Supply*, *supra* note 36.
[39] *Id*.
[40] Sally V. Mallison & W. Thomas Mallison, *Chapter III: The Naval Practices of Belligerents in World War II: Legal Criteria and Developments*, 65 INT'L L. STUD. 87, 91 (1993) [hereinafter *Naval Practices of Belligerents*].
[41] *Id*. at 91.
[42] *Id*.
[43] Sally V. Mallison & W. Thomas Mallison, *Chapter IX: Naval Targeting: Lawful Objects of Attack*, 64 INT'L L. STUD. 241, 248–49 (1991) [hereinafter *Naval Targeting*] (stating that immediately after the attack on Pearl Harbor, the Chief of Naval Operations sent a message to the Commander of the Pacific Fleet to "[e]xecute against Japan unrestricted air and submarine warfare"); Crawford, *supra* note 33.
[44] *See,* Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, arts. 12, 13, 16 [hereinafter GC II].
[45] *See, e.g.*, *Naval Targeting*, *supra* note 43, at 261.
[46] *Id*.

current trends, this Article explores whether these vessel delineations are still accurate, examines the definition of "belligerent act," and makes recommendations to accommodate the further use of non-warships in accordance with international law.[47]

II. VESSEL CATEGORIZATION

Because targeting at sea is vessel-based, the importance of proper vessel categorization cannot be overstated. During conflict, vessel categorization determines privileges and immunities (if any), targeting options, and whether belligerent acts are authorized by, or against, the vessel.[48] Vessel actions during peacetime can also impact a vessel's categorization during armed conflict.[49] The scope of a non-warship's conduct is further complicated by the definition of "belligerent act." This section will briefly lay out the current status of vessel categories in preparation for a discussion of belligerent acts.

The pertinent vessel types for this Article include warships, naval auxiliary vessels, maritime militia, and merchant vessels.[50] Warships, as defined by the U.N. Convention on the Law of the Sea (UNCLOS) are ships, "belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."[51] Non-warships can also be converted into warships provided they meet specific criteria.[52] These converted ships are not the same as privateering because they become part of the state's naval force, are no longer under a private master, and fall under military chain of command.[53]

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[47] There are risks to these shifting norms, similar to those faced in a land-based context, discussed in Part VI, *infra*.

[48] Rob McLaughlin, *The Future Law of Naval Warfare*, *in* THE FUTURE LAW OF ARMED CONFLICT 141, 143 (Matthew C. Waxman & Thomas W. Oakley eds., 2022).

[49] *Topic: The Use of Roll-On/Roll-Off (RORO) Ferries in Military Operations*, USINDOPACOM J06 (Jan. 25, 2023), https://bit.ly/4h2yg9b ("[a] state's conduct in peacetime is liable to influence how other states will respond to like conduct in conflict or how other states will behave in future conflicts."). *See also* James Kraska and Michael Monti, *The Law of Naval Warfare and China's Maritime Militia*, 91 INT'L L. STUD. 450, 451, 465–66 (2015).

[50] Subcategories and immunities for hospital ships are beyond the scope of this Article.

[51] United Nations Convention on the Law of the Sea, art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. This definition remains largely the same as Hague VII, with the exception being that UNCLOS broadened the definition, incorporating vessels belonging to any branch of the armed forces. *See* Hague VII, *supra* note 34.

[52] The State must announce such conversion as soon as possible. Kraska et al., *supra* note 24, at 39–40.

[53] Wolff Heintschel von Heinegg, *The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century–Some Select Issues*, *in* YEARBOOK OF INT'L HUMANITARIAN L. 72 (T.D. Gill et al. eds., 2014).

Both warships and other ships "owned or operated by a State and used only on government non-commercial service" have "complete immunity from the jurisdiction of any state other than the flag state."[54] For example, the United States' USNS ships operating in the South China Sea and providing submarine and anti-submarine warfare capabilities fall into this category.[55] Also in this category, similar to USNS ships, are government-owned or -operated auxiliary general intelligence (AGI) vessels, used by Russia and China.[56] Warships and naval auxiliary vessels are given sovereign immunity; however, only warships are permitted to conduct belligerent acts under the law of naval warfare.[57] Under the laws of naval warfare, auxiliary vessels can be targeted as lawful military objectives at any time.[58]

The term "maritime militia" is not a legal term of art, but is commonly used in the maritime industry to describe civilian vessels, operated by civilians but augmenting a state's naval forces.[59] This category of vessel is most similar to PMCs on land, in that they provide assistance both in times of peace and conflict, and as a result, may blur the lines between combatant and civilian. The People's Republic of China's (P.R.C.) MMFVs are considered a maritime militia.[60] Based on the activities of the SBFVs, they too would likely qualify as a maritime militia, given their integration and the support the P.R.C. provides these vessels. Similarly, Vietnam operates a maritime militia as an "ostensibly paramilitary force with a self-defense function."[61] Vietnam's maritime militia is largely comprised of local fishermen, comparable to the SBFVs, which can make it difficult to distinguish between maritime militia and fishing vessels.[62] As a maritime militia, these

[54] UNCLOS, *supra* note 51, art. 96.
[55] The United States defines naval auxiliaries as ships, "other than warships, that are owned by or under the exclusive control of the armed forces." U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 2.3.1 (2022) [hereinafter U.S. NAVAL COMMANDER'S HANDBOOK].
[56] *See, e.g.*, Andrew Greene, *Chinese 'Spy Ships' Expected to Sit Off Darwin and Central Queensland During Talisman Sabre Military Exercises*, ABC.NET (Jul. 20, 2023, 2:09 PM), https://ab.co/4etu15k; Patricia Kime, *Coast Guard Tracking Russian Intelligence Ship 100 Miles Off Hawaii*, MILITARY.COM (Jan. 19, 2023), https://bit.ly/4gYBsTY.
[57] Kraska et al., *supra* note 24, at 37. The concept of a "belligerent act" is further discussed in Part III, *infra*.
[58] *Id*. at 141.
[59] *Id*. at 48–49.
[60] POLING ET AL., *supra* note 6, at 12–13.
[61] Prashanth Parameswaran, *What's Next for Vietnam's Maritime Militia?*, DIPLOMAT (Jan. 28, 2020), https://bit.ly/4eApHRP.
[62] *See* Yan Yan, *Is Vietnam Sending Its Maritime Militia to China's Coast?*, DIPLOMAT (Mar. 5, 2020), https://bit.ly/4gWH6FV.

fisherman are not permitted to conduct belligerent acts, however, their vessels can relatively easily be converted into warships during periods of armed conflict.[63]

Finally, a merchant vessel is defined as a "ship that is not a warship or [other state] ship and that is used . . . for commercial trade, fishing purposes or for passenger transport. Noncommercial privately-owned vessels (such as yachts) fall into the category of merchant vessels."[64] Merchant vessels can be categorized as "enemy" or "neutral" during periods of naval warfare. In general, neutral merchant vessels are always subject to visit and search by belligerent warships and must obey those orders.[65] Unless specifically exempted, an enemy merchant vessel is always subject to capture when located beyond neutral waters.[66]

In a similar manner to land warfare, interpretations of how broadly "military objective" can be read vary by state. A neutral merchant vessel could be treated as an enemy merchant vessel based on whether its cargo is perceived as contraband.[67] For example, in naval warfare the United States permits capture and, if resisted, attack, on enemy merchant vessels considered "war-sustaining" or "war-supporting."[68] Most other states, however, have a narrower view, and do not recognize "war-sustaining" contributions,[69] taking the position that such merchant vessels are not "military objectives" and can only be interfered with "by establishing a lawful blockade."[70]

Current naval operations highlight the complexity of the categorizations and how non-warships are being seamlessly integrated into naval operations, regardless of their perceived category. The BEHSHAD, for example, when not in an armed conflict, would be categorized as a merchant vessel.[71] There is no

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[63] Kraska et al., *supra* note 24, at 51.
[64] *Id*. at 54.
[65] However, neutral merchant vessels traveling in a convoy with warships of the same flag may not be searched provided the neutral state warship certifies that it is not carrying contraband and provides other information it is entitled to during a visit and search. *See* John Astley & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 144–45 (1997).
[66] Von Heinegg, *supra* note 53, at 84. *See also* Hague VI, *supra* note 34, arts. 1–3. Most states provide specific guidance for how a merchant vessel should be handled. Von Heinegg, *supra* note 53, at 85.
[67] If, for example, the neutral vessel contains supplies that will be used by the enemy military.
[68] U.S. NAVAL COMMANDER'S HANDBOOK, *supra* note 55, at ¶ 8.6.2.2. The United States also considers an enemy merchant vessel not to be "innocently employed" if it meets criteria to give it war-sustaining or war-supporting character. *Id*.
[69] "War-sustaining" actions include the export of goods such as crude oil, allowing the enemy to earn revenue that contributes to the war-fighting effort. *See* Kraska et al., *supra* note 24, at 138–39.
[70] *Id*. at 119 (stating that a blockade "is a belligerent operation intended to prevent vessel traffic from all States from entering or leaving specified coastal areas that are under the sovereignty, occupation, or control of an enemy").
[71] Assuming the Houthis consider themselves to be engaged in a non-international armed conflict, the BEHSHAD is arguably similarly categorized when assisting the Houthis with targeting. Given

prohibition on merchant vessels aiding in naval operations during peacetime.[72] However, presuming the Houthis consider themselves to be in a non-international armed conflict with Israel or Yemen,[73] the BEHSHAD gathering information and passing it to the Houthis for purposes of targeting puts the vessel in the "kill chain," rendering it targetable under the laws of naval warfare.[74] Because the BEHSHAD is registered as a civilian vessel, these actions could also fall under the definition of piracy with regard to the Houthis' non-international armed conflicts.[75] The BEHSHAD could then be subject to seizure by any warship on the high seas, and subsequent criminal prosecution. As an Iranian-flagged vessel, the BEHSHAD's actions could also bring about issues of state responsibility, which raises the question of whether Iran can or should be found liable for the BEHSHAD's actions.

