

XIII

The Status of Belligerent Personnel “Splashed” and Rescued by a Neutral in the Persian Gulf Area

*31 Virginia Journal of International Law 611 (1991)**

When a neutral country such as the United States has a rather sizeable naval force in a confined area for the protection of vessels flying its flag, it is inevitable that components of that force will, at times, find themselves in armed confrontation with ships and military aircraft of belligerents in that area. In the Iran-Iraq war, ships and military aircraft frequently attacked the tankers that the U.S. Navy had been sent to the Persian Gulf to protect, or even attacked components of the U.S. Navy itself. There are several discrete examples of just such confrontations.

On August 10, 1987, a U.S. Navy fighter plane fired two missiles at an Iranian plane which had violated the “bubble” announced by the Navy as a measure of self-protection.¹ And on August 25, 1987, a U.S. destroyer fired across the bows of two small unidentified vessels which were approaching the tankers that the destroyer was escorting.² On April, 18, 1988, in retaliation for the damaging of an American warship, United States armed forces attacked and destroyed two Iranian oil platforms (which were also used as anti-aircraft platforms) and U.S. naval vessels engaged in a subsequent encounter with Iranian vessels, all of which resulted in heavy Iranian casualties. However, as the individuals on the platforms were given warning of the attacks which were about to take place, and Iranian tugboats were permitted to engage in rescue work without impediment by the U.S. forces, no Iranians were rescued from the sea by the latter.³

The first two incidents terminated with no damages, no casualties and no individuals in custody. The third incident terminated with both Iranian casualties and “splashed” personnel, but again with no individuals in custody. The question these examples pose concerns the status of the members of the crews of such ships or aircraft when they are disabled, sunk or shot down by the U.S. forces

* This article is a revision of remarks delivered at the 82nd Annual Meeting of the American Society of International Law Panel on Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War, 23 April 1988. See Levie, *Remarks*, 82 PROC. AM. SOC'Y INT'L L. 597 (1988).

while they are engaged in such attacks, or while they are committing other illegal acts against U.S. flagged merchant shipping, or warships, or planes, and when they are thereafter rescued from the sea by those forces. I refer to “ships” rather than “warships” because there exists a considerable question regarding the status of some of the Iranian warships involved.

Article 14 of the 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea states that it does not apply to “ships at war.” However, article 11(1) of the same Convention provides that:

Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, *even though an enemy*, found at sea in danger of being lost.⁴

This humanitarian rule should be and in fact was complied with by the U.S. naval forces in the Persian Gulf. For example, an Iraqi pilot whose plane had been shot down by the Iranians was rescued from the sea by a component of the U.S. naval forces. Shortly thereafter he was turned over to the Iraqi authorities. On the night of September 21–22, 1987, an Iranian vessel, later identified as the *Iran Ajr*, was observed by a U.S. Army helicopter equipped with night-vision sensors to be laying mines in the Gulf in the vicinity of U.S. naval vessels and an anchorage used by them and the tankers they were there to protect. When the minelayer disregarded the radio orders of the helicopter to discontinue its minelaying activity, the helicopter opened fire on the Iranian vessel and rendered it dead in the water.⁵ Twenty-six Iranian seamen and three bodies were subsequently rescued from the sea by a component of the U.S. naval forces.⁶ Similarly, on October 8, 1987, when a U.S. helicopter flying over the waters of the Persian Gulf was fired upon by a gunboat, it returned the fire. Four wounded Iranians and the bodies of two others were recovered from the sea by a component of the U.S. naval forces.⁷ Were the individuals who were rescued after these incidents prisoners of war? While the question is moot at the moment as all of the individuals were quickly repatriated through the agency of the government of Oman, it is one which may require a hard decision at some time in the future.⁸

Common article 2 of the 1949 Geneva Conventions Relative to the Treatment of War Victims is the article concerned with the circumstances under which those Conventions are to be applied.⁹ It provides that:

[T]he present Convention shall apply in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.¹⁰

