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Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective

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Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective

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The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of Defense, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

Between 1952 and 1960, the International Committee of the Red Cross (ICRC) embarked on a project to write a detailed commentary on each of the four 1949 Geneva Conventions, based primarily on the negotiating history of the Conventions and prior State practice. With the passage of time, the ICRC decided to update the commentaries to reflect State practice “in applying and interpreting the Conventions . . . during the decades since their adoption.”¹ By doing so, the ICRC would “ensure that the new editions reflect contemporary practice and legal interpretation.”²

The maritime landscape, both operationally and legally, has changed significantly since the first edition of the *Commentary* on the Second Geneva Convention (GCII) was published in 1960.³ ICRC experts believe that the wounded, sick, and shipwrecked can be better protected if the GCII rules are clearly understood in light of current operational realities. Accordingly, the intent of the updated *Commentary* is to reflect current State practice and provide “up-to-date legal interpretations based on the latest practice, case law, academic commentary and ICRC experience” to afford greater protection for combatants and civilians during armed conflicts at sea.⁴

One question left unanswered by the new *Commentary* is the relationship between international humanitarian law (IHL) and other international treaties applicable to the maritime domain, such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and treaties adopted under the auspices of the International Maritime Organization (IMO). Does the outbreak of hostilities terminate or suspend the applicability of these maritime conventions or do they remain in effect, in part or in their entirety,

1. *Introduction* to INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA ¶ 5 (2017) [hereinafter COMMENTARY ON THE SECOND GENEVA CONVENTION].

The ICRC published its *Commentary* on the First Geneva Convention in 2016. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD (2016).

2. *Introduction* to COMMENTARY ON THE SECOND GENEVA CONVENTION ¶ 5.

3. *See* Peter Maurer, *Foreword* to COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 1.

4. *Introduction* to COMMENTARY ON THE SECOND GENEVA CONVENTION ¶ 14.

during an armed conflict at sea? Do different rules apply between parties to the conflict and parties to the conflict and neutral powers? Are parties to the conflict and neutral powers nevertheless bound during an armed conflict at sea by the provisions of the maritime conventions that reflect customary international law? This article analyzes these questions in light of the 1969 Vienna Convention on the Law of Treaties, the International Law Commission's 2011 Draft Articles on the Effects of Armed Conflicts on Treaties, and U.S. State practice, focusing primarily on the duty to render assistance to mariners in distress at sea.

II. SECOND GENEVA CONVENTION

GCII establishes a legal framework for the humane treatment and protection of victims of armed conflict at sea. In this regard, Article 12 requires parties to the conflict to respect and protect, in all circumstances, members of the armed forces and other individuals falling within the scope of the Convention “who are at sea and who are wounded, sick or shipwrecked . . . without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.”⁵ Paramount to achieving this core objective of humane treatment, the parties to the conflict are required, after each engagement and without delay, to “take all possible measures to search for and collect the shipwrecked, wounded and sick,” without discriminating between their own and enemy personnel.⁶ This obligation has its origins in Article 16(1) of the Tenth 1907 Hague Convention, which provides that “after every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them . . . against pillage and ill-treatment.”⁷ The main difference between the 1907 and 1949 conventions is that the phrase “so far as military interests permit” was replaced with “take all possible measures,” thus applying the stricter requirement adopted for war on land to war at sea.

5. 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 [hereinafter GC II]. Individuals falling within the scope of the Convention are set forth in Article 13.

6. *Id.* art. 18; *see also* COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 1, art. 18, ¶ 1618.

7. Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention art. 16, Oct 18, 1907, 36 Stat. 2371, T.S. No. 543, *reprinted in* THE LAWS OF ARMED CONFLICTS 397 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Hague Convention No. X].

There may be circumstances, however, in which the belligerents do not have the capability or capacity to conduct adequate search and rescue operations after an engagement. In such cases, the 1949 Convention allows the parties to the conflict to facilitate and supplement their search and recovery efforts by appealing “to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.”⁸ A similar provision is found in Article 17(2) of Additional Protocol I, which provides “the Parties to the conflict may appeal to the civilian population and the aid societies . . . to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location.”⁹ This obligation was first included in Article 9 of the Tenth Hague Convention: “Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.”¹⁰

Article 21, Article 9’s counterpart in the 1949 Convention, clearly does not impose an obligation on the parties to the conflict to request assistance, stating, “the Parties . . . *may* appeal.”¹¹ Nonetheless, the 2017 *Commentary* takes the position that appealing to the charity of neutrals to provide assistance is not necessarily a discretionary function. In circumstances where it is not feasible for a belligerent warship engaged in a surface action to conduct a search and rescue operation, the ICRC believes that the parties to the conflict may be legally bound to notify nearby neutral coastal authorities, humanitarian organizations, or “vessels in the vicinity that there are shipwrecked, wounded, sick or dead in need of rescue or recovery, and appeal to their charity to take them on board and care for them.”¹² The ICRC’s position that this is not a discretionary function is understandable given the overarching obligation of the parties to the conflict in Article 18 to promptly collect and “ensure” the adequate care of the shipwrecked, wounded, and

8. Neutral vessels that respond to such an appeal or that have on their own accord provided assistance to wounded, sick, or shipwrecked persons, “shall enjoy special protection and facilities to carry out such assistance.” GC II, *supra* note 5, art. 21.

