

REPORTS AND DOCUMENTS

Protection considerations in the law of naval warfare: The Second Geneva Convention and the role of the ICRC

Speech given by ICRC President Peter Maurer on the occasion of the launch of the Updated Commentary on the Second Geneva Convention on 4 May 2017

: : : : : :

From early history, people have used the sea, lakes and rivers for trade and commerce, for adventure and discovery. Despite these close ties, our survival on water depends on man-made objects such as ships, navigation systems and oxygen tanks. If we get injured or sick on water, or if our ships sink, we are vulnerable and our lives are in immediate danger.

Nothing demonstrates this more clearly and more tragically in recent times than the large numbers of migrants and refugees who died while trying to cross the Mediterranean Sea. Many of these men, women and children successfully escaped a deadly conflict on land, only to perish at sea.

Many States have a military presence at sea in times of peace, sometimes far away from their coastline. Existing and emerging powers are investing heavily in their navies, deploying warships, including submarines.

Often this is to pursue objectives other than fighting a war. Navy ships are deployed to protect lines of communication essential to trade and economic prosperity; to act as a deterrence; to conduct surveillance and interdiction; and to project the State's power overseas.

The sea is of vital economic importance, and shipping and fishing are multi-billion-dollar industries. The discovery of offshore resources such as fossil energy and seabed mining has further enhanced the economic potential of the oceans. As with anything of economic value, there is a risk of competing

territorial claims over the right to these resources, which might even escalate into armed conflict.

The ICRC has also relied on boats to carry out its humanitarian activities. In the last decade alone, the ICRC has chartered vessels to evacuate wounded and sick in Sri Lanka [2009], to facilitate the return home of detainees in Libya [2011], and to bring in relief supplies to areas inaccessible by land in Somalia [2006], Lebanon [2006], South Sudan [2014] and Yemen [2015].

To adapt to the complex reality of modern-day warfare and the growing challenges of assisting victims of armed conflicts, the ICRC is currently exploring how feasible it would be to have an ICRC hospital ship. Such vessels would significantly increase the ICRC's emergency response capacity to complex emergencies and allow us to innovate and adapt to a rapidly changing world.

The term "maritime security" has become a buzzword in recent years. Its meaning is broad, covering operations against piracy, "terrorist" threats to shipping, trafficking of narcotics, the illicit movement of people and goods, arms proliferation, and illegal fishing. With the increased attention on maritime security operations, terrorism threats and migration, it is important to recall that humanitarian law is specifically and exclusively designed to operate in the context of an armed conflict.

Maritime security operations take many forms, some of which might involve the use of force at sea. Militaries, and their naval forces, are a major actor in these operations. While these activities generally remain below the threshold of armed conflict and therefore outside the scope of international humanitarian law [IHL], they raise questions relating to the lawfulness of using force at sea.

These operations increase the potential for incidents that could trigger an armed conflict at sea. If this happens, the rules protecting the victims of the conflict must be known and their contemporary meaning understood by all parties to the conflict. And this leads me to why we are here today.

In March last year, the ICRC reached a major milestone in launching the updated Commentary on the First Geneva Convention of 1949, dealing with the protection of wounded and sick members of the armed forces on land. This was the first update of Pictet's Commentary, published in 1952.

Today, we reach a second milestone, and I am very proud to present to you today the updated Commentary on the Second Geneva Convention.

Applying the same methodology used for the update of the Commentary on the First Convention, the ICRC again opened up the drafting process to external contributors who, together with our staff lawyers, researched and drafted the texts of the Commentary.

Drafts were peer-reviewed by forty senior scholars and practitioners from around the world, many of whom serve in, or used to serve in, their country's naval forces. We also benefited from input from international organizations with relevant subject-matter expertise. The Commentary is therefore the result of a thorough and collaborative process.

This updated Commentary aims to reflect current practices of the world we live in today, and provide up-to-date legal interpretations. Both the factual and legal

landscapes have changed since the publication of the initial Commentary in 1960, with potential implications for the interpretation of the Convention.

For one, international law regulating activities at sea has developed significantly since 1949, in particular the UN Convention on the Law of the Sea and several conventions under the auspice of the International Maritime Organization.

Naval warfare capabilities have also developed, to the point of allowing parties to strike targets far away. Many States nowadays possess submarines in their naval arsenals.