A number of years ago the International Committee of the Red Cross (ICRC) produced lengthy, and what have subsequently become authoritative, commentaries with respect to each of the four 1949 Geneva Conventions. Each of these commentaries contains a substantially identical statement with respect to common article 2. The pertinent portions of the Commentary on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War state that:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, *the fact that persons covered by the Convention are detained is sufficient for its application.* The number of persons captured in such circumstances is, of course, immaterial.¹¹

This will be an acceptable interpretation of the provisions of common article 2 in the great majority of cases. However, in some respects, and under some circumstances, it may be too all-encompassing. When Major Arthur D. Nicholson of the United States Army was shot and killed by a Russian soldier in the Potsdam area on March 25, 1985, and his sergeant-driver was held prisoner at gunpoint for a number of hours, he certainly constituted a person “covered by the Convention” who was “detained.”¹² But was there an “armed conflict” between the Soviet Union and the United States? Were the provisions of the Prisoner-of-War Convention applicable to the sergeant? When Lieutenant Robert O. Goodman of the United States Navy was shot down by the Syrian Army on December 4, 1983, and was taken into custody by the Syrians and held for one month before being released, once again there was certainly a person “covered by the Convention” who was “detained.”¹³ But was there an “armed conflict” between Syria and the United States? Were the provisions of the Prisoner-of-War Convention applicable to the lieutenant? The original announcements made by both U.S. officials and the Syrians appeared to assume that he was a prisoner-of-war.¹⁴ However, the United States appeared to have changed its position. President Reagan later stated: “I don’t know how you have a prisoner of war when there is no declared war between nations. I don’t think that makes you eligible for the Geneva Accords.”¹⁵

Although an isolated incident of the use of force between two nations may be considered by one or both of them to be indicative of the existence of an armed conflict between them, usually the nations involved will wish to keep their options open and will not consider that such an incident has initiated an

armed conflict—unless the very purpose of the incident was to serve as a basis for such a claim.¹⁶

The first question to be decided, then, is whether there is an armed conflict between the parties. The ICRC takes the position that such incidents as those which occurred in the Persian Gulf in September and October 1987 constitute armed conflict and bring the Convention into play.¹⁷ I do not agree with that conclusion. But even assuming *arguendo* that the ICRC position is correct, this alone will not always solve the problem.

Article 4 of the 1949 Geneva Prisoner-of-War Convention specifies the categories of persons who are entitled to the status of prisoners of war. First among these categories are “[m]embers of the armed forces of a Party to the conflict as well as militias or volunteer corps forming part of such armed forces.”¹⁸ The Iranians who were recovered from the sea by the U.S. Navy on September 22, 1987, were apparently members of the Iranian navy and the vessel was an Iranian warship.¹⁹ If there was an armed conflict and if the Prisoner-of-War Convention was applicable, they would unquestionably come within the coverage of the quoted provision and would be entitled to the protection afforded by the Convention.

Suppose, however, that they had been members of the “Revolutionary Guards”—the individuals who appear to compose the crews of the so-called “gunboats” which attack any and every ship found in the Persian Gulf, without regard to the flag that it flies or the cargo that it carries.²⁰ Do such individuals fall within the category of persons entitled to prisoner-of-war status when they are rescued by U.S. naval forces from the waters of the Persian Gulf into which they have been precipitated by action of those same armed forces? Or are they illegal combatants who are not entitled to the benefits of that status? While we really know very little about the organization of the Revolutionary Guards, it would appear that they are, at a minimum, members of a militia or volunteer corps forming part of the Iranian armed forces. Under these circumstances, and under the ICRC interpretation of the Convention provision, they, too, are entitled to the status of prisoners of war if they fall into the hands of another power during a period of armed conflict. It is very possible that they have been guilty of violations of international law inasmuch as they have, without warning, attacked unarmed, neutral vessels. But this does not affect their entitlement to prisoner-of-war status. It only means that they could be subjected to trial and punishment for their illegal acts—an unlikely event.