9. The belligerents “shall grant both protection and the necessary facilities to those who respond to this appeal.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 17, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

10. Hague Convention No. X, *supra* note 7, art. 9.

11. GC II, *supra* note 5, art. 21 (emphasis added).

12. COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 1, art. 18, ¶ 1637.

sick, as well as in the general purpose and intent of GCII to maximize protection for victims of armed conflict at sea. Nonetheless, the plain language of the Convention—“may appeal”—does not support this conclusion.

Similarly, it does not appear that GCII obliges a neutral to respond to the request for assistance given the language of Article 21, under which appeals are made to the “charity” of commanders of neutral vessels. However, the *Commentary* correctly states that this does not mean “that the response to an appeal . . . is necessarily left entirely to the commander’s discretion.”¹³ As discussed in the following Part, there are a number of non-IHL treaties that impose an obligation on States to come to the assistance of persons in danger of being lost at sea. To the extent these treaties have not been annulled by the concept of *lex specialis* and remain in effect during an armed conflict at sea, neutrals would arguably have a duty to provide the requested assistance, if feasible and consistent with their treaty obligations.

III. DUTY TO RENDER ASSISTANCE

Customary international law has long recognized the affirmative obligation of mariners to render assistance to persons in distress at sea to the extent they can do so without serious danger to their ship, crew, or passengers. This long-standing custom is codified in a number of international treaties adopted under the auspices of the IMO, as well as the 1958 Geneva Convention on the High Seas¹⁴ and the 1982 UNCLOS.¹⁵ Moreover, there is nothing in IHL that precludes neutrals from providing such assistance. On the contrary, Article 17(1) of Additional Protocol I specifically provides that the “civilian population and aid societies . . . shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas.”¹⁶ Moreover, “no one shall be harmed, prosecuted, convicted or punished for such humanitarian acts,”¹⁷ which would suggest that the customary duty to render assistance remains in force during an armed conflict.

13. *Id.* art. 21, ¶ 1872.

14. Convention on the High Seas art. 12, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5639, 450 U.N.T.S. 82.

15. United Nations Convention on the Law of the Sea art. 98, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

16. AP I, *supra* note 9, art. 17.

17. *Id.*

A. International Maritime Organization Treaties

The duty to render assistance first appeared in the 1910 Salvage Convention,¹⁸ almost forty years before the IMO was formally established.¹⁹ The obligation is codified in Article 11, which 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.”²⁰ The Convention explicitly does not apply to warships or other “Government ships appropriated exclusively to a public service.”²¹ However, given that the obligation extends to anyone in distress, “even though an enemy,” the duty to render assistance under the Salvage Convention applies both in times of peace and during an armed conflict.

An obligation to render assistance, as well as establish search and rescue services, is also contained in the International Convention of the Safety of Life at Sea (SOLAS).²² Regulation V/7 requires States to “undertake to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts.”²³ Regulation V/33 further requires that masters of ships at sea—which are in a position to be able to provide assistance—on receiving a signal from any source that persons are in distress at sea, “proceed with all speed to their assistance.”²⁴ If the ship receiving the request is unable or considers it unreasonable or unnecessary to provide assistance, “the master must enter in the log-book the reason for failing to

18. Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, T.S. No. 576 [hereinafter 1910 Salvage Convention].

19. The IMO was not established until 1948. Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 3. The organization’s name was later simplified to the International Maritime Organization as it is now known.

20. 1910 Salvage Convention, *supra* note 18, art. 11.

21. *Id.* art. 14.

22. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2.

23. “These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.” *Id.* annex, ch. V, reg. 7.

24. *Id.* annex, ch. V, reg. 33, ¶ 1.

proceed to the assistance of the persons in distress . . . [and] inform the appropriate search and rescue service accordingly.”²⁵ Regulation V/33 additionally authorizes the relevant search and rescue service to

requisition . . . ships as the . . . search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.²⁶

Like the 1910 Salvage Convention, SOLAS Regulation V/1 also exempts warships, naval auxiliaries, and other ships owner or operated by a State and used only on government non-commercial service from its application. Nonetheless, warships and other government vessels “are encouraged to act in a manner consistent, so far as reasonable and practicable, with . . . chapter [V].”²⁷ As discussed in Part VI below, U.S. State practice is to apply the duty to render assistance to its warships and other non-commercial government-owned or operated vessels.²⁸

The 1979 Search and Rescue Convention²⁹ contains similar provisions regarding the establishment of search and rescue services and the duty to render assistance to persons in distress at sea. Chapter 2 of the Convention’s annex requires the parties to make the “necessary arrangements . . . for the provision of adequate search and rescue services for persons in distress at sea round their coasts.”³⁰ If a party receives information that a person is in distress at sea in its search and rescue region, “the responsible authorities . . . shall take urgent steps to provide the most appropriate assistance available.”³¹ Additionally, any unit that receives information of a distress incident shall take “immediate action to assist as is within its capability or shall alert other units which might be able to assist, and shall notify the rescue co-ordination centre or rescue sub-centre in whose area the incident has occurred.”³²

25. *Id.*

26. *Id.* ¶ 2.

27. *Id.* annex, ch. V, reg. 1, ¶ 1.

28. *See supra* Part VI.

29. International Convention on Maritime Search and Rescue, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97.

30. *Id.* annex, ch. 2, ¶ 2.1.1.

31. *Id.* ¶ 2.1.9.

32. *Id.* annex, ch. 5, ¶ 5.9.1.

