

Neutral mariners and humanitarian law: a precedent for protecting neutrals in armed conflict

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Stormy petrels are small, dark-hued seagoing birds. In violent weather they fly between the waves for protection.¹ According to the lore of the sea, they are heralds of danger.

For centuries, neutral mariners navigating the same waters have tried to avoid the violence that engulfed seafaring warriors. In our mobile world, their experience is a cautionary tale and represents a legal precedent for all international travellers. In recent times airline passengers, expatriate workers and many others have been endangered by conflicts not their own. When that happens, their lives depend on the same principles that have been forged to protect neutrals at sea. Neutral mariners have been the stormy petrels of international law.

Two hundred years ago these sailors were ensnared in the first modern, global conflict. For ten generations they have possessed an undesirable distinction — that of being the only neutrals regularly targeted in the wars of other nations. On land, it was by chance that an expatriate was caught up in someone else's conflict. At sea, sailors of all nations crossed paths and neutral seamen, on neutral ships, ran a high risk of suffering in other people's wars.

A body of obscure but important international law took shape to protect these men and women. In the late twentieth century it stands as the only corpus of rules that specifically protect neutral nationals in armed conflict. Unlike the case in the year 1792, these rules now carry potential life or death impact for millions of other international

* The opinions expressed in this article are those of the author and not necessarily those of the American Red Cross.

¹ Goethe, Friedrich, in: Grzimek, Bernhard, ed., *Grzimek's Animal Life Encyclopedia*, Van Nostrand Reinhold Company, New York, pp. 155-156.

travellers as well. The rules are based on custom, so the full story needs to be told.

I. HUMANITARIAN RIGHTS OF NEUTRALS DURING GLOBAL WAR, 1792-1815

In 1792 France declared war on Austria, beginning a generation of conflict that spread around the globe and drew in a struggling young nation called the United States of America. When news of this war against kings reached the Americans, they rejoiced at this affirmation of their own recent revolution. That enthusiasm vanished when their merchant fleet was endangered by the contest.

It was the practice of warring states to blockade enemy ports. Neutral ships were stopped when suspected of carrying contraband that would assist the enemy's war effort. When those suspicions were confirmed by admiralty courts the cargo and vessels were declared to be "prize", confiscated and sold. The 1790s marked the beginning of a tenacious, long fought worldwide conflict. Disruptions of neutral commerce that had been recurrent but transitory became an intractable burden for neutral states.

Britain declared that it would confiscate as prize any neutral ship caught carrying provisions to the French West Indies. President Washington issued a neutrality proclamation to keep U.S. commerce out of the war, but it did no good. Many American merchant ships were captured and then condemned by British admiralty courts. In 1794, the British rescinded the order for capture of neutral ships.

That defused one crisis, leaving the U.S. government more time for another with France. That nation liberally issued privateering commissions to halt any American shipping in the West Indies that might benefit England. Privateers were private, commercially motivated sailors from every maritime state, often no more than buccaneers with official papers. The laws of war were irrelevant to their trade.

In 1796, the U.S. Secretary of State asked President Washington's legal adviser to identify the rights of American merchant seamen in the face of growing attacks on the nation's commerce. In furnishing his opinion, the Attorney General had ample guidance from the practice of the Old World.

By the mid-sixteen hundreds, it was well established in Europe that navies could stop, visit and search neutral merchantmen to see whether their cargo would assist enemy military efforts. Neutral envoys made

vigorous protest against any mistreatment of the crew on those ships.² Their frequent protests gave rise to a principle. The crew of detained vessels had to be respected as neutrals, and protected just as in time of peace.³ A different rule applied to merchant mariners of warring states. They were prisoners of war and their protection was that of the law of war.⁴

The U.S. Attorney General declared that the rights of the neutral mariners were plain: they were “citizens of the world”, and in a situation where a person “for hire serves as a mariner on board of a neutral ship employed in contraband commerce with either of the belligerent powers, he is not liable to any prosecution or punishment for so doing, by the municipal laws of his own State; nor is he punishable personally, according to the laws of nations, though taken in the fact, by that belligerent nation to whose detriment the prohibited trade would operate”.⁵ This reassured the government of the United States, but did not relieve the plight of the nation’s sailors.

