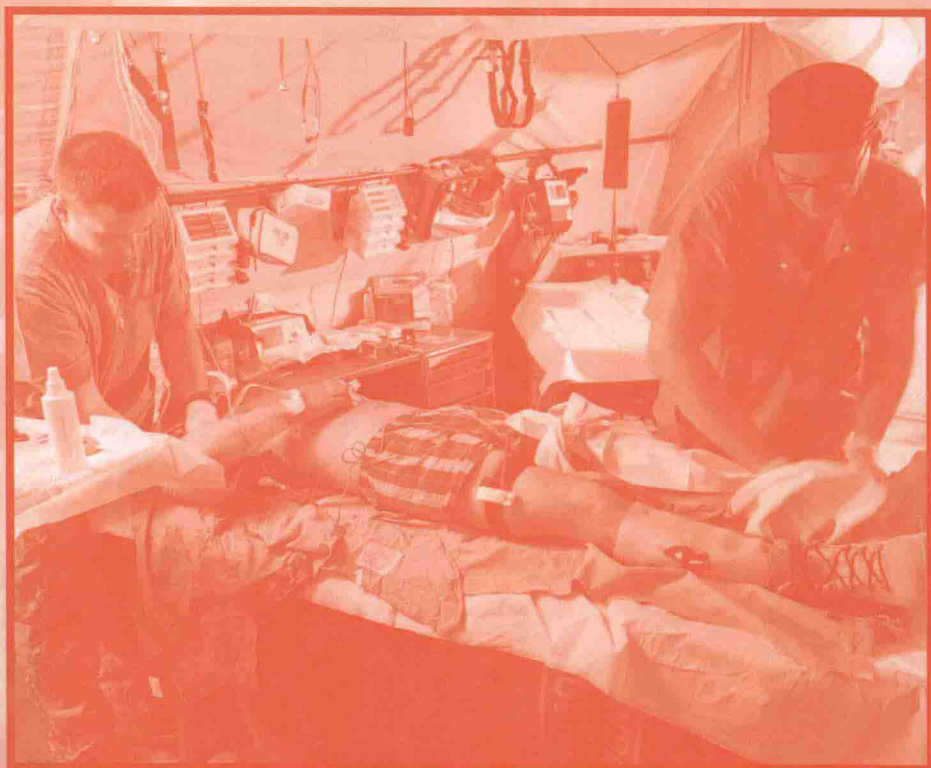


International Humanitarian Law Series

First Do No Harm: Medical Ethics in International Humanitarian Law

Sigrid Mehring



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First Do No Harm: Medical Ethics in International Humanitarian Law

By

Sigrid Mehring



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Doctors and paramedics of the German armed Bundeswehr forces demonstrate the supply of a wounded man in a mobile field hospital during an exercise in the German base camp in Mazar-i-Sharif, Afghanistan, October 2013. Copyright: ANP, The Netherlands.

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Dedicated to my father



Preface and Acknowledgments

Because both international humanitarian law and medical ethics have been my passions for a long time, it was my goal to combine both areas of study in a book on a topic that deserves academic scrutiny: medical care in armed conflicts. The work of physicians in armed conflict, though often valued and noticed, has so many facets that an in-depth study of this work was in order. It comes at a time where the medical involvement in ill-treatment of persons seeking and needing medical care has increasingly received international attention. It is my hope that this attention does not abate – for the sake of the men and women who risk their lives to save those of others and the many victims of armed conflicts.

This book is based on my doctoral thesis at the University of Hamburg. It was written between 2009 and 2012, and updated in April 2014. More recent legal and political developments could regrettably not be taken into account.

I owe a debt of gratitude to many who have supported and helped me in the work on this book. First and foremost, I would like to express my gratitude to em. Prof. Dr. Dr. h.c. Rüdiger Wolfrum for supervising my thesis, for giving me freedom in my research and for providing opportunities to enhance my work on international humanitarian law and increase my knowledge on general public international law while at the Max Planck Institut for Comparative Public Law and International Law in Heidelberg. For his belief in my work and incredible feedback, I would furthermore like to thank Prof. Dr. Stefan Oeter.

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My gratitude also goes to Brill Publishers for their encouragement and the decision to publish this book in the International Humanitarian Law Series. I am honored.

Finally, I am eternally grateful to my family, especially my father for teaching me to work and think like a lawyer, Gudrun for instilling in me a sense for the dilemmas that physicians face and making me the 'Passiv-Mediziner' I am, Saskia for the much needed distraction and comfort food, and my mother for all the emotional support. And finally, Jannes. Thank you.