Chapter 3 of the annex further requires the parties to coordinate their search and rescue operations with neighboring States,³³ and encourages parties to allow their rescue coordination centers to provide assistance, when requested, “to other rescue coordination centers, including assistance in the form of vessels, aircraft, personnel or equipment.”³⁴ Moreover, assistance shall be provided “regardless of the nationality or status of such a person or the circumstances in which that person is found,” which suggests that the obligation applies in times of peace, as well as during an armed conflict at sea.³⁵ This conclusion is further supported by Article II of the Convention, which provides that “no provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments.”³⁶

Finally, Article 10 of the 1989 Salvage Convention imposes a duty on every master, “so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.”³⁷ The Convention further requires the parties to cooperate in matters related to salvage “in order to ensure efficient and successful performance of salvage operations for the purpose of saving life or property in danger.”³⁸ Like the 1910 Salvage Convention, the requirements of the 1989 Convention do “not apply to warships or other non-commercial vessels owned or operated by a State and entitled . . . to sovereign immunity under generally recognized principles of international law unless that State decides otherwise,” in which case the party shall notify the Secretary-General, specifying the terms and conditions of such application to its sovereign immune vessels.³⁹ State parties are additionally required to adopt measures necessary to enforce the duty to render assistance.⁴⁰

B. Other International Agreements

Apart from the aforementioned IMO instruments, the 1958 High Seas Convention, UNCLOS, and the 1944 Chicago Convention also impose a duty to

33. *Id.* annex, ch. 3, ¶ 3.1.1.

34. *Id.* ¶ 3.1.7.

35. *Id.* annex, ch. 2, ¶ 2.1.10.

36. *Id.* art. II(2).

37. International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 165.

38. *Id.* art. 11.

39. *Id.* art. 4.

40. *Id.* art. 10(2).

render assistance to persons in distress at sea. Article 12 of the High Seas Convention provides:

1. Every State shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) To render assistance to any person found at sea in danger of being lost;
 - (b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him.⁴¹

The duty is not, however, absolute. The master is only required to act when doing so would not place the ship or its crew and passengers in “serious danger.”⁴² Article 12 further requires coastal States to “promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and—where circumstances so require—by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”⁴³

A nearly identical requirement, with the same limiting language, is found in Article 98 of UNCLOS:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.⁴⁴

UNCLOS additionally makes clear that nothing in the Convention is intended to “alter the rights and obligations of States Parties which arise from

41. Convention on the High Seas, *supra* note 14, art. 12.

42. *Id.*

43. *Id.*

44. UNCLOS, *supra* note 15, art. 98.

other agreements compatible with . . . [UNCLOS] and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under . . . [UNCLOS].”⁴⁵ Arguably, the duty to search for casualties after an engagement imposed by Article 18 of GCII is consistent with the duty to render assistance under Article 98.

States parties to the Chicago Convention⁴⁶ are similarly required to devote aviation assets to provide prompt search and rescue services. If a pilot-in-command observes

another aircraft or a surface craft . . . in distress, the pilot shall, if possible and unless considered unreasonable or unnecessary . . . keep the craft in distress in sight until compelled to leave the scene or advised by the rescue coordination centre that it is no longer necessary. . . .⁴⁷

Moreover, upon receipt of information concerning an emergency, rescue coordination centers shall “evaluate such information and assess the extent of the operation required.”⁴⁸ The obligation to conduct search and rescue operations continues “when practicable, until all survivors are delivered to a place of safety or until all reasonable hope of rescuing survivors has passed.”⁴⁹

Like the IMO instruments, Annex 12 to the Convention also requires contracting States to “individually or in cooperation with other States, arrange for the establishment and prompt provision of search and rescue services within their territories to ensure that assistance is rendered to persons in distress.”⁵⁰ This assistance shall be provided to aircraft in distress and to survivors of aircraft accidents “regardless of the nationality or status of such persons or the circumstances in which such persons are found,”⁵¹ which again suggests that the obligations of the Chicago Convention remain in force during an armed conflict.

45. *Id.* art. 311.

46. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

47. International Civil Aviation Organization, Search and Rescue, Annex 12 to the Convention on Civil Aviation ch. 5, ¶ 5.6.2.a (2004).

48. *Id.* ¶ 5.1.2.

49. *Id.* ¶ 5.5.1.

50. *Id.* ch. 2, ¶ 2.1.1.

51. *Id.* ¶ 2.1.2.

IV. VIENNA CONVENTION ON THE LAW OF TREATIES

Rules of treaty interpretation are set out in the Vienna Convention on the Law of Treaties (VCLT).⁵² Article 31 provides the general rule: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵³ A treaty may only be terminated or suspended “as a result of the application of the provisions of the treaty or of the . . . [VCLT].”⁵⁴ Of note, none of the treaties imposing the duty to render assistance contains an express provision providing for their suspension or termination during an armed conflict.

If the provisions of the treaty are unclear or its interpretation “leads to a result that is “manifestly absurd or unreasonable,” then “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31. . . .”⁵⁵ Given the humanitarian nature of the duty to render assistance contained in the various maritime conventions, which is akin to the obligation to search for casualties imposed by Article 18 of GCII, an interpretation that these conventions automatically terminate or are suspended at the outbreak of an armed conflict would appear to be “manifestly absurd and unreasonable.”

The VCLT also cautions that

the invalidity [or] termination . . . of a treaty . . . or the suspension of its operation . . . shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.⁵⁶

Here, the most obvious example is customary international law obligations. Most States and legal scholars would agree that the duty to render assistance is a long-standing customary international law norm.

52. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

53. *Id.* art. 31(1).

54. *Id.* art. 42(2).

55. *Id.* art. 32.

56. *Id.* art. 43. Furthermore, Article 73 states the provisions of the VCLT do “not prejudice any question that may arise in regard to a treaty from . . . the international responsibility of a State or from the outbreak of hostilities between States.” *Id.* at art. 73.

V. DRAFT ARTICLES ON THE EFFECTS OF ARMED CONFLICT ON
TREATIES

As stated in Article 73, one issue left unanswered by the VCLT is the effect of armed conflict on State obligations under existing treaties. Consequently, in 2000 the International Law Commission (ILC) identified this gap as a topic for its long-term work program. Between 2005 and 2008, the ILC discussed the issue and in 2008 adopted on first reading a set of eighteen draft articles and an annex, along with commentaries. These draft articles and annex were submitted to governments for comment and observations through the U.N. Secretary-General. In 2010, the special rapporteur submitted his proposed amendments to the draft articles to the ILC, taking into account the comments and observations of governments. The following year, after discussing the special rapporteur's report, the ILC adopted the draft articles and annex, with commentaries, and transmitted them to the U.N. General Assembly with a recommendation to take note of the draft and to consider the possibility of concluding a treaty on the subject at a later date. The General Assembly accepted the ILC's recommendation in Resolution 66/99 on December 9, 2011,⁵⁷ and subsequently decided to return to the issue in 2017 with a view to examining the form to be given to the draft articles and inviting governments to comment on any future action regarding them.⁵⁸

Consistent with paragraph 48 of the *GCII Commentary*, Article 3 of the draft ILC articles reflects the contemporary international law principle that “the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between (a) States parties to the conflict [or] (b) a State party to the conflict and a State that is not.”⁵⁹ An armed conflict may, therefore, affect the obligations of parties to a preexisting treaty in different ways, depending on whether they are a belligerent or a neutral. Article 3 “establishes the general principle of legal stability and continuity,”⁶⁰ reflected in the 1985 resolution of the Institute of International Law (IIL) on the Effects

57. G.A. Res. 66/99, Effects of Armed Conflict on Treaties (Dec. 9, 2012).

58. G.A. Res. 69/125, Effects of Armed Conflict on Treaties (Dec. 10, 2014).

59. Effects of Armed Conflicts on Treaties, in *Report of the International Law Commission to the General Assembly*, 66 U.N. GAOR Supp. No. 10, at 173, art.3, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 Y.B. Int'l. Comm'n (forthcoming) [hereinafter Draft ILC Articles].

60. *Id.* art. 3, cmt. ¶ 1.

of Armed Conflict on Treaties,⁶¹ as well as contemporary domestic case law.⁶²

Article 2 of the 1985 IIL resolution provides that “the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.”⁶³ The same principle applies to neutrals pursuant to Article 5—“the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of bilateral treaties in force between a party to that conflict and third States.”⁶⁴ Similarly, “the outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict.”⁶⁵ Articles 3 and 4 further clarify that “the outbreak of an armed conflict renders operative, in accordance with their own provisions, between the parties treaties . . . which by reason of their nature or purpose are to be regarded as operative during an armed conflict,”⁶⁶ and that “the existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless treaty otherwise provides.”⁶⁷ None of the aforementioned treaties that impose the humanitarian obligation to render assistance to persons in distress at sea contains a provision that would allow for their termination or suspension in the event of an armed conflict.

Articles 4 through 7 of the draft ILC articles provide guidance to assist in the analysis of whether a treaty remains in effect (partially or entirely) during an armed conflict. The first question is whether the treaty contains a provision “on its operation in situations of armed conflict,” if so, those provisions apply.⁶⁸ As previously indicated, none of the relevant conventions contains such a provision.

Absent an express provision, the next step is to apply the rules of treaty interpretation contained in the VCLT.⁶⁹ As discussed in Part IV, none of the treaties imposing the duty to render assistance contains an express provision

61. Institute of International Law, *The Effects of Armed Conflict on Treaties* (1985), http://www.idi-iil.org/app/uploads/2017/06/1985_hel_03_en.pdf.

62. *See* Part VI.

63. Institute of International Law, *supra* note 61, at art. 3.

64. *Id.* art. 5.

65. *Id.*

66. *Id.* art. 3.

67. *Id.* art. 4.

68. Draft ILC Articles, *supra* note 59, art. 4.

69. *Id.* art. 5.

providing for their suspension or termination during an armed conflict. Moreover, any interpretation of these treaties that would suspend or terminate their application completely during an armed conflict would arguably be “manifestly absurd or unreasonable.”⁷⁰ Furthermore, a convincing argument can be made that the duty to render assistance is a customary norm of international law and, as provided in Article 43 of the VCLT, termination or suspension of a treaty does not abrogate the duty of States parties to fulfill their obligations embodied in the treaty to which they would be subject under international law independently of the treaty.⁷¹ Applying these general rules of treaty interpretation to the maritime conventions, it could be argued that they remain in force, at least, with respect to nations that are not parties to the armed conflict.

Nonetheless, if the VCLT’s rules of interpretation are not determinative, Article 6 of the draft ILC articles provides additional factors that can help decide whether a treaty terminates or is suspended in the event of an armed conflict. These factors include:

- (a) the nature of the treaty, its particular subject matter, its object and purpose, its content and the number of parties to treaty; and
- (b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.⁷²

There is widespread international adherence to all of the maritime treaties. The 1910 Salvage Convention has eighty States Parties,⁷³ while the 1989 Salvage Conventions has seventy States parties.⁷⁴ SOLAS and UNCLOS have 163⁷⁵ and 168⁷⁶ parties, respectively. Similarly, the Search and Rescue

70. *See supra* text accompanying note 55.

