CHAPTER bibliography


Introductory text

The sight of thousands of wounded soldiers on the battlefield at Solferino moved Henry Dunant to initiate the process that resulted in the Geneva Conventions. Conventions I and II are entirely given over to safeguarding not only the wounded, sick and shipwrecked, but also the support services (personnel and equipment) needed to come to their aid. Once wounded, sick or shipwrecked and provided that they refrain from any act of hostility, even former combatants become “protected persons”.[1] They may not be attacked and must be respected and cared for, often by removing them from the combat zone for impartial care. Protocol I extends this protection to wounded, sick and shipwrecked civilians refraining from any acts of hostility.[2]

The necessary care can often only be given, however, if the people who provide it are not attacked and allowed to fulfill their task. On the battlefield this will only work if they constitute a separate category -medical personnel-, never participating in hostilities and caring for all the wounded without discrimination, and if they are identifiable by an emblem.

**SPECIFIC BIBLIOGRAPHY**

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Further reading:


I. The idea of Solferino

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Suggested reading:


Further reading:


II. Respect, protection and care for the wounded, sick and shipwrecked,
without any adverse distinction

Introductory text

Wounded and sick are persons who are, because of trauma, disease or other physical or mental disorder or disability, in need of medical assistance.[3] This covers equally new-born babies, maternity cases and other persons in immediate need of medical assistance. Shipwrecked are persons who are in peril in waters as a result of misfortune affecting them or their vessel.[4] The IHL definition is however more restrictive than common parlance, because persons who continue despite their condition to commit acts of hostility are excluded from the definition and specific protection.

The wounded, sick and shipwrecked must, first, be respected, i.e. may neither be attacked when not in the power of a party, nor killed or ill-treated by a party in whose power they are.[5] This implies in our view equally that they must be taken into account in the proportionality evaluation of the anticipated adverse effects of an attack in the conduct of hostilities and it is uncontroversial that precautionary measures have to be taken for that purpose.

Second, a party must also protect them, i.e. exercise due diligence in preventing the wounded and sick from being harmed by others (pillage and ill-treatment are specifically mentioned[6] or natural causes. This is specified by an obligation to take all feasible measures to search for them and to collect them[7], which also ensures that they will be cared for. This must be done on land at all times, and particularly after each engagement, at sea only after each engagement.[8] To facilitate such search and evacuation, cease-fires and agreements to remove them from besieged areas are encouraged.[9]

Third, they must be treated humanely and cared for (to the fullest extent practicable and with the least possible delay) by the party in whose power they are, without any adverse distinction.[10] Only medical reasons and not nationality authorize priority in treatment.

To avoid that wounded, sick or shipwrecked are considered as missing certain information about them must be recorded and transmitted to their power of origin through the (Central Tracing Agency of) the ICRC and, when it exists, the Protecting Power.[11]

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Provided that they refrain from any act of hostilities.

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  b. under Protocol I: extension to civilians

  P I, Art. 8(a) and (b)

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- UN, Report of the Secretary-General for the World Humanitarian Summit
- Afghanistan, Attack on Kunduz Trauma Centre

SPECIFIC BIBLIOGRAPHY

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3. Protection

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- Afghanistan, Attack on Kunduz Trauma Centre
- Thailand, Attack on Hospital
- UN, Security Council Resolution 2286 on Attacks on Hospitals

4. Care
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- ICRC, Iran/Iraq, Memoranda
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- Sri Lanka, Naval War against Tamil Tigers

equal treatment

GC I, Art. 12 [CIHL, Rule 110]

Cases and Documents

- Iraq, Care for Wounded Enemies
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- Afghanistan, Attack on Kunduz Trauma Centre

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Cases and Documents

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- Case Study, Armed Conflicts in the former Yugoslavia [Para. 3]
- Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
- Democratic Republic of Congo, Fighting with the M 23 Group

III. Medical and religious personnel

Introductory text

Conventions I and II, which aim to protect and ensure care for the wounded, sick and shipwrecked, also extend protection to medical personnel, administrative support staff and religious personnel. They are not to be attacked on the battlefield and must be allowed to perform their medical or religious duties. This presupposes a certain stability of the status of such personnel, but IHL foresees the existence of both permanent and temporary medical personnel. In both cases, they must be designated as such by a party. Temporary personnel is only protected while carrying out its duties.