Private warfare, once a popular economic venture on land, was long abolished by the 1790s. Many nations continued the practice at sea, however, by commissioning privateers. There were handsome profits to be made when a rich cargo ship was confiscated. French-authorized privateers eagerly hunted American commerce in the Caribbean.

In early 1796 grim reports reached the U.S. The captured captain of one American merchant ship was confined, deprived of rations and then forced to wait while the captors encouraged his crew to murder him. Finally, after two months he abandoned his ship, concluding there was no prospect that he would be allowed to challenge the capture before an admiralty court. This was followed by reports of mariners killed in unprovoked cannonades, crew members beaten and killed when their ships were boarded, crews held for long periods in unhealthy conditions with high mortality, ships wantonly plundered.⁶

² Jessup, Philip, and Deak, Francis, *Neutrality: Its History, Economics and Law*, Columbia University Press, New York, 1935, p. 165.

³ *Ibid.*

⁴ Pictet, Jean, ed. *Commentary on the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 98.

⁵ *Opinions of Attorneys General*, House of Representatives Ex., Doc. No. 55, 31st Congress 2d Session, Washington, 1851, pp. 33-35.

⁶ Lowrie, Walter and Clarke, Matthew, eds, *American State Papers*, Gales & Seaton, 1832, Vol. 2 (Foreign Relations), pp. 61-63.

In 1798 the American fleet and U.S.-commissioned privateers were arrayed for undeclared war against the French fleet and privateers. This conflict, known to history as the “Quasi War”, never spread to shore. By 1799 the Quasi War had faded, and in 1800 was formally closed with a treaty of friendship and commerce — a treaty of peace deemed impolitic since a state of war had, technically, never existed. The treaty was a landmark in an oft neglected sphere of the law of war.

It compelled protection for neutral mariners, should they encounter visitation or arrest in future conflicts involving one of the parties. This was the rule: “And that more abundant care may be taken for the security of the respective citizens of the contracting parties, and to prevent their suffering injuries by the men of war, or privateers of either party, all commanders of ships of war, and privateers, and all others of the said citizens shall forbear doing any damage to those of the other party, or committing any outrage against them, and they act to the contrary, they shall be punished, and shall also be bound in their persons, and estates, to make satisfaction and reparation for all damages and the interest thereof, of whatever nature the said damages may be.”⁷ Tensions eased in Caribbean waters, but in Europe blood was still pouring into the sea.

Scandinavian mariners were pressured by aggressive patrolling by the British fleet. They began travelling in convoys, under escort by their own navies. This did not go unchallenged. On 25 July 1800 the Danish frigate *Freya*, while escorting such a convoy, took on a squadron of five British ships after refusing a demand to visit and search the merchantmen. There were deaths on both sides.⁸

In February 1801 Russia, Prussia, Denmark and Sweden joined in a neutral league to protect their shipping from the British fleet. That short lived agreement was the ultimate target on 2 April 1801, when a British fleet sailed into Copenhagen harbour and struck the Danish flotilla. The battle lasted five hours and effectively ended the confederation of the neutrals.

Neutral mariners discovered that their troubles did not end when they dropped anchor in port. The Czar of Russia laid claim to Malta. In support of that claim his government seized 300 British merchant

⁷ Bevans, Charles, ed., *Treaties and Other International Agreements of the United States of America 1776-1949*, U.S. Government Printing Office, Washington, 1971, Vol. 7, p. 809.