My conclusion, then, is that occasional incidents do not constitute a state of war, or even of armed conflict, if there is a difference, between the United States and Iran or Iraq. Therefore, none of the Iranians who have been, or who are likely to be, “splashed” and rescued by United States forces in the Persian Gulf have been, or will be, entitled to prisoner-of-war status. It must be borne in

mind, however, that a decision that there is no armed conflict and that an individual is, therefore, not entitled to prisoner-of-war status only means that he is not entitled to the protection of all of the specific provisions of the 1949 Geneva Prisoner-of-War Convention. It does not mean that he is unreservedly at the mercy of the power in whose custody he finds himself. He is still entitled to all of the protection of general humanitarian law. For example, he must receive any necessary medical care, he may not be denied adequate food and water, he may not be tortured or otherwise maltreated, he may not be treated as a hostage, etc.

One final aspect of the problem is worthy of mention. It is not beyond the realm of possibility that some American military personnel serving in the Persian Gulf will, in the future, fall into the power of the Iranian regime. It will undoubtedly be recalled that the holding of hostages is not an unknown phenomenon to that regime. It is devoutly to be hoped that the precedent that the United States has established of immediate repatriation will contribute to making it politically inexpedient for Iran to hold such American personnel as hostages, as might otherwise have occurred.

Addendum

Even disregarding the perennial Arab-Israeli controversies, during the past decade international crisis has followed international crisis in the Middle East in general, and in the Persian Gulf in particular. Iran and Iraq fought a bloody war from 1980 to 1988, a war which necessitated the establishment of a naval presence in that area by half a dozen nations in order to protect neutral merchant shipping. During 1984, the mystery of the mines in the Red Sea posed grave difficulties for Egypt and its Suez Canal and necessitated a multilateral force to clear the mines from the sea. During the 1980s there was rarely a moment when the internecine conflict in Lebanon was not costing lives, with international interventions on a number of occasions.²¹ Then, on 2 August 1990, less than two years after the Iran-Iraq conflict had come to an inconclusive halt, Iraq, under Saddam Hussein, invaded, occupied, and annexed its neighbor, Kuwait, bringing down upon its head the wrath of the great majority of the members of the international community, including most of the fifteen members of the Security Council of the United Nations. Military forces from thirty nations concentrated in Saudi Arabia and when non-military actions such as economic blockades proved ineffective in inducing Saddam Hussein to recognize the error of his actions, the Security Council authorized Kuwait and its cooperating "coalition" states "to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions" if Iraq had not complied with the mentioned resolutions by 15 January 1991.²² This was, of

course, a euphemistic way of authorizing the use of armed force while avoiding the need for any unpalatable words.

Aerial bombardment began shortly after the deadline. Inevitably, coalition planes were shot down and crew members became prisoners of war of the Iraqis. In this instance there was no question with respect to the applicability of the 1949 Geneva Prisoner-of-War Convention.²³ Although Iraq became a party to this Convention in 1956, she paid as little attention to its provisions in this conflict as she had during the Iran-Iraq War.²⁴ In the other direction there was a fairly substantial number of Iraqis who elected to become prisoners of war rather than fight for Saddam Hussein. The ground war started late in February and within a matter of days the number of Iraqi prisoners of war in the custody of the members of the coalition reached the tens of thousands.²⁵ Delegates of the ICRC immediately began visiting these prisoners of war, a process which thereafter continued without interruption.

When Iraq capitulated and agreed to comply with the provisions of the previous Security Council resolutions, Security Council Resolution 686 (1991), set forth the requirements to be imposed on Iraq in order to warrant a cease fire. The resolution contained the following provision:

3. *Further demand that Iraq:*

(c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990). . . .²⁶

On March 6, 1991, Iraq released thirty-five prisoners of war, asserting that that was all she held.²⁷ Shortly thereafter the coalition commenced the incremental repatriation of the Iraqi prisoners of war who had expressed a desire for repatriation.²⁸ That process was to continue until all Iraqi prisoners of war who desired repatriation were back in Iraq.

