

United States, Use of Medical Helicopter to target protesters

A helicopter from the US National Guard bearing a Red Cross emblem hovered low above protesters after a city-wide curfew. The case raises questions about the importance of the protection of the emblem and its use as a distinctive sign during peacetime.

Acknowledgments

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. USE OF MEDICAL HELICOPTER TO TARGET PROTESTERS IS UNDER INVESTIGATION, NATIONAL GUARD SAYS

[Source: Alex Horton, Use of medical helicopter to target protesters is under investigation, National Guard says, 2 June 2020, The Washington Post, references omitted, available at:
<https://www.washingtonpost.com/national-security/2020/06/02/helicopter-protest-dc/>]

[1] On the battlefield, the roar of helicopter blades paired with a red cross is salvation for wounded troops and civilians.

[2] But the thwomping blades of military helicopters, including one with red cross markings, were part of a low-flying show of force over Washington's streets Monday night — an incident now under investigation.

[3] Numerous videos on social media showed an unarmed Lakota medevac helicopter hovering over demonstrators. Its red cross markings, visible on the aircraft's belly and side, was flown by the Washington D.C. Army National Guard. At least two helicopters roared overhead, sending people and debris flying.

[4] The use of a helicopter with red cross markings was an abuse of global norms that could help erode its neutral symbolism, military justice experts said.

[5] "This was a foolish move," said Geoffrey Corn, a former Army lawyer and professor at the South Texas College of Law in Houston. "The symbolic significance of the red cross is pervasive: It denotes a 'noncombatant' function of the armed forces."

[6] The National Guard has been used to augment police across the country, defense officials have insisted, including 18,000 Guard members in 29 states and the District mobilized in response to unrest after the death in police custody of George Floyd in Minneapolis last week.

[7] The use of a helicopter's rotor wash, the downward rush of air from its rotors, is a common military tactic to incite fear, disperse crowds and warn of other capabilities, like rockets and guns, said Kyleanne Hunter, a former Marine Corps pilot who flew Cobra attack helicopters in Iraq and Afghanistan.

[8] Hunter, now a senior adjunct fellow at the Center for a New American Security in Washington, said she flew low over civilian vehicles to disperse them ahead of convoys in Iraq.

[9] And after reviewing videos of the helicopter, she concluded that it flew far too low to be on a surveillance mission.

[10] "You add more military equipment, you get more military tactics," she said. "It's to provoke and incite rather to protect and serve."

[11] One helicopter buzzed protesters from a height nearly level with three- and four-story buildings in the Chinatown area, ripping tree limbs away. Rotor wash hurled glass from broken windows like shrapnel. Protesters and a few remaining journalists scattered to the sides of the street to seek shelter beneath awnings, or went sprinting away, shouting "I can't hear!" and "I can't see!"

[12] Many closed or covered their eyes to protect from flying debris and ran blind, causing them to stumble and fall before they scrambled back up.

[13] Maj. Gen. William J. Walker, commander of the D.C. National Guard, has directed an investigation into

the “low-flying maneuver,” a spokesman said Tuesday evening. The decision to use the maneuvers was authorized by the highest levels of that command, the New York Times reported.

[...]

[14] But the use of medevac helicopters during demonstrations after curfew stunned justice experts, who said the red cross symbolizes mercy.

[15] “Misuse of the red cross symbol is prohibited even during peacetime by the First Geneva Convention, to which the U.S. is a party,” said Rachel E. VanLandingham, a former Air Force attorney and professor at the Southwestern Law School in Los Angeles.

[16] Linking the symbol with law enforcement, VanLandingham said, can weaken its “effectiveness as signifying medical and humanitarian assistance, a symbol of trust that is needed to give those vehicles with that symbol needed access where they are needed during armed conflict.”

[17] It is unclear whether the helicopter was one of few available. VanLandingham said it might have been prudent to consider covering up the red crosses before flight.

[18] The use of the helicopter also may violate Army regulations, Corn said, including domestic operations that outline the use of medical resources for “the evacuation of patients, movement of medical supplies and personnel, and support of search and rescue activities.”

[19] Flying low in urban areas presents numerous risks to the pilots, crew, aircraft and people on the ground, Hunter said, factors that are typically considered before flying such a mission.

[20] Helicopters are not as aerodynamic as airplanes, so in the event of a malfunction, pilots need to assess their altitude, speed and weight before calculating what to do. One solution, Hunter explained, is to rotate the aircraft so air can move over the blades — an attempt to control the helicopter into a crash landing.