⁸ Feldbaek, Ole, “The Anglo-Danish Convoy Conflict of 1800” in *Scandinavian Journal of History*, 2, 1977, pp. 170-171.

vessels and their crews. Britain replied by ordering an embargo on Russian, Danish and Swedish vessels in English ports and seizing vessels of those states found at sea. In the sweep that followed, Sweden alone suffered the detention of 200 of its merchant ships. That crisis ended on 7 April 1801 when the British seamen were released.⁹

Though the maritime rights of neutral states gave rise to many disputes and to acts of war, those differences never shook the fundamental principle that neutral mariners could not be mistreated. Even while events at sea were building toward another war between England and America, the British High Court of Admiralty was reaffirming the humanitarian rights of neutral mariners.

In the course of prize proceedings against a Spanish ship, it was brought to the attention of the court that the 22 detained crew had been placed in irons. The court was not convinced that the captors had justified this extreme measure, and ruled: "...that it is due to the honour of the country, and to the injury the Spaniards have sustained, that some civil compensation should be made; and with that view I decree 100 guineas to be distributed amongst the sufferers."¹⁰ The crew of *De Fire Damer* were also abused by privateers. The prize master put in charge was drunk, and violent with his captives. He also refused to take on a pilot who knew the local waters and struck a rock off Falmouth.

The Court held that owners are "answerable for the proper conduct of the persons to whose care they entrust the privateer. They ought not to put their vessel into the hands of a person capable of being guilty of such outrageous behaviour...". The Court awarded the same damages as in the prior case, finding that this was to "deal out very scanty justice...". It was noted that the privateer involved had been lost. Otherwise, the Court would have directed steps to revoke its commission.¹¹

Military confrontation over neutral rights shifted back to the New World. France and Britain both harried American merchant vessels. One British practice especially stirred anger. During visits to search for contraband goods, crews of the British fleet began taking seamen off U.S. merchant ships for forcible service in their navy. These men

⁹ Mahan, A.T. *The Influence of Sea Power Upon the French Revolution and Empire 1793-1812*, Vol. II, Reprinted by Scholarly Press, Michigan, pp. 53-55.

¹⁰ See case of *La Purissima Conception* (1803) reprinted in *The English Reports*, W. Green & Son, Ltd., 1923, Vol. 165 pp. 687-690.

¹¹ *Ibid*, see case of *De Fire Damer* (1805), pp. 804-805.

were deserters from the British Navy, it was claimed, and lawfully impressed for that service. Thousands of U.S. citizens were taken from their ships, and in 1807 and 1811 this brought on naval battles between U.S. and British ships. In 1812 the United States declared war on England, this hazard to its citizens being one of the reasons.

That same year, the U.S. made its contribution to the jurisprudence on humanitarian rights of neutrals at sea. In prize proceedings, it was determined that a U.S. merchant ship had been unjustly seized by an over-eager U.S. privateer commanded by a Captain Downie. Penalties were assessed for damage to the cargo, and a claim entertained for insults and mistreatment to William Mooney, owner of the vessel.

That claim was not upheld by the judge, who found that "warm words passed between Capt. Downie and Mr. Mooney at the time of handcuffing. I observe that though he states at large the challenge of Captain Downie, he drops altogether any account of the provocation that led to it." But lest that decision send the wrong message, he hastened to add his view of the requirements of the law of nations.

The author of this opinion was Joseph Story, founder of U.S. admiralty jurisprudence and an influential Supreme Court Justice. He wrote: "There can be no doubt of the jurisdiction of this court to punish every indignity offered to those, who, by the fortunes of war, fall into the possession of our armed ships. It would be disgraceful to the character of the country to suffer a practice to exist, which, setting at defiance the rules of civilized warfare, should consummate a triumph over an enemy by personal indignities, or modes of restraint unnecessary for the general safety. Much less ought such conduct to be tolerated towards neutrals or citizens of our own country. And where the case should be clearly made out, accompanied with undeserved suffering or malicious injury, the court could never hesitate to pronounce for exemplary damages."¹²

The war with England ended in 1814 with no resolution of the impressment problem. The end of the Napoleonic Wars in 1815 removed all urgency from the issue of visit and search. Ironically, the next step forward was taken because of a menace stalking others.