If they fall into the hands of the adverse party, permanent medical and religious personnel are not to be considered prisoners of war and may only be retained if they are needed to care for prisoners of war. Conventions I and IV provide protection for civilians caring for sick and wounded combatants and civilians. This includes the right for inhabitants of the conflict zone to collect and care for wounded and sick. The civilian population has even an explicit obligation to respect the wounded and sick. Protocol I further expanded the category of persons (permanent or temporary personnel, military or civilian) protected by virtue of their medical or religious functions and abandoned the distinction between military and civilian personnel. Aid societies are granted the same protection if they meet the requirements laid out in the Conventions. This includes staff of National Red Cross and Red Crescent Societies only if they fulfil the requirements laid out in the Conventions. Such self-defence or defence of others may obviously only be directed against unlawful attacks.

What counts as such acts harmful to the enemy is subject to controversy. Some consider that the term is larger than that of direct participation in hostilities, which is correct for medical units and transports, for whom the concept is used in the treaties.
One may however argue that persons only lose their special protection if they directly participate in hostilities. Civilian medical personnel who do so lose their protection as civilians only if and for such time as they directly participate in hostilities. For military medical personnel, the consequences and duration of such loss of protection are again controversial. Some argue that as members of the armed forces they turn into combatants who turn into POWs if captured. Others consider that they regain protection as medical personnel as soon as they no longer commit acts harmful to the enemy, which would mean that they have to be repatriated if they fall into the power of the enemy.

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a. military (permanent or temporary) medical personnel *GC I*, Arts 24-25; *GC II*, Arts 36-37

b. civilian medical personnel assigned by a party to the conflict *GC IV*, Art. 20; *P I*, Art. 8

**SPECIFIC BIBLIOGRAPHY**

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- religious personnel attached to the armed forces or medical units *P I*, Art. 8

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d. medical personnel made available by third States or organizations to a party to the conflict
   P I, Art. 8

e. personnel of a National Society recognized and specifically authorized by a party to the conflict
   GC I, Art. 26; GC II, Art. 24; P I, Art. 8

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Suggested reading:


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b. once in enemy hands
   GC I, Arts 28-32
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   • employment caring for prisoners of war

Cases and Documents

• United States, Mukhtar Yahia Maji Al Warafi v. Obama

c. under control of the enemy
   P I, Arts 15-16 [CIHL, Rule 26]
   • right to perform their medical mission

Cases and Documents

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   • right not to perform acts contrary to medical ethics
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3. Duties of medical personnel

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a. no direct participation in hostilities
they may be armed, but only with light weapons
and may only use them for their own defence or for that of the wounded and sick under their care

Cases and Documents

- British Military Court at Hamburg, The Peleus Trial
- Health Care in Pakistan’s Tribal Areas
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Further reading:


c. give care without discrimination

Cases and Documents

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- Iraq, Care for Wounded Enemies
- Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
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d. respect principle of neutrality

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IV. Protection of medical transport, units and material

(including hospitals and ambulances)

Introductory text

International Humanitarian Law (IHL) establishes comprehensive and detailed protection for medical units,[24] medical transports[25] and medical material[26] be they military or civilian. [27] These units and transport must be respected and protected at all times by the belligerents[28] and are not to be the object of attack. Under no circumstances are protected installations to be used in an attempt to shield military objectives from attack.[29]

The protection to which medical installations are entitled does not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy.[30] In such instances their protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

IHL treaties lists some situations which do not lead to a loss of protection: that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge; that the unit is guarded by a picket or by sentries or by an escort (which may also carry only light individual weapons and use them only in self-defence and defence of others), that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units; or that members of the armed forces or other combatants are in the unit for medical reasons. [31]

Cases and Documents

- United States, Use of medical helicopter to target protesters
- Sri Lanka, Jaffna Hospital Zone
- Case Study, Armed Conflicts in the former Yugoslavia [Para. 5]
- Yemen, Obstructing Medical Care
- Syria, the Battle for Aleppo

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- a. identification
- GC I, Annex II

United States, Mukhtar Yahia Maji Al Warafi v. Obama

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Cases and Documents

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- Afghanistan, Attack on Kunduz Trauma Centre
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2. Loss of protection

GC I, Arts 21 and 22

Cases and Documents

- Yemen, Obstructing Medical Care
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- Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
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Suggested reading:


V. Possible constitution of hospital, safety and neutralized zones

GC I, Art. 23; GC IV, Arts 14-15 [CIHL, Rules 28 and 29]
(See also infra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 13. Zones created to protect war victims against the effects of hostilities)