Contents

Preface and Acknowledgments	xI
-----------------------------	----

Introduction	1
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PART 1

Introduction to Physicians in Armed Conflicts and Medical Ethics

1	The Role of Physicians in Armed Conflict	9
	A Medical Actors in Armed Conflicts	9
	B Guiding Principles	13
	C General Principles of Medical Ethics	27
	D Specific Areas of Concern in Recent Armed Conflicts	48
	E Conclusion	75

PART 2

The Legal Framework of Medical Care in Armed Conflicts

2	International Humanitarian Law	79
	A The Geneva Conventions of 1864, 1906 and 1929	79
	B Medical Care in International Armed Conflicts	87
	C Medical Care in Non-International Armed Conflicts	118
	D Conclusion	127
3	International Criminal Law	131
	A Medical War Crimes	133
	B Medical War Crimes in International Criminal Law	141
	C Prosecution of Medical War Crimes	148
	D Possible Defenses to Medical War Crimes	175
	E Conclusion	183
4	Customary Status of International Humanitarian Law	189
	A Customary International Humanitarian Law	190
	B The ICRC Study on Customary International Law	225
	C Conclusion	233

- 5 **The Relevant Human Rights Norms Applicable to the Work of Physicians in Armed Conflict** 236
 - A Applicability of Human Rights in Armed Conflicts 237
 - B Human Rights Relevant to Medical Treatment 257
 - C Conclusion 272

PART 3

Medical Ethics in Armed Conflict

- 6 **The Interpretation of the Reference to Medical Ethics and Generally Accepted Medical Standards pursuant to the Vienna Convention on the Law of Treaties** 279
 - A Articles 31 and 32 of the Vienna Convention on the Law of Treaties 279
 - B An Interpretation of the Open Terms in Geneva Law pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties 283
 - C Conclusion 303
- 7 **Medical Ethics in International Law** 306
 - A Medical Ethics as Found in International Humanitarian Law 306
 - B Medical Ethics in Other Sources of International Law 310
 - C Conclusion 334
- 8 **A Pluralistic Approach to Medical Ethics** 335
 - A A National Concept of Medical Ethics in International Humanitarian Law 336
 - B National Medical Ethics 338
 - C The Desirability of a Pluralistic Approach 354
 - D Conclusion 357
- 9 **The Documents by the World Medical Association (WMA)** 360
 - A The World Medical Association 364
 - B The Status of the WMA Documents 365
 - C The Legitimacy of the WMA Documents 368
 - D Conclusion 418

PART 4

Conclusion

10	Conclusion, Recommendations and Outlook	423
	A Conclusion on Medical Ethics in International Humanitarian Law	423
	B Five Common Principles of Medical Ethics	427
	C Outlook	433
	Annexes	437
	Annex I: The Hippocratic Oath as translated by Heinrich von Staden	437
	Annex II: WMA Declaration of Geneva	438
	Annex III: WMA International Code of Medical Ethics	439
	Annex IV: WMA Regulations in Times of Armed Conflict	441
	Bibliography	445
	A Literature	445
	B Table of Cases	476
	C Documents	484
	D Web Pages	495
	Index	496

Introduction

Picture a war without physicians. This would mean unimaginable suffering not only for civilian populations but also for all those on a battlefield, in an airplane or on the seas, as well as those captured. It would mean that no medical care could be provided to those wounded by weapons of war. The suffering of the victims of war would be much greater. Even though physicians' tasks also include ensuring a continuous fighting force, they are the prime actors who make armed conflicts bearable. Hence, it should be considered a great achievement of the past centuries that physicians play their role in armed conflicts. Physicians not always work in the spotlights, but rather on the sidelines by alleviating suffering, assuaging wounds, and ensuring a last bit of normalcy in situations of chaos caused by conflict. With physicians, armed conflicts can be fought with at least a speck of respect for the humanity of persons.

Naturally, there are a number of different actors in armed conflict that all serve the medical needs of the victims of armed conflicts: from military medical personnel, to the personnel of civilian hospitals, to members of humanitarian aid organizations. They all share the same mission of saving lives and alleviating suffering in an endeavor aimed at destruction and death. What they also have in common are the rules binding them. All physicians who are carrying out medical duties in armed conflict, whether as part of military or civilian personnel or whether employed by a humanitarian aid organization, have rights and obligations imposed by international humanitarian law.¹

The present analysis is born out of curiosity for the role of physicians in recent armed conflicts.² Although working on the sidelines, physicians are often the center of attention, for example in the Gaza-conflict in 2008/2009 or in the unrest during the Arab spring of 2011.³ Reports concern their work, for

1 The term international humanitarian law and the laws of armed conflict will be used interchangeably, though the former should be given preference as it emphasizes the humanitarian character of this area of international law.

2 In modern conflicts, there is a wide range of actors providing medical care, including physicians, nurses, psychologists, paramedics, and others. This book will focus on physicians. The term 'physician' will be used as a *generalis* for all persons 'trained and qualified to practise medicine', *The Oxford Dictionary of English*, 2nd Ed. (Oxford University Press, 2006), while the term 'doctor' will be used if used by others or in quotes.

