



International legal protection of medical personnel in warfare and peace missions

Međunarodna pravna zaštita medicinskog osoblja u ratu i mirovnim misijama

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Introduction

According to the International Committee of the Red Cross (ICRC) “2,400 targeted attacks had been carried out in the last three years against patients and health-care workers, transport and centres in 11 countries”¹. According to the Physicians for Human Rights in Syria there were 400 attacks against medical facilities and 768 deaths of medical personnel since March 2011². World Health Organisation (WHO) stated that as many as 645 medical personnel were killed during the armed conflict in Syria until September 2015³ and that around 60% of hospitals became dysfunctional during the same period. All these circumstances, including several heavy attacks on hospitals in Syria and Afghanistan in 2015 and 2016^a⁴ prompted the UN Security Council to reaffirm the international law protection of medical and humanitarian personnel by adopting Resolution 2286 (2016). Despite the rising number of casualties in armed conflicts worldwide, there is still relentless support for international peace missions, which invariably involve medical personnel, by both United Nations (UN) and other international organisations. Against the background of recent events, UN Security Council (UNSC) Resolution and widespread practice of peace missions, this article will try to provide a brief overview of international legal framework relevant for medical and humanitarian personnel covering both the status of domestic medical personnel and that of international missions in warfare and for peace operations.

^a Attack on the hospital of Doctors without Frontiers in Kunduz, Afghanistan on 3 October 2015 killing 42 people including doctors, nurses and patients. Reports show that only in 2015 and during the first three months of 2016 there were attacks on medical personnel and facilities in 19 countries in armed conflicts or political violence.

General legal framework – Geneva Conventions and international humanitarian law

International humanitarian law traces back to the mid of XIX century⁵. Rules applicable today stem from the four 1949 Geneva Conventions (GC)⁶, their Additional Protocols (AP) adopted in 1979 and 2005⁷, and the so-called Hague rules codified almost a century ago. Regardless of different sources, there is a common understanding today that international humanitarian law is “one single complex system”⁸.

The fundamental rule relevant for medical personnel attached to their armed forces guarantees a specially protected status which means that they must be respected and protected at all times and in all circumstances (GCI Art. 24, GCII Art. 36, GCIV Art. 20, API Art. 15, and APII Art. 9)^{6,7}. This protection covers immunity from the attacks and obligation to ensure uninterrupted performance of providing medical help and health care even if they fall into the hands of the adverse party (GCI, Arts. 19-23)⁶, including the right of medical personnel to be allowed to search for and to collect wounded and sick (GCI, Art. 15, APII, Art. 8)^{6,7}. Medical personnel is entitled to wear a distinctive emblem of Red Cross (GCI Arts. 40, 41; GCII Art. 42; GCIV Art. 20; API Art. 18; APII Art. 12)^{6,7}, to carry small arms and to provide medical assistance in all circumstances (GCI, Art. 22)⁶. Immunity includes the prohibition of requisition of medical equipment and supplies (GCI Arts. 33–35, GCIV Art. 57, and API Art. 14)^{6,7}. Upon the outbreak and during the course of hostilities parties to the conflict may establish hospital zones and localities whereas protecting powers and ICRC are invited to facilitate the institution and recognition of these hospitals and localities (GCI, Art. 23, GCIV, Art. 14)^{6,7}. This protection can be removed once the abuse of protected status is revealed (GCI, Art. 19, 24)⁶. However, under no circumstances shall the medical aid be considered as an abuse of privileged status.

The privileged status is further confirmed by the rule in Article 28 of the Geneva Convention I according to which medical personnel who fall into the hands of the adverse Party, may be retained only in so far as the state of health of prisoners of war requires or otherwise be released. Pursuant to Article 30 of the GCI⁶: “medical personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit. Pending their return, they shall not be deemed prisoners of war but they shall continue to fulfill their duties under the orders of the adverse Party and shall preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong. On their departure, they shall take with them the effects, personal belongings, valuables and instruments belonging to them.”

