

I. International humanitarian law: ICRC guidance and its application in urban warfare

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The new ICRC guidance on the Geneva Conventions

In 2011 the International Committee of the Red Cross (ICRC) initiated a multi-year project to update a series of commentaries that provide guidance to states on how to interpret and implement the four Geneva Conventions, as well as their Additional Protocols. Adopted in 1949 in the aftermath of World War II, the Geneva Conventions are an international benchmark for behaviour during armed conflict.¹

Over time, the updated ICRC commentaries will address all aspects of how the Geneva Conventions apply in contemporary conflict. However, the first update, published on 22 March 2016, focuses on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.² As the first in the series, it addresses some cross-cutting issues that will apply to all of the commentaries.

The updated ICRC commentaries will progressively replace documents that were published in 1952, which, like the Geneva Conventions themselves, largely reflected the lessons and experience of World War II. The new commentaries take into account changes in the nature of armed conflict, including the changing identity of warring parties, developments in technology, the accumulated body of experience related to the application of the Geneva Conventions in conflict, and the expanded body of law in interrelated areas (in particular international human rights law and the development of international criminal law that can punish individuals responsible for serious offences committed during armed conflict).

The revised ICRC commentaries and international humanitarian law

One of the central issues addressed in the updated commentaries is how to apply the Geneva Conventions in non-international armed conflicts. All the Geneva Conventions make clear that states parties undertake to respect, and to ensure respect for, the Conventions ‘in all circumstances’. Since the Conventions entered into force, subsequent practice has often been taken to mean that this obligation applies to both international and non-international

¹ The text of the Geneva Conventions of 1949 and their Additional Protocols can be found at International Committee of the Red Cross (ICRC), ‘The Geneva Conventions of 1949 and their Additional Protocols’, 1 Jan. 2014.

² Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, adopted 12 Aug. 1949; and ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edn, 2016.

armed conflicts, and the updated ICRC commentaries explicitly incorporate this perspective.

The classification of international and non-international armed conflict is an important issue because in non-international armed conflicts there is no provision for prisoner-of-war status and no legal regime governing occupation. However, there is no international body responsible for classification and no agreed codified methodology. The updated commentaries are therefore vital because of the special role the Geneva Conventions give to the ICRC in ensuring 'the faithful application of international humanitarian law'.³

Common Article 3 of the Geneva Conventions is the only universal, legally binding text that governs non-international armed conflicts: it requires humane treatment for all persons in enemy hands, without distinction. The updated commentaries underline that Common Article 3 (which applies across the Geneva Conventions) specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial in all circumstances. Common Article 3 does not explicitly prohibit the transfer of persons from one authority to another if there is a significant risk that those persons would then suffer a violation of their fundamental rights. However, the updated ICRC commentaries advise that the prohibition on inhumane treatment should disallow the practice of rendition if there are substantial grounds to believe that persons transferred will be in danger of being subjected to illegal violence.

The body of international human rights law has been developed since the adoption of the Geneva Conventions in 1949, and this law remains applicable in conflict locations. Once it has been determined that a non-international armed conflict is taking place on the territory of a state, it could be concluded that Common Article 3 and other humanitarian law provisions apply everywhere. However, in a non-international armed conflict there may be some or many parts of the territory of a state that remain peaceful. The ICRC guidance proposes that humanitarian law applies in a non-international armed conflict only where acts are closely related to hostilities and committed in the context of the armed conflict. Where there is no connection between acts of violence and the non-international armed conflict, domestic criminal and law enforcement regimes should apply, respecting the rules contained in applicable human rights law.

International criminal law has also been developed since the Geneva Conventions entered into force. Responsibility for war crimes defined in Common Article 3 may be attributed to individuals, who may face criminal sanctions for serious breaches of humanitarian law, and these sanctions may be applied in non-international armed conflicts.

³ ICRC, *The ICRC: Its Mission and Work* (ICRC: Geneva, Mar. 2009), p. 4.