[21] But the presence of protesters on the ground, buildings on all sides and a low altitude would make such a maneuver “virtually impossible” in the event of engine failure, Hunter said. The best a pilot could hope for at that altitude, she said, is minimizing injuries on the ground.

B. RECKLESS USE OF US HELICOPTERS TO INTIMIDATE PROTESTERS

[Source: Richard Weir, Reckless Use of US Helicopters to Intimidate Protesters, 5 June 2020, Human

Rights Watch, references omitted, available at: <https://www.hrw.org/news/2020/06/05/reckless-use-us-helicopters-intimidate-protesters>]

[...]

A “show of force” is a common US military tactic used to intimidate and scare opponents. But hovering low over protesters and using rotor wash to disperse them is reckless and dangerous. Under these circumstances it was excessive use of force prohibited by international human rights law. One former US military combat pilot told Human Rights Watch he used a similar tactic to suppress and detain suspected insurgents in Afghanistan. The windspeeds created by a low-hovering helicopter can lift objects and cause serious damage, potentially leading to injury or death. These risks are amplified in congested urban environments, where the consequences would be exceptionally dangerous if something were to go wrong.

Using helicopters displaying the Red Cross emblem raises further concerns. The emblem is a universally recognized symbol of medical aid and is protected under the Geneva Conventions. Its misuse is prohibited under the conventions and it has no place in a “show of force” or to forcibly disperse protesters. Commentary by the International Committee of the Red Cross notes that the emblem’s proper use in peacetime is important “to ensure that its special meaning and purpose is well understood, respected and not undermined.”

The commander of the District of Columbia’s National Guard announced an investigation into the incident. The helicopters’ use was reportedly ordered by President Donald Trump, who has since voiced his support for the pilots involved.

[...]

C. 18 US CODE CHAPTER 33 - EMBLEMS, INSIGNIA, AND NAMES, 1948

[Source: ICRC, National Implementation of IHL, 18 US Code Chapter 33 - Emblems, Insignia, and Names, 1948, date of entry into force: 25.06.1948, as amended on 01.03.2012, footnotes omitted, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=EF8F09D7FCF494D1C1256A460036912E&action=openDocument&xp_countrySelected=US&xp_topicSelected=GVAL-992BU8&from=state&SessionID=DZ34ZK89MM]

SUMMARY

The Federal criminal code prohibits the fraudulent or unauthorized use of the red cross emblem and of the words "Red Cross" and "Geneva Cross". The use of the Swiss heraldic emblem is also prohibited within the United States. To falsely or fraudulently pretend or represent oneself as a member of the American Red Cross for the purpose of collecting money or material is a punishable offence under the section 917 of the Code.

[...]

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE

PART I - CRIMES

CHAPTER 33 - EMBLEMS, INSIGNIA, AND NAMES

Sec. 706. Red Cross

Whoever wears or displays the sign of the Red Cross or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for the American National Red Cross; or

Whoever, whether a corporation, association or person, other than the American National Red Cross and its duly authorized employees and agents and the sanitary and hospital authorities of the armed forces of the United States, uses the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or the words "Red Cross" or "Geneva Cross" or any combination of these words -

Shall be fined under this title or imprisoned not more than six months, or both.

This section shall not make unlawful the use of any such emblem, sign, insignia or words which was lawful on the date of enactment of this title.

[...]

D. THE GENEVA DISTINCTIVE EMBLEMS PROTECTION ACT, 2006

[Source: ICRC, National Implementation of IHL, The Geneva Distinctive Emblems Protection Act, 2006,

date of entry into force: 12.01.2007, footnotes omitted, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=B621242120CE4EEDC12572D700384940&action=openDocument&xp_countrySelected=US&xp_topicSelected=GVAL-992BU8&from=state&SessionID=DZ34ZK89MM]

SUMMARY

The Act amends the federal criminal code to prohibit the wearing or displaying of the Red Crescent or the Red Crystal or any other insignia imitating such emblems for the fraudulent purpose of claiming membership in an authorized national society that uses such emblems, the International Committee of the Red Cross (the ICRC), or the International Federation of the Red Cross and Red Crescent Societies (the Federation). The Act also prohibits using the designations red crescent or "third protocol emblem", or emblems or other signs or insignia that are made or coloured in imitation of these emblems. The Act imposes a fine and/or imprisonment of up to six months for such violations. The Act authorizes the use of these emblems and designations, consistent with the Geneva Conventions, by national societies that are members of the Federation, the ICRC, the Federation, their duly authorized employees and agents, as well as the sanitary and hospital services of the armed forces of States Parties to the Geneva Conventions of 12 August 1949. The Act also authorizes the Attorney General to bring a civil suit in the cases of violations of the Act.