The P.R.C.'s maritime militia patrolling the South China Sea brings about similar questions of vessel categorization. These vessels have been known to interfere with fishing, seabed exploration, and other lawful activities of vessels nearby, frequently maneuvering in unsafe manners, risking collision.[76] While it is clear that the P.R.C. is directing the maritime militia, these actions place the vessels within a "gray zone" with regard to whether they should be considered civilians or combatants,[77] paralleling states' uses of PMCs on land.

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the events in April 2024 between Iran and Israel, it is also arguable that the two countries are engaged in an international armed conflict.

[72] The law of naval warfare explicitly limits the conduct of "belligerent acts" to warships during times of naval warfare, and UNCLOS only affords sovereign immune rights to warships and other government ships operated for non-commercial purposes. Neither realm explicitly prohibits a merchant vessel from conducting actions that do not amount to a "belligerent act," although such vessels would not be afforded sovereign immune rights. Kraska et al., *supra* note 24, at 2; UNCLOS, *supra* note 51, art. 32.

[73] A discussion of this premise is beyond the scope of this Article.

[74] *See, e.g.*, NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW, VOLUME 4: LAW OF ARMED CONFLICT, DM 69, para. 10.6.19 (2d ed. 2019) [hereinafter NEW ZEALAND MANUAL]; FEDERAL MINISTRY OF DEFENCE (GERMANY), ZDV 15/2, LAW OF ARMED CONFLICT MANUAL 147 (2013) [hereinafter GERMAN MANUAL]; Norwegian Ministry of Defence, Manual of the Law of Armed Conflict 10.35 (2013, English ed. 2018) [hereinafter NORWEGIAN MANUAL].

[75] Generally, prize law and the law of maritime neutrality do not apply to non-international armed conflicts, unless "there is a recognition of belligerency or the conflict 'has all the trappings of an international armed conflict.'" Kraska et. al., *supra* note 24, at 30. Therefore, attacks on merchant vessels by non-State organized armed groups do not have a basis in the law of naval warfare and could be assessed under the crime of piracy pursuant to the law of the sea. *See* Kraska et al., *supra* note 24, at 30–31; UNCLOS, *supra* note 51, arts. 101(a), (c) (defining piracy, in part, as "illegal acts of violence or detention" and "act of inciting or of intentionally facilitating" those acts).

[76] POLING ET AL., *supra* note 6, at 13–14.

[77] *Id*. at 14. It is long held custom, as explained in the U.S. Supreme Court case, *The Paquette Habana*, that "small coastal fishing vessels and small boats engaged in local coastal trade are exempt from attack." McLaughlin, *supra* note 48, at 146 (citing The Paquete Habana, 175 U.S. 677 (1900)). The P.R.C. use, especially of the SBFVs, in patrolling the South China Sea threatens to blur the lines of this "long held custom." *Id*. at 146.

Ultimately, we are at a point of potential change within the maritime regime. While privateering was outlawed with the Paris Declaration, states still use auxiliary vessels, civilian merchant vessels, and other non-warships in a variety of ways crossing into the gray zone.[78] Arguably, the concept of the naval auxiliary is already being broadened; many of these civilian vessels could be considered naval auxiliaries while assisting in naval operations. Gaps in international law regulating the actions of non-warships have arisen since the original establishment of these laws. One way to close these gaps involves clarifying of the scope of permitted conduct for such vessels. Vessel categorization matters because it determines whether the vessel can conduct a belligerent act. We now turn to the definition of "belligerent act" and what constitutes permissible versus impermissible action by a non-warship.

III. WHAT IS A BELLIGERENT ACT?

"Belligerent acts" include engaging in hostilities, visiting, searching, and diverting enemy or neutral vessels, inspecting and capturing enemy vessels, and establishing and enforcing a blockade, among others.[79] Per the laws of naval warfare, while all vessels being used by the government for non-commercial purposes are eligible for sovereign immunity,[80] only warships are permitted to engage in belligerent acts.[81] The concept that only a warship may engage in these acts is clear, but the definition of a "belligerent act," and therefore what would be an impermissible action by a non-warship, is being impacted by technological developments. In order for a state to appropriately utilize non-warships in naval warfare, that state must clearly understand and communicate the restrictions and limitations to vessels under its purview. This is applicable during peacetime and armed conflict alike, as a non-warship is always prohibited from conducting a belligerent act.

The *Newport Manual on the Law of Naval Warfare* includes "gathering intelligence" in its list of belligerent acts that would render an enemy or neutral merchant vessel a military objective, and thus targetable.[82] Separately, it includes "being incorporated into or assisting the enemy's intelligence or military data-gathering systems" as distinct actions rendering a merchant vessel a military

[78] Rob McLaughlin, *The Law of the Sea and PRC Gray-Zone Operations in the South China Sea*, 116 AM. J. INT'L L. 821, 821, 825 (2022) [hereinafter *PRC Gray-Zone*].
[79] Kraska et al., *supra* note 24, at 37.
[80] States can limit sovereign immunity, if they so choose. *See, e.g.*, Navy Admin. Message, 165/21, 041827Z Aug. 21, Chief of Naval Operations, subject: Sovereign Immunity Policy, ¶ 7 (limiting assertion of sovereign immunity of voyage-chartered and foreign flagged vessels operating under U.S. contract).
[81] UNCLOS, *supra* note 51, arts. 101, 110; Kraska et al., *supra* note 24, at 37–38.
[82] Kraska et al., *supra* note 24, at 142.

objective.[83] The result is that both directly gathering and assisting in gathering intelligence renders a merchant vessel targetable. However, given the potentially overbroad definition of "intelligence," classifying "gathering intelligence" as a belligerent act could limit a broad array of actions exclusive to warships. Many state military manuals include reference to a merchant vessel becoming targetable based on being incorporated into, or assisting with, intelligence or military data-gathering systems,[84] however, they do not include "gathering intelligence" amongst their lists of belligerent acts.[85]

The umbrella terms of "military attacks," "conducting hostilities," and "offensive attacks" have been used to delineate what is a belligerent act, but these terms still leave room for interpretation.[86] For instance, what constitutes an "attack" in cyberspace or with regard to electronic surveillance? Does the act of monitoring an enemy's economic activity or social behaviors to ascertain intent mean that the vessel has engaged in a belligerent act?

We can look to developing international law in cyberspace as a means to determine at what point an act becomes belligerent. The *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (*Tallinn Manual*) defines a "cyber attack" as an operation, offensive or defensive, "that is reasonably expected to cause injury or death to persons or damage or destruction to objects."[87] The *Tallinn Manual* further defines attacks as "acts of violence against the adversary, whether in offence or defence,"[88] and utilizes a broader definition of "causing injury," to include "reasonably foreseeable consequential damage, destruction, injury, or death."[89] This definition is intended to include both incidental and consequential impacts caused by the manipulation of a cyber system. For example, a cyber attack's destruction of a central processing unit that

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[83] *Id*.
[84] *See, e.g.*, INT'L INST. HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 60(c) (Louise Doswald Beck ed., 1995) [hereinafter SAN REMO MANUAL]; GERMAN MANUAL, *supra* note 74, at 147 ("it is incorporated into or assisting the enemy's intelligence and communication system"); NEW ZEALAND MANUAL, *supra* note 74, § 10.6.19; NORWEGIAN MANUAL, *supra* note 74, § 10.35 ("being incorporated into or assisting the enemy's intelligence collection").
[85] *See, e.g.*, SAN REMO MANUAL, *supra* note 84, ¶ 60(a) (including in belligerent acts laying mines, cutting undersea cables, engaging in visit and search of neutral merchant vessels); GERMAN MANUAL, *supra* note 74, at 147 (includes mine laying or clearance, taking measures based on the law of prize); NORWEGIAN MANUAL, supra note 74, § 10.35 (listing hostile actions that would render an enemy merchant vessel subject to attack including mine laying, cutting undersea cables, engaging in visit and search, or attacking).
[86] *See* NORWEGIAN MANUAL, *supra* note 74, § 10.19; Raul Pedrozo, AUTONOMOUS VESSELS IN MARITIME AFFAIRS 72 (Springer Int'l Pub. 2023); Kraska et al., *supra* note 24, at 37.
[87] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 415 (Michael N. Schmitt ed., 2017) [hereinafter TALLINN MANUAL 2.0].
[88] *Id*.
[89] The effects must also be greater than *de minimis* damage or destruction. *Id*. at 416.

results in a dam releasing water causing damage to property and life would be included as "reasonably foreseeable" damage.[90]

A cyber operation rising to the level of cyber attack could be a "belligerent act," and thus impermissible by any vessel other than a warship. But other vessels could provide means of cyber support not rising to the level of a "belligerent act." While only warships can visit and search enemy and neutral vessels, a non-warship could work in conjunction with the warship conducting a cyber operation on an enemy or neutral vessel, as long as the assistance does not rise to the level of an "attack." An example is cyber actions slowing the vessel, misdirecting it, or impacting its navigation systems, preventing the ship from maneuvering away from the warship. The vessel has not been destroyed or severely damaged. During peacetime, the same standards apply. A non-warship could assist in a naval operation as long as it does not rise to the level of a belligerent attack. Individuals on the non-warship could conduct a cyber action on another vessel, as long as it does not rise to the level of "cyber attack." States have not established uniform standards in this area; international law is still developing with regard to the threshold of destruction or severe damage and what is tolerable without reaching the level of an "attack."[91]