71. VCLT, *supra* note 52, art. 43.

72. Draft ILC Articles, *supra* note 59, art. 6(a)–(b).

73. COMITÉ MARITIME INTERNATIONAL, CMI YEARBOOK 2009, PART III: STATUS OF RATIFICATIONS TO MARITIME CONVENTIONS 432, 436–39 (2009), <http://www.comite-maritime.org/Uploads/pdf/CMI-SRMC.pdf>.

74. INTERNATIONAL MARITIME ORGANIZATION, STATUS OF IMO TREATIES 463 (2018), <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf>.

75. *Id.* at 16.

76. United Nations Treaty Collection, Depository: Law of the Sea, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

Convention has 111 States parties.⁷⁷ The object and purpose of these treaties, particularly the humanitarian duty to render assistance, is consistent with the humanitarian object and purpose of GCII to limit the suffering of victims of armed conflict at sea. These factors clearly weigh in favor of concluding that the treaties remain in force, at least in part, during an armed conflict.

Finally, the annex to the draft ILC articles provides a list of treaties that, based on their subject matter, exhibit a higher likelihood of continued applicability following the outbreak of an armed conflict.⁷⁸ One category that meets this criterion and therefore remains in effect during an armed conflict, whether all or only some of the contracting parties are belligerents, is multilateral law-making treaties.⁷⁹ Such treaties are defined as treaties that “create rules of international law for regulating the future conduct of the parties without creating an international regime, status, or system.”⁸⁰ A 1948 letter from the Legal Advisor to the State Department sets out the U.S. position regarding such treaties:

[N]on-political multilateral treaties to which the US was a party when the US became a belligerent in the war, and which . . . [the United States] has not since denounced in accordance with the terms thereof, are still in force in respect of the US and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realized that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.⁸¹

A similar position was expressed in the 1948 letter of an official of the British Foreign Office:

It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly

77. INTERNATIONAL MARITIME ORGANIZATION, *supra* note 73, at 415.

78. Draft ILC Articles, *supra* note 59, art. 7.

79. *Id.*, annex, ¶ (c), at 202.

80. *Id.*, annex, cmt. (15), at 202.

81. Letter from Ernest A. Gross, Legal Adviser, U.S. Department of State, to Richard Rank (Jan. 29, 1948), in Richard Rank, *Modern War and the Validity of Treaties*, 38 CORNELL LAW QUARTERLY 321, 343–44 (1953), reprinted in Draft ILC Articles, *supra* note 59, cmt. to annex, ¶ 17, at 202–03.

true in the case of conventions to which neutral Powers are parties. . . . Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfillment of multilateral conventions insofar as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. . . . As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated.⁸²

All of the maritime conventions that impose an obligation to render assistance to persons in distress at sea would appear to fall within the category of multilateral law-making treaties.

Moreover, consistent with Article 43 of the VCLT, Article 10 of the draft ILC articles provides that termination or suspension of a treaty as a result of an armed conflict "shall not impair in any way the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of that treaty."⁸³ This principle is consistent with the International Court of Justice opinion in the Nicaragua case: "The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."⁸⁴ The duty to render assistance to persons in distress at sea is widely recognized as a customary norm of international law. This duty remains in force during an armed conflict, subject to *lex specialis* considerations pertaining to the parties to the conflict.

VI. U.S. STATE PRACTICE

U.S. State practice, as reflected in domestic court opinions interpreting international law, U.S. law, federal regulations, and relevant military manuals

82. Letter from J. Mervyn Jones, British Foreign Office, to Richard Rank (Jan. 7, 1948), in Rank, *supra* note 81, at 346–47, reprinted in Draft ILC Articles, *supra* note 59, cmt. to annex, ¶ 18, at 203.

83. Draft ILC Articles, *supra* note 59, art. 10.

84. Military and Paramilitary Activities In and Against Nicaragua, Jurisdiction of the Court and Admissibility of the Application (Nicar. v. U.S.), Judgment, 1984 I.C.J. Rep. 392, ¶ 73 (Nov. 26).

support the position that the obligation to render assistance to persons in distress at sea remains in effect during an armed conflict.

A. Domestic Court Opinions

Since the earliest days of the republic, U.S. courts have taken the position that not all treaties terminate *ipso facto* at the outbreak of an armed conflict. For example, in 1823, the U.S. Supreme Court held:

[W]e are not inclined to admit the doctrine urged at the bar that treaties become extinguished *ipso facto* by war between the two governments unless they should be revived by an express or implied renewal on the return of peace. . . . There may be treaties of such a nature as to their object and import as that war will put an end to them, but where treaties contemplate a permanent arrangement of territorial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. . . . We think therefore that treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity and to deal with the case of war as well as of peace do not cease on the occurrence of war, but are, at most, only suspended while it lasts, and unless they are waived by the parties or new and repugnant stipulations are made, they revive in their operation at the return of peace.⁸⁵

While recognizing that there are divergent views on the effect of war upon treaties, the Supreme Court reached a similar conclusion in *Karnuth v. United States* (1929). In that case, the Court held:

The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority, and the view now commonly accepted is that whether the stipulations of a treaty are annulled by war depends upon their intrinsic character. But as to precisely what treaties fall and what survive under this designation, there is lack of accord.⁸⁶

85. *Society for the Propagation of the Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 494–95 (1823).