[...]

An Act

To amend title 18, United States Code, to prevent and repress the misuse of the Red Crescent distinctive emblem and the Third Protocol (Red Crystal) distinctive emblem. [...]

[...]

SECTION 1. [...]

This Act may be cited as the "Geneva Distinctive Emblems Protection Act of 2006".

SEC. 2. GENEVA DISTINCTIVE EMBLEMS.

[...]

Sec. 706a. Geneva distinctive emblems

(a) Whoever wears or displays the sign of the Red Crescent or the Third Protocol Emblem (the Red Crystal),

or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for an authorized national society using the Red Crescent or the Third Protocol Emblem, the International Committee of the Red Cross, or the International Federation of Red Cross and Red Crescent Societies shall be fined under this title or imprisoned not more than 6 months, or both.

(b) Except as set forth in section (c) and (d), whoever, whether a corporation, association, or person, uses the emblem of the Red Crescent or the Third Protocol Emblem on a white ground or any sign or insignia made or colored in imitation thereof or the designations 'Red Crescent' or 'Third Protocol Emblem' shall be fined under this title or imprisoned not more than 6 months, or both.

(c) The following may use such emblems and designations consistent with the Geneva Conventions of August 12, 1949, and, if applicable, the Additional Protocols:

(1) Authorized national societies that are members of the International Federation of Red Cross and Red Crescent Societies and their duly authorized employees and agents.

(2) The International Committee of the Red Cross and its duly authorized employees and agents.

(3) The International Federation of Red Cross and Red Crescent Societies and its duly authorized employees and agents.

(4) The sanitary and hospital authorities of the armed forces of State Parties to the Geneva Conventions of August 12, 1949.

(d) This section does not make unlawful the use of any such emblem, sign, insignia, or words which was lawful on or before December 8, 2005, if such use would not appear in time of armed conflict to confer the protections of the Geneva Conventions of August 12, 1949, and, if applicable, the Additional Protocols.

(e) A violation of this section or section 706 may be enjoined at the civil suit of the Attorney General.".

[...]

Discussion

1. (*Document A, paras [2]-[3]; Document B; Document C; Document D*)

a. Who is entitled to use the red cross and red crescent emblems? In what circumstances? (HR, Art. 23(1)(f); GC I, Arts 38-44 and 53; GC II, Arts 41-43; GC IV, Art. 18; P I, Arts 8 and 18; P II, Art. 12; CIHL, Rule 59)

b. Who used the helicopter with the red cross emblem in this case? Was it authorised to do so under US

law? Under relevant rules regulating the use of the emblem?

c. Why do the Geneva Conventions and Additional Protocol III contain detailed provisions concerning the use of the emblem? What problems are these provisions attempting to resolve? (GC I, Arts 38-44 and 53; GC II, Arts 41-45; GC IV, Arts 18, 20-22; P I, Arts 8, 18 and 38; P II, Art. 12; CIHL, Rules 30 and 59)

2. (*Document C; Document D*) Can the different distinctive signs authorised by the Geneva Conventions and Additional Protocol III be used interchangeably within the same State? (P III, Arts 2 and 3)

3. (*Document A, paras [1], [5]-[6], [14]-[18]; Document B*)

a. (*Document A, para. [6]*) Does the fact that a military helicopter was involved mean that the whole body of IHL is applicable? Was the emblem in this case used in an armed conflict?

b. What is the scope of applicability of the rules on the protection of the emblem?

c. What is the difference between the protective and indicative uses of the emblem? Are authorised uses of the emblem different in times of armed conflict and during peacetime? (GC I, Art. 54)

d. (*Document A, para. [5]*) Is the emblem's primary function to denote a 'non-combatant' status?

e. Was it lawful to mark a helicopter of the US National Guard with the emblem? Is using a helicopter with an emblem during law enforcement operations prohibited? At least if the purpose was a show of force? Could it be justified by the fact that no other helicopter was available? What could have been an option?

f. (*Document A, para. [16]*) Does IHL provide for any sanctions for misuse of the emblems? Who has the responsibility to punish such misuse? What can be the potential negative consequences of improper use of the emblem? (GC I, Art. 54; GC II, Art. 45; P I, Art. 18)

4. (*Document C; Document D*) Why must States - in this case, the US - adopt legislation on the use of the emblem? Is this necessary even in States where international treaties are considered part of national law under a country's constitutional system? In your opinion, is the US law ideally in line with IHL? (GC I, Arts 44 and 54)