This cyber "attack" threshold could be translated to electronic warfare (EW) actions by non-warships. EW includes actions taken to control the electromagnetic spectrum through "operation security, EW, psychological operation, military deception, and physical strike."[92] These actions can amount to: (1) electronic attack, controlling the enemy's electromagnetic spectrum, (2) electronic protection, used in defense of personnel, facilities, and equipment, and (3) electronic warfare support, recognizing and responding to threats in order to support surveillance and reconnaissance.[93] While EW can be considered armed force, specifically electronic attack, similarities exist between EW and cyber in that both have the capability to manipulate a system (be it via power, energy, or through cyberspace), impacting the physical world or physical actions.[94]

Vessels could serve as a platform to conduct a variety of EW operations. To implement the cyber "attack" threshold, a state could compare EW actions to whether it is "reasonably expected to cause injury or death to persons or damage

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[90] *Id*.
[91] Michael N. Schmitt, *Terminological Precision and International Cyber Law*, LIEBER INSTITUTE (Jul. 29, 2021), https://bit.ly/3U1C9Sp.
[92] Seungcheol Choi et al., *Method for Effectiveness Assessment of Electronic Warfare Systems in Cyberspace*, 12 SYMMETRY 1, 2 (2020).
[93] *Id*.
[94] Major Thomas R. Burks, *Cyberspace, Electronic Warfare, and a Better Jus Ad Bellum Analogy*, 82 A.F. L. REV. 1, 10, 12 (2022).

or destruction to objects."[95] An EW action that jams an enemy's radio to prevent the vessel from communicating with other enemy vessels, thereby allowing a warship to interdict, would not rise to a level of belligerent act because there was no damage or destruction. If, on the other hand, the EW action overloaded and overwhelmed a circuit, thereby destroying an enemy vessel's circuit board and rendering the vessel unable to navigate and exposed to significant harm or destruction, that would reach the level of "belligerent act." During peacetime, a non-warship could still utilize EW to assist a warship in conducting a naval operation, or conduct EW actions, so long as they do not constitute a "belligerent act."[96] Similar to other means and methods of warfare, states need to consider the foreseeable outcome of the action to determine whether it constitutes a "belligerent act."

Beyond cyber and EW, states need to be cognizant of "gray zone" actions they may request of non-warships. These actions should all fall below the level of a belligerent act because they are not occurring during naval warfare; however, they often walk the line and could be conceived as crossing the threshold. For example, if vessel A intentionally maneuvers around vessel B, forcing vessel B to go in a certain direction, but the maneuver results in vessel A colliding with vessel B, vessel B's state could perceive this as a belligerent act, depending on the severity of damage and danger of the maneuver. Were collision and severe damage "reasonably foreseeable"? Or, take the example of the South China Sea where various states are taking actions to "claim" the rocks, islands, shoals, and other features.[97] State A could conceivably view state B's vessel anchoring at a rock as equivalent to "conducting hostilities" if it perceives the rock as state A's sovereign territory. The intrusion onto state A's rock would be equivalent to an intrusion onto sovereign territory.[98] These scenarios could escalate quickly; a state should be able to defend its use of a particular vessel, and explain why the action does or does not constitute a belligerent act.

As with other areas of international law, the broad definition of "belligerent act" leaves much to interpretation. States must be ready to articulate standards in conjunction with use of a specific vessel (warship or not) when conducting naval operations, specifically in the "gray zone."

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[95] TALLINN MANUAL 2.0, *supra* note 87, at 415.
[96] For example, a non-warship conducting EW to jam another vessel's radio frequencies while a warship it is working with launches and recovers aircraft.
[97] Ben Dolven, Caitlin Campbell, & Ronald O'Rourke, CONG. RSCH SERV., IF10701, CHINA PRIMER: SOUTH CHINA SEA DISPUTES (2023).
[98] Per UNCLOS, state B can lawfully conduct innocent passage through the rock's territorial sea, however, the act of anchoring serves as the potential "belligerent act" as a violation of state A's sovereignty. UNCLOS, *supra* note 51, arts. 17–19, 121.

IV. LAND AND MARITIME INTERNATIONAL LAW DIFFERENCES

International law provides standards for civilian participation in military activities both on land and at sea, and these standards are further structured to address actions during both peacetime and armed conflict.[99] This section provides a brief background of the international law pertaining to civilians and civilian companies both on land and at sea, highlighting similarities and differences that will play a role in the future of naval warfare if civilian participation increases. This framework emphasizes how vessel categorization impacts a navy's ability to integrate non-warships, and demonstrates where and how the definition of "belligerent act" becomes important.

A. Civilian Participation in Armed Conflict

During armed conflict, the biggest differentiation between land and maritime warfare is the concept that at sea, it is not the individual, but the vessel's characterization that matters. If a vessel is a warship or auxiliary, it is always targetable regardless of the makeup of the crew.[100] Whereas on land, in general, individuals make up the main targeting calculus.[101]

Because targeting at sea is vessel-based, the land approach can be analogized to the maritime context, allowing civilian merchant vessels to maintain some protections. However, these protections are not absolute, and civilian merchant vessels are always subject to inspection for war supplies and related contraband.[102]

While customary international law applies to all armed conflicts, specific provisions cover civilian protection, in international armed conflict via the 1977

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[99] *E.g.*, GC II, *supra* note 44; Convention (III) Relative to the Treatment of Prisoners of War, art.4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

[100] U.S. NAVAL COMMANDER'S HANDBOOK, *supra* note 55, ¶ 5.3.3. The Handbook further explains:

> At sea, the principle of proportionality is applied using a vessel-based construct, which evaluates whether any anticipated harm to surrounding civilian vessels or objects is excessive in relation to the expected military advantage in attacking a target vessel . . . . Except for exempted ships identified in 8.6.3, and absent specific knowledge, an individualized proportionality assessment is not required once the vessel has been deemed a lawful military objective.

Id.

[101] On land, when targeting roads, bridges, etc. that constitute military objects, the mere presence of civilians on the road, bridge, etc. does not render the objects immune from attack, but military planners must consider civilians presence *on/in* the actual object through the principle of proportionality. DEP'T OF ARMY & U.S. MARINE CORPS TRAINING & EDUC. COMMAND, FM 6-27/MCTP 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 2-25–26 (2019).

[102] *See* UNCLOS, *supra* note 51, art. 110; Astley & Schmitt, *supra* note 65, at 144–45.

Additional Protocol (AP I) to the Geneva Conventions, and in a non-international armed conflict via Common Article III to the four Geneva Conventions of 1949, for parties to those treaties.[103] While AP I, Article 49(3) states that the provisions in articles 48 through 67 are not applicable to armed conflict at sea,[104] naval warfare is still governed by customary rules such as the principle of distinction and the rule of proportionality. Thus, parties to an armed conflict must distinguish between civilians and combatants and between civilian objects and military objectives. The rule of proportionality mandates that the incidental and involuntary harm caused to the civilian population during military operations must not be excessive in relation to the direct military advantage to be gained.[105] Additionally, basic customary international law regarding targeting, including the avoidance of unnecessary destruction, the Martens Clause, and the prohibition on direct attacks against the civilian population, all apply to naval warfare.[106]

While targeting principles vary, the basic definitions of "combatant," "armed forces," and "civilians,"[107] can be transferred to, and utilized within, the maritime domain, providing a framework to define individuals onboard a vessel. However, given that targeting at sea predominantly applies to attacks against objects (vessels), the classification of the *object* being targeted is central to the

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[103] Much of these treaties is deemed customary international law, applicable to all, regardless of whether a state is party to the treaty. *See, e.g.*, OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 19.20.1 (31 Jul. 2023) [hereinafter U.S. DOD LAW OF WAR MANUAL].

[104] However, AP I is applicable to "attacks from the sea or from the air against objectives on land." Protocol Additional to the Geneva Conventions of Aug. 12 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 49(3), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Kraska et al., *supra* note 24, at 6; SAN REMO MANUAL, *supra* note 84, § III, para. 9.

[105] *Rule 14: Proportionality in Attack*, INT'L COMM. RED CROSS: INT'L HUMANITARIAN L. DATABASE, https://bit.ly/4ewSoze.

[106] *Naval Targeting*, *supra* note 43, at 286. The Martens Clause is the principle that when a situation is not covered under an existing rule, the parties to the conflict are still bound by the principles of International Humanitarian Law, such as the principle of humanity. These principles apply in naval warfare just as they apply in land warfare. Convention (II) With Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803, U.N.T.S. 403; *Naval Targeting*, *supra* note 43, at 286.

[107] Combatant is defined as "all members of the armed forces of a party to the conflict . . . except medical and religious personnel." *Rule 3: Definition of Combatants*, INT'L COMM. RED CROSS: INT'L HUMANITARIAN L. DATABASE, https://bit.ly/4eVh9Vy; *see also* AP I, *supra* note 104, at art. 43(2). Armed Forces, "consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates." *Rule 4: Definition of Armed Forces*, INT'L COMM. RED CROSS: INT'L HUMANITARIAN L. DATABASE, https://bit.ly/3zOgSop; *see also* AP I, *supra* note 104, at art. 43(1). Civilians, "are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians." There is an exception for civilians considered to be acting as "*levee en masse*." *Rule 5: Definition of Civilians*, INT'L COMM. RED CROSS: INT'L HUMANITARIAN L. DATABASE, https://bit.ly/4eWm6xs; *see also* AP I, *supra* note 104, at art. 50.

validity of the conduct.[108] To this end, International Humanitarian Law (IHL) applicable to the distinction between civilian objects and military objectives and the definition of a "military objective" are instructive.[109]

1. Direct Participation in Hostilities

While civilians lose protection from attack if they are considered "directly participating in hostilities,"[110] a civilian object can also lose protection if it is used as a military objective.[111] Following this line of thought, civilian merchant vessels can lose protection if used to transport contraband or participate in belligerent acts.[112] "Direct participation in hostilities" can be defined as "conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations."[113]

The concept of "direct participation in hostilities" applicable in land warfare can be compared to naval warfare concepts.[114] In the land warfare context, direct participation in hostilities has a three-pronged requirement: (1) a belligerent nexus; (2) a threshold of harm; and (3) direct causation of the harm or damage.[115]

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[108] *See* Kraska et al., *supra* note 24, at 2. However, once a ship is captured, individuals are treated distinctly dependent upon their status. Kraska et al., *supra* note 24, at 52–54, 57 (differentiating treatment of armed forces, persons accompanying the forces, noncombatants, and personnel onboard captured enemy merchant vessels).

