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Finabel
The European Land Force Commanders Organisation

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Introduction

On July 8th 2024, the Okhmatdyt Children's Hospital in Kyiv suffered an airstrike that killed at least 42 civilians, five of them children, and injured at least 190 (HRW, 2024). The hospital was hit during a wave of Russian Federation missile attacks on different cities in Ukraine (UNSC, 2024). Since Russia's full-scale invasion, Ukraine has sustained at least 9,560 civilian casualties, and 21,450 more injuries, including 1,796 children (594 killed and 1202 injured) (HRW, 2024). The Russian Federation claims that it was an accident, going so far as to declare that: "claims about a deliberate Russian strike on civilian targets in Kyiv are not true. The destruction was caused by the fall of a Ukrainian air defence missile [...] If this were a Russian strike, there would have been nothing left of the building and all the children would have been killed and not wounded", as stated in the United Nations Security Council (UNSC) meeting the day after the attack (UNSC, 2024).

This is one aggression in a long list of strikes on hospitals and medical facilities, which are places that enjoy a special regime of protection within International Humanitarian Law (IHL). This paper explores the norms that protect these spaces and the people inside them, aiming to shed light on a worrying trend of unlawful warfare. Firstly, the 1949 Geneva Conventions and the 1977 Additional Protocols are examined, with Article 14 of the IV Geneva Conventions as the backbone foundation upon which the legal protection is built. Secondly, an account of the prohibition of attacks on hospitals and safety zones is explored, which proposes different options in which this breach of IHL could be prosecuted. Lastly, this article briefly oversees the international community's response to the aforementioned attack and compares it to other conflicts in which similar attacks have occurred.

'Medical Neutrality' and Article 14 of the IV Geneva Convention

The rules of IHL constitute the legal regime that regulates how war is conducted to protect humanitarian concerns from the dangers of war (Beer, 2019). Among them are the "rules of targeting", which encompass dictating who, what, when and how military forces can attack (Beer, 2019). These include the objects (medical units) and the subjects (medical staff, the wounded and sick, mothers and children) that enjoy special protection known as medical neutrality in what is known as 'medical neutrality'. The principle of medical neutrality was introduced by the 1949 Geneva Conventions and their 1977 Additional Protocols, which constitute the base for IHL. The different elements that make up medical neutrality have been recognised by the International Committee of the Red Cross as binding customary international humanitarian law (PHR, n.d.)

The regulation of the protection of medical facilities in conflicts began with the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864. This Treaty introduced the protection of ambulances and military hospitals as long as they remained neutral during armed conflicts (Gordon & Perugini, 2019). Subsequently, The Hague Regulations of 1907 introduced the rule that forces belligerent parties to spare hospitals (visibly marked) unless they are used for military purposes during sieges and bombardments (ICRC, n.d.). Nevertheless, the inadequacy of these regulations was highlighted by the attacks on medical units during World War I, the interwar period, and later World War II (Gordon & Perugini, 2019). These attacks were often justified by the proximity of medical units to other strategic objectives, claiming that medical units were not the intended targets. As a result, this prompted the ICRC to develop new measures to protect hospitals. The most important are the Geneva Conventions of 1949, particularly Article 14 of the IV Geneva Convention:

Hospital and safety zones and localities:
In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organised as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.
Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.
The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Article 14 is supplemented by other clauses in Part II of the Convention, titled “General protection of populations against certain consequences of war”. This part oversees the field of application, the definition of hospitals, safety and neutralised zones, as well as the general protection and status of the subjects that this clause shelters. A few decades later, the provisions of the Additional Protocols successfully broadened the scope of application and clarified the definition of several important concepts, two of which are cited below.

Notably, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was conceived as a tool to address the weaknesses exposed by conflicts during and after the Cold War. Subsequently, this led to the development of the 1977 Additional Protocols to the Geneva Conventions, which provided conceptual clarity on key terms (Gordon & Perugini, 2019). The Additional Protocol I (API), defines ‘protected persons’ in Article 4: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

Additionally, according to Article 8.e 'medical units' are defined as "establishments and other units, whether military or civilian, organised for medical purposes, namely the search for, collection, transportation, diagnosis or treatment—including first-aid treatment—of the wounded, sick and shipwrecked, or for the prevention of disease". The term includes, "hospitals and similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary" (ICRC, n.d.).