Cases and Documents

- Sri Lanka, Jaffna Hospital Zone
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- SANDOZ Yves, “Localités et zones sous protection spéciale”, in Quatre études du droit international humanitaire, Geneva,
VI. The emblem of the Red Cross/Red Crescent/Red Crystal

Introductory text

The Conventions and Additional Protocols authorize the use of four emblems – the red cross, the red crescent, the red crystal and the red lion and sun – on a white background.[32] However, today only the first three authorized emblems are utilized. For a number of years the International Red Cross and Red Crescent Movement has encountered problems arising from the use of a host of other emblems. This threatens the emblem’s essential universality, neutrality and impartiality, and ultimately undermines the protection it provides. Hopefully, these problems have been solved with the entry into force of Protocol III enabling States to adopt the red crystal.

The emblem serves both protective and indicative functions. It is used mainly as a protective device in times of conflict to distinguish and identify from certain persons and objects protected by the Conventions and the Additional Protocols (medical personnel, medical units and medical means of transport[33]). This also covers military medical personnel, units and transport. To be effective in such circumstances the emblem must be visible and therefore large.[34] It may only be displayed for medical purposes, and such use must be authorized by and under the control of the State.

The emblem is used as an indicative device mainly in peacetime, as such use does not signify protection but rather identifies persons, equipment and activities (in conformity with Red Cross principles) affiliated with the Red Cross or the Red Crescent.[35] Utilization for indicative purposes must comply with national legislation, and if used for such indicative purposes in times of armed conflict, the emblem must be small in size. In contrast to the above-mentioned limitations, the ICRC and the International Federation of Red Cross and Red Crescent Societies may use the emblem, including of all dimensions at all times and for all their activities.

In order to avoid undermining the protection the emblem provides, abuse and misuse of the emblem, which in certain situations constitutes a war crime,[36] must be prevented; thus, the emblem may be neither imitated nor used for private or commercial purposes.[37] States Parties have an obligation to implement national legislation, consistent with the Conventions and Additional Protocols, regarding not only appropriate authorization of the emblem’s use but also punishment of abuse and misuse of the emblem.[38]

Cases and Documents

- ICRC, Model Law Concerning the Emblem
- Cameroon, Law on the Protection of the Emblem and the Name “Red Cross”
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**GC I, Art. 38**

**Cases and Documents**

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**Suggested reading:**


**Further reading:**


2. Technical means of identification

**P I, Annex I**

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**Suggested reading:**


**Further reading:**

3. Protective use

**GC I, Arts 39-43** and **53-54** [CIHL, Rule 30]

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- Burkina Faso, Law on the Use and Protection of the Red Cross and Red Crescent Emblems in Burkina Faso, 2003
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a. to distinguish medical personnel and units

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b. to be displayed with the permission and under the control of the competent authority
c. may be used at all times by the ICRC and the International Federation

Cases and Documents

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**GC I, Art. 44**

Cases and Documents

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5. Repression of abuse and misuse

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**SPECIFIC BIBLIOGRAPHY**
VII. Provisions on the dead and missing

Introductory text

It is not primarily to protect the dead and the missing themselves that IHL contains specific rules concerning them. Their main concern is “the right of families to know the fate of their relatives”. If the missing person is alive, the first concern is obviously to find him or her and that he or she is treated in conformity with IHL. If the missing person is dead, the main concern is to inform the family about the death and the place of burial. However, the respect of human dignity which applies beyond the death of a person to his or her remains as well as the respect of the feelings of the family and the community towards the dead are also humanitarian concerns.

Persons are considered missing if their relatives or the power on which they depend have no information on their fate. Each party has an obligation to search for persons who have been reported as missing by the adverse party.

In reality, missing persons are either dead or alive. If they are alive, they are missing either because they have been detained by the enemy or separated from their families by front-lines or borders. In that case, they benefit from the protection IHL offers to the category to which they belong (civilian, prisoner of war, wounded and sick, etc.). In any case, IHL contains rules designed to ensure that they do not remain missing – except if they wish to sever their links with their family or country.

If the person is missing because, as is regularly the case in armed conflicts, postal services have been interrupted or groups of people displaced, family links should soon be re-established, inter alia through the ICRC Central Tracing Agency, as long as the parties respect their obligation to promote the exchange of family news and reunification of families. If a person is missing because he or she has been detained or hospitalized by the enemy, the family’s uncertainty should not last for long, as IHL prescribes that information on their hospitalization or detention be forwarded rapidly to their family and the authorities through three channels: notification of hospitalization, capture or arrest, transmission of capture or internment cards, and the right to correspond with the family. A lawfully detained person can therefore not be missing for long. The personal details of every person deprived of their liberty must be recorded and the detaining authorities are under an obligation to answer inquiries about protected persons. Secret detention, i.e. forced disappearances, are absolutely prohibited by IHL.

