



Overview of Principles and Rules of International Humanitarian Law Applicable to Conduct of Hostilities with a Focus on Targeting of Hospitals and Medical Units

What follows is a general and brief overview of the principles and rules found in international humanitarian law governing the conduct of hostilities during armed conflict, with a focus on the rules and regulations relevant to the targeting of hospitals and medical units.

I. Qualification of the armed conflict in Syria

A threshold question in any analysis of legality under international humanitarian law (“IHL”)¹ is whether the situation in question is an international armed conflict (“IAC”) or a non-international armed conflict (“NIAC”). This qualification is significant because it determines which rules apply to the conflict being studied. For instance, the four Geneva Conventions and the First Additional Protocol thereto apply to situations of IAC. Article three common to the four Geneva Conventions (“Common Article Three”) and the Second Additional Protocol to the Geneva Conventions apply to situations of NIAC.²

In addition to determining whether the treaty rules for IAC or NIAC apply to a specific situation, qualification of a conflict situation also determines which rules of customary international law apply (“CIL”).³ A rule of CIL is recognized by the statute of the International Court of Justice (“ICJ”) as a “general practice accepted as law.”⁴ Generally, to amount to a rule of CIL, there must be two elements: (1) actual state practice and a (2) belief on the part of the actor that the practice in question is either required, prohibited, or allowed (depending on the rule) as a matter of law. The ICJ has explained “it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states.”⁵ Thus, CIL provides another set of legally binding rules and regulations outside of the treaty system.

Thus, to determine what rules apply to the targeting decisions being made in Syria, one must first ascertain whether the treaty and customary rules applicable to an IAC or to a NIAC apply. An IAC is defined as “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties [to the Geneva Conventions].”⁶ Thus, because only states can be High Contracting

¹ This memo adopts the term international humanitarian law (“IHL”) to refer to the framework of international law that applies to international and non-international armed conflicts. The law of armed conflict (“LOAC”) is a term that is also used to refer to the same framework. A less commonly used term is law of war (“LoW”). All of these terms refer to the same general legal framework.

² It bears noting that the treaty rules applicable to IACs far outnumber those applicable to NIACs.

³ See, e.g., Jean-Marie Henckaerts, Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law* (2005) (describing 161 rules widely considered customary law, some of which apply only to IAC, some of which apply only to NIAC, and some of which apply to both IAC and NIAC situations). See also International Committee of the Red Cross, Customary International Humanitarian Law Database; available at: <http://www.icrc.org/customary-ihl/eng/docs/home>.

⁴ ICJ Statute, Article 38(1)(b).

⁵ ICJ, *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, § 27.

⁶ Article two common to the four Geneva Conventions.

Parties to the Geneva Conventions, an IAC is any conflict in which one state is opposing another state (or states) through the use of force.⁷

In contrast, a NIAC is a conflict in which a state is fighting an armed group, or two or more armed groups are fighting each other (without state involvement). In other words, if an armed group is one of the belligerent parties (whether it is opposing a state or another armed group), the context is almost always qualified as a NIAC.⁸ This is the situation in Syria, where the Syrian government is fighting a number of armed groups. Additionally, it appears that a number of armed groups within Syria may be in conflict with each other. Without parsing the quickly changing lines along which the belligerents are organized and are fighting, it is correct to say that the conflict in Syria, due to the participation of armed groups, is a NIAC.

To determine whether a situation is a NIAC, or a less serious form of violence such as an internal disturbance or riot (to which human rights law and domestic law apply), the elements of intensity of violence and organization of the belligerent parties are often assessed.⁹ In the case of Syria, it appears that the violence has certainly reached a level of intensity such that it amounts to more than a “mere” internal disturbance; similarly, the non-state belligerent actors appear to be organized such that they are able to carry out coordinated, and in some cases concerted, armed attacks. Thus, there is little question that the situation in Syria is a NIAC.

When defining a NIAC there are two general thresholds: (1) conflicts to which Common Article Three applies (the lower of the two thresholds); and (2) conflicts to which Common Article Three and the Additional Protocol II apply (the higher threshold). Common Article Three, which is the only article in the four Geneva Conventions that applies to a NIAC, has been described as a “convention in miniature” and lays down the most basic rules applicable to NIACs. The article describes its scope of application to those “armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties.”¹⁰ Thus, because the situation in Syria is one in which the Syrian government is fighting one or more armed groups, and the intensity and organization elements are satisfied, the protections and prohibitions found in Common Article Three apply. Additional Protocol II requires a higher threshold for its application. It applies to:

[A]rmed conflicts . . . 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 party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹¹

Syria, however, is not a signatory to the Protocol, thus, as a matter of treaty law Additional Protocol II does not apply to the conflict in Syria.

⁷ An IAC may also be established if one state declares war against another. Triggering the application of IHL in such a manner is uncommon, however.

⁸ In some limited circumstances, if a state is exercising overall control over the belligerent armed group, the conflict may be qualified as an IAC because the armed group is essentially an agent of the state. See ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995. Thus far, this does not appear to be the case in Syria.