Advances in technology have also influenced how States carry out their obligations under the Second Convention. For example, new technologies such as satellites and unmanned aerial platforms can be used to assess the number and location of wounded, sick and shipwrecked at sea. Technology enabling underwater searches to retrieve the dead has also advanced considerably in recent years.

The updated Commentary takes into account these legal and factual developments to the extent that they affect the interpretation of the Second Convention.

The Second Geneva Convention, just like the First Convention, recognizes that even when the IHL rules regulating the conduct of hostilities are properly applied, armed conflict results in death and destruction.

At its core, the Second Convention requires that members of the armed forces who are wounded, sick or shipwrecked must be respected and protected. This Convention regulates in great detail the types of vessels that may be used to rescue and to provide medical and other care, including military hospital ships and coastal rescue craft. I trust that the panel of experts we have convened today will provide detailed insights on these subjects.¹

Critically, the Convention requires the parties to the conflict, after each engagement, to take all “possible measures” to search for, collect and provide care to the victims of an engagement at sea. The Second Convention also deals with the protection of deceased persons, and regulates the delicate subject of burial at sea. These obligations are important to ensure respect for the dignity of the deceased person.

Although contained in two separate Conventions, the First and Second Geneva Conventions embody the same logic and humanitarian principles: members of the armed forces who suffer during armed conflict must be aided, protected and cared for, regardless of whether their suffering takes place on land or at sea.

Just as the First Geneva Convention is as relevant today as it was in 1949 for any armed conflict that takes place on land, so the Second Convention is relevant for any armed conflict that takes place wholly or partly at sea or other waters.

There have been a number of armed conflicts with hostilities at sea since 1949. In these conflicts, the Second Geneva Convention was crucial for ensuring

1 Video of the panel of experts at the launch of the Updated Commentary on the Second Geneva Convention is available at: www.icrc.org/en/event/launch-updated-commentary-second-geneva-convention.

the care and protection of the wounded, sick, shipwrecked and dead members of the armed forces.

The reach of the Second Convention is greater than one might initially think. For one, oceans constitute 71% of the Earth's surface. The use of submarines and unmanned naval systems further increases the physical space in which an armed conflict could occur at sea. In addition, the Second Convention applies not only to the seas but also to other bodies of water such as internal waters and lakes.

It is also important to note that, while the history of naval warfare mostly deals with armed conflicts waged by States against States, non-international armed conflicts can also have a naval component. In such event, common Article 3 applies.

This provision sets a minimum yardstick protecting persons not, or no longer, participating in any armed conflict, whether on land or on water. Critically, under common Article 3, civilians are among those protected.

At the launch of the updated commentary on the First Geneva Convention, I spoke about the increased complexity of today's armed conflicts – more actors, more weapons, more refined strategies and more networks. These complexities are not unique to warfare on land. Warfare is changing and new weapons are being developed, including warfare capabilities at sea.

I also referred to the challenge of ensuring respect for IHL. Since recent conflicts have mainly impacted people and objects on land, it is on land that respect for IHL has been most rigorously tested. But the effect of warfare can often also be felt at sea, including on shipping. The challenge of ensuring respect for IHL is not specific to the first Geneva Convention.

The rules contained in the Second Convention can only be effective if they are respected and properly implemented by the belligerents. As with warfare on land, the key to increasing protection is respect for and better implementation of the existing rules.

Here, the ICRC has an important role to fulfil as guardian and promoter of humanitarian rules and as an impartial, neutral and independent organization whose exclusive humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence. It follows from the ICRC's mission and mandate that it does not take a position on the underlying reasons for armed conflict, including any territorial claims States may have at sea.

The ICRC has a long history in the interpretation of IHL rules applicable to warfare at sea. During the drafting of the 1864 Geneva Convention, the ICRC proposed a similar convention for maritime warfare. This is an area of IHL that is underrepresented in scholarly circles, and where we remind everyone of the protection considerations to comply with during an armed conflict at sea.

The updated Commentary of the Second Geneva Convention forms a natural part of the ICRC's broader and historical engagement in the protection of victims of armed conflict at sea. I am convinced this Commentary will facilitate common understanding of the meaning and critical importance of the provisions of the Second Convention, which in turn will contribute to the protection of those who suffer during armed conflict at sea.