Therefore, medical personnel will not have the status of prisoners of war (POWs) but will still benefit from all the provisions of the GCIII (GCI, Art. 28, 29, GCII Art. 37, GCIII, Arts. 32 and 33)⁶. This is why they have the status of retained personnel unlike other persons in captivity who are detained persons or prisoners. In these circumstances medical personnel are entitled to certain special privileges such as the right to visit periodically prisoners of war in hospitals outside the detention camp, right to have the senior medical officer of the highest rank to monitor the professional activity of the retained medical personnel, the right to direct access to medical personnel under their supervision, right to be released of all other duties other than health services. However, medical personnel belonging to neutral powers or organisations entrusted with medical aid, which are not deemed as a party to the conflict, may not even be retained (GCI, Art. 32)⁶.

The 1949 Fourth Geneva Convention (GCIV)⁶ was the first international treaty to provide special protection to civilian population thereby extending the application of international humanitarian law to civilian medical personnel and hospitals. Under the GCIV medical personnel and hospitals are to be respected and protected from deliberate attacks (GCIV, Art. 18)⁶ unless hospitals are used for military operations causing harm to the enemy but only after a due warning is given (GCIV, Art. 19)⁶ medical personnel are to be given the safe passage for evacuation during the attack (GCIV, Art. 17)⁶, while hospital staff, defined as “persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases” [GCIV, Art. 20(1)]⁶ are protected and respected and will be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armband which they shall wear on the left arm while carrying out their duties (GCIV, Art. 20)⁶. This protection is in line with the duty of the parties to the conflict as well as of the occupying power to provide medical care and supplies to civilians (GCIV, Arts. 55-56)⁶, so medical personnel are always allowed to carry out their duties (GCIV, Art. 56)⁶. In addition,

internees are entitled to the attention of medical personnel of their own nationality (GCIV, Art. 91(3))⁶. Internees who are doctors, dentists or other medical personnel may be employed by the detaining power to provide medical aid to other internees (GCIV, Art. 95).

Additional Protocols to Geneva Convention (1977)⁷ extend the protection to civilian medical personnel, medical supplies and units. The protection originally provided only to medical personnel attached to parties to the conflict is now extended for humanitarian purposes to practically all categories of medical personnel: of a neutral or other State which is not a Party to that conflict; of a recognized and authorized aid society of such a State, and of an impartial international humanitarian organization [API, Art. 9(2)]⁷, but according to Protocol I there need to be identity cards issued to both permanent and temporary civilian medical personnel (API, Annex I (1993), Arts. 2, 3). All necessary help and assistance shall be provided to civilian medical personnel in areas where health services cease due to combats (API, Art. 15)⁷. Pursuant to Article 16 of API any person able to perform medical activities for the benefit of the wounded should be able to do so without fear or any form of coercion. This means that medical personnel are immune from punishments for providing medical aid or assistance provided that assistance is in line with medical ethics (GCI Art. 18, API Art. 16, 17 and APII Art. 10). According to the Commentary of the API “medical activity” is not limited to giving treatment: “He [doctor] may be called upon also to diagnose (which may reveal that nothing is wrong), report as an expert consultant, give proof of death, or merely advice, and so forth”⁹. There is also prohibition of coercing medical personnel to provide assistance that is contrary to medical ethics (API Art. 16, APII Art. 10)⁷. Furthermore, according to Article 16(3) of the API medical personnel can withhold information on patients “under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families.” This seems to extend the standard rule of “medical confidentiality” as it implies that such patients are not to be denounced⁹. Still, it is not entirely clear to whom this obligation is actually addressed: to those who can compel medical personnel or to medical personnel itself^b. However, there is an exception from this rule in relation to the compulsory notification of communicable diseases [API, Art. 16(3)]⁷.