¹² See case of *The Lively* (U.S. Circuit Court for District of Massachusetts 1812) reprinted in *The Federal Cases*, West Publishing Co., St. Paul, 1895, Vol. 15, pp. 631, 636.

II. AN ERA OF PROGRESS FOR NEUTRALS, 1815-1914.

At the end of the Napoleonic Wars, the British government began a long diplomatic campaign to suppress the maritime slave trade. It had only modest success. In 1842, mariners benefited from an implied concession made to the U.S. government in those efforts. The governments ratified a treaty that year, pledging cooperation to end the slave trade. The U.S. government was concerned that to cooperate would be to condone impressment. The British Foreign Minister assured his counterpart that there was "much reason to hope that a satisfactory arrangement" could be made on this question. It never was, but by the 1850's his government had abandoned any claim of a right to impress mariners sailing under other flags.¹³

On 16 April 1856 the Declaration Respecting Maritime Law was signed in Paris. This agreement, formulated in furtherance of the treaty that ended the Crimean War, established that neutral goods are not subject to capture except when contraband of war. The humanitarian significance of this declaration was in the pronouncement that "Privateering is, and remains, abolished."¹⁴ Freeing the seas of commerce-driven combatants was a major step forward in protecting neutral and belligerent seamen from the excesses of war. The United States was not a party to the Declaration, but soon had another opportunity to contribute to the development of the law on maritime neutrals.

When the War of Secession began in 1861, President Lincoln declared a blockade on the ports of the rebelling states. It took years for the U.S. Navy to make it effective. But from the beginning blockade running merchant ships were captured; as their numbers grew so did disputes over the treatment of crew.

The schooner *Adeline* was captured in 1861 and the crew included three recalcitrant Englishmen. They admitted that they had run the blockade before. It was standard practice to release foreign blockade runners promptly, but one Commander Woodhull decided that there was no need to tolerate repeat offenders. He came up with a simple expedient.

He forced them to promise, under oath, that they would not "again embark in a like enterprise or interfere with the legitimate object of

¹³ Moore, John Bassett, *A Digest of International Law*, Government Printing Office, Washington, 1906, Vol. 2, pp. 999-1001.

¹⁴ See text in Schindler, Dietrich and Toman, Jiri, eds, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 788, "Declaration Respecting Maritime Law, (1856)".

the United States government in suppressing the rebellion".¹⁵ A protest from the British government followed and received prompt reply.

On advice of the Secretary of State, the Secretary of the Navy Department instructed the commander of the blockading squadron that there was no authority to make such demands on neutral merchant seamen. "It may be lawful to detain as witnesses such persons as may be found on board a vessel charged with a breach of the blockade, when their testimony may be indispensable to the administration of justice; but when captured in a neutral vessel, they can not be considered, and ought not to be treated, as prisoners of war. The three persons, therefore, who were conditionally released, are to be regarded as absolved from the obligation required of them. You will please communicate to the commanding officers in your squadron the principle herein stated, for their guidance".¹⁶

On occasion, exasperated U.S. authorities bent the rules, delaying release for long periods of time to take testimony or investigate a claim of foreign nationality.¹⁷ These practices strained diplomatic relations and the rules protecting neutrals, but the humanitarian obligations to those sailors were never in dispute.

The revolution in the law of land warfare that began with the Geneva Convention of 1864 spread to the law of war at sea with the 1868 draft articles for a maritime treaty. Humanitarian interests of all seamen were served during the Franco-Prussian War of 1870, when the traditional practice of holding belligerent merchant mariners as prisoners of war gave way to a policy requiring that they be set free.¹⁸ Not too long after, neutral mariners were for the first time, identified for protection in model rules.

