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The Unique and Protected Status of Hospital Ships under the Law of Armed Conflict

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Hospital ships have long enjoyed a unique position under the law of armed conflict. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (GWS-Sea) codifies the protection afforded hospital ships that are serving in an area of hostilities during international armed conflict. In light of the deployment of USNS Comfort (T-AH 20) in support of Operation Iraqi Freedom (OIF), the protected status of hospital ships and the maintenance of that status remain important topics. The import is even more pronounced in light of the sweeping changes in technology since the 1949 Geneva Conventions and the modern-day terrorist threat from non-State actors who do not adhere to the law of armed conflict.

Background

Article 22 of GWS-Sea provides that military hospital ships may in no circumstances be attacked or captured, but shall at all times be respected and protected. This provision extends to hospital ships the immunity conferred on the wounded, sick and shipwrecked. Article 31 of GWS-Sea provides the means by which parties

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to a conflict can verify that hospital ships are abiding by the provisions of GWS-Sea, specifically that they are not committing acts outside their humanitarian duties and harmful to the enemy. It includes the right for parties to the convention to control and search the vessels, direct their movement or even detain them for a limited period of time. Parties may place a commissioner on board to ensure compliance. Additionally, the parties may also arrange for the placement on board of neutral observers who shall verify "the strict observation of the provisions contained in the present Convention." Article 34 of GWS-Sea provides that the protection to which hospital ships are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. In short, hospital ships must refrain from all interference, direct or indirect, in military operations. In addition, the second paragraph of Article 34 provides that hospital ships may not possess or use a secret code for their wireless or other means of communication. Article 35 of GWS-Sea enumerates conditions that shall not be considered as depriving hospital ships of the protections afforded. Specifically, the arming of crews for the maintenance of order or self-defense, the presence on board of apparatus exclusively intended to facilitate navigation or communication, and the storage of arms taken from the sick and wounded are not actions that deprive a hospital ship of its protected status. Two points that must be reassessed in light of modern conditions are the use of secure communications aboard hospital ships and the arming of hospital ships beyond the traditional “small arms” paradigm.

Secure Communications

Article 34 of GWS-Sea has been viewed as prohibiting the use of secure communications equipment on hospital ships during international armed conflict. Changing technology and the practical necessity to communicate in a manner consistent with present-day technology requires that the prohibition against hospital ships using secure communication equipment be reevaluated. While the intent of the prohibition (the right of belligerents to be assured that hospital ships do not commit “acts harmful to the enemy”) must be maintained, the realities of modern communications and navigation technology should also be taken into consideration. In today’s highly technological environment where most computer and satellite communications are routinely encrypted, hospital ships should be able to utilize these state-of-the-art communications assets in order to operate safely and accomplish their humanitarian mission. In today’s highly technological operating environment, the ship’s capacity to operate safely and fulfill its humanitarian mission during armed conflict would be degraded without access to encrypted communications.
Since 1949, discussions among international legal authorities have recognized the need to reevaluate the use of secure communications equipment that may violate, or appear to violate, the “secret code” prohibition of Article 34.

As early as the close of the Diplomatic Conference of Geneva of 1949, there was concern among the Conference participants that the ability of hospital ships to communicate efficiently with warships and military aircraft was in jeopardy and needed further study.8

More recently, paragraph 171 of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea9 recommends a different rule than Article 34. Paragraph 171 provides: “In order to fulfill most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.”