Interestingly, Article 14 includes two exceptions outlined in Article 19 of the IV Convention as "Discontinuance of protection of hospitals". The first exception occurs when medical units are used 'outside of their humanitarian duties' to commit harmful acts to the enemy or to engage in perfidy. The second exception applies if an attacker issues a warning within "appropriate, a reasonable time-limit", and the warning goes unheeded. The conditions under which medical neutrality ceases are further reinforced in Article 13 API and Article 11(2) Additional Protocol II. The concerning aspect of these last attacks on medical units is that they have not been carried out based on the established exceptions; instead, but the belligerent parties execute these attacks and later deny authorship. This situation raises the question of not only whether these current legal tools are sufficient to address these violations (The Lancet, 2018), but also whether there are more effective methods to hold perpetrators accountable. Historically, despite being a breach of IHL, most of these attacks have not been brought to justice. While these incidents are condemned, they are not often prosecuted. This is the case of the UN Special Rapporteur warning about how the damage and destruction of medical units during the war in Syria amounts to war crimes and may constitute crimes against humanity (OHCHR, 2016). In the few occasions that they are prosecuted, it is always in conjunction with other charges, such as the case of the Prosecutor v. Germain Katanga, convicted for "one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging)" (The Prosecutor v. Germain Katanga, 2014); or The Prosecutor v. Bosco Ntaganda, convicted for "crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property)" (The Prosecutor v. Bosco Ntaganda, 2021); among other cases.

Only six convictions have occurred since the International Criminal Court (ICC) was established in 2002 (Davies, 2022), and there has only been one case in history in which prosecution of an attack on a medical unit was successful. This was the case of Vukovar Hospital during the Croatian War of independence, during which Slavko Dokmanović was convicted by the International Criminal Tribunal for the former Yugoslavia (ICTY, 1998). For removing people from the Vukovar Hospital, beating said individuals and later killing them, Dokmanović was charged of "wilfully causing great suffering; wilful killing (Grave breaches of the Geneva Conventions, Article 2(c); Murder; cruel treatment (violations of the laws or customs of war, Article 3); and Murder; inhumane acts (crimes against humanity, Article 5 (a) and (i)" (ICTY, 1998). As reflected in this conviction, while possible to prosecute, as it does breach several treaties on the bases of which the prosecution was successful, historically attacks against medical units have a low chance of securing conviction.

Besides the mentioned above, which could also apply to this case, as endorsed by Articles 8(b)(i) of the Rome Statute of the ICC, intentionally directing attacks against civilians who are not participating in hostilities—such as children in a hospital—constitutes is a serious violation of the laws of armed conflicts. Attacks on medical units can also amount a war crime according to Articles 8(b)(ii) and 8(b)(v) of the Statute. From the beginning of Russia's full-scale invasion of Ukraine, the World Health Organization (WHO) has been gathering evidence for a war crime investigation into the alleged war crimes, documenting attacks carried by Russia on healthcare facilities in Ukraine (Reuters, 2022). Regardless, the contents of the warrants remain secret to protect the victims, and there is no indication that the documented attacks on medical units are included in the case against President Vladimir Putin issued by the ICC (UN, 2023).

Granted, the intentionality of these attacks must be proven to hold perpetrators accountable. However, the legal tools to prosecute these crimes do exist, thus the international community must recognise these acts instead of normalising them.

The Prohibition of attacks on hospital and safety zones and localities

Despite being a well-known clause of the Geneva Conventions of 1949 and the Additional Protocols, hospitals are often attacked by military forces, as it has occurred in the cases of the war in Afghanistan, the Syrian Civil War, the Israeli occupation of Palestine (Gordon & Perugini, 2019), South Sudan, and Iran (Bhuyan, Ebuenyi & Bhatt, 2016). In 2016, four out of five permanent members of the UNSC participated through military coalitions in air strikes on hospitals in Yemen, Syria and Afghanistan (Bouchet-Saulnier & Whittall, 2019). Despite the existence of these rules, a clear disparity exists between the provisions of IHL and the actual practices of belligerent parties' practice (Beer, 2019). The issue, however, is not the norms' capacity to ensure the protection of medical units, but rather the compliance and enforcement of said rules (Beer, 2019).