In 1882 the Institute of International Law adopted draft regulations on prize law. These rules explicitly covered the detention and seizure of neutral as well as belligerent merchant ships. Clear humanitarian obligations were set forth. "The Captain of the captor vessel is responsible for the good treatment and entertainment of the persons found on board the vessel seized by the crew of the captor vessel and by the crew which mans the vessel seized; he should not permit even those

¹⁵ *Message of the President of the United States to the Two Houses of Congress*, Government Printing Office Washington, Ex. Doc. No. 1, 37th Congress, 3d Session, 1862, Vol. 1, p. 243.

¹⁶ *Official Records of the Union and Confederate Navies in the War of the Rebellion*, Government Printing Office, Washington, 1897, Series I, Vol. 6, p. 498.

¹⁷ Bernath, Stuart, *Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy*, University of California Press, Berkeley, 1970, pp. 142-143.

¹⁸ *Op. cit.*, note 4, p. 98.

persons who are prisoners of war to be employed at humiliating occupations".¹⁹ For many years, practice and doctrine were in agreement with this standard.

During the Spanish-American War of 1898 both governments required total restraint by their naval forces when visiting neutral merchant ships. The Spanish government ordered that boarding operations "be exercised with the greatest moderation by the belligerent, special care being taken to avoid causing the neutral any extortion, damage, or trouble that is not absolutely justifiable". Officers conducting these visits were also to "act without prejudice to the good faith of the neutral being visited, and without losing sight of the consideration and respect that nations owe to one another".²⁰

American naval officers were also under clear instructions on the treatment of neutrals caught attempting to break through their blockade. "The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration. Any of the officers or crew, however, whose testimony before the prize court may be desired, should be detained as witnesses".²¹

During the Russo-Japanese War of 1904 the crews of some neutral vessels had harrowing encounters with the Russian Navy. The rule that detained ships went to port was sometimes replaced with a new practice: they were sunk. Some mariners had to scramble off in lifeboats as fighting vessels moved in to destroy their ships.²² The Japanese complained of this, but warning the mariners did receive and evacuation they did get. This turn of events took merchant seamen halfway into twentieth century warfare. In a few years they finished that journey. First, there were important legal developments.

The rules of maritime warfare were revised by the Hague Conventions of 1907. Hague Convention XI stipulated that when enemy merchant ships were captured, those crew members who were neutral nationals were not to be taken as prisoners of war. Officers were to be granted the same protection if they promised in writing not to serve on an enemy ship. Similar protections were accorded to merchant crews

¹⁹ Scott, James Brown, ed., *Resolutions of the Institute of International Law*, Oxford University Press, New York, 1916, pp. 46, 56.

²⁰ *Papers Relating to the Foreign Relations of the United States 1898*, Kraus Reprint Corporation, New York, 1968. pp. 777-778.

²¹ *Ibid*, p. 781.

²² Takahashi, Sakuye, *International Law Applied to the Russo-Japanese War*, (American editor), The Banks law Publishing Co., New York, 1908, pp. 317-330.

of belligerent states.²³ Other rules for the protection of neutrals soon followed.

The London Naval Conference of 1909 produced a declaration on the laws of naval war. One of its rules required that all crew on board neutral vessels had to be placed in safety before the ships could be destroyed.²⁴ Although the declaration was never ratified, it was influential in the policies of maritime states.

The German Prize Ordinance of 1909 prescribed the unconditional release of the crew when a neutral ship was captured for carrying contraband, or for breach of blockade. Japanese regulations of 1914 also instructed that crew on captured neutral vessels were not to be made prisoners of war. If needed as witnesses, they could be detained for that purpose.²⁵ Unfortunately, neutral mariners soon discovered, along with soldiers and civilians of belligerent states, that the technology of modern war overwhelmed the legal regimes that had taken so long to build. The twentieth century was to be very dangerous for neutrals at sea.