Notes

1. N.Y. Times, Aug. 11, 1987, at A1, col. 6.
2. N.Y. Times, Aug. 25, 1987, at A1, col. 6.
3. N.Y. Times, April 19, 1988, at A1, col. 6.
4. 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, 37 Stat. 1658, 1672 (1910) (emphasis added).
5. N.Y. Times, Sept. 22, 1987, at A1, col. 6.
6. N.Y. Times, Sept. 23, 1987, at A1, col. 6.
7. N.Y. Times, Oct. 9, 1987, at A1, col. 6. Although it has not been possible to ascertain whether the individuals in this latter group were Iranian naval personnel or members of the so-called "Revolutionary Guards," they were probably the latter. When queried on this point at the time of the first incident, the Administration spokesperson stated that the United States did not consider this question to be important. N.Y. Times, Sept. 25, 1987, at A8, col. 6.

8. After the September repatriation had been accomplished, the ICRC, which had been an observer at the turnover, delivered a note to the United States authorities in which it was asserted that "such situations and their consequences fell within the scope of the Geneva Conventions." 27 *Int'l Rev. Red Cross* 650 (No. 261, November-December 1987).

9. See 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364, 75 U.N.T.S. 135, 136.

10. Of course, neither the United States nor Iran recognized the existence of a state of war between them. During the early 1950s, when the Netherlands and Indonesia were engaged in hostilities over what was then Dutch New Guinea, the Netherlands took the position that the Convention was not applicable because both countries chose to consider that a state of war did not exist. F. Kalshoven, *Constraints on the Waging of War* 27 (1987).

11. III Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War 23 (J. Pictet ed. 1960) (emphasis added). Concerning the problem that arises when neither side recognizes the existence of a state of war, the Commentary further states:

What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war? Even in that event it would not appear that they could, by tacit agreement, prevent the Convention from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.

12. *N.Y. Times*, Mar. 26, 1985, at A1, col. 6.

13. *N.Y. Times*, Jan. 8, 1984, § 4, at 1, col. 1.

14. *N.Y. Times*, Dec. 30, 1983, at A8, col. 1.

15. *N.Y. Times*, Dec. 21, 1983, at A22, col. 6. It should be noted that the President made a major error in each of these two short sentences. He erred by implying that a "declared war" was a prerequisite for bringing the Convention into effect. He further erred in referring to the "Geneva Accords," the title given to the agreements that ended the French war in Indochina in 1954, instead of to the "Geneva Prisoner-of-War Convention."

16. Typical of the latter type of incident was the "attack" on the German radio station by "Polish" troops which created the basis for Hitler going to war with Poland in 1939.

17. See *supra* note 8. A representative of the ICRC has informed the author that the note did not refer to the specific incident but was a general note sent to all countries having naval forces in the Persian Gulf.

18. See *supra* note 9; 6 U.S.T. at 3319, T.I.A.S. at 3364, 75 U.N.T.S. at 138.

19. Letter of President Reagan to Congress, 24 September 1987, 87 Dep't of State Bull. 44 (No. 2128, Nov. 1987).

20. This probably describes the Iranians involved in the October 1987 and the April 1988 incidents.

21. *L.A. Times*, Apr. 17, 1990, at A21, col. 1. Approximately forty thousand members of the Syrian Army have been in Lebanon for fifteen years and are still there.

22. U.N. Doc. S/RES/678 (1990), reprinted in 29 *I.L.M.* 1565 (1990).

23. See *supra* note 9.

24. After obvious physical maltreatment, Iraq presented several of the pilots on television, a violation of article 13 of the Convention. With respect to Iraqi (and Iranian) treatment of prisoners of war during their conflict, see *Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General*, U.N. Doc. S/16962, 22 February 1985, para. 51-158, 271-294.

25. *N.Y. Times*, Feb. 25, 1991, at A14, col. 1; *N.Y. Times*, Feb. 26, 1991, at A14, col. 1; *N.Y. Times*, Feb. 28, 1991, at A10, col. 1.

26. U. N. Doc. S/RES/686 (1991), reprinted in 30 *I.L.M.* 569 (1991).

27. *N.Y. Times*, Mar. 6, 1991, at A14, col. 5.

28. *Bulletin of the International Committee of the Red Cross*, April 1991, at 1, col. 2.