Since the full-scale invasion of Ukraine, Russia has also carried out this unlawful practice. As of May 2023, the WHO has verified 1,878 attacks that affected medical units and patients since February 2022 (UNSC, 2024). In this sense, the obligation to "ensure the respect and protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical units", has not been fulfilled (UNSC, 2016).

Despite their obligations, warring parties continue to attack medical units. They often either disagree with the accusations, provide no explanation, deny attribution or claim that the attack was accidental and unintended (Gordon & Perugini, 2019). In other cases, warring parties ground their arguments on one of the exceptions found in Article 19 of the IV Geneva Convention (Gordon & Perugini, 2019: 440). However, this is not the case with the bombing of Kyivs' Okhmatdyt Children's Hospital, the authorship of which has been denied by Russian authorities.

Russian attacks on Ukraine's medical units are usually framed as accidents or failed counter-attacks "Ukrainian air defence missiles often go off-target, as manifested by multiple past tragedies", said the representative of the Russian Federation, a statement which showcases this distorted portrayal (UNSC, 2024). This is also the case at hand, with the attack on the Children's Hospital on the 9th of June. As declared by the Russian Defence Ministry: "Claims about a deliberate Russian strike on civilian targets in Kyiv are not true. The destruction was caused by the fall of a Ukrainian air defence missile" (Corp & Herrmannsen, 2024). Against this argument is the evidence that the strike that hit the Okhmatdyt Children's hospital coincided on time with a wave of Russian missile attacks on different urban centres (UNSC, 2024), that the Russian Defence Ministry claimed to "have achieved their strike targets" (Khlyudzinsky, 2024). Adding to this, Ukrainian authorities found remnants of a Russian cruise missile in the zone (BBC, 2024).

Even in the case that this was an accidental attack, it would be an instance of 'commission by omission' or breach of the 'duty to act'. As observed in Common Article 1 of the Geneva Conventions (1949), regarding the obligation of contracting parties to respect and ensure the Convention; the Additional Protocol I (1977) Article 86 ("Failure to Act") and 87 ("Duty of the Commanders"); or the Rome Statue of the ICC, Article 28 ("Responsibility of Commanders and Other Superiors"), which dictates that military staff can be criminally held responsible for crimes committed as a result of their failure to control their forces and act lawfully are some of the clauses which illustrate this rule of IHL. By failing to properly observe their obligation to protect hospitals, or in the case of lawful attack based on the exceptions foreseen in the law, the belligerent party is violating IHL.

Additionally, what erodes the argument of it being accidental is the fact that this was not an isolated case. In fact, in 2023 the UN attributed Russia 249 attacks on Ukrainian hospitals and schools (UNSC, 2024). Since 2022, Russian forces have attacked medical units and struck at hospitals (Biesecker, Kinetz & Dupuy, 2022) with 64 healthcare facilities having been attacked only in the first month of the full-scale invasion (Taylor, 2022). Despite Russian attempts to reframe the situation, only "few believe this", as said by the representative of the Republic of Korea in the UNSC meeting on the 9th of July (UNSC, 2024).

Nonetheless, 'accidental' harm caused to civilians, particularly in medical units, can still constitutes a violation of IHL. Said violation occurs if it is the outcome of a failure to comply with the obligation to respect and protect medical units, ensuring their correct and normal functioning, as per Article 18 of the IV Geneva Convention which recognises that "in no circumstance"—that being intended or accidental—medical units may be the object of an attack, and shall at all times be protected by all the involved parties. Moreover, the harm, even if accidental, further constitutes a failure to comply with two of the guiding principles of IHL: distinction and proportionality (Beer, 2019). In fact, other countries' prosecutors could file claims against the Russian Federation by proving recklessness, without needing to prove intent (Davies, 2022) As of March 2022, prosecutors from Germany, Lithuania, Poland, Slovakia, Spain, and Sweden have started investigating the Russian Federation actions in Ukraine (Davies, 2022).

This is a worrying trend of disregard for IHL. It has become such a normal practice of warfare that in some conflicts, like the Syrian war, "every hospital in eastern [Aleppo] has been hit at least once" (Bhuyan, Ebuenyi, & Bhatt, 2016). Either by abusing the exceptions on the protection of medical units, or by claiming these attacks to be accidental, belligerent parties are eroding the good practices of IHL and acting in spite of it. While far from being the only war crime that Russia has allegedly committed against Ukraine, it cannot be overlooked. Hospitals have a special regime of protection that IHL is in practice failing to provide. As such a fundamental part of the protection of civilians, special attention needs to be given to ensure their security.