III. DISTINCTIONS BETWEEN MARINERS VANISH, 1914-1945

In the early months of World War I Germany sent out commerce raiding ships that distinguished between their targets by traditional visit and search. Even when ships were determined to be of enemy nationality, crew were evacuated before the vessels were destroyed. By the end of 1914 these raiders had been sunk by the British. Germany began to rely on newer maritime technology.

On 20 October 1914, the British steamer *S.S. Glitra* was stopped by a U-boat. In a model demonstration of compliance with the rules of war, the crew were allowed to evacuate. The sea cocks were then opened and the ship sunk.²⁶ No lives were lost and little attention was paid to the incident.

²³ *Op. cit.*, note 14, p. 821, Hague Convention XI of 1907, Arts. 5,6.

²⁴ *Op. cit.* note 14, p. 852, Declaration Concerning the Laws of Naval War, Art. 50.

²⁵ Hackworth, Green Haywood, *Digest of International Law*, U.S. Government Printing Office, Washington, 1943, Vol. 7, p. 247.

²⁶ Horne, Charles F., ed., *Source Records of the Great War*. U.S., s.: National Alumni, 1923, Vol. 3, p. 53.

It was soon discovered that the submarine was a vulnerable boat when it surfaced. Winston S. Churchill, then serving as First Lord of the Admiralty, moved with characteristic determination and began arming British merchant ships with guns to drive off U-boats.²⁷ Visit and search, followed by orderly evacuation and destruction of Allied merchant ships, was a short lived practice. German U-boats began to strike without warning from beneath the surface of the sea. Confirming the nationality of merchant ships through a periscope was not always possible, determining whether a neutral ship carried contraband goods was out of the question.

On 4 February 1915, the German government announced that “The waters round Great Britain and Ireland, including the English Channel, are hereby proclaimed a war region.” Commencing on 18 February 1915, all enemy merchant ships found in the region would be destroyed, and neutral merchant ships in the area might also be endangered because “attacks intended for hostile ships may affect neutral ships also”.²⁸ Danger came on schedule.

On 19 February 1915, the Norwegian oil steamer *Belridge* was torpedoed but managed to make port. Between then and the end of May three Norwegian and two Dutch merchant ships, and one American tanker were sunk by U-boats operating in the region. U-boats also sank merchant ships and fishing trawlers of belligerent states.²⁹ The traditional protection of visit and search was dying out for mariners of warring and neutral nations alike.

Under intense pressure, the German government yielded in 1916 and issued the following order to its naval forces. “In accordance with the general principles of visit and search and the destruction of merchant vessels, recognized by international law, such vessels, both within and without the area declared a naval war zone, shall not be sunk without warning and without saving human lives unless the ship attempts to escape or offer resistance”.³⁰ That policy was abandoned on 1 February 1917, when the German government gave notice that neutral ships would navigate in designated blockade zones at their own risk. This led to diplomatic crisis and, ultimately, the U.S. declaration of war on Germany. Post war efforts to build a new legal order included an attempt at restoring pre-1914 visit and search practices.

²⁷ Churchill, Winston S., *The World Crisis*, Charles Scribner’s Sons, New York, 1931, p. 749.

²⁸ *Op. cit.*, note 26, p. 56.

²⁹ *Op. cit.*, note 26, pp. 59-64.

³⁰ *Op. cit.*, note 26, vol.4 pp. 100-101.

At the Washington Naval Conference of 1921-1922, the British representative recommended a ban on submarines as “a weapon of murder and piracy”. Other representatives also opined that German submarine operations in World War I had violated international law. However, there was no agreement to abolish this weapon.³¹ The London Naval Treaty of 1930 required that “submarines must conform to the rules of International Law to which surface vessels are subject.” The treaty was terminated in 1936, but that requirement was kept alive by a Proces-Verbal.³²

Neutral shipping was quickly targeted in World War II. In late September 1939 Hitler authorized the unconditional sinking of enemy merchant ships.³³ Before the end of the year neutral shipping was added to the target list. All vessels except those of Italy, Japan, Spain and Russia could be sunk within designated zones.³⁴ By late 1941, all major maritime states were at war. During that brief period when there were neutral maritime powers, they had no safe passage on the high seas.

