# Attacks on Medical Units in International Humanitarian and Human Rights Law

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MSF-run hospital in Ma'arat al-Numan, Idleb Governorate, 15 February 2016 (Photo MSF - www.msf.org)

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The Syrian conflict has been characterised by the damaging or destruction of a high number of medical units. The sheer number of incidents recorded alone indicates that in many cases such facilities may have been either deliberately targeted or otherwise damaged/destroyed as a result of a failure to adhere to international humanitarian law- in particular the prohibition of launching indiscriminate attacks and the principles of proportionality and precautions in attack. OHCHR has in the first half of 2016, documented medical units such as hospitals and clinics being hit on an almost weekly basis, depriving the local population of their right to health. According to the World Health Organisation almost 60 percent of public hospitals in Syria are now either only partially functional or have closed, and more than 750 health workers have been killed since the beginning of the conflict.[1]

This note has been developed to support humanitarians working on Syria. Its aim is to provide a brief overview of the relevant international humanitarian law and human rights law relating to the protection of medical units in the Syrian context.

# Applicable law

In terms of the applicability of international humanitarian law, the fighting between the Syrian armed forces, pro-government armed groups and third states intervening on the invitation of the government, on one side, and various armed groups on the other, as well as the fighting between the various armed groups is characterized as a non-international armed conflict.[2] As such the Government of Syria, along with all other parties to the non-international armed conflict are bound by international humanitarian law which applies in non-international armed conflict. These include the minimum protections offered by Common Article 3 to the four Geneva Conventions, as well as customary international law applicable in conflicts not of an international nature.[3]

Syria has also signed a number of international human rights law treaties, and these remain applicable during times of armed conflict.[4]

[1] Information provided by the Health Cluster Turkey Gaziantep Hub on 22 August 2016.

[2] The ICRC issued a statement on 17 July 2012, in which it described the violence in Syria as constituting a non-international armed conflict: https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm; the third report of the COI, dated 15 August 2012 also documented in para. 12 that the violence in Syria had reached the legal threshold for a non-international armed conflict. Despite the launching of airstrikes against armed opposition groups by several international actors since 2014, the generally accepted threshold of involvement necessary to be classified as an international armed conflict is generally considered as not having been met in Syria.

[3] As customary international law is determined from evidence of a general practice accepted as law through either the general practice of states or through what states have accepted as law, this document also makes several references to international humanitarian law treaties that are only applicable to parties involved in an international armed conflict, in particular the four Geneva Conventions of 1949 (with the exception of Common Article 3) and it first Additional Protocol of 1977. This document also refers to Additional Protocol II, which Syria has not ratified and is therefore not applicable. These provisions are not applicable to the non-international conflict in Syria and should therefore not themselves be used, or referred to, as a basis for the obligations of the parties to the conflict in Syria. Rather, references are made to them in this document solely for the purpose of being authorities indicating the existence of norms of customary international law applicable in non-international armed conflicts. Similarly, while not an authority in themselves, reference is also made to the position taken by ICRC on what norms have crystallised into rules of customary international law.

[4] Including, but not limited to the International Covenant on Civil and Political Rights, (acceded 1969); International Covenant on Economic, Social and Cultural Rights (acceded 1969); Convention on the Rights of the Child (ratified 1993) acceding to the optional protocols on child soldiers and child trafficking in 2003; International Convention on

# Special protections granted under international humanitarian law

## The law

Intentionally directing attacks against hospitals and places where the sick and wounded are collected is prohibited under international humanitarian law, provided they are not military objectives. Any such intentional attacks are war crimes.

Such a prohibition in non-international armed conflicts is implicit in Common Article 3 of the Geneva Conventions, which requires that the wounded and sick be collected and cared for.[5] It is also an established rule of customary international law applicable in both international and non-international armed conflict.[6] The Security Council has also on several occasions affirmed that this is a rule of customary international law.[7]

## Definition of medical units

The ICRC uses "medical units" to describe all establishments where the wounded and sick are cared for. The ICRC defines "medical units" as establishments and other facilities, whether military or civilian, organized for medical purposes, be they fixed or mobile, permanent or temporary. This includes hospitals and other similar structures, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units.[8] It also includes medical transportation, be it land, water, or air transportation.[9]

## Exception

The clause "provided they are not military objectives" is the exception to the rule prohibiting the targeting of medical facilities. What this means is that the protection of medical units ceases when they are being used outside their humanitarian function to commit "acts harmful to the enemy".[10] Exactly what constitutes such an act is not defined by law, though the 2016 ICRC Commentary on the First Geneva Convention notes that such acts include firing at the enemy for reasons other than individual self-defence, installing a firing position in a medical post, the use of a hospital as a shelter for able-bodied combatants, as an arms or ammunition dump, or as a military observation post, or the placing of a medical unit in proximity to a military objective

the Elimination of All Forms of Racial Discrimination (acceded 1969); and Convention on the Elimination of all Forms of Discrimination Against Women (acceded 2003).