The minimum standard of protection of medical personnel that is applicable to national medical personnel of the parties to the conflict places health workers in a better position than persons falling into the category of combatants. Such protection can cease only if these privileges are used to commit hostile acts outside of their humanitarian function, and only upon a due and timely warning¹⁰. The same applies

^b “[T]here is no obligation upon those exercising medical activities to remain silent. They may denounce the presence of the wounded to the authorities even when they know that this will be prejudicial to the wounded person or his family, if such denunciation is in their view necessary for saving lives. The prohibition is aimed at those who could compel such denunciations.” – The 1987 Commentary of the API⁹.

to members of the medical profession who take part in hostilities regardless of their medical background¹¹. The practical problem that may arise in a warfare is the re-assigning personnel from medical to non-medical and *vice versa* as it significantly changes the status of combat immunity¹².

Breaches of the rules of protection of medical personnel in a warfare or during military occupation fall into the category of war crimes as prescribed by international criminal law, more precisely by Article 8(2)(b)(xxiv) of the Statute of the International Criminal Court: “intentionally directing attacks against...personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” and civilian medical personnel that is to be respected at all times constitute a war crime in international armed conflicts. Since medical personnel are entitled to use these emblems it follows that they are protected by this criminal law provision. In addition, a number of national military manuals and national criminal legislation provide for criminal punishment in case of disrespect for medical personnel, units and hospitals. Also, denial of medical services equally amounts to a war crime¹³. Conversely, war crimes committed by medical personnel have also been recognized by international law and are usually referred to as “medical crimes”¹⁴.

Special legal regimes: Peace missions

There is an estimate that around 100,000 persons have been engaged in UN peace missions today¹⁵, so the significance of their legal status from the international, humanitarian and national law is self-evident. While the general legal framework provides for rules applicable during the armed conflicts and in occupied territories, contemporary employment of international forces quite often fall outside such context given that international forces organized under the auspices of the UN and other international organisations will usually find themselves outside the war zones¹⁶ for the purposes of so-called peace-keeping, peace-making or peace-building missions^c. On the other hand, the possibility for peace corps to get involved in the armed conflict cannot be fully excluded. Therefore, the international legal regime for peace missions is a complex one that depends on the circumstances in which they operate, i.e. whether they are involved in the armed conflict and what their role is therein, or whether international forces are operating in peace zones where there is still a risk of hostilities which may require the use of enforcement measures.

Although the idea of peace missions originated at the very beginning of the work of the United Nations, peace missions as such are not envisaged in the UN Charter. Originally the peace missions were organized under Chapter

VI of the UN Charter whereas today they have been mostly authorized by the UN Security Council acting under Chapter VII of the UN Charter. The difference lies in the authority of the decision adopted. The whole legal framework was to be constructed in the years to come and significantly improved during the last 20 years. The assumption that UN peace corps were to be employed outside war zones significantly shaped the rules for peace missions. However, this assumption would turn out to be rebuttable so the rules applicable to peace missions in armed conflicts were also reconsidered. Therefore, rules applicable for peace missions and medical personnel which constitute their integral part shall be presented here along these lines.

UN peace missions consist of military and civilian personnel of contributing states on the basis of agreement between these states and the UN. Its employment in foreign territories is further based on the decisions of UNSC and agreement between the UN and receiving State [Status of Forces Agreement (SOFA) or Status of Mission Agreement (SOMA)], as well as on the memorandums of understanding entered into between contributing states and the UN.¹⁷ Despite the fact that there is a model SOFA, each UN peace mission has a specific legal framework within which it operates.