If the missing person is dead, it is as important but more difficult to inform the family. There is no obligation for each party to identify every dead body found, as this would be an impossible task. However, whenever circumstances permit, and particularly after an engagement, each party to an armed conflict must, without delay, take all possible measures to search for, collect and evacuate the dead. Each party must also attempt to collect and record information that may assist in the identification of the deceased, including by agreeing to establish search teams. The collection of such information is facilitated if individuals wear identity cards or tags as prescribed for combatants. Identifying the dead often requires comparing forensic data obtained from a dead body (e.g., dental forensics) with data about a person reported missing previously collected when he or she was living or which is still available through the family. This process necessitates cooperation between two belligerents (or, after the conflict, between the former belligerents): the party with control over the remains of the deceased individual and the party with the information necessary to identify those remains thanks to, inter alia, data provided by the deceased’s family.

If such identification is successful, the family has to be notified. In any case, the remains must be respected and given decent burial, and the gravesites marked. Each party to the conflict must take all possible measures to prevent the dead from being despoiled and the mutilation of dead bodies is prohibited. Burial at sea is possible for persons dying in sea warfare, but it inevitably deprives the families of the possibility to receive the remains and to visit the grave site.

Understandingly, relatives will wish to have access to the graves and often even to have the remains of their loved ones returned to them. This requires an agreement between the parties concerned, which can generally only be reached once the conflict has ended.

A problem not solved by IHL, but which must be tackled by domestic law, is that families need pragmatic solutions to legal problems they face while a person remains missing. Such solutions, the abovementioned measures to prevent disappearances...
as well as steps to be taken to elucidate the fate of missing persons, and assisting the families of missing persons in other respects necessitate domestic legislation, parts of which should already be adopted in peacetime. The ICRC and the Inter-Parliamentary Union have published a guide for Parliamentarians, comprising a model law, to facilitate the adoption of such comprehensive legislation.[59]


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- Israel, Cheikh Obeid et al. v. Ministry of Security
- ECHR, Cyprus v. Turkey [Paras 129-157]
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Cases and Documents

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• Israel, The Rafah Case (Paras 46-53)
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c. marking of gravesites
do. access to gravesites
e. agreements on the return of remains
  P I, Art. 34(2) and (4)

Cases and Documents

• Israel, Evacuation of Bodies in Jenin

VIII. Transmission of information

Cases and Documents

• ICRC, Tracing Service [5]

1. Recording of information

GC I, Art. 16; GC II, Art. 19

2. Notification (to the power of origin through the Central Tracing Agency)

GC I, Art. 16; GC II, Art. 19

3. Transmission of death certificate and belongings (to the next-of-kin through the Central Tracing Agency)

GC I, Art. 16; GC II, Art. 19 [CIHL, Rule 114]

Footnotes

• [1] See Protected persons are defined in GC I-II, Art. 13
• [2] See P I, Art. 8(a) and (b) GC IV, Art. 16
• [3] See PI Art. 8(a)
• [4] See Ibid. Art. 8(b)
• [5] See GCs I and II, Arts 12. See also the detailed list of prohibited acts and precautionary measures to be taken inPI, Art. 11.
• [6] See GC, Art. 15(1); CIHL Rule 111
• [7] See GC, Art. 15(1); CIHL, Rule 109
• [8] See GCII, Art. 18(1)
• [9] See GC, Art. 15(2) and (3) and GCII Art. 18(2)
• [10] See GCs I and II, Arts 12(2) and (3) PI, Art. 10(2); GCs, common Art. 3(2) PI, Art. 7(2); CIHL Rule 110
• [12] See GC I, Arts 24 and 25
• [13] See GC I, Arts 24-27; GC II, Arts 36 and 37; P I, Arts 15-20; P II, Art. 9; CIHL, Rule 25
• [14] See GCI, Arts 24 and 25
• [16] See GC I, Art. 18; GC IV, 20(1)
• [17] See GCI, Art. 18
• [18] See GCI, Art. 18(2)
• [19] See PI, Art. 8(c) and (d)
Medical units may be fixed or mobile, permanent or temporary. “Medical units” means 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, for example, hospitals and other 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. “Medical transports” means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict.”