[5] See also ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 28.

[6] In terms of non-international armed conflict: Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 11(1) and Statute of the International Criminal Court, art. 8(2)(e)(ii) and (iv). The protection is also laid out in the military manuals of many states applicable in non-international armed conflict including those of the Russian Federation and the United States. See also ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 28.

[7] Most recently in SC resolution 2286 (2016).

[8] *Ibid*, reflecting the definition in Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 8(e).

[9] Ibid, rule 29, reflecting the implication in common Article 3 of the Geneva Conventions; Protocol II art. 11(1); and Statute of the International Criminal Court, art. 8(2)(e)(ii) and (iv). The protection is also laid out in the military manuals of many states applicable in non-international armed conflict including those of the Russian Federation and the United States.

[10] *Ibid*, rule 28 which states this is a norm of customary international law, reflected in the First Geneva Convention, art. 21; the Fourth Geneva Convention, art. 19; Protocol I, art. 13; and Protocol II, art. 11(2). It is also contained within the military manuals of many states including the United States and the Russian Federation.

with the intention of shielding it from the enemy's military operations.[11]

The use of medical facilities as military objectives could in itself amount to violations of international humanitarian law depending on the reasons behind such actions. If the purpose is in order to render military personnel or equipment immune from attack, such acts may amount to a violation of the requirement to remove, to the extent feasible, civilian persons and objects from the vicinity of military objectives.[12] It may also amount to violations of the IHL prohibitions relating to the taking of hostages,[13] the use of human shields,[14] and the improper use of the distinctive emblems of the Geneva Conventions such as the Red Cross or Red Crescent.[15]

While applicable in international armed conflict, the Geneva Conventions provide useful examples of acts which do not constitute "acts harmful to the enemy", which include the personnel of the unit being lightly armed for the purposes of self-defence or the defence of persons in their charge, the unit being guarded by sentries or a protective barrier, when small arms and ammunition taken from the wounded and sick are found in the unit, or the presence of both wounded and sick combatants and civilians.[16] Purely military medical units run by a party to the conflict providing care to wounded and sick combatants are also protected. Finally, the ICRC notes that state practice, reflected in the Geneva Conventions and Additional Protocols, suggests that prior to launching an attack against a medical unit being used to commit acts harmful to the enemy, a warning should to be issued setting out a reasonable time-limit to desist. Only after such a warning has been unheeded can an attack be launched.[17] This ties in with an attacking party's obligation to abide by the doctrine of precaution (see definition below), which continues to apply regardless of the medical unit's loss of protected status.

The ICRC has stated that the failure to adequately mark a hospital by displaying distinctive emblems does not cause it to lose its protection.[18] The medical unit is protected because of its function, not because it is displaying a distinctive emblem.

**Other violations**

There are cases where the medical unit may not have been intentionally targeted but where violations of international humanitarian law occurred nonetheless. A facility may have been damaged or destroyed as a result of a party launching an indiscriminate attack which was of a nature to strike military objectives and civilians and civilian objects without distinction, or an attack where it could have been expected that the attack would cause excessive damage to civilians, civilian objects, or protected structures in relation to the military advantage anticipated.[19] Such incidents may constitute war crimes if the party knew that the attack may cause excessive incidental civilian loss of life, injury, or damage.[20]

The attacker may have also failed to abide by the principles of distinction, proportionality and precautions in attack, which would be a violation of international humanitarian law. These

[11] ICRC 2016 Commentary on the First Geneva Convention, paragraphs 1841-1842.
[12] Ibid, rule 24.
[13] See ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 96.
[14] *Ibid*, rule 97.
[15] ICRC 2016 Commentary on the First Geneva Convention, paragraph 1842; and ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 59.
[16] First Geneva Convention, art. 22; Fourth Geneva Convention, art. 19; and Protocol I, art. 13(2).
[17] See ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 28; First Geneva Convention, art. 21; Fourth Geneva Convention, art. 19; Protocol I, art. 13(1); and Protocol II, art. 11(2).
[18] See ICRC, Customary International Humanitarian Law: Volume 1: Rules, rules 28 and 30.
[19] For a detailed explanation of what constitutes an indiscriminate attack for the purposes of international humanitarian law, see the paper "Indiscriminate Attacks and Indiscriminate Weapons in International Humanitarian Law", produced by OHCHR Syria Team in March 2016.
[20] See ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 156.