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea was signed on 12 August 1949. It updated the humanitarian protection accorded to members of belligerent naval forces and merchant crews during armed conflict. As neutral mariners are not such persons, the Geneva Conventions of 1949 do not clearly protect them.³⁵ A recent conflict proved that military hazards still wait for them at sea.

IV. OTHER NEUTRALS BEGIN SHARING THE MARINERS' RISKS, 1984-1991

In the years after World War II death did not come for neutral mariners from beneath the waves. In the 1980s it returned — this time

³¹ Mallison, Sally V., and Mallison, W. Thomas, “Naval Targeting: Lawful Objects of Attack.” *International Law Studies 1991: The Law of Naval Operations*. Ed. Robertson, Jr., Horace B., Naval War College Press, Newport, vol. 64, p. 246.

³² *Ibid.*, p. 247.

³³ Morison, Samuel Eliot, *History of United States Naval Operations in World War Two*. Little, Brown and Company, Boston, 1975, Vol. 1, p. 9.

³⁴ *Ibid.*, pp. 9-10.

³⁵ See Article 2 common to the four Geneva Conventions of 1949, which stipulates that each Convention shall apply “to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties...”. Nothing is said about application to situations involving neutrals.

from the surface and the air. Between 1984 and 1988, attacks on neutral merchant shipping were relentless during the Iran-Iraq conflict.

During military operations in the Gulf that have come to be known as the Tanker War, there were at least 325 hits on ships flying 35 neutral flags, and at least 123 deaths among neutral merchant seamen.³⁶ The assaults were made by jets, helicopters, and gunboats. Mines were another threat. It has been asserted that some attacks had as their purpose the killing of merchant seamen.³⁷

Neutral mariners still need protection. One may view them as an anomaly in that they are targets of deliberate attack in time of war, but not protected by the express terms of the Geneva Conventions of 1949. In an increasingly mobile world, they should be recognized as the first of many neutrals who will, from this time on, need protection because of their presence during the armed conflicts of other nations. In the months leading up to the Gulf War of 1991 there was a major international crisis because of foreign guest workers trapped in, and fleeing from, the scene of impending conflict. With increasing numbers of labourers, managers, civil servants, students, professionals, scholars and tourists combing the globe, the chances of repeated crisis are high. Many have a potential stake in the protection of neutrals during armed conflict.

V. NEUTRAL MARINERS: STATUS AND IMPLICATIONS

The legal status of neutral mariners in armed conflict is well stated by the US Navy. In its Commander's Handbook on the Law of Naval Operations is found the following guidance: "The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft which have assumed the character of enemy merchant vessels or aircraft by operating under enemy control or resisting visit and search".³⁸ This guidance is consistent with customary precedent and the

³⁶ Intertanko, *Iran/Iraq Conflict 1984/1988. The Tanker War — No End?* 3rd Edition, International Association of Independent Tanker Owners, Norway, 1988. pp. 42-43.

³⁷ *Ibid.*, pp. 23-25.

³⁸ *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A), FMFM 1-10, para. 7.9.2., Reprinted in Robertson, Horace B., ed., *International Law Studies 1991: The Law of Naval Operations*, Vol. 64, Naval War College Press, Newport, pp. 472-473.

Hague Rules of 1907. As in much of international humanitarian law, the practice of nations is not always commensurate with their obligations.

Varied sources of law exist to protect neutral mariners.