The International Community's Response to the Russian attack of Kyiv's Okhla Tdyt hospital

The international response to the attack against Kyivs' Children's Okhmatdyt Hospital was unanimous. From more than 16 declarations in the UNSC the day after the attack, to extensive media and internet coverage, the gravity of the issue is profound. Coinciding with the NATO Summit held in Washington, the Organisation condemned the attack and Russia was called to withdraw all of its forces from the Republic of Moldova, Georgia and Ukraine (NATO, 2024).

Considering this is a problem mainly related to compliance and enforcement of the existing laws, NGOs recommend the condemnation of attacks, the promotion of adherence to IHL and the collection of data to seek accountability and visibility of these attacks (SHCC, 2022). The law is reactive, not proactive, and oftentimes can only follow the facts, not prevent them, so collecting the data to later present it is a pivotal task during times of conflict.

It is important to note that the repeated attacks on hospitals during the war in Ukraine is not the reflection of a revisionist State forgoing IHL. This is the continuation of a trend in the last decades of belligerent parties failing to uphold IHL during armed conflicts (Lancet, 2018). As reported by the Safeguarding Health in Conflict Coalition, in 2023 there was an increase in 2023 by 25% in comparison to 2022, with 2,562 incidents of violence against or obstruction of access to health care in zones in conflict (SHCC, 2023). This trend is seen in the Russian attacks, but also in many other cases, like the siege of Mosul where the US-led coalition supported the Iraqi and Kurdish forces against the Islamic State of Iraq and the Levant (Lancet, 2018). The response from the international community, however, is not as unified in all situations.

The Safeguarding Health in Conflict Coalition (SHCC) annual report makes a series of demands under what they call the 'end of impunity' (SHCC, 2022). These include the request to the ICC, the UNSC (when the ICC lacks jurisdiction), national prosecutors and international investigatory institutions to prioritise the investigation into the reported attacks on medical units and their patients as war crimes and crimes against humanity; the ask for UN member states to conduct investigations of the violations of IHL (by their own military forces) regarding the protection of medical units (SHCC, 2022). Additionally, they also call for strengthening prevention—as was requested by the UNSC Resolution 2286—reforming and expanding the collection of data on attacks on health cases, strengthening global, regional, and domestic leadership, and supporting health care workers (SHCC, 2022).

Conclusion

Attacks on hospitals despite being a grave breach of IHL are a worrying trend in modern warfare, as demonstrated by the case of Okhla Try Children's Hospital. Despite it being a known and fundamental clause of the Geneva Conventions, the case of Okhla Tdyt Children's Hospital, among many others, shows a concerning disregard for norms on the rise. The violation of Article 14 of the IV Geneva Convention is not only a breach of the IHL obligation to protect hospitals but also endangers civilians by depriving them of their universal right to access healthcare. Furthermore, the difficulty of prosecuting these war crimes, despite being recognised in Article 8 of the Rome Statute, and the astonishing low number of convictions, paint a pessimistic picture of the future of hospitals as safe zones for the wounded and sick.
To combat this, it is fundamental to have a unified stance against all attacks on medical units, give the same level of visibility to these issues, and collect all the information for later investigations. The existing norms are enough to protect these spaces, but they need to be complied with and enforced.

Bibliography

Beer, Y. (2019). Save the Injured – Don't Kill IHL: Rejecting Absolute Immunity for 'Shielding Hospitals'. The European Journal of International Law, 30(2). doi:10.1093/ejil/chz037.

Bhuyan, S. S.; Ebuenyi, I. & Bhatt J. (2016). Persisting trend in the breach of medical neutrality: a wakeup call to the international community. BMJ Global Health, 1, doi:10.1136/bmjgh-2016-000109.

Biesecker, M.; Kinetz, E. & Dupuy, B. (2022, March 25). War Crimes Watch: Russia's onslaught on Ukrainian hospitals. The Associated Press. https://apnews.com/article/russia-ukraine-war-crimes-tracker-b39137c3a96eef06f4ba1793fd694542.

Bouchet-Saulnier, F. & Whittal, J. (2019). An environment conducive to mistakes? Lessons learnt from the attack on the Médecins Sans Frontières hospital in Kunduz, Afghanistan. International Review of the Red Cross, 100 (1-2-3), 337–372. doi:10.1017/S18163831188000619.