3 Especially non-governmental organizations have discussed the role of physicians in armed conflict, for example in the Gaza conflict: Amnesty International, *The Conflict in Gaza: A Briefing on applicable Law, Investigations and Accountability*, AI Index: MDE 15/007/2009 (2009); Physicians for Human Rights – Israel, *Ill Morals: Grave Violations of the Right to Health*

example the persons they have saved or children they have brought into the world. There seems to be a general belief in the 'good' qualities of physicians and their overall 'good' character which should keep them from doing harm.⁴

Certainly, physicians most often act to the benefit of those in need of medical care but there may also be some black sheep. Involvement by physicians in ill-treatment and torture during interrogations in United States (U.S.) detention facilities established in the so-called 'war on terror' raised serious criticism.⁵ The International Committee of the Red Cross (ICRC), in a confidential report to the U.S. government, concluded that

during the Israeli Assault on Gaza (March 2009); in Libya: International Committee of the Red Cross, *Libya: ICRC makes urgent call for access to wounded* (24 March 2011); see also in Bahrain: Amnesty International, *Bahrain: A Human Rights Crisis*, AI Index: MDE/11/019/2011 (21 April 2011); Physicians for Human Rights, *Do No Harm: A Call for Bahrain to end Systematic Attacks on Doctors and Patients* (April 2011); in Syria: Amnesty International, *Health Crisis: Syrian Government targets the Wounded and Health Workers*, AI Index: MDE 24/059/2011 (2011).

- 4 See for example the discussion on the character of Dr. Gérard Ntakirutimana, a physician accused of genocide. International Criminal Tribunal for Rwanda, *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Trial Chamber Judgment [2003], para. 910. The case will be discussed in Chapter 3. See also statements in this respect during the Diplomatic Conference where the Additional Protocols were drafted by the Dutch delegate who believed certain matters 'should be left to the ethical conscience of the medical practitioner, who would always act in the interests of the patient'. O.R. XI, CDDH/II/SR.14, Statement by delegate Deddes (Netherlands), p. 125. His position was supported by delegate Krasnopeev (USSR), p. 126.
- 5 The conclusion that the treatment of detainees in U.S. detention facilities amounted to ill-treatment and at times torture, was reached concerning Guantánamo Bay by five UN Special Rapporteurs in Leila Zerrougui, Chairperson of the Working Group on Arbitrary Detention, et al., Economic and Social Council, *Report on the Situation of Detainees at Guantánamo Bay*, Doc. No. E/CN.4/2006/120 (27 February 2006), para. 52. The involvement of physicians in interrogations and torture was also widely discussed in medical literature, see Robert Jay Lifton, 'Doctors and Torture', 351 *New England Journal of Medicine*, 415 (2004); M. Gregg Bloche & Jonathan H. Marks, 'Doctors and Interrogators at Guantánamo Bay', 353 *New England Journal of Medicine*, 6 (2005); M. Gregg Bloche & Jonathan H. Marks, 'When Doctors go to War', 352 *New England Journal of Medicine*, 3 (2005); Susan Okie, 'Glimpses of Guantánamo – Medical Ethics and the War on Terror', 353 *New England Journal of Medicine*, 2529 (2005); George J. Annas, 'Unspeakably Cruel – Torture, Medical Ethics, and the Law', 352 *New England Journal of Medicine*, 2127 (2005); Philippe J. Sands, *Torture Team – Deception, Cruelty and the Compromise of Law* (Penguin Books, 2008); Nancy Sherman, 'From Nuremberg to Guantánamo: Medical Ethics Then and Now', 6 *Washington University Global Studies Law Review*, 609 (2007); Jonathan H. Marks, 'Doctors as Pawns? Law and Medical Ethics at Guantánamo Bay', 37 *Seton Hall Law Review*, 711 (2007).

[t]he alleged participation of health personnel in the interrogation process and, either directly or indirectly, in the infliction of ill-treatment constituted a gross breach of medical ethics and, in some cases, amounted to participation in torture and/or cruel, inhuman or degrading treatment.⁶

Before being able to reach a conclusion on the question whether physicians should have been involved in interrogations during the 'war on terror', the role of physicians in armed conflict should be scrutinized. It needs to be clarified to which legal or ethical rules they should adhere and which rules they may not violate so that they themselves and the persons they treat may be best protected.