The ICRC commentaries reinforce the opinion that although specific individuals can be held accountable under international criminal law, this does not in any way detract from the responsibility of states to respect and implement international humanitarian law (IHL). Moreover, if a non-state actor commits a war crime on the instructions of a state, the instructing state as well as the individual perpetrator can be held accountable.

A remaining area of uncertainty is how to determine the legal responsibility of a non-state armed group, as an entity, for acts committed by members of the group. Applying the test of effective control (that a non-state armed group exercises the functions usually assigned to a government on the territory of a state, including the maintenance of law and order) would be one way of assigning responsibility. However, this could blur a principle that states regard as important: not giving status to or recognizing the authority of non-state armed groups.

Safeguarding the impartiality of humanitarian relief and attacks on healthcare workers

In 2016 the World Health Organization (WHO) published a first report with consolidated data on attacks on healthcare facilities and workers. According to the report:

Over the two-year period from January 2014 to December 2015, there were 594 reported attacks on health care that resulted in 959 deaths and 1561 injuries in 19 countries with emergencies. More than half of the attacks were against health care facilities and another quarter of the attacks were against health care workers. Sixty-two per cent of the attacks were reported to have intentionally targeted health care.⁴

The WHO report indicates that 64 per cent of attacks took place in Iraq, Libya, Syria, the West Bank and Gaza Strip, and Yemen in 2014–15. Almost 40 per cent of the total number of recorded attacks took place in Syria alone.⁵ International attention was drawn to the issue of protecting humanitarian relief and health professionals in September 2016, when a warehouse used by the Syrian Arab Red Crescent (SARC) was attacked while the contents of a 31-truck aid convoy were being unloaded.⁶ The United Nations Office for the Coordination of Humanitarian Affairs confirmed that the truck convoy had been notified to all parties to the conflict and that the convoy was clearly

⁴ World Health Organization, *Attacks on Health Care: Prevent, Protect, Provide*, Report on Attacks on Health Care in Emergencies Based on Consolidated Secondary Data, 2014 and 2015, Geneva, 2016.

⁵ World Health Organization (note 4), p. 4.

⁶ ICRC, 'Syria: attack on humanitarian convoy is an attack on humanity', News release, 20 Sep. 2016; and Raydan, N. and Grove, T., 'Russia, Syrian regime deny carrying out aid convoy attack', *Wall Street Journal*, 20 Sep. 2016. On the civil war in Syria also see chapter 3 in this volume.

marked as humanitarian.⁷ As a result of the attack, the UN suspended all of its aid convoys in Syria.⁸

A deliberate attack on a humanitarian aid mission would violate both IHL and international human rights law. On 21 October 2016 the UN Secretary-General established a board of inquiry to investigate the September 2016 attack on the humanitarian aid convoy. While the report was not released, the Secretary-General did release a summary in a letter to the President of the Security Council in December 2016.⁹

According to the report, the Board of Inquiry had insufficient evidence to be certain in attributing the attack but stated that it was ‘highly likely’ it was carried out by the Syrian Air Force using a combination of attack helicopters and fixed-wing fighter aircraft. The Board of Inquiry was unable to determine whether a Russian aircraft also participated, and it noted that armed opposition groups in Syria did not have the capability to carry out such an attack.¹⁰ However, the Russian Ministry of Defence released a statement in the immediate aftermath of the attack in September 2016 in which it said that ‘no airstrikes on the United Nations humanitarian convoy in the southwestern outskirts of Aleppo were carried out by Russian or Syrian aviation’.¹¹

In September 2016 armed groups opposed to the Syrian Government—in particular Jaysh al Mujahideen, which provided an armed escort to the aid convoy as it approached Aleppo—controlled the area where the SARC-operated warehouse was located. The warehouse is adjacent to Highway 60, one of the main routes by which armed groups opposed to the Syrian Government were receiving aid from Turkey, via Idlib province.¹² At the time of the attack, the Russian authorities published pictures claiming that a truck carrying heavy weapons was driving parallel to the convoy along part of its route. However, the Board of Inquiry was unable to demonstrate a link between these images and the attack. Ultimately, the Board of Inquiry concluded that ‘it did not have evidence to conclude that the incident was a deliberate attack on a humanitarian target’.¹³