Corp, R. & Herrmannsen, K. (2024, July 8). Children's hospital hit as Russian strikes kill dozens in Ukraine. BBC News.https://www.bbc.com/news/articles/cl4y1pjk2dzo.

Davies, M. (2022). Why hospital bombings remain difficult to prosecute as war crimes. BMJ News, 376. doi: https://doi.org/10.1136/bmj.o771.

Dockrill, M. L. (1981). Humanity in Warfare: The Modern History of the International Law of Armed Conflicts, International Affairs, 57(39) 496–497, https://doi.org/10.2307/2619597.

Human Rights Watch. (2024). Russia's July 8 Attack on a Children's Hospital in Ukraine. Human Rights Watch.https://www.hrw.org/news/2024/07/11/russias-july-8-attack-childrens-hospital-ukraine.

International Committee of the Red Cross. (1949). IV Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949. In Treaty Series: Victims of Armed Conflicts, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=default.

International Committee of the Red Cross. (1977). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. In Treaty Series: Victims of Armed Conflicts, https://ihl-databases.icrc.org/en/ihl-treat89ies/api-1977?activeTab=default.

International Committee of the Red Cross. (n.d.) Practice relating to Rule 28, Medical Units, ICRC Database, Customary IHL, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule28.

International Criminal Court. (1998). Rome Statute of the International Criminal Court. International Criminal Court. ISBN No. 92-9227-227-6. https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.

International Criminal Tribunal of the former Yugoslavia. (1998). “Vukovar Hospital” (IT-95-13a). Case Information Sheet.https://www.icty.org/x/cases/dokmanovic/cis/en/cis_dokmanovic.pdf.

Khlyudzinsky, V. (2024, July 8). "Strike targets achieved": Russian Defense Ministry lies again that they hit military targets. Novosti Ukrainy (News of Ukraine). https://www.newsweek.com/will-russia-face-war-crime-charges-over-attacks-ukrainian-hospitals-1685633.

NATO. (2024, July 10). Washington Summit Declaration. NATO. https://www.nato.int/cps/en/natohq/official_texts_227678.htm.

Office of the United Nations High Commissioner for Human Rights. (2024, 9th July). Russian Federation’s Attack on Ukrainian Children’s Hospital ‘Not Only a War Crime’ but ‘Far Beyond the Limits of Humanity’, Medical Director Tells Security Council. OHCHR. https://press.un.org/en/2024/sc15761.doc.htm.

Oswald, B. (2001). The creation and control of places of protection during United Nations peace operations. IRCR, 83(844). https://international-review.icrc.org/sites/default/files/S1560775500183518a.pdf.

Physicians for Human Rights. (n.d). Introduction to Medical Neutrality. PHR. https://phr.org/our-work/resources/introduction-to-medical-neutrality/.

Safeguarding Health in Conflict Coalition. (2022). Ignoring red lines: violence against health care in conflict. SHCC. https://insecurityinsight.org/wp-content/uploads/2023/05/SHCC-Report-Ignoring-Red-Lines.pdf.

Taylor, L. (2022). Russian forces are increasingly targeting Ukrainian healthcare facilities, says WHO. BMJ Global Health, 376. https://doi.org/10.1136/bmj.o801.

The Lancet. (2018). Examining humanitarian principles in changing warfare. The Lancet, 391. doi: 10.1016/S0140-6736(18)30256-3.

The Prosecutor v. Germain Katanga. Case Information Sheet. ICC-01/04-01/07. (2014).

The Prosecutor v. Bosco Ntaganda. Case Information Sheet. ICC-01/04-02/06. (2021).

The Security Council. (2016, May 3). Resolution 2286 (2016). Resolution 2286 (S/RES/2286) Adopted by the Security Council at its 7685th meeting. http://unscr.com/en/resolutions/doc/660.

United Nations News. (2023, March 17). Russia: International Criminal Court issues arrest warrant for Putin. United Nations News. https://news.un.org/en/story/2023/03/1134732.

World Health Organization. (2023, 30th May). WHO records more than 1000 attacks on health care in Ukraine over the past 15 months of full-scale war. WHO. https://www.who.int/europe/news/item/30-05-2023-who-records-1-000th-attack-on-health-care-in-ukraine-over-the-past-15-months-of-full-scale-war.