[109] The principle of distinction between civilian objects and military objectives states that parties to a conflict must distinguish between civilian objects and military objectives, and that attacks may only be directed against military objectives. Military objectives are defined as, "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization . . . offers a definite military advantage." *Rule 7: The Principle of Distinction Between Civilian Objects and Military Objectives*, INT'L COMM. RED CROSS: INT'L HUMANITARIAN L. DATABASE, https://bit.ly/47Ws5zO; *Rule 8: Definition of Military Objectives*, INT'L COMM. OF THE RED CROSS: INT'L HUMANITARIAN L. DATABASE [hereinafter ICRC Rule 8], https://bit.ly/3XXzeLH. A civilian object is any object that is not a military object. *Rule 9: Definition of Civilian Objects*, INT'L COMM. RED CROSS: INT'L HUMANITARIAN L. DATABASE, https://bit.ly/3zXqpJJ.

[110] AP I, *supra* note 104, art. 51(3).

[111] ICRC Rule 8, *supra* note 109. Outside the maritime realm, in all aspects of the military, there has been an increase in civilian participation in what are traditionally considered "military" functions. This is especially prevalent in areas such as artificial intelligence (AI), cyber, and space. *See, e.g.*, Bruno Macaes, *How Palantir is Shaping the Future of Warfare*, TIME (July 10, 2023, 1:30 PM), https://bit.ly/3ByYAYZ.

[112] Kraska et al., *supra* note 24, at 2.

[113] INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 12 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], https://bit.ly/3PLWU1Z.

[114] While targeting in naval warfare centers around the object (vessel) being targeted, given advances in technology and the different potential uses of merchant vessels, a shift to a framework similar to direct participation in hostilities applicable to the vessel as a whole could be applied.

[115] Nils Melzer, *Civilian Participation in Armed Conflict*, *in* THE LAW OF ARMED CONFLICT AND THE USE OF FORCE 216 (Frauke Lachenmann & Rudiger Wolfrum, eds., Oxford Univ. Press 2017).

Some states adhere to the temporal concept of the "revolving door," where civilians "lose and regain protection against direct attack in parallel with the intervals of their engagement."[116] The United States, however, rejects the "revolving door" principle, stating that persons engaged in a pattern of directly participating in hostilities do not regain protection in periods when they are not taking a direct part in hostilities.[117]

During a non-international armed conflict, the status of a member of an organized armed group depends on whether the individual's continuous function in a group "involve[es] his or her direct participation in hostilities," also referred to as the "continuous combat function."[118] Only those individuals whose "continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function."[119] All others participating in an organized armed group serving in non-combat roles, and/or who only directly participate in hostilities on a spontaneous or sporadic basis, are targetable only while "directly participating in hostilities."[120] The temporal aspect of direct participation in hostilities is not settled customary international law. Given technological advances, the limitations of "direct participation in hostilities" as a standard are currently being widely debated.[121]

Despite the fact that AP I does not apply to naval warfare, these temporal issues translate to the maritime context.[122] While there are specific rules on targeting civilian vessels,[123] we can compare the temporal aspect of land warfare to maritime warfare and analogize it to a similar concept in naval warfare. For example, uses of the BEHSHAD could call into question the temporal aspect of direct participation. Is the BEHSHAD directly participating in hostilities only while actively assisting Houthi targeting, the entire time it is positioned in the Gulf of Aden, or until it returns to port? States following the "revolving door"

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[116] ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 70.
[117] U.S. DOD LAW OF WAR MANUAL, *supra* note 103, at ¶ 5.8.4.2.
[118] ICRC INTERPRETIVE GUIDANCE, supra note 113, at 34.
[119] *Id*.
[120] *Id*.
[121] *E.g.*, cyber, space, and unmanned aerial weapons (drones). *See e.g.*, David Wallace, et al., *Direct Participation in Hostilities in the Age of Cyber: Exploring the Fault Lines*, 12 HARV. NAT'L SEC. J. 164 (2021), Jonathan Horowitz, *One Click from Conflict: Some Legal Considerations Related to Technology Companies Providing Digital Services in Situations of Armed Conflict*, 24 CHI. J. INT'L L. 305 (2024); Francis Grimal and Michael J. Pollard, *"Embodied AI" and the Direct Participation in Hostilities: A Legal Analysis*, 51 GEO. J. INT'L L. 513 (2020).
[122] The concept of direct participation in hostilities as described in AP I is considered customary international law, applicable in both international and non-international armed conflict. Amichai Cohen & David Zlotogorski, PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW 138 (Oxford Univ. Press 2021). This section will delve into how these temporal issues can apply in the maritime context.
[123] Kraska et al., *supra* note 24, at 141–45.

principle might consider the BEHSHAD to be targetable only while actively providing targeting assistance, whereas the United States might consider it targetable until such time as it is no longer capable of assisting the Houthis. Alternatively, the BEHSHAD could be considered to be maintaining a "continuous combat function," such that even if a state follows the "revolving door" theory, they may still consider the BEHSHAD targetable the entire time it remains in the Gulf of Aden.

Similarly, the SBFVs could bring up "direct causation" questions during international armed conflict. If these vessels function similarly to the P.R.C.'s fishing vessels during the "Battle of the Paracels" with South Vietnam in 1974,[124] the SBFVs meet the direct causation threshold by providing "war-supporting" functions. This is similar to the United States' targeting of Salim Hamdan, Osama bin Laden's driver, who also transported weapons for al-Qaeda and received weapons training.[125]

The key distinction is the concept of targeting in naval warfare. Targeting at sea is different than on land because at sea the focus of the target is a platform/object, such as ships and aircraft, as opposed to the individuals operating the platform/object or those on board.[126] As such, vessels in general are separated into the different categories. However, despite the differences in targeting, merchant vessels, both enemy and neutral, maintain similar protections against attack as long as they do not engage in actions amounting to "directly participating in hostilities."[127] The key difference is that the warship maintains the option to visit and search, as long as they are outside neutral waters, regardless of whether the vessel is "directly participating in hostilities."[128] This stop, board, and search procedure expands the aperture of naval warfare, bringing more vessels into a potentially hostile setting.[129]

2. Individual Status in Circumstances of Capture

Geneva Convention III, Article 4(A)(2) allows individuals categorized as "members of other militias and members of other volunteer corps" to be treated

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[124] The vessels operated around Vietnamese-held islands, depositing troops onto unoccupied islands, ultimately providing forces to assault and overwhelm Vietnamese forces. POLING ET AL., *supra* note 6, at 3–4.
[125] Jay C. Jackson, *Applying the U.S. and ICRC Standards for Direct Participation in Hostilities to Civilian Support of U.S. Military Operations*, 70 A.F. L. REV. 53, 102–03 (2013) (noting that Salim Hamdan may have lost protection based on membership in an organized armed group).
[126] Kraska et al., *supra* note 24, at 2. However, civilians on board vessels are considered when determining which actions to take. This requires citation.
[127] *Naval Targeting*, *supra* note 43, at 288.
[128] *See* Kraska et al., *supra* note 24, at 172.
[129] The visit and search process, as comparable to land "checkpoints," is discussed in Part IV.A.iii, *infra*.

as prisoners of war if they meet specified criteria.[130] These conditions apply to groups as a whole; members of the militias are not assessed individually.[131] Geneva Convention II uses the same language in stating, "members of other militias and members of other volunteer corps" who are wounded, sick and shipwrecked should be treated as prisoners of war.[132]

Scholars who have written about militias and other volunteer land warfare corps believe it is unlikely PMCs would meet the criteria to be considered "other militia or volunteer corps."[133] Instead, they are considered civilians providing support functions.[134] In the P.R.C. maritime militia scenario, there is still debate as to whether individuals operating those vessels would be eligible for POW status if captured.[135] There may be some situations in which civilian vessels more easily fall under the combatant category, given the organization of some civilian vessels.[136]

Finally, naval warfare draws on land warfare in its determination of POW status, specifically with regard to Geneva Convention II, which covers wounded, sick, and shipwrecked members of the armed forces. If a warship is captured, civilian mariners, contractors, or other civilians authorized to accompany the force are entitled to POW status.[137] Similarly, officers and crews of naval auxiliaries, that are not considered combatants, nonetheless receive POW status if their vessel is captured.[138] Individuals' treatment on captured enemy merchant vessels varies. The officers and crew of enemy merchant vessels are granted POW status pursuant to Geneva Convention II Article 13(4) and Geneva Convention III

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[130] The militia or volunteer corps must be: (a) commanded by a person responsible for subordinates; (b) have a distinctive, recognizable sign; (c) carry arms openly; and (d) conduct operations in accordance with the laws and customs of war. GC III, *supra* note 99.
[131] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L. L. 511, 527 (2005) [hereinafter *Humanitarian Law and DPH by PCs*].
[132] GC II, *supra* note 44.
[133] Shannon Bosch, *Private Military and Security Contractors: A Face-Off with the Notion of Direct Participation in Hostilities in International Armed Conflicts*, J. JURID. SCI., 2012, at 3–4; *Humanitarian Law and DPH by PCs*, *supra* note 131, at 531.
[134] *See, e.g.*, Bosch, *supra* note 133, at 1, 3; *Humanitarian Law and DPH by PCs*, *supra* note 131, at 531.
[135] "[I]n most cases, their status as civilians or combatants is purposely obfuscated, placing them in a legal gray zone." POLING ET AL., *supra* note 6, at 14.
[136] Land-based PMCs often fail at the requirement that they operate independently because they are providing services specifically for the armed forces (e.g., security, building infrastructure, etc.). However, a civilian vessel could meet such criteria by operating independently from any other vessels, or in a different location than other vessels. *See Humanitarian Law and DPH by PCs*, *supra* note 131, at 528–29. This concept is discussed further in Part V.A., below.
[137] GC III, *supra* note 99, art. 4(A)(4).
[138] Kraska et al., *supra* note 24, at 52.