principles can be understood as follows:

*Distinction*: parties to the conflict must distinguish between the civilian population and fighters, and between civilian objects and military objectives - a typical example of a breach of this principle would be for example the bombarding of an entire area from the air and treating 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.

*Proportionality:* parties to the conflict are prohibited from launching 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 (disproportionate) in relation to the concrete and direct military advantage anticipated.

*Precaution in attack:* In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. This includes verifying that the target is a military objective and that the attack respects the proportionality requirement; choosing weapons and timing for the attack with a view to avoiding or reducing civilian casualties; issuing advance warnings when feasible; and suspending an attack if it becomes apparent that it does not respect the principle of proportionality.

**Duty to investigate such attacks**

International humanitarian law places and obligation on States to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and if appropriate, prosecute the suspects.[21] Any such action must of course be in conformity with international human rights law relating to due process and the right to a fair trial.[22]

Such a duty to investigate and hold to account is applicable to non-state actors due to such groups being subject to international humanitarian law. It is also implicit in the doctrine of "command responsibility", which holds commanders and other superiors criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.[23]

[21] This requirement is accepted as a rule of customary international law applicable in non-international armed conflict. See ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 158. Such a clause is also contained in the Preamble to the Statute of the International Criminal Court. It is included in several international conventions applicable in non-international armed conflict such as: the Convention on the Prevention and Punishment of the Crime of Genocide, art. VI; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7; and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. 7(1). It is also contained within all four Geneva Conventions: First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; and Fourth Geneva Convention, art. 146.

[22] See in particular the International Covenant on Civil and Political Rights, art. 9, 10, 11, 14, and 15.

[23] See ICRC, Customary International Humanitarian Law: Volume 1: Rules, rule 153. This doctrine is also contained within Statute of the International Criminal Court, art. 28; along with in the states of several ad-hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 7(3); and the International Criminal Tribunal for Rwanda (ICTR), art. 6(3). Several commanders and civilian persons in positions of authority have been tried and in many cases convicted for war crimes committed by members of armed groups under their command or authority.

# International human rights law - the right to health

Under international human rights law, everyone has the right to the highest attainable standard of physical and mental health.[24] It is important to note that the right to health is not one's right to be healthy, but rather constitutes a number of freedoms and entitlements, including the right to be free from interference with one's health, and entitlement to have access to health facilities, goods and services, as well as to the enjoyment of the conditions which allow people to lead healthy lives such as food, housing, water and sanitation, safe and healthy working conditions, and a healthy environment.[25] International human rights law recognises that many States do not have sufficient resources to be able to establish a highly modernised national health service, especially in a time of conflict. States are therefore under an obligation to use the maximum of their available resources in taking progressive steps towards the full realization of the right to the highest attainable standard of health for their citizens.

In cases in which it is impossible or extremely difficult for the State to fulfil the right to health, due to lack of control over certain parts of its territory, the State retains the obligation not to raise any obstacles to the full realization of this right and must take all possible measure to facilitate its realization.

It is a violation of international human rights law if a State breaches the obligations to respect and protect the right to health. Core obligations of a state with regard to this right include as a minimum the requirement:

a) To ensure the right of access to health facilities, goods, and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;

b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

c) To ensure access to basic shelter, housing, and sanitation, and an adequate supply of safe and potable water;

d) To provide essential drugs, as from time to time denied under the WHO Action Programme on Essential Drugs;
e) To ensure equitable distribution of all health facilities, good and services.[26]

Any action taken by a state to frustrate any of the above listed obligations is also a violation of the right to health.

[24] International Covenant on Economic, Social and Cultural Rights, art. 12; Convention on the Rights of the Child, art 6(2), 23, and 24; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5e(iv); and the Convention on the Elimination of all Forms of Discrimination Against Women, art. 11(1)(f), 12, and 14(2)(b).
[25] Committee on Economic, Social, and Cultural Rights, General Comment No. 14, para. 8.
[26] *Ibid*, para. 43.