1. Customary rules as found in court opinions, military manuals and practice, and model codes.

2. Conventions which apply by inference. Although specific references to neutral mariners are sparse, the protections of the Hague and Geneva conventions apply when neutral merchant seamen appear to become belligerents. This principle was established in the Hague Convention V of 1907 Respecting the Rights and Duties of Neutral Powers and Persons In Case of War on Land. In a rare legal reference to the protection of neutrals in land warfare, it is provided that a neutral “shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent state could be for the same act”.³⁹

3. The customary obligation to rescue and repatriate shipwrecked sailors is an ancient one. In modern times it has been set out in the Geneva Convention on the High Seas of 1958 and the U.N. Convention on the Law of the Sea of 1982. Both mandate assistance to anyone found in danger at sea, the rescue of persons in distress and, after collision, the rendering of assistance to other ships and crews.⁴⁰ If a merchant vessel is attacked, the crew cannot then be left to their own devices. If not aided and protected under the rules for belligerents, they must be aided and protected under the peacetime rules of the high seas.

The determination of governments to protect their mariners may, indirectly, be responsible for their neglected status in international humanitarian law. By implication, to urge measures for their wartime protection is to acknowledge that they might be attacked. Governments do not send such signals. In the months before the Gulf War of 1991, governments were reluctant to assert that the Geneva Conventions were applicable to detainees because that would have implied an existing state of armed conflict.

³⁹ *Op. cit.*, note 14, p. 945. Hague Convention V of 1907, Art. 17.

⁴⁰ U.N. Convention on the Law of the Sea, Art. 98, and Geneva Convention on the High Seas, Art. 12.

Steps can be taken to strengthen protections for neutral mariners:

1. Efforts should be made to ensure that the doctrine and practice of all navies are consistent with their humanitarian obligations.

2. Nations which may undertake action against neutral merchant shipping must recognize their obligation to apply, at a minimum, the same humanitarian protection accorded to belligerents in like circumstances. Concern about political consequences will be removed if other governments declare that they recognize the humanitarian purpose and will not consider such application to be, in itself, a declaration of hostility toward the neutral state.

3. In any future negotiations to update the law of naval warfare, provision should be made for the protection of neutral merchant seamen who are attacked or detained by belligerents. A brief provision, such as the following, would embrace generations of custom: *“During all military operations conducted in furtherance of blockades and maritime trade restrictions relating to armed conflict, the enforcing authorities shall, as a minimum, accord non-combatant crew members and passengers of non-belligerent and neutral civilian vessels, who are engaged in lawful maritime activities, the full protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and the Geneva Convention Relative to the Protection of Civilian Persons in time of War”*.

Fundamental principles derive from the customary law relating to neutral mariners in armed conflict. Non-combatant neutrals endangered in the course of military operations are entitled to the full protection of international humanitarian law. If detained, such persons are entitled to prompt repatriation. Neutrals owe no duty of loyalty to a belligerent state, and cannot be punished because their acts happen to aid one side or the other in an armed conflict. If their acts are those of a belligerent, they have a right to the same protection as a belligerent national in like circumstances.

In defining categories of persons entitled to protection under international humanitarian law, the thorniest legal issue of our century has been the sorting of lawful from unlawful combatants in conventional and guerrilla units. In the twenty-first century, the great challenge may be in the sorting and protection of neutral and non-neutral civilians. Neutral rights and the treatment of neutral mariners have been issues that led nations to war. That should be motive enough for governments to address those questions before such crises begin. In the meantime, the experience of the neutral mariner has shaped a body of customary

international law. It provides guidance for their protection and that of other neutrals who are present in places of conflict.

The centenary of Columbus' voyage has provoked many responses. Something is overlooked in the debate. That small part of the human race which has made its livelihood at sea has had a disproportionate impact on history. These mariners have established contacts among civilizations, opened pathways for migration, made possible the exchange of goods and knowledge, pushed forward international law. To review the story of neutral mariners and humanitarian law is to reaffirm this. The mariner's experience affects us all.

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