Article 4(A)(4).[139] Private passengers, as long as they are not members of the enemy's armed forces,[140] "are subject to the discipline of the captor and are to be landed at a convenient port as soon as possible."[141] The final vessel category, neutral merchant vessels, similarly divides the occupants. Enemies found on board a neutral vessel may be interned until their status can be identified.[142] If the neutral merchant vessel is captured as a prize, the officers and crew are not POWs, and are to be repatriated as soon as is reasonably feasible.[143] However, if the vessel directly participates in hostilities, or serves as an auxiliary to the enemy, the officers and crew can be held as POWs.[144] Separately, neutral nationality crew members may not be made POWs unless they personally have committed hostile actions.[145]

3. Difference with Land Warfare

An important differentiation between land and maritime warfare is the concept of prize law, which does not exist in land warfare. While privateering was essentially outlawed with the Paris Declaration of 1856,[146] the concept of prize law is still a valid means of preventing free movement of vessels during periods of armed conflict.[147] Prize law is only applicable to civilian objects and makes "the capture and seizure of third parties' private property during armed conflict" legal.[148] Prize law requires that any captured vessel, aircraft, or goods be adjudicated by domestic prize court as part of condemnation proceedings.[149]

Prize law is a means to prevent the enemy from obtaining necessary supplies in support of the war effort, while adhering to IHL by not attacking merchant vessels, thus avoiding disproportionate civilian casualties. It is also viewed as a means of economic warfare that is not readily available in land-based conflicts. Depending on the actions of the individuals on the merchant vessel before and during the visit, search, and capture process, these individuals could be seen as displaying hostile actions, exhibiting hostile intent, or directly

[139] Per Hague XI, if these individuals did not take part in hostilities, they should not be held as POWs if they meet certain requirements. Hague XI, *supra* note 34, arts. 6, 8; Kraska et al., *supra* note 24, at 57.
[140] They would be entitled POW status as members of or accompanying the armed forces.
[141] Kraska et al., *supra* note 24, at 57.
[142] *Id*. at 58–59.
[143] *Id*. at 58.
[144] *Id*.
[145] *Id*.
[146] Paris Declaration, *supra* note 29.
[147] Wissa, *supra* note 1, at 213–14; Kraska et al., *supra* note 24, at 48.
[148] Schulz, *supra* note 22, at 219.
[149] These proceedings are governed by the domestic law of the state. Kraska et al., *supra* note 24, at 160–62.

participating in hostilities, making the vessel a lawful object of targeting and attack.

While "checkpoints" are prevalent in land warfare, there is no similar legal authority for militaries to seize civilian property at such checkpoints.[150] There is no "international" equivalent on land to maritime prize law proceedings that would permit adjudication of civilian items seized.[151] In fact, checkpoints on land cause increased confusion and terrify civilians due to the uncertainty of whether they will be exposed to violence at the checkpoint.[152] The lack of an equivalent procedure on land makes sense when considering the disparity in the transportation of goods on land compared to the quantities involved in the global maritime shipping industry. Thus, prize law applicable in the maritime theater brings a significantly more impactful form of economic warfare.

The ability to capture a merchant vessel and subject its contents to prize adjudication significantly expands possible belligerent actions while maintaining adherence to IHL. This also places merchant vessels in a more precarious position during armed conflict, raising questions as to whether merchant vessels should be armed or contain their own private security teams.[153] Blurring the lines of distinction creates a substantial negative consequence in increased usage of non-warships in naval operations. It would become more difficult to distinguish between a non-warship that is "directly participating in hostilities" and one that is simply a merchant vessel. This could result in states inadvertently targeting merchant vessels as military objectives, thereby placing the lives of civilians onboard *true* noncombatant vessels at risk.

Even during peacetime, states must be cognizant of the ways in which they utilize merchant vessels and other non-warships during naval operations. For example, the P.R.C. maritime militia currently operates in a gray zone, intending to "sow confusion and dissonance," specifically as to how the vessels are categorized.[154] By creating such a pattern in peacetime, they have set a precedent

[150] The UN defines a checkpoint as "any staffed physical impediments to travel within a territory." Justin Schon, *The Centrality of Checkpoints for Civilians During Conflict*, 18 CIV. WARS 281, 281 (2016).
[151] Civilian items seized during land conflicts would be subject to the domestic law of the state, whereas maritime conflicts generally occur on the high seas, not subject to the domestic laws of any state, necessitating the international concept of prize law. See *Constitutional Rights in Wartime*, JUSTIA, https://bit.ly/4g3S6zz (last visited Dec. 28, 2024).
[152] *Id*. at 282.
[153] Stacy Flippin & Meghan Smorol, *A Call to Arms: Evolving Law and Culture to Protect Our Merchant Maritime Fleet*, DEF.TRANSP. J. ONLINE (Feb. 3, 2020), https://bit.ly/4eSJDPM.
[154] *PRC Gray-Zone*, *supra* note 78, at 824, 830.

whereby a state could consider the vessels to be naval auxiliaries, targetable in a situation of armed conflict.[155]

The letters of marque, discussed in Part V, could also create confusion like prize law. Merchant vessels engaging in privateering under letters of marque would be perceived as directly participating in hostilities and therefore lawful objects of attack. States need to take this consequence into consideration. States should make abundantly clear to the vessel owner and master (if different) the repercussions involved in participating in naval operations, so that they understand crews' risks and exposure to armed conflict.

B. International Law Applicable to Peacetime Naval Operations

Both on land and at sea, civilians, PMCs, civilian merchant vessels, and other non-warships are increasingly integrated into military operations during peacetime.[156] UNCLOS serves as the major source of international law pertaining to peacetime naval operations and is generally thought to reflect customary international law.[157] UNCLOS sets forth a vessel categorization scheme affording different rights, privileges, and immunities.[158] There is an overarching principle within UNCLOS that the seas must be used for "peaceful purposes."[159] However, while there are disagreements regarding what constitutes a "peaceful purpose," UNCLOS does not expressly prohibit military activities on the high seas,[160] and most states utilize Article 2(4) of the U.N. Charter to define whether an activity is "peaceful."[161]

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[155] "Admiral John Richardson, head of the US navy, said he told his Chinese counterpart, vice-admiral Shen Jinlong, in January that Washington would not treat the coast guard or maritime militia–fighing boats that work with the military–differently from the Chinese navy, because they were being used to advance Beijing's military ambitions." Demetri Sevastopulo, *US Warns China on Aggressive Acts by Fishing Boats and Coast Guard*, Financial Times (Apr. 28, 2019), https://bit.ly/4h6bXiU. See also, *PRC Gray-Zone*, *supra* note 78, at 835 (quoting the Financial Times article, stating that the U.S. Navy recently made similar assertions, "when it declared that maritime militia vessels would, in the event of armed conflict at sea, prima facie be considered targetable auxiliaries, rather than merchant vessels").

[156] *See, e.g.*, *supra*, Introduction (describing the use of Chinese fishing vessels in the South China Sea, USNS ships for surveys, and the *BEHSHAD* in the Red Sea and Gulf of Aden).

[157] 169 countries have ratified UNCLOS, and, while the United States has not ratified the convention, President Ronald Reagan's 1983 Ocean Policy Statement proclaimed that UNCLOS reflects customary international law in all aspects except those related to seabed mining. Astley & Schmitt, *supra* note 65, at 121–22; *Statement on United States Oceans Policy*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (Mar. 10, 1983), https://bit.ly/4azLHv6.

[158] UNCLOS, *supra* note 51, art. 32.

[159] *Id*. arts. 88, 56(2), 141, 240, 242, 246.

[160] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY, VOLUME III 91 (Nordquist, et al., eds., Kluwer Acad. Pub. 1985).

[161] James Kraska, *Intelligence Collection and the International Law of the Sea*, 99 INT'L L. STUD. 602, 609 (2022) [hereinafter *Intelligence Collection and Int'l LoS*]. The U.N. Charter governs law of

While UNCLOS differentiates certain privileges and immunities for warships and other governmental ships used for non-commercial service, it does not comment or advise on other vessels working with a state's navy.[162] While there is a separate scheme governing naval warfare, state actions and use of civilian vessels during peacetime play a role in wartime categorization, and thus, states need to be aware of how non-warship activities could be perceived.[163] For example, since 2016, the P.R.C. has required that civilian ferries be built in such a way that they meet defense standards and accommodate military vehicles.[164] These "roll-on, roll-off ferries" have participated in Chinese naval exercises more than 1000 miles from normal crossing routes.[165] Similar to the fishing vessels participating in the P.R.C.'s maritime militia, transferring the legitimate peacetime use of these ferries into an armed conflict scenario, where they transport military vehicles and supplies, creates a distinction issue. While legal under international law to utilize these vessels in exercises because it is not a "belligerent act," this "dual purpose" increases the chances that P.R.C. merchant vessels could be seen as directly participating in hostilities during naval warfare if operating in conformity with current integration in P.R.C. exercises.