On the other hand, there are some significant general rules applicable to all UN peace missions mostly in terms of immunities and privileges. The main privilege enjoyed by members of peace missions is immunity from the jurisdiction of a receiving state. Probably the most relevant international treaty for granting this privilege and other forms of protection of personnel participating in UN peace missions would be the 1946 Convention on the Privileges and Immunities (CPI) of the United Nations¹⁸ and the 1994 Convention on the Safety of United Nations and Associated Personnel (Safety Convention)¹⁹ and its 2005 Optional Protocol. According to its Article 1(c) this Convention applies to all UN operations undertaken “for the purpose of maintaining or restoring international peace and security” or when the Security Council or the General Assembly “has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation”¹⁹. Pursuant to the Convention all parties have a duty to ensure the safety and security of UN and associated personnel and to take appropriate steps for their protection while on a mission. The Optional Protocol extends such protection to humanitarian, political and development assistance. In its Article 4, the Safety Convention mandates the UN to conclude special agreements with host states that would include provisions on immunities of members of the peace mission. This is not without relevance given that a number of existing and prospective host states have not ratified the Safety Convention. In practice these agreements are known as, already mentioned Status-of-Force Agreements (SOFA) and Status-of-Mission Agreements (SOMA) which individually settle a number of outstanding issues including those of privileges and immunities: “The conclusion of SOFAs or SOMAs is of practical value for each mission. While the sovereign immunity of peacekeepers derives from customary law rather than SOFAs and SOMAs, the latter may have three important effects: to

^cThere are also more specialised peace operations such as UNMEER (United Nations Mission for Ebola Emergency Response - UN GA 69/1(2014) and UN SC Res. 2177(2014)) that was the first-ever UN emergency health mission entrusted with the task to scale up the response to this disease on the ground. After the mission's mandate expired on 31 July 2015 it was overtaken by several agencies including UN peace mission in Liberia and WHO. Such missions inevitably involve a considerable number of medical personnel.

confirm the principle of immunity; to jointly agree on certain limitations to existing privileges where this may be appropriate, and to establish rules and procedures for cooperation between the sending state and the host state”¹⁶. These agreements also regulate which laws of the host state remain applicable for members of peace missions as well as which laws would not apply (such as the rules on carrying arms, traffic rules, social security and salaries legislation, etc.).

For example, there were several peace-keeping missions in Chad and Central African Republic (CAR) caused by the increase of refugees from Sudan and CAR^d. The current peace-keeping missions are the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the European Union Training Mission in the CAR (EUTM-RCA). The MINUSCA Status of Forces Agreement was concluded on 2 September 2014²⁰. Given the grave situations in neighbouring countries and civil war within CAR^e the issue remained constantly under the Security Council monitoring which resulted, *inter alia*, in UN sanctions against CAR involving arms embargo, travel ban and freezing of assets²¹. According to the CAR SOFA and SC Resolutions, the mandate and powers of the MINUSCA were widely tailored. For example, SC Res. 2301 (2016) adapted the mandate of the MINUSCA by allowing “proactive and robust posture without prejudice to the basic principles of peacekeeping”²¹ and “to actively seize, confiscate and destroy, as appropriate, the weapons and ammunitions of armed elements, including all militias and other non-state armed groups, who refuse or fail to lay down their arms”²¹ which implies the right to use force.

Civilian and military personnel of MINUSCA, its contractors and national contingencies of participating States, as well as their property, assets and funds, thus enjoy judicial immunity from the CAR (paras. 4, 15, 26-34 CAR SOFA; II, V-VII CPI)^{18, 20}. However, the CAR SOFA permits the arrest of MINUSCA military personnel but only by MINUSCA military police in order to be transferred to their commander for further disciplinary measures. Military members of the military component of MINUSCA shall be subject to the exclusive jurisdiction of their respective participating State in respect of any criminal offence that may be committed by them in the Central African Republic. Immunity from civil jurisdiction depends on the prior authorization of the UN Special Representative depending on whether the case is related to official duties (CAR SOFA, Art. 53)²⁰. However, they are not relieved of responsibility that is to be assessed before their domestic courts whose jurisdiction remain intact by their international status. As to civil liability for damages

^d The MINURCAT mission (established on the basis of SC Res. 1778 (2007) of 25 September 2007 followed by the SOMA between UN and Central African Republic concluded on 20 November 2008. MINURCAT completed its mission in 2010 due to the decision of Chad to withdraw from the agreement) was transformed to a new mission, BINUCA that was eventually, following the adoption of the SC Res. 2149 (2014) subsumed in the newly established peacekeeping operation – MINUSCA.