The Explanation to the San Remo Manual10 details the reasons for this new rule, that being, the general wording of Article 34 has caused difficulties. The British, during the Falklands War, found that transmitting to or from their hospital ships in the clear risked giving away the positions or planned movements of combat forces. The participants in the San Remo process evidently thought that, since Article 34 jeopardizes the ability of hospital ships to operate effectively, the rule ought to concentrate on the sending of military intelligence and that in order to fulfill their humanitarian mission effectively, hospital ships should be permitted to use secure communication equipment that in modern technology is an integral part of most communications systems.11

Given the interpretation of Article 34 of GWS-Sea, the use of encrypted communications equipment on board hospital ships is problematic. It is clear that as technology has changed, the terms of paragraphs 2 of GWS-Sea Article 34 have been rendered obsolete. Nonetheless, States parties to the GWS-Sea arguably remain bound by its terms. One possible approach to effecting a change in the law is the premise that an accepted change in practice by parties can be utilized to further interpret and modify a treaty. This concept is reflected in Article 31 of the Vienna Convention on the Law of Treaties which states, “any subsequent practice in the application of the treaty which establishes the agreement of the parties” can be used to interpret the meaning of that treaty.12

The prohibition against the use of secret codes by hospital ships was born in a bygone era. In the past, use of encrypted communications was not needed for safe navigation or for affecting the humanitarian mission of hospital ships, rather, only for military operational reasons such as receiving or transmitting intelligence. Paragraph 171 of the San Remo Manual, as well as varied other international sources,13 illustrate the widespread recognition that, in concert with the necessities of modern technology, the use of encrypted communication equipment on hospital ships in furtherance of their
humanitarian mission and safe navigation should be permitted. Encrypted communication equipment necessary for safe operation and efficient long-range communication is now in common use at sea. The necessity for this now commonplace use of encrypted communications equipment should apply equally to hospital ships, as long as they commit no act harmful to the enemy. The modification of existing treaty obligations between parties envisioned by Article 31 of the Vienna Convention could be applied to the practice of using encrypted communications by hospital ships.

Accordingly, use of encrypted communications should be permissible when its purpose is to facilitate the navigation\(^4\) or communication\(^5\) of the hospital ship in furtherance of its humanitarian mission and is not employed in a manner that is harmful to the enemy. Under such circumstances, the presence and use of such equipment violates neither the spirit nor the intent of GWS-Sea.

**Defensive Arming of Hospital Ships**

The arming of a hospital ship for self-defense against terrorists and other non-State actors must also be reconsidered. The Geneva Conventions by their own terms only apply during “declared war or any other armed conflict which may arise between two or more of the High Contracting Parties.” Terrorists and their organizations (the threat against which hospital ships are now defending themselves) are not States party to the Geneva Conventions and their tactics (attacking “soft” targets normally protected under the law of armed conflict (LOAC)) fall outside the traditional definition of international armed conflict. Although it is doubtful that the Geneva Conventions apply to self-defense measures that hospital ships may take against terrorist acts, an analysis of this issue is required based on the US policy position reflected in Department of Defense (DoD) Directive 5100.77 (DoD Law of War Program) that US forces will apply the LOAC to all military operations.

GWS-Sea does not directly address weapons systems for hospital ships. As noted above, Article 34 provides that the “protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.” Article 35 provides that the fact the crews of ships or sick-bays are armed for the maintenance of order, for their own defense or that of the sick and wounded, shall not be considered as depriving hospital ships or sick-bays of vessels of their protected status.

While it is clear that crews of hospital ships may be armed for their own defense, GWS-Sea does not specify what are permissible weapons. The accepted norm for arming medical personnel ashore has been “small arms” such as pistols and rifles, and that norm was equally applied to the crews of hospital ships. Traditionally, it was thought that light, portable, individual weapons such as pistols and rifles were
all that was needed for personal defense on hospital ships. Crew-served weapons, such as machine guns, were presumed to go beyond the need for use in self-defense, given that belligerents were bound to not attack hospital ships under the provisions of GWS-Sea.