C. The Maritime "Gray Zone"

The use of non-warships in naval operations is not unique to the 21st century. However, new technologies and innovative uses of non-warships challenge established notions of maritime and international law and requires ongoing analysis to establish acceptable conduct.

International law pertaining to maritime operations is premised on a world where only two paradigms exist: peacetime, where the law of the sea applies, and armed conflict, applying the law of naval warfare.[166] There are certain

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the use of force in international relations and is applicable at sea. *Id*. at 609, 631–32; U.N. Charter art. 2(4).

[162] However, merchant vessels are not permitted to stop other vessels, including ships suspected of conducting piracy. UNCLOS, *supra* note 51, art. 107. Merchant vessels are subject to boarding, questioning, and even criminal prosecution by a coastal state if deemed to have violated its domestic laws while in its territorial seas. ROBIN CHURCHILL ET AL., THE LAW OF THE SEA 155–56 (Manchester Univ. Press, 4th ed. 2022).

[163] *See, e.g.*, Kraska and Monti, *supra* note 49 (concluding that China's use of fishing vessels in its maritime militia "exploits a seam in the law of naval warfare, which protects coastal fishing vessels from capture or attack unless they are integrated into the enemy's naval force," and risks erasing the distinction between warships and other ships in naval warfare).

[164] Associated Press, *China Using Civilian Ships to Enhance Navy Capability, Reach*, VOA NEWS (Sept. 24, 2022, 12:38 PM) https://bit.ly/4ewL1HP.

[165] Courtney Mabeus, *Chinese Navy Using Commercial Car Ferries to Launch Amphibious Landing Craft*, USNI NEWS (July 26, 2021, 5:27 PM), https://bit.ly/3BLgGGX.

[166] *See* James Kraska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare*, EJIL: TALK! (Dec. 3, 2018), https://bit.ly/3BwCciS ("Exploring the legal circumstances of the incident

areas of the world's oceans where states are arguably currently engaging in naval warfare.[167] Other large swaths of the sea are not involved in outright naval warfare, but are also not operating in a true "peacetime" environment.[168]

One needs only to look at the ongoing tensions within the South China Sea, where multiple states are engaged in conduct falling below the level of an armed attack. Yet these states attempt to assert control over various areas under the ruse of supporting the "freedom of navigation." In May 2023, the Philippines placed navigational buoys in five disputed areas near the Spratly Islands, an area that the Philippines claims as its exclusive economic zone (EEZ)—the same area is also claimed by Vietnam.[169] The Philippines stated that the buoys were intended "to improve safety of navigation" and should be of no concern, but Vietnam viewed this action as a violation of its sovereign rights.[170] Meanwhile, Chinese and Philippine coast guard vessels clashed near the disputed Second Thomas Shoal in March 2024.[171] Each country accused the other of causing minor collisions and damage.[172] To add to the tension, the United States sent a warship near the disputed Paracel Islands in the South China Sea, in November 2023, on a "freedom of navigation" operation.[173] The Paracel Islands are claimed by China, Vietnam, and Taiwan, and the action was intended by the United States to counter "excessive claims of maritime interests."[174] All of these actions, while falling below the threshold of armed attack, are nonetheless provocative in a sensitive area of the world's oceans.

States need to be cognizant of current maritime rules, laws, and regulations, recognizing that peacetime missions are not "little more than less-violent subsets of similar wartime tasks."[175] International law creates a dichotomy

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requires selection between peacetime rules of the law of the sea and the law of naval warfare, which applies to international armed conflicts.").

[167] For example, the Black Sea where Russia and Ukraine are involved in an international armed conflict. The same might be said for the Red Sea and Gulf of Aden where the Houthis are operating. Rob McLaughlin, *Houthi Operations in the Red Sea and LOAC?*, LIEBER INST. (Jan. 8, 2024), https://bit.ly/47Z9EdU.

[168] *E.g.*, *PRC Gray-Zone*, *supra* note 78, at 821 (discussing China's actions, and the Philippine response, to claims for islands in the South China Sea, which does not equate to an international armed conflict, but still constitutes rising tensions and increased hostilities over the disputed islands).

[169] *Vietnam Rebukes China, Philippines Over South China Sea Conduct*, REUTERS (May 18, 2023, 7:23 AM), https://bit.ly/4ga3c6r [hereinafter *Vietnam Rebukes China, Philippines*].

[170] *Id*.

[171] Jim Gomez, *Philippine and Chinese Vessels Collide in Disputed South China Sea and 4 Filipino Crew are Injured*, ASSOCIATED PRESS (Mar. 5, 2024, 2:33 PM), https://bit.ly/4dydzPT.

[172] *Id*.

[173] *U.S. Destroyer Sails South China Sea "Freedom of Navigation" Operation*, KYODO NEWS (Nov. 26, 2023, 10:46 PM), https://bit.ly/4dBSzry [hereinafter *U.S. Destroyer Sails South China Sea*].

[174] *Id*.

[175] Ivan T. Luke, *Naval Operations in Peacetime: Not Just "Warfare Lite*,*"* 66 NAVAL WAR COLL. REV. (SPRING), 11, 11 (2013).

where a state is either in an armed conflict, or not. International law dictates that a single shot does not create a situation of armed conflict such that IHL and the law of naval warfare would apply.[176] Specifically during peacetime operations, legitimacy is key, and that depends on operating within, and abiding by, the correct maritime paradigm for a given situation.[177] This requires an emphasis on proper vessel categorization and maintaining a clear understanding of what is a belligerent act.

V. AN ALTERNATIVE: BRINGING BACK LETTERS OF MARQUE

One way to incorporate civilian vessels, while not running afoul of the prohibition on belligerent acts would be to bring back the concept of letters of marque during periods of armed conflict.[178] This would bring back a version of privateering, under the auspices of prize law. Letters of marque would not need to take a specific form; they could be in the same form as a standard contract commonly utilized today, the difference being that in naval warfare they could authorize a vessel to conduct belligerent acts.

A peacetime letter of marque is unnecessary because a contract in its current form suffices. The government could decide to contract with a private vessel solely for non-commercial purposes, in which case it would maintain immunities per UNCLOS.[179] Alternatively, the contract could specify that a vessel would continue carrying out its normal private function, but also conduct activities on behalf of the state during opportune times, depending upon the specific request.[180] States would need to ensure that the civilian vessels understand their purpose and the strict limitations of the contract, to ensure that these vessels

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[176] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27) [hereinafter *Nicaragua*].
[177] Luke, *supra* note 175.
[178] This concept would be separate and distinct from the National Defense Reserve Fleet (NDRF), which consists of approximately 100 vessels serving as a reserve for national defense and national emergencies. *National Defense Reserve Fleet and Service*, U.S. DEP'T TRANSP., https://bit.ly/3XWyAht. The Civil Reserve Air Fleet (CRAF) provides a good comparison. The CRAF consists of aircraft from U.S. airlines that are contractually committed to augment U.S. Department of Defense airlift requirements in emergencies, "when the need for airlift exceeds the capability of military aircraft." *Civil Reserve Air Fleet*, AIR MOBILITY COMMAND, https://bit.ly/3YhCpyb.
[179] UNCLOS, *supra* note 51, art. 96.
[180] For example, a state looking for a means of passive intelligence collection could conceivably contract to place equipment on the vessel for purposes of collection and the merchant vessel could nonetheless continue its merchant journey. *See, e.g.*, *Intelligence Collection and Int'l LoS*, *supra* note 161, at 603 ("[I]n terms of the international law of the sea, intelligence collection that occurs outside of the territorial sea is lawful. Furthermore, even intelligence collection by a foreign ship inside the territorial sea, while a violation of State sovereignty, may not violate the law of the sea, per se.").

do not exceed lawful authority, perform an *ultra vires* belligerent act, and thereby create an incident resulting in unwanted conflict.

A. Letters of Marque During Armed Conflict

During armed conflict, letters of marque could function in a similar manner to their pre-Paris Declaration role,[181] but instead of serving an offensive function, they could be employed to protect merchant vessels and ensure continued shipping while freeing up warships to conduct belligerent acts. Parallels can be drawn between the PMCs operating in Iraq and the proposed letters of marque during naval warfare. Just as many PMCs provided protection functions,[182] so too can these vessels. The key difference between a traditional contracted state vessel and one operating pursuant to a letter of marque is that the letter of marque could conceivably grant authority for a vessel to conduct actions traditionally viewed as "belligerent acts."

One difference between PMCs and civilian vessels operating under letters of marque is the latter's ability to be considered combatants and thus afforded POW rights, if captured. Under the third Geneva Convention, persons can be given POW rights if they meet certain criteria to be considered "other militia or volunteer corps" under Article 4(A)(2) so long as they are operating independently from the armed forces.[183] It is unlikely that PMCs would meet the independent prong of this requirement.[184] Civilian vessels, however, could still meet the requirement of "belonging to a Party,"[185] but remain independent of the armed forces. While they would be acting in concert with military forces, these civilian vessels act separately, under their own mission, specific to their letter of marque. Even merchant vessels operate in a command structure, with the ship's master being overall responsible.[186] Civilian vessels could meet the second requirement of the Geneva Convention's criteria by utilizing the automatic identification system (AIS) to signal that they are operating as a militia.[187]

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[181] A privately-owned vessel outfitted as a warship, and authorized by a "recognized national government" via commission. The privateers were required to conform to the conduct of the laws of naval warfare. Bederman, *supra* note 16.

[182] PMCs have been employed to guard convoys and embassy personnel, to name a few. Bosch, *supra* note 133, at 21.