^e Prosecutor of the International Criminal Court opened on 24 September 2014 investigation into alleged crimes committed since 2012.

that may occur in the course of the performance of their duties any claim for damages can be addressed only to the UN (CAR SOFA, Art. 56), which is the result of both the immunity of personnel but also of the legal capacity of the UN^{f, 16}. MINUSCA is entitled to premises free of charge, to fiscal privileges, tax-free imports and establishment of commissaries, full freedom of movement without any restrictions or prior approvals, including the unrestricted entry into and departure from the CAR.

However, immunities are not the only privilege assigned to personnel²² – it extends to the prohibition of arrest and hostage-taking (Safety Convention, Art. 8)^g. They are equally protected from any form of attack that is punishable by laws of receiving states. The status of peace corps under the Safety Convention assumes that there is no armed conflict that would replace the applicability of norms of peace to norms of war, i.e. the international humanitarian law. The problem is one on the ground: the level of hostilities which may involve members of peace operations does not have to rise to the level of armed conflict but would certainly involve some use of force. Such “robust peace operations”¹⁶ are not rare, as can be seen from the authority vested to MINUSCA described above. The principal position is that such situations are those of enforcement rather than hostilities so the international humanitarian law does not apply¹⁶ or even that the level of use of force by peace operations can be of a higher level than for other armed forces before the international humanitarian law applies²³. However, there are situations when the existence of the armed conflict would be recognized by the peace mission. There are several possible regimes for the peace corps in the armed conflict: if international forces take part in hostilities and become a party to the armed conflict, and if they are engaged in the armed conflict but without being a party to it. In the first instance, members of the military component of the peace mission become combatants and they are thus fully under the international humanitarian law regime – which moves medical personnel under the scope of Geneva Conventions both in terms of its rights and duties. In the second instance peace corps enjoy the pro-

^f While the rules envisaged in the CAR SOFA follow the general practice in this respect, there is also emerging practice according to which certain exceptions seem to have been carved out before several national courts precisely because of the immunities of the UN as an international organization, and on the basis of command control over national contingencies. “In *Mothers of Srebrenica et al. v. Netherlands and the United Nations*, the Hague Court of Appeal ruled that it is impossible to bring the UN before a Dutch court due to the immunity from prosecution granted to the UN pursuant to international conventions, and it accepted that the Netherlands should share UN immunity in this respect. Later on, in *Netherlands v. Hasan Nuhanovic*’, the Supreme Court of the Netherlands concluded that the Netherlands was responsible for the death of three Muslim men from Srebrenica and stated that the pertinent conduct of Dutchbat, as part of a UN peacekeeping force, could be attributed to the Netherlands because public international law allows the conduct to be attributed in this specific case to the sending state and not to the UN, insofar as the state had effective control over the disputed conduct. Immunity was not invoked here, because the Court was deciding on the conduct of national military personnel. It rather concluded that the UN did not have (or no longer had) exclusive operational control over Dutchbat, and that the state of the Netherlands was responsible for those actions in terms of domestic tort law.”

^g During the operation of UN Peace Mission in Sierra Leone (UNAMSIL) 500 peacekeepers were taken hostage in May 2000.

tection as civilians and cannot be treated as a legitimate target despite the warfare situation²⁴.