More generally, the Geneva Conventions form the basis of the framework that legitimizes the engagement of the Red Cross and Red Crescent in humanitarian assistance in conflict locations. However, the legal protec-

⁷ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), ‘Syria: UN/SARC convoy hit in Urum al-Kubra, northwest of Aleppo city’, Statement by Stephen O’Brien, Emergency Relief Coordinator, 19 Sep. 2016.

⁸ UN News Centre, ‘UN officials condemn attacks against aid convoy and warehouse in rural Aleppo’, 20 Sep. 2016.

⁹ United Nations, Security Council, Letter from the Secretary-General addressed to the President of the Security Council, S/2016/1093, 21 Dec. 2016.

¹⁰ United Nations, Annex to S/2016/1093 (note 9), p. 8.

¹¹ Al Jazeera, ‘UN suspends all Syria aid after convoy bombed’, 20 Sep. 2016.

¹² Cafarella, J. and Casagrande, G., ‘Syrian armed opposition forces in Aleppo’, Institute for the Study of War Backgrounder, 13 Feb. 2016.

¹³ United Nations (note 10), p. 9.

tion of healthcare facilities and workers in conflict is based on principles of humanitarianism, which include providing care and assistance on an impartial basis to those in need. Humanitarian organizations must often negotiate with local warring parties in order to deliver assistance, but they must do so in ways that avoid compromising their impartiality in case they forfeit legal protection. The number of humanitarian organizations that offer assistance in conflict zones has expanded over time, and new guidance is needed on how diverse actors gain the consent of warring parties to operate on the ground.

The 2016 ICRC guidance indicates that over 130 countries have introduced domestic legislation to prevent the misuse of the distinctive emblems that provide protection while also pointing to the need for non-legislative measures such as instruction in the proper use of distinctive emblems.¹⁴

International humanitarian law and urban warfare

Modern surveillance and targeting techniques, combined with highly accurate weapons, make armed forces and armed groups operating in the open very vulnerable. This has accelerated a move towards smaller units that can move quickly and has changed the approach to concealment. In recent conflicts, warring parties that recognize their vulnerability have 'hidden' in or close to civilian populations, which very often means in cities. The process of urbanization has led military establishments to prepare for operations in cities, including peace support operations, policing operations, raids and sustained urban combat.¹⁵ Violence led by both state and non-state actors is increasingly being fought in populated areas.

Finding a balance between demonstrating that control can be exercised and avoiding actions that are counterproductive, provocative or illegal has been a challenge in urban environments, where opposition forces may be difficult to distinguish from civilians and where the same individuals may move between combatant and non-combatant roles at different times.¹⁶ In some cases a weaker armed group has used what is sometimes called 'lawfare' to gain a military advantage.¹⁷ By locating close to a civilian population, a weaker armed actor complicates the military task for an adversary that

¹⁴ ICRC (note 2), Art. 54: 'Prevention of misuse of the emblem'.

¹⁵ Vautravars, A., 'Military operations in urban areas', *International Review of the Red Cross*, vol. 92, no. 878 (June 2010); and NATO Allied Command Transformation, *Strategic Foresight Analysis: 2013 Report* (NATO Strategic Analysis Branch: Norfolk, VA), p. 43.

¹⁶ Gompert, D. C. et al., *Underkill: Scalable Capabilities for Military Operations Amid Populations*, (RAND Corporation: Santa Monica, CA, 2009).

¹⁷ One definition of lawfare is 'the exploitation of the law of armed conflict to achieve tactical and strategic goals'. Scharf, M. P. and Andersen, E., 'Is lawfare worth defining? Report of the Cleveland Experts Meeting, September 11 2010', *Case Western Reserve Journal of International Law*, vol. 43, no. 1 (2010), p. 23.

respects the IHL requirement for a distinction between civilians and combatants.