[183] GC III, *supra* note 99, at art. 4(A)(2). The specific requirements to be considered "other militia or volunteer corps" are discussed in Part IV.A.2.

[184] "Many contractors and subcontractors would run afoul of this provision in that they provide services specified by the armed forces; thus, they are not meaningfully independent." *Humanitarian Law and DPH by PCs*, *supra* note 131, at 529.

[185] GC III, *supra* note 99, art. 4(A)(2).

[186] *Id*. art. 4(A)(2)(a).

[187] AIS is a "short-range coastal tracking system" originally developed to share identification and positioning to vessels and shore stations. The International Maritime Organization (IMO) Convention for the Safety of Life at Sea (SOLAS) regulation, "requires all vessels of 300 GT and above engaged on international voyages and all passenger ships irrespective of size to carry AIS

So long as the vessel openly carries arms, it meets the third requirement. The P.R.C.'s maritime militia, specifically the MMFVs, easily meet this requirement by nature of the vessels' designs. Conversely, if a merchant vessel were utilizing its cargo units, or other forms of obfuscation, to hide the fact that it is carrying arms, it would not meet the third requirement.[188] The final requirement is that these groups operate "in accordance with the laws and customs of war."[189] As long as the letters of marque inform the merchant vessels of the requirement to follow the laws and customs, they meet the criteria. To protect itself, a state utilizing privateers should mandate that the ship's master and key crew members understand the laws of war, specifically the laws of naval warfare.

Letters of marque provide a quick, cost-effective option to increase the reach of a navy. A letter of marque also serves as a distinct authorization from the state, eliminating ambiguities that may be caused if the state simply wrote additional tasks into a contract. In fact, others have also recommended this concept.[190] Letters of marque can be catered to specific naval operations and operate in largely the same manner as PMCs have in land warfare.[191]

B. Risks in Bringing Back Privateering

There are risks to restoring privateering and letters of marque, including the concept of "plausible deniability." Many of these concerns mirror the concerns related to increased use of PMCs on land.[192] However, the United States, for example, has reached a point where letters of marque could provide a means of

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onboard." *AIS (Automatic Identification System) Overview*, NATO OTAN ALLIED MARITIME COMMAND, https://bit.ly/3U0HKbw.

[188] Raul Pedrozo, *China's Container Missile Deployments Could Violate the Law of Naval Warfare*, 97 INT'L L. STUD. 1160, 1161 (2021).

[189] GC III, *supra* note 99, art. 4(A)(2)(d).

[190] *See, e.g.*, Todd Emerson Hutchins, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates*, 99 CAL. L. REV. 819 (2011); Cancian & Schwartz, *supra* note 29. In 2015, Ian Rice and Douglas Borer recommended bringing back letters of marque to aid in the fight against violent extremist organizations in Iraq and Syria. *See* Ian C. Rice & Douglas A. Borer, *Bring Back the Privateers*, THE NATIONAL INTEREST (Apr. 22, 2015), https://bit.ly/3ZW3SYG ("There are insufficient ground forces to alter the territorial status quo the Islamic State has created. By authorizing private forces with letters of marque, Congress will begin to address the pressing need to engage in ground combat against VEO militants.").

[191] The U.S. military relies on civilian launch facilities, such as SpaceX, to launch military satellites into orbit. *See, e.g.*, Sandra Erwin, *SpaceX Launches U.S. Missile-Defense Satellites*, SPACENEWS (Feb. 14, 2024), https://bit.ly/4eS7gb9. Anduril, a defense start-up just signed a contract with U.S. Special Operations Command to "deliver, advance, and sustain" counter-unmanned systems capabilities, including "counter-drone capability" through an artificial intelligence platform "designed to autonomously identify and classify threats. Andrew Eversden, *Andruil Nets Biggest DoD Contract to Date: Signifier or Outlier for Defense Start-Ups?*, BREAKING DEFENSE (Jan. 24, 2024, 2:33 PM), https://bit.ly/3Ydh4Xz.

[192] Including "deprivileging" the state's role in the security sphere, the concept of *pecunia nervus belli*, and diffusing state responsibility, all discussed at length in Part VI, *infra*.

stability, outweighing the risks.[193] Much the same way privateers were utilized to increase a state's naval capacity in the 18th and 19th centuries, the United States would benefit from private vessel assistance to achieve the ship levels needed to meet requirements.[194]

However, it is not guaranteed that other countries would even recognize a letter of marque, especially those party to the Paris Declaration. If a merchant vessel carrying a letter of marque is involved in hostilities and subsequently captured by a state that does not recognize the letter, they could be treated as unprivileged belligerents. The officers and crew could be detained, and even private passengers would be subject to discipline by the captor.[195] If the captor does not recognize the vessel as conducting legitimate state action, it could be classified as a pirate vessel.

The concept of piracy also becomes a concern regardless of whether a state utilizes letters of marque. A non-warship involved in a naval operations in contravention of international law could be viewed as committing acts of piracy, and would thereby be subject to capture by any other state's warship.[196] For example, a state could consider the P.R.C.'s SBFV fleet engaged in acts of piracy. They key is whether the vessels are operating "for private ends," under the UNCLOS definition of piracy. A "fleet" of private fishing vessels could be perceived as acting in furtherance of their own fishing gains and profit. If a vessel is not recognized as a state vessel, its actions that constitute "violence" could be recognized as being for private ends given that the actions are not associated with a state.[197]

U.S. practice during the Civil War serves as an example of the risks involved in a state not recognizing letters of marque. Confederate President Jefferson Davis issued letters of marque to Confederate vessels at the start of the

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[193] States party to the Paris Declaration would need to rescind their signature to return to the practice.

[194] Per the most recent Battle Force Ship Assessment and Requirement, the U.S. Navy requires 381 ships, and as of July, 2023, the U.S. Navy had 299 ships. Sam Lagrone, *Navy Raises Battle Force Goal to 381 Ships in Classified Report to Congress*, U.S. NAVAL INSTITUTE (July 18, 2023, 6:12 PM) https://bit.ly/4gTlxWN.

[195] U.S. NAVAL COMMANDER'S HANDBOOK, *supra* note 55, § 8.6.2.1.

[196] UNCLOS, *supra* note 51, art. 101.

> Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft; and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

[197] *See* UNCLOS, *supra* note 51, art. 101.

Civil War.[198] President Lincoln countered with a proclamation stating that these Confederate-issued letters of marque were "pretend" because the "United States did not recognize the Confederacy as a legitimate nation."[199] As a result, anyone manning these vessels were treated as pirates.[200]

Regardless of whether states utilize letters of marque, if they seek to incorporate non-warships into naval operations, they need to be cognizant of corresponding risks to non-warships. Merchant vessels in particular, do not have sovereign immunity, so even if they are given a letter of marque, they could still be subject to search. Further, if the searching state does not recognize letters of marque, the vessel could be captured and brought into domestic court.

VI. STRATEGIC AND POLITICAL CONSIDERATIONS

The rise of PMCs and military dependence on private companies in state actions at sea creates gray areas within existing international laws and vessel categorization. These gray areas require a discussion of the potential normative impacts of the uses of vessels in naval operations. While civilian participation provides advantages, states need to be cognizant of the potential downsides. The impact spreads beyond the battlefield; as President Dwight Eisenhower said, "[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist."[201] In this section I will apply observations made regarding the impact of land-based PMCs to the maritime setting.

A. States Risk Losing Monopoly on the Right to Use Force

In his piece, *Corporate Warriors: The Rise of the Privatized Industry and Its Ramifications for International Security*, P.W. Singer dives into the growing PMC industry, positing that "the state's role in the security sphere has become deprivileged, just as it has in other international arenas such as trade and finance."[202] Further, it has been noted that the increase of PMCs currently causes states to lose one of its essential attributes, "the monopoly on the right to use force

[198] Jennifer Gonzalez, *Pirates, Privateers, and Civil War Maritime Laws*, LIBRARY OF CONGRESS BLOGS (May 28, 2020), https://bit.ly/480w4eY.
[199] *Id*.
[200] *Id*.
[201] *Eisenhower's Farewell Address*, *1961*, PBS.ORG AMERICAN EXPERIENCE, https://to.pbs.org/4dIi9LA (last visited Oct. 8, 2024).
[202] P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT'L SEC. 186, 187 (2001).

within international law."[203] Examples exist around the world of PMCs influencing state security actions.[204]

These very real concerns also apply to the maritime regime. Allowing a civilian vessel to participate in naval operations naturally removes some decision-making power from the state. Just as in land warfare, a civilian shipping company could use its strength to influence a weaker state, pushing them into taking actions beneficial to the company's profit, but detrimental to state security. States with rules and regulations governing the use of these PMCs are at risk of being influenced by working with a company located within their territory as opposed to another territory.[205] States desiring to utilize private shipping vessels in naval operations need to be cognizant of the pressure that could be placed on their governments depending on the arrangements reached.

Virtually all areas considered "exclusive domain of the military" have become corporate, including hiring, training, planning, and combat, thus threatening trickle-down effects.[206] Weapons maintenance and supply have become completely privatized in many states, causing the entire military machine to break down if PMC employees leave or go on strike.[207] Production of an entire line of vessels or weapons could be halted in the event of a labor issue at a PMC.

The Newport News Shipyard and the U.S. Navy's development of a "monopoly-monopsony" relationship provides an excellent example. As the relationship grew from its initial stages helping to design aircraft carriers in the post-World War II era, "[c]ontractors assumed more responsibility at earlier stages of design and engineering work."[208] The utter dependency both ways is cause for

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[203] Pauline Collins, *The New Autonomous Corporate Warriors and Their Implications for Humanity*, 9 Y.B. N.Z. JURIS. 15, 34 (2006).

[204] *See, e.g.*, Singer, *supra* note 202, at 206 (exploring rumors that Executive Outcomes helped oust the leader of Sierra Leone in 1996 in favor of a local general with whom they had a better working relationship); David Evans, *Corporate Profit and Modern War: National Militaries Are Now Merely the Paymasters for Private Corporations*, PEACE MAGAZINE, Jul-Sep 2005, at 13 (describing Haliburton's Root and Brown Corporation pushing boundaries for what corporations can do in military operations, "because they were employed to write the official rulebook . . . on the use of the private military services."); COUNCIL OF THE EUR. UNION GEN. SECRETARIAT, THE BUSINESS OF WAR – GROWING RISKS FROM PRIVATE MILITARY COMPANIES (Aug. 31, 2023) (demonstrating that even the EU is concerned about weakening state sovereignty and potential rivalry over delegation of functions to PMCs).

[205] *See, e.g.*, *Private Security Contractors: DOD Needs to Better Identify and Monitor Personnel and Contracts*, U.S. GOV'T ACCOUNTABILITY OFF. (Jul. 29, 2021), https://bit.ly/3Yg01Ec (In the United States, 32 C.F.R. § 159 regulates PMCs operating in contingency operations, humanitarian or peace operations, or other military operations or exercises, yet the GAO released a report in 2021 citing concerns over the Department of Defense's use of PMCs).

[206] Evans, *supra* note 204.

[207] Singer, *supra* note 202, at 206.

[208] David Ress, *The Navy and Newport News: A Case Study of a Monopoly-Monopsony Duet*, 30 WAR IN HIST. 320, 327 (2023).

concern.[209] While the U.S. Navy works with other shipbuilding companies, extensive work with one company raises concerns that Department of Defense decisions may become influenced by the desires of that company.[210] This problem is not new; states have consistently looked to private industry for manufacturing purposes.[211] This problem will persist because a state's complete control of all defense-related production would result in state-owned businesses. Such state domination of the means of production is not consistent with a democratic society or a competitive economy which generates advanced technologies from privately-owned businesses. This need not become a major problem; it is simply a concern that states need to be cognizant of when working with civilian shipping companies.

Relatedly, an increase in reliance on commercial shipping companies' vessels risks an increase in *pecunia nervus belli* (money nourishes war).[212] This is not unique to the maritime realm; in fact, "so central to North America's economy is the defense industry that to separate ourselves from its influence might risk economic collapse."[213] In land warfare, when PMCs have personnel in conflict zones, these individuals generally operate solely in the interests of their employer.[214] Thus, military power risks being determined by the ability to pay, giving private organizations influence over government policy and public goals.[215] These companies are not concerned with foreign policy or security, unless and until it impacts their profits.[216] A state utilizing letters of marque, for example, would need to understand this mindset when deciding which civilian shipping companies to work with and provide letters of marque. These private transnational shipping companies are most concerned with their bottom line. Specifically in instances of letters of marque, where the privateers make a profit from the sale of the ships and cargo captured, states must be mindful that the actions may be for the benefit of the company and not the state. Shipping companies could become dependent on conflict for profits, countering the assumption that non-state actors are peace-oriented.[217]

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[209] *Id*.
[210] *See generally* Singer, *supra* note 202.
[211] World War II provides a great example, where the War Production Board converted peacetime manufacturers into manufacturing plants for weapons and military equipment, even helping to stimulate the economy post-depression. *See* David Vergun, *During WWII, Industries Transitioned From Peacetime to Wartime Production*, U.S. DEP'T DEF. (Mar. 27, 2020), https://bit.ly/3BC1xIb.
[212] Singer, *supra* note 202, at 209.
[213] Evans, *supra* note 204.
[214] Collins, *supra* note 203, at 34.
[215] *Id*. *See also* Evans, *supra* note 204 ("The line between business and the military has become obscure, as military armies spawn giant successful corporations (such as China's COSCO) and resource corporations are accused by the UN of promoting and fueling civil war for profit.").
[216] Collins, *supra* note 203, at 35.
[217] Singer, *supra* note 202, at 210.

B. PMCs Diffusing Responsibility

Ultimately, both in land and maritime warfare, the concern with PMCs is that they threaten to obfuscate responsibility.[218] States need to be ready to answer questions from their constituency, and on the world stage, regarding the use of PMCs to evade public policy restrictions.[219] PMCs can provide the cover of plausible deniability, making it easier to shift blame in the event that an action goes awry.[220] If a state intends to implement a politically unpopular foreign policy, we sometimes see them turning to PMCs to achieve results.[221] Governments recognize the importance of public relations campaigns because they rely on the continued support of their constituency to wage wars.[222]

In the maritime realm, we are already seeing this take place. The BEHSHAD has long been suspected of providing support to Iran, although it is registered as a commercial cargo ship.[223] This registration provides a layer of separation between Iran and the actions that the BEHSHAD takes, creating plausible deniability in response to the international community. For example, if the BEHSHAD is found to be providing intelligence to the Houthis, Iran has shielded its connection to the Houthis.[224]

C. Lack of Oversight

Another issue regarding transparency and control involves questions of actual state oversight of PMC operations.[225] A civilian who commits an offense is answerable only to either the national law of the state in which he or she is temporarily based or the law of the state of their nationality where that state has passed legislation permissible under international law to impose extraterritorial jurisdiction.[226] In many instances, the contracts for PMCs on land create barriers

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[218] *Id*. at 215–16.
[219] *Id*.
[220] *Id*. at 218 (referencing Dyncorp's "antidrug" operations in Colombia). When governments wage war by proxy, one step removed, media attention is not attracted to the activities of PMCs in the same manner as when a state's national military is deployed into a conflict zone. *See also* Collins, *supra* note 203, at 33.
[221] Collins, *supra* note 203, at 30.
[222] *Id*. at 37.
[223] Susie Coen, *Iran Warns US Not to Target Ship 'Providing Intelligence to Houthis*,*'* TELEGRAPH (Feb. 6, 2024, 7:41 PM) https://bit.ly/47TDvo9 (Noting that the BEHSHAD's owners have been sanctioned by the U.S. Treasury Department as it is suspected to be a front for "state-run Islamic Republic of Iran Shipping Lines.").
[224] Iran could deny any connection to intelligence sharing between the BEHSHAD and the Houthis because the BEHSHAD is not a state-owned vessel, and the state conceivably does not have control over it.
[225] Collins, *supra* note 203, at 30.
[226] *Id*. at 31.

between individuals working for the company and the government.[227] This shield or lack of a direct link often results in a failure to prosecute individuals, sometimes due to lack of jurisdictional clarity.[228] It can also send a message to those impacted within conflict zones that IHL can be disregarded if a state military is not involved.[229] IHL is made by states, for states, making it less easily applicable to corporate entities. [230] As PMC use rises, IHL enforcement becomes more difficult.[231] Of course, it is also possible that a PMC, or, in our case, a civilian vessel, will act in an *ultra vires* manner, causing potentially catastrophic consequences.

If navies utilize letters of marque, they should include a requirement to abide by international law. The question then becomes how states ensure that the ships' masters know and understand international law applicable to the sea, and, in turn, what impact this has on state responsibility. Does a state lose some of its plausible deniability by taking affirmative actions to ensure the ship's master comports with international law, or do they simply include the requirement in a letter of marque and leave it up to those operating the vessel to learn on their own?

These concerns reflect the ultimate fear that the use of merchant vessels may blur the lines between civilian and military objects and cause a return to the unrestricted maritime warfare that occurred in World War II. IHL rules, specifically the Geneva Conventions, were drafted in an attempt to eliminate such actions and regulate warfare. A return to unrestricted maritime warfare risks toppling current rules-based international order.

VII. CONCLUSION

Civilian involvement is changing state interaction and military behavior. Incorporating non-warships into naval operations provides an opportunity to supplement, and expand upon, existing naval power in peacetime and armed conflict. Just as these changes provide opportunities, so too must states be clear-eyed and have a full understanding of the ripple effects.

Impacts span far beyond naval warfare. What states do during peacetime also has a lasting effect on how their navies will be perceived, and targeted, in the event of armed conflict. Participation in peacetime naval operations that do not constitute an "armed attack" could nonetheless confuse the character of a merchant vessel, or even bring about claims that a vessel is illegally participating

[227] Singer, *supra* note 202, at 215.
[228] Robert Beckhusen, *A Decade Later, Contractor Pays Out Millions for Iraq Prisoner Abuse*, WIRED (Jan. 9, 2013, 12:45 PM), https://bit.ly/3NipLKa.
[229] *See, e.g.*, Collins, *supra* note 203. at 38; Beckhusen, *supra* note 228.
[230] Collins, *supra* note 203, at 39.
[231] *Id*. at 45.

in piracy. States could bring back letters of marque; although, as discussed, this practice involves a variety of risks, not least of which is obfuscating responsibility.

However, there are ways for states to protect themselves and ensure they uphold international laws and norms in all naval operations. Maintaining a clear concept of vessel categorization and providing direct guidance to non-warships when acting on behalf of the state helps protect the state. Maintaining a consistent definition of a "belligerent act" throughout all means and methods of warfare and integration creates clarity in the extent to which non-warships can participate in naval operations. Regardless of how a state integrates non-warships, maintaining clear messaging through these lenses ensures consistency throughout the wide array of naval operations.

Just as on land, states need to fully understand who they work with. The issues with PMCs do not simply go away because actions occur at sea. States must heed President Eisenhower's warning and ensure that the military-industrial complex does not have a disproportionate impact on a state's security actions.

Ultimately, the use of non-warships in naval operations can provide substantial benefits, if utilized in an appropriate manner, with an awareness of potential implications on future scenarios, and keeping international law at the forefront.