86. *Karnuth v. United States*, 279 U.S. 231, 236–37 (1929); *see also* *Techt v. Hughes*, 229 N.Y. 222, 240–43 (1920) (noting that Benjamin Cardozo, then Chief Justice of the Court of

Further, in 1947, the U.S. Supreme Court reaffirmed the principles articulated in the aforementioned cases in *Clark v. Allen*, stating:

We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. There may, of course, be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt v. Hughes*⁸⁷

These decisions reflect the contemporary international law view, stated in both the *GCII Commentary* and the draft ILC articles, that treaties are not extinguished *ipso facto* as a result of armed conflict. Treaties may terminate or be suspended if their execution is incompatible with armed conflict, such as treaties of a political nature. However, treaties that can reasonably be executed after the outbreak of hostilities remain in effect and must be observed. The treaties reflecting the duty to render assistance fall into the latter category.

B. U.S. Laws and Regulations

U.S. laws and regulations impose an obligation on masters and captains to render assistance to persons in distress at sea in times of peace and war. Consistent with Article 10 of the 1989 Salvage Convention, which calls on States parties to adopt measures necessary to enforce the duty to render assistance to persons in distress at sea, 46 U.S.C. § 2304 imposes a statutory obligation on ships' masters and individuals in charge of vessels to "render

Appeals of New York, and later U.S. Supreme Court Justice, provided a lengthy expose on this legal question).

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came. The writers of our own time reject these sweeping statements. International law today does not preserve treaties or annul them It deals with such problems pragmatically, preserving or annulling as the necessities of war exact.

Interestingly, although the Court of Appeals of New York heard *Techt* nearly a decade before the U.S. Supreme Court heard *Karnuth*, the two courts rendered similar opinions regarding the effects of war on existing treaties.

87. *Clark v. Allen*, 331 U.S. 503, 508–9 (1947) (citations omitted).

assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to . . . [their] vessel or individuals on board.”⁸⁸ Failure to comply with this obligation subjects a master or individual violating the law to a fine not exceeding \$1,000, two years imprisonment, or both.⁸⁹ Further, Australian law imposes a similar obligation on non-sovereign immune vessels, even with regard to persons of a foreign State at war with Australia.⁹⁰

The 46 U.S.C. § 2304 obligation specifically does not apply to warships or other government owned or operated vessels in public service.⁹¹ However, the U.S. Navy imposes a similar duty on commanding officers of warships or the senior officer present via Article 0925 of the U.S. Navy Regulations.⁹² Navy Regulations are lawful general orders under Article 92 of the Uniform Code of Military Justice.⁹³ Failure to comply with the obligation to render assistance, unless doing so would seriously endanger the ship or its crew, is therefore subject to criminal prosecution at a special or general courts-martial.⁹⁴ The case of the USS *Dubuque*, discussed below, exemplifies the importance the U.S. Navy places on this duty.

88. 46 U.S.C. § 2304(a)(1) (2012).

89. *Id.* § 2304(b) (2012).

90. Navigation Act 1912 (Cth) s 317A (Austl.), <https://www.legislation.gov.au/Details/C2012C00196>.

(1) The master of a ship shall, so far as he or she can do so without serious danger to his or her ship, its crew and passengers (if any), render assistance to any person, *even if such person be a subject of a foreign State at war with Australia, who is found at sea in danger of being lost*.

(2) The master of a ship who fails to comply with the provisions of this section shall be guilty of an offence punishable on conviction by imprisonment for a period not exceeding 10 years.

(emphasis added)

The Navigation Act does not apply to ships belonging to, or operated by, the Australian Defence Force. *Id.* s 3.

91. 46 U.S.C. § 2304(a)(2) (2012).

92. U.S. Dep’t of the Navy, U.S. Navy Regulations art. 0925 (1990).

1. Insofar as can be done without serious danger to the ship or crew, the commanding officer or the senior officer present as appropriate shall:

- a. proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance, insofar as such action may reasonably be expected of him or her;
- b. render assistance to any person found at sea in danger of being lost;
- c. afford all reasonable assistance to distressed ships and aircraft; and
- d. render assistance to the other ship, after a collision, to her crew and passengers and, where possible, inform the other ship of his or her identity.

93. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946(a), art 92 (2012).

94. *Id.*

U.S. Coast Guard Regulations similarly impose a comparable, but more expansive duty on commanding officers of Coast Guard ships. The Coast Guard Regulations state: “Upon receiving information that a vessel or aircraft is in distress within the area of operation of the unit, the commanding officer shall, whenever it is appropriate to do so, assist such vessel or aircraft as soon as possible.”⁹⁵ Further, the regulations provide that “[i]n rendering assistance during any distress case, the commanding officer shall aid the distressed vessel or aircraft and its passengers and crew until such time as it is able to proceed safely, or until such time as further Coast Guard assistance is no longer required.”⁹⁶ Moreover, consistent with GCII Article 18(1), Coast Guard Regulations do not require, but allow for searches for bodies, albeit under certain circumstances:

When it has been definitely established . . . that persons are dead, the Coast Guard is not required to conduct searches for bodies. If, however, requests are received from responsible agencies . . . Coast Guard units may participate in body searches provided that these searches do not interfere with the primary duties of the units. Commanding officers and officers in charge shall exercise tact and good judgment in the use of their forces for such purposes.⁹⁷