The result has often been what has been described as ‘asymmetric urban warfare in which militarily weak parties do not directly engage militarily strong adversaries by using the conventional means and methods’.¹⁸ In an urban terrain, ‘forces can enter easily, but will be harder to extract; ambushes will be easier to conduct and more prevalent; foot soldiers will conduct most of the fighting; the terrain favors defense; and the mobility advantage professional militaries have is lost’.¹⁹

Legal commitments

As the ICRC has made clear, because international law on the conduct of hostilities regulates and limits the methods and means of warfare used by parties to an armed conflict, ‘Regulations pertaining to the choice of weapons clearly constitute a major part of the law on the conduct of hostilities. Under IHL, this choice is not unlimited’.²⁰ Beyond directly banned weapons, IHL prohibits direct attacks on civilians or civilian objects, proscribes indiscriminate and disproportionate attacks and imposes an obligation to take all feasible precautions in attack, regardless of the weapon used.

Although it is accepted that civilian casualties may be sustained in situations where military targets are attacked, warring parties must take such precautions as are practicable or practically possible to rule out indiscriminate attacks. The types of attack that are to be considered as indiscriminate include: (a) an attack by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²¹

Area bombardment of a city or town is considered illegal by the ICRC under IHL because it treats clearly separated and distinct objectives as a single military target.²² Warring parties must take measures to separate military targets from population centres and, if an attack is expected to cause

¹⁸ John-Hopkins, M., ‘Regulating the conduct of urban warfare: lessons from contemporary asymmetric armed conflicts’, *International Review of the Red Cross*, vol. 92, no. 878 (June 2010), p. 470.

¹⁹ Ward, A., ‘Battleground metropolis: the future of urban warfare’, *The National Interest*, 24 Mar. 2015.

²⁰ ICRC, ‘International law on the conduct of hostilities: overview’, Geneva, 29 Oct. 2010.

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, Art. 51.

²² ICRC, ‘Rule 13: area bombardment’, Customary IHL Database.

‘collateral civilian damage’ that is excessive in relation to the concrete and direct military advantage anticipated, it must be cancelled or suspended.

As noted above, attention has been drawn to the need to respect IHL with regard to healthcare. The need to ensure protection for the education sector has also been the focus of attention. In 2010 the Global Coalition to Protect Education from Attack (GCPEA) was formed by organizations in the field of education, among others. The GCPEA developed a Safe Schools Declaration that was issued at the end of May 2015 and which elaborated a set of Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict.²³ By the end of 2016 a total of 59 states had subscribed to the declaration.

Explosive weapons might affect a wide area because of the large destruction radius of the individual munition used, the inaccuracy of the delivery system and/or the delivery of multiple munitions over a wide area.²⁴ These categories of explosive weapons include large bombs and missiles, indirect fire weapon systems such as mortars, rockets and artillery, multi-barrel rocket launchers and certain types of improvised explosive devices (IEDs). According to the ICRC, “The terms “densely populated areas” and “populated areas” should be understood as synonymous with “concentration of civilians”, defined in international humanitarian law as “a city, town, village or other area containing a similar concentration of civilians or civilian objects”.”²⁵

The UN Secretary-General has called on all parties to conflict—national military and security forces, and armed groups—to avoid using explosive weapons with wide-area effects in populated areas.²⁶ The ICRC President has stated that ‘The ICRC maintains that the use of such weapons that have wide area effects should be avoided in urban areas, despite the absence of an express legal prohibition but based on the likelihood of indiscriminate effects.’²⁷ There is also an international initiative to develop a political commitment to end the use of explosive weapons in populated areas (see section II).

²³ Global Coalition to Protect Education from Attack (GCPEA), <<http://protectingeducation.org/>>. The text of the ‘Safe Schools Declaration’ can be found at <http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf>; the ‘Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’ can be found at <http://protectingeducation.org/sites/default/files/documents/guidelines_en.pdf>.