Physicians' rights and obligations in armed conflict are laid out in the four Geneva Conventions (GC) of 1949 and the two Additional Protocols (AP) of 1977. It is in the Additional Protocols that the laws of armed conflict intersect with medical ethics. The first paragraph of articles 16 AP I and 10 AP II reads:

Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

The reference to internal rules of the medical profession was meant to provide an alternate set of rules and obligations for physicians in armed conflict to exponentially increase the protection of those in need of medical care. However, by including the term 'medical ethics'⁷ in the Additional Protocols, the drafters introduced an open, 'extra-legal' term into the framework of international humanitarian law. Medical ethics are not explicated in the articles

6 International Committee of the Red Cross, Regional Delegation for United States and Canada, *ICRC Report on the Treatment of Fourteen "High-Value Detainees" in CIA Custody*, WAS 07/76 (14 February 2007), p. 26–27. Furthermore, even claiming that physicians had been experimenting on detainees, Physicians for Human Rights, *Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series* (26 April 2011).

7 Throughout this book, for clarity's sake the term medical ethics will be used despite the modern prevalence of the term bioethics. This is more convenient because in 1977, when the Additional Protocols were drafted, the term bioethics had yet to be coined: the Protocols refer to medical rather than bioethics. The discussion concerning bioethics is nonetheless also of relevance for the relevant provisions in the laws of armed conflict, as the use of the term stems from the time the Geneva Conventions and its Additional Protocols were written. Nowadays, the drafters would most probably have chosen a reference to bioethics which includes the ethics governing the patient-physician relationship.

themselves. The relevant articles merely establish that physicians cannot be punished for carrying out medical duties in accordance with medical ethics and cannot be forced to act in violation of them. The reference to medical ethics as an alternate framework of rules thus invokes the application of an extra-legal set of rules to bind or guide physicians. Although there are some well-known codes containing principles of medical ethics, from the *Hippocratic Oath* or the World Medical Association's *Declaration of Geneva*, to Beauchamp and Childress' *Principles of Biomedical Ethics*, it needs to be examined whether there are universal medical ethics and whether they apply to physicians in an armed conflict. In the interest of the principle of specificity,⁸ medical ethics should be interpreted and filled so that physicians have clear guidelines on how to treat persons in accordance with medical ethics without violating international humanitarian law. In that way, physicians, as possible perpetrators of medical war crimes, can also foresee the consequences of their actions and courts, as a last instance, can judge the ethical behavior of physicians in armed conflict.

The book answers the question how the reference to medical ethics in articles 16 AP I and 10 AP II providing boundaries to the actions of physicians in armed conflict is to be interpreted. Part of the answer is mapping all relevant legal rules for the treatment of those in need of medical care by physicians in armed conflict, and another part is finding a valuable and useful interpretation for the reference to the extra-legal term medical ethics in international humanitarian law. Considering that scholarly literature and state practice concerning medical ethics in armed conflicts is sorely lacking, the book is aimed at providing a remedy for this lacuna.

It should be clear by the formulation of the problem that the analysis is only concerned with situations of armed conflict. This may be an international armed conflict between two states as defined in article 2 of the Geneva Conventions of 1949. It may also be a non-international armed conflict between two parties on the territory of a state.⁹ Acts by physicians, for example the

8 Antonio Cassese, *International Criminal Law*, 2nd Edition (Oxford University Press, 2008), p. 41 *et seq.*

9 Non-international armed conflict are defined in article 1 (1) AP II as 'armed conflicts [not covered by AP I] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [AP II]'. In *Tadić*, the ICTY expanded on the difference between internal disturbances and armed conflict and stated that 'an armed conflict exists whenever there is a resort to armed force between States

criminal involvement in torture or in illegal organ trafficking, in other circumstances that have not surpassed the threshold of an armed conflict cannot be considered.¹⁰

On the basis of an extensive analysis, the book will contribute to a clearer picture of the role of physicians in armed conflict. It will also finally examine the reference to medical ethics in international humanitarian law so that the legal and ethical framework of medical care in armed conflict and their intersection is no longer as unspecified as it is today.

or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of Former Yugoslavia since 1991 (ICTY), *Prosecutor v. Dusko Tadić* a.k.a. 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction [1995], para. 70.

- 10 Physicians were involved in torture and ill-treatment in many contexts. One example being the military juntas in South America. See Maren Mylius, 'Folter unter ärztlicher Aufsicht – Die Beteiligung von Medizinerinnen an Menschenrechtsverletzungen am Beispiel Argentiniens', 2 *MenschenRechtsMagazin*, 186 (2009). Allegations of physicians' involvement in illegal trafficking of kidneys taken from civilian prisoners in the aftermath of the Kosovo conflict were made by Carla Del Ponte & Chuck Sudetic, *Madame Prosecutor – La Caccia* (Other Press, 2009), p. 277 *et seq.* and credibly investigated in Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights (Dick Marty), *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, Doc. 12462 (7 January 2011), particularly para. 159 *et seq.* Subsequently, a non-binding resolution was adopted by Council of Europe: Parliamentary Assembly, *Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo*, Resolution 1782 (25 January 2011).

PART 1

*Introduction to Physicians in Armed Conflicts
and Medical Ethics*