In the event of a reported distress, the commanding officer of a Coast Guard vessel under way shall, unless otherwise directed by higher authority, “proceed immediately toward the scene of any reported distress within the range of operation.”⁹⁸ Similarly, the commanding officer of a ship in port shall, unless otherwise directed by higher authority, “proceed, as soon as possible, to the scene of any reported distress within that area of operation.”⁹⁹ When rendering aid and assistance, “the commanding officer shall use sound discretion and shall not unnecessarily jeopardize the vessel or the

95. Commandant, U.S. Coast Guard, COMDTINST M5000.3B, United States Coast Guard Regulations § 4-1-7B (1992) [hereinafter U.S. Coast Guard Regulations]; *see also* 1 Office of Navigation Safety and Waterway Services, United States Coast Guard & Chairman, Joint Chiefs of Staff, Joint Publication 3-50, National Search and Rescue Manual: National Search and Rescue System (1991); 2 Office of Navigation Safety and Waterway Services, United States Coast Guard & Chairman, Joint Chiefs of Staff, Joint Publication 3-50.1, National Search and Rescue Manual: Planning Handbook (1991).

96. U.S. Coast Guard Regulations, *supra* note 95, § 4-1-7.C.

97. *Id.* § 4-1-7D.

98. *Id.* § 4-2-5A.

99. *Id.* § 4-2-5B.

lives of the personnel assigned to it.”¹⁰⁰ Additionally, having due regard for the health of his or her crew, “the commanding officer shall take on board distressed seamen of the United States, shipwrecked persons, and persons requiring medical care.”¹⁰¹ Once on board, “assisted persons shall be furnished rations and may be transported to the nearest or most convenient port of the United States.”¹⁰²

The duty to render assistance, however, only applies to “vessels or aircraft [and seamen or airmen] of a foreign State *at peace* with the United States.”¹⁰³ Accordingly, if the United States is a neutral during the conflict, Coast Guard ships could provide assistance to any of the belligerents at peace with the United States, as well as to other neutral nations. Assistance to a vessel and its crew of a nation at war with the United States would not be provided under the Coast Guard Regulations, but rather would be afforded under Article 18 of GCII. Coast Guard Regulations also allow the commanding officer to provide assistance to private efforts, when necessary.¹⁰⁴ This would include efforts by relief societies or private entities engaged in the collection of wounded, sick, or shipwrecked personnel.

The duty to assist persons, ships, and aircraft in distress at sea is also reflected in U.S. military manuals. For example, *The Commander’s Handbook on the Law of Naval Operations* reflects the view of the maritime services—Navy, Marine Corps, and Coast Guard—that “customary international law has long recognized the affirmative obligation of mariners to go to the assistance of those in danger of being lost at sea” as codified in both the 1958 High Seas Convention and UNCLOS.¹⁰⁵ A similar view on the customary nature of the duty to render assistance to persons in distress at sea is expressed in the German Navy Commander’s Handbook—“It is not due to the morale of mariners but in accordance with seafaring tradition and thus with customary law that all mariners help each other in cases of distress at sea.”¹⁰⁶ Thus, as a customary rule, the duty to render assistance remains in effect in times of peace, as well as war.

100. *Id.* § 4-2-5C.

101. *Id.* § 4-2-5F.

102. *Id.*

103. *Id.* §§ 4-2-5D, 4-2-5F (emphasis added).

104. *Id.* § 4-2-5E.

105. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* § 3.2.1 (2007).

106. BUNDESMINISTERIUM DER VERTEIDIGUNG, REFERAT SM 3 AUFTRAGSNUMMER 2002U-01441, *KOMMANDANTEN-HANDBUCH: RECHTSGRUNDLAGEN FÜR DEN EINSATZ*

C. USS *Dubuque* Incident

For its part, the United States takes the duty to render assistance seriously. As an example, on June 10, 1988, the USS *Dubuque* (LPD 8) came across a boatload of eighty Vietnamese refugees adrift in a dilapidated junk in the South China Sea.¹⁰⁷ The U.S. warship, under the command of Captain Alexander Balian, was en route to the Persian Gulf to assume minesweeping duties after the USS *Roberts* (FFG 58) struck an Iranian M-08 mine in the central Persian Gulf on April 14, 1988. The *Dubuque* was carrying a contingent of nine hundred Marines to augment U.S. forces in the Gulf in the event of further hostilities with Iran following Operation Praying Mantis. Standing orders in effect at the time of the incident included: (1) U.S. Navy Regulations, Article 0925, which required commanding officers to render assistance to any person found at sea in danger of being lost; and (2) Commander, U.S. Seventh Fleet Operations Order 201, which required commanding officers to take on board persons in life endangering circumstances at sea if relief of persons in such circumstances cannot be accomplished by repair to boats, re-provisioning, or navigational assistance.

An inspection of the junk by the *Dubuque*'s executive officer revealed that the vessel had a makeshift sail and appeared seaworthy, but did not have an operable engine. In his report to Captain Balian, he also reported that twenty people had already died on the voyage and that the remaining survivors on board looked emaciated and distraught. Nonetheless, Captain Balian elected not to embark the refugees on the ship because he believed it would endanger his mission by delaying considerably the *Dubuque*'s arrival in the Persian Gulf. He was also concerned about the health and safety of his crew.