²⁴ Geneva International Centre for Humanitarian Demining (GICHD), *Explosive Weapon Effects: Final Report* (GICHD: Geneva, Feb. 2017).

²⁵ ICRC, ‘Explosive weapons in populated areas’, Fact sheet, 14 June 2016, pp. 1–2.

²⁶ OCHA, ‘Protecting civilians from the use of explosive weapons in populated areas’, Fact sheet, 11 Aug. 2016, p. 2.

²⁷ ICRC, Speech by Peer Maurer, President of ICRC, at Ninth Senior Workshop on International Rules Governing Military Operations (SWIRMO), Algiers, Algeria, 14 Nov. 2015.

*Ukraine*²⁸

Information regarding the recent use of explosive weapons with wide-area effects in populated areas of eastern Ukraine raises serious questions about how those using such weapons are interpreting and applying IHL rules.²⁹

Between 1 January 2011 and 30 June 2015, Action on Armed Violence (AOAV) recorded 539 attacks worldwide that simultaneously hit 'Multiple Urban' location types. Attacks in urban areas were the most destructive across the AOAV's data set of explosive violence incidents, accounting for 10 per cent of incidents but 30 per cent of total civilian deaths and injuries. Although the AOAV has recorded the use of rocket artillery in Libya, Somalia, Syria and Yemen in the last five years, more deaths and injuries were recorded from these weapons in Ukraine than anywhere else in the world (39 per cent of worldwide harm from rocket artillery was recorded in Ukraine). The AOAV recorded 22 rocket artillery attacks in eastern Ukraine that caused deaths and injuries between 1 May 2014 and 30 April 2015; of 594 deaths and injuries, 312 (53 per cent) were civilians.³⁰

The BM-21 Grad rocket system was designed in the 1960s for use against a concentration of enemy attackers or to prepare the way for an infantry attack. The Grad was intended for use as part of an artillery battery, generating a high volume of fire to blanket a large area. At the limit of its 20-kilometre range, a Grad rocket is expected to land within 600 metres of its aim point; it is not accurate enough to attack a single point target.³¹ Both the Ukraine Government forces and rebel separatist groups are known to have used Grad rockets in populated areas.

Artillery rocket systems such as Grad rockets have killed more civilians per attack than any other explosive weapon used during the conflict in eastern Ukraine. On average, there were 14 civilian deaths and injuries from Grad rockets per attack in the first year of fighting in eastern Ukraine (1 May 2014–30 April 2015). The average for all explosive weapons incidents in eastern Ukraine for the same period was nine.³²

One of the priorities the Ukrainian armed forces have emphasized when seeking military assistance from outside powers is improving the effectiveness of their urban warfare techniques.³³ The high priority given to urban

²⁸ On the conflict in Ukraine see chapter 4, section II, in this volume and also chapter 3 in *SIPRI Yearbook 2015* and chapter 4 in *SIPRI Yearbook 2016*.

²⁹ ICRC (note 25). See also the resources provided by the International Network on Explosive Weapons at <<http://www.inew.org/>>.

³⁰ Overton, I., Craig, I. and Perkins, R., 'Wide-area impact: investigating the wide-area effect of explosive weapons', Action on Armed Violence, Feb. 2016, pp. 19–20.

³¹ For further details on the Grad rocket system see GICHD, '122 mm BM-21 multi barrel rocket launcher (MBRL)'.

³² Overton, Craig and Perkins (note 30), p. 20.

³³ Ukraine Today, 'British soldiers train Ukrainian troops in urban warfare techniques', *KyivPost*, 18 Mar. 2016.

warfare reflects the fact that, in the early phase of the conflict in eastern Ukraine, a combination of non-state militia forces and regular Russian armed forces out of uniform conducted operations in an attempt to take control of key cities in the Donbas region, including Donetsk, Luhansk, Mariupol and Sloviansk. The Ukrainian armed forces have therefore focused their operations on preventing the loss of control over key cities and the recovery of those that have fallen under the control of opposition forces.