Structure and levels of medical support for UN peacekeeping missions have been standardized and generally supported by the medical support unit of the Department for Peace Keeping Operations (DPKO) of the UN²⁵. According to the surveys of professional medical personnel of certain contributing states, there seem to be some chronic and typical problems arising out of complex multinational peace operations regarding the status and functioning of medical support for peacekeeping missions²⁶. During the UNAMSIL it was discovered that national contingencies were not able to provide satisfactory medical support. Problems that were identified were in relation to inadequate medical care for the civilian members of the mission either in terms of the lack of specialists (tropical diseases, gynaecologists) or lack of hygiene²⁷. The problems do not end with organizational or resource issues but may involve some ethical considerations especially regarding the medical aid to the local population.²⁸ The ethical dilemma lies in the conflict between the UN medical mandate limited to UN personnel, on one hand, and professional duties of medical workers, international humanitarian and human rights considerations toward local population, on the other. For example, in the 2014 *Memorandum of Understanding between the UN and Republic of Serbia for Contributing Resources to the United Nations Interim Force in Lebanon (UNIFIL)*²⁹ explicitly sets forth that medical support facilities can provide care to UN and other authorized personnel, either under self-sustainment or as a fee-for-service medical care (except for emergency care). However, this regime is not applicable to the local population: "Care provided to non-eligible personnel (e.g. local population) by a troop/police contributor is not reimbursable by the United Nations."

Responsibilities of contributing states do not cease with sending their personnel to act under the UN mandate. Even more, it seems that it is their "primary responsibility to ensure that units are properly equipped, trained and prepared for a peacekeeping mission"²⁷. The command structure may remain with the contributing state together with the need to establish a mechanism for potential responsibility claims and issues regarding its personnel.

National legal framework of Serbia for multinational operations

While the general legal framework is international, there are also national legal rules the scope of which is limited to national contingencies. These rules cannot overturn or outweigh international legal regime but they are of immediate relevance for national members of peace mission and to certain extent supplement international legal regime by providing additional protection to national troops or by implementing rules on responsibility for acts of national contingencies. In case of Serbia, there is a special Law on Deployment of Serbian Army and Other Defence Forces in Multinational Operations outside the Territory of Republic of Serbia (2009). This Law allows that only those members of

armed forces of Serbia who had adequate training and were given certificate are eligible to join national contingency of peace corps (Art. 12), where they cannot stay longer than one year (Art. 22). Their engagement is contract-based (Art. 30) and is subject to disciplinary, criminal and civil liability rules set forth in both national legislation and international treaties (Art. 27), and most notably to international rules on the use of force and international humanitarian law. There are a number of social benefits (Arts. 25 and 34) as well as legal, diplomatic and material assistance (Art. 28) for Serbian military personnel engaged in multinational operations. While all members of peace missions represent UN or other international organization and while they enjoy immunity from the courts of the receiving state²⁹, the command structure remains with the commander of national contingency unless the applicable international agreement provide for a different command structure (Art. 21) and Republic Serbia, as a contributing state, remains liable for civil damages incurred on third parties during the mission (Art. 38).

Conclusion

International humanitarian law applicable during the armed conflict has equalized military and civilian medical personnel in terms of their protection. However, the rules on military medical personnel are more detailed and precise regarding both their rights and responsibilities in a warfare given their special position. The protection extended to medical personnel and hospitals is on the higher end of protection granted by the international humanitarian law the breach of which can be qualified as war crimes. The protection of medical personnel within peace missions is of equal value but of different source and character as it amounts to the protection available to diplomatic missions. While there exists difference between military personnel as opposed to civilian component of peace missions, where the former enjoy absolute immunity from jurisdiction of the host state, the concept of protection of UN places also civilian part of the mission quite high given the condition of prior authorization of the Special Representative of the UN Secretary General for any enforcement measure to be undertaken against personnel before the courts of the host state. The particular regime is, however, always to be assessed against the rules envisaged in SOFA or SOMA agreement concluded for each particular peace mission. The problem that peace missions are facing today is the one of characterization of the hostilities where they operate, i.e. which rules governing the use of force would be applicable. If hostilities are qualified as armed conflict it is the international humanitarian law that applies, but if such hostilities do not reach the level of armed conflict measures undertaken would be treated as enforcement measures outside international humanitarian law context. There remains the fact that today peace missions function in quite volatile environments with increasing risks for peace corps personnel which has been indirectly confirmed by UN Security Council resolutions authorizing peace missions to act in a more proactive and robust manner.

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