Captain Balian decided to provide the refugees with provisions—fruit, canned food, rice, and fresh water—and send them on their way with a navigational chart containing plotted coordinates to the Philippines. However, Captain Balian was unaware that the junk had been adrift for nineteen days, not seven as he had been told, and that thirty of the original 110 passengers on board had already died. Balian was also misinformed that there were only

VON SEESTREITKRÄFTEN [FEDERAL MINISTRY OF DEFENSE, REFERENCE SM3 ORDER NUMBER 2002U-01441, COMMANDER'S HANDBOOK: LEGAL BASES FOR THE OPERATIONS OF NAVAL FORCES] (2002) (Ger.).

107. For a more detailed description of this incident, see JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 684–86 (2013). Further, the factual ascertains made within this section may also be found within this source and page range.

sixty (rather than eighty) refugees on board the junk. As a result, he miscalculated the time it would take for the boat to reach the Philippines and the amount of provisions needed; therefore, the food and water provided was insufficient for the remainder of the journey. The refugees drifted for nineteen more days until rescued by a Filipino fishing vessel. Only fifty-two of the original 110 refugees that left Vietnam survived the ordeal. When they ran out of food, they resorted to cannibalism to survive.

As a result of his failure to take the refugees on board or provide other means for their rescue, Captain Balian received a general court-martial at which he was found guilty of dereliction of duty for failing to give adequate assistance to the refugees. He received a career-ending letter of reprimand, and was relieved of command.

VII. CONCLUSION

Although the law regarding the effects of armed conflict on preexisting treaty obligations is not completely settled, most contemporary scholars would agree with the position taken by the ICRC in the *GCII Commentary* that the initiation of hostilities does not *ipso facto* terminate or suspend application of previous adopted international agreements.¹⁰⁸ Most scholars would also agree that the concept of *lex specialis derogat legi generali* (special law repeals general laws) constitutes a general principle of international law.¹⁰⁹ The concept is frequently raised when debating the applicability of international human rights law during armed conflicts regulated by IHL, but it can also apply to other bodies of law, such as the law of the sea.

The United States takes the position that in nearly all circumstances, IHL is the *lex specialis* governing armed conflict and the protection of armed conflict victims.¹¹⁰ This position is based on the premise that “[t]he rule that is more specifically directed towards the action receives priority because it takes better account of the particular features of the context in which the law is to be applied, thus creating a more equitable result and better reflecting the intent of the authorities that have made the law.”¹¹¹ In this regard, IHL “has been developed with special consideration of the circumstances of war

108. *See* PART V.

109. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 116 (5th ed. 2003).

110. OFFICE OF THE GENERAL COUNSEL, U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL § 1.3.2 (rev. ed., Dec. 2016).

111. *Id.* § 1.3.2.1.

and the challenges inherent in its regulation by law.”¹¹² Accordingly, IHL treaties like GCII are viewed as “*lex specialis* in relation to treaties providing peacetime norms concerning the same subjects.”¹¹³ Thus, as between opposing belligerents, the obligation to search for and collect the shipwrecked, wounded, and sick reflected in Article 18 of GCII would be viewed as *lex specialis* in relation to the duty to render assistance to persons in distress at sea contained in the various peacetime maritime treaties. The U.S. Coast Guard Regulations, which limit the duty to render assistance to “vessels or aircraft [and their crews] of a foreign state at peace with the United States,” confirm this conclusion.¹¹⁴

The *GCII Commentary* suggests that it could “be argued that the more a question is linked, or the closer it occurs to, actual hostilities” the more GCII prevails.¹¹⁵ Thus, the ICRC argues that “situations far from the battlefield or not linked to actual hostilities may still be regulated by” the maritime treaties.¹¹⁶ While this position may have some humanitarian appeal, it is not supported in law or by State practice. For the purpose of searching for and collecting casualties at sea after an engagement, IHL is *lex specialis* vis-à-vis the belligerents regardless of the proximity to the battlefield.

That is not to say, however, that the duty to render assistance reflected in the various maritime treaties is abrogated during an armed conflict vis-à-vis the belligerents and neutrals or between neutrals and other States not party to the conflict. Consistent with the basic principle of *pacta sunt servanda* (agreements must be kept)¹¹⁷ the obligation would remain in force between neutrals. Similarly, the obligation would remain in force between neutrals and the parties to the conflict as a customary rule of international law. Most governments and contemporary scholars agree that the duty to render assistance to persons in distress at sea is widely recognized as a long-standing principle of international law.¹¹⁸ The existence of an armed conflict does not override the duty of a State to fulfill its obligations “embodied in the treaty to which it would be subject under international law independently of that

112. *Id.*

113. *Id.*

114. U.S. Coast Guard Regulations, *supra* note 95, § 4-2-5D.

115. *Introduction* to COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 1, ¶ 58.

116. *Id.*

117. VCLT, *supra* note 52, art 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

118. See *supra* notes 83–84 and accompanying text.

treaty.”¹¹⁹ Parties to the conflict and neutral powers are therefore bound during an armed conflict at sea by the provisions of the maritime conventions that reflect customary international law.

In sum, the peacetime duty to render assistance to mariners in distress at sea remains in effect during an armed conflict as a treaty obligation and/or as a matter of customary international law in the following circumstances: (1) Neutral parties must render assistance to other neutral parties; (2) Neutral parties must render assistance to belligerents upon request or *sua sponte*; and (3) Belligerent parties must render assistance to neutral parties. However, the obligation is suspended as between the belligerents during the armed conflict.

119. Draft ILC Articles, *supra* note 59, art.10; *see also* VCLT, *supra* note 52, art. 43.