However, current-day suicide-style terrorist tactics against so-called “soft-targets,” exemplified by the attacks on the World Trade Center, the Pentagon, US embassies in Africa, and on the USS Cole, demonstrate the need for enhanced defenses against individuals or groups not complying with the law of armed conflict. In this new threat environment, where large-scale, deadly, and indiscriminate attacks on civilians and civilian objects have become part of terrorists’ modus operandi, mounted machine guns have become by necessity standard elements of defensive force protection systems for naval vessels. Such weapons have offensive capability when installed on helicopters and small boats, but in the context of being mounted on board a large, relatively slow and not-easily-maneuverable ship, any offensive capability is greatly diminished (if not lost altogether) and the weapon becomes purely defensive in nature. To that end, hospital ships should be able to employ machine guns and similar armament solely for self-defense against terrorists and other persons who do not recognize or follow the law of armed conflict. This interpretation is consistent with the long-standing US Army interpretation of self-defense permissible under Article 22 of Geneva Convention I (pertaining to wounded and sick forces on land) as “personal defense and for the protection of the wounded and sick under their charge against marauders and other persons violating the law of war.” Such weapons would not be used in an offensive capacity nor against lawful belligerents complying with the law of armed conflict and who are exercising their rights under GWS-Sea. It is only as a result of the emergent threat to targets traditionally protected under the law of armed conflict (such as a hospital ship) that it is necessary to enhance the defensive measures available to these protected platforms. Although the Geneva Conventions would not likely apply, the use of machine guns in self-defense against non-State actors is consistent with Articles 34 and 35 of GWS-Sea, as well as the underlying principles governing the protected status of hospital ships under the law of armed conflict.

Notes

1. Captain Grimord is the Deputy Assistant Judge Advocate General, Navy International and Operational Law Division. Major Riggs is the Head of the Operational Law Branch, Navy International and Operational Law Division. The opinions expressed herein are those of the authors and do not necessarily reflect those of the Department of the Navy or Department of Defense.
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4. This provision dates from the draft Additional Articles Relating to the Condition of the Wounded in War, Geneva, Oct. 21, 1868, which did not enter into force. See THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 369 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). The wording was only somewhat modified to take its present form as found in GWS-Sea.

5. Additionally, hospital ships must be warned of the offending action and given a reasonable amount of time to comply before their protected status can be violated. Harmful acts are, for example, transporting combatants or arms, transmitting military intelligence via radio or providing cover for a warship.

6. COMMENTARY, supra note 3, at 191.

7. A secondary, but important additional consideration, is the current standards relating to the privacy of medical records pursuant to the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") establishes, for the first time, a set of national standards for the protection of certain health information. The US Department of Health and Human Services issued the Privacy Rule to implement the requirement of HIPAA. The Privacy Rule standards address the use and disclosure of individuals’ health information—called "protected health information" by organizations subject to the Privacy Rule—called "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used.


9. Sponsored by the International Committee of the Red Cross (ICRC) and completed in June 1994 by a group of legal scholars and naval practitioners, the Manual serves as a contemporary restatement of international law applicable to armed conflict at sea and comprehensively addresses the subject for the first time since the 1913 Oxford Manual. In most respects, the Manual correctly states the law and, with the exception of some portions, is consistent with US practice. The San Remo Manual is reprinted in Schindler & Toman, supra note 4, at 1153. The 1913 Oxford Manual is reprinted in id. at 1123.

10. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 236–37 (Louise Doswald-Beck ed., 1995).

11. It is important to note that the San Remo Manual recommendation is consistent with the rules regarding the use of secure communications equipment by medical aircraft and vehicles. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, art. 28, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 2, at 422. Unlike hospital ships, other medical transports are not restricted from using encryption equipment. They are, however, bound by the same requirement that they commit no acts harmful to the enemy. International law permits medical aircraft and vehicles to possess and use encrypted communications equipment “solely to facilitate navigation, communications, or identification.” Hospital ships have the same or similar navigation, communication, and identification requirements as medical transport aircraft.
14. Military Global Positioning System (GPS) is encrypted.
15. Video teleconferencing of real time medical procedures and other patient information would by necessity have to be encrypted in order to utilize the necessary satellite communications.
16. See Commentary, supra note 3, at 194. See also Annotated Supplement, supra note 13, at § 8.2.3.