⁹ See International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper (2008), available at: <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>; ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, ¶¶ 94-134. See also the Commentary to Common Article Three that lists additional indicia to consider.

¹⁰ Common Article Three, four Geneva Conventions.

¹¹ Art. 1, Additional Protocol II.

Thus, the situation in Syria is a NIAC, to which, as a matter of treaty law, only Common Article Three applies. Nonetheless, the customary international law rules concerning the conduct of hostilities provide a framework under which the legality of a targeting operation is to be assessed. These rules of CIL have equal weight as those found in treaties. Many of these CIL rules are reflected in the treaties applicable to IACs and NIACs. One source of these rules is a Study published in 2005 by the International Committee of the Red Cross (“ICRC”), which sought to identify contemporary rules of customary international humanitarian law. The Study is generally considered a reliable exposition of, and source for, current customary international humanitarian law.

II. Applicability of IHL to Non-state Actors

Though international law is a state-centric system, generally binding only states, IHL is notable in so far as it binds both states and non-state actors. For instance, Common Article Three states “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . .”¹² It is clear, based on the use of the general term “party” in contradistinction to the term “high contracting party” that Common Article Three applies to both states and armed groups. Similarly, Additional Protocol II contemplates application to both, as in its opening article it states that the Protocol “develops and supplements [Common Article Three]” and it applies to those conflicts between a state and an armed group “which under responsible command, exercise[s] such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”¹³

Thus, though armed groups may protest that they are not signatories to IHL treaties and therefore ostensibly not bound by IHL, the text of the treaties is clear -- in situations of NIAC IHL binds both states and armed groups. The ICRC acknowledged this when it explained:

Although it is clear that all parties to non-international armed conflict are legally bound by IHL, armed groups cannot ratify or formally become party to IHL treaties; only States can do so. As a result, armed groups may consider themselves technically not bound by the international obligations specified in treaty law.¹⁴

III. CIL rules governing conduct of hostilities

A. Principle of distinction

The fundamental principle underlying the legal framework applicable to conduct of hostilities is that of distinction. Parties to a conflict must at all times distinguish between civilian objects and military objectives, and between civilians and combatants.¹⁵ Operations may be directed only against military objectives and combatants; it is prohibited to target civilian objects or civilians.¹⁶ Thus, any targeting operation directed at a civilian object or civilian is prohibited, unless the protections have

¹² Common Article Three, four Geneva Conventions.

¹³ Art. 1, Additional Protocol II.

¹⁴ International Committee of the Red Cross, “Increasing Respect for International Humanitarian Law in Non-International Armed Conflict” 19 (2008).

¹⁵ See art. 48, Additional Protocol I; Rules 1, 7, ICRC Customary International Humanitarian Law Study.

¹⁶ See art. 48, Additional Protocol I; Rules 1, 7, ICRC, Customary International Humanitarian Law Study.

been suspended due to the civilian directly participating in hostilities or the civilian object is being used to engage in acts “harmful to the enemy.”¹⁷

A civilian object is defined in contradistinction to military objectives (“civilian objects are all objects that are not military objectives.”)¹⁸ Military objectives are those objects which “by their *nature, location, purpose or use* make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁹ Thus, at a minimum, hospitals and medical units are to be afforded those protections accorded civilian objects and protected from attack, unless they satisfy the definition of military objective above. Similarly, medical personnel are protected from attack, provided they do not directly participate in hostilities.

B. Principle of proportionality

The principle of proportionality prohibits the launching of an attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁰ Prior to targeting a military object, if damage to civilian objects or civilian death or injury is anticipated, then an assessment must be undertaken in which the anticipated military advantage to be gained is weighed against the “collateral” damage to protected civilians or civilian objects that is anticipated. Thus, under IHL not every attack that results in civilian death or injury, or the destruction of a civilian object, is prohibited. Whether a strike was legal depends in part on whether the principle of proportionality was respected when the operation targeting the military objective was carried out.

C. Prohibition of indiscriminate attacks

Attacks that are indiscriminate in nature are prohibited.²¹ Indiscriminate attacks are described in Additional Protocol I as those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by IHL, and are thus of a nature to strike military objectives and civilian or civilian objectives without distinction.²²

¹⁷ A civilian loses their protection from attack if they directly participate in hostilities. *See, e.g.*, Art. 51, First Additional Protocol; Art. 13, Second Additional Protocol; Rule 6, ICRC Customary International Humanitarian Law Study. Similarly, a civilian object loses its protection if it is being used for acts harmful to the enemy. Art. 74, HPCR Manual on International Law Applicable to Air and Missile Warfare; Art. 19, Fourth Geneva Convention; Rule 10, ICRC Customary International Humanitarian Law Study.

¹⁸ Rule 9, ICRC Customary International Humanitarian Law Study.

¹⁹ Rule 8, ICRC Customary International Humanitarian Law Study; Art. 52, Additional Protocol I.

²⁰ Rule 14, ICRC Customary International Humanitarian Law Study; Art. 51, Additional Protocol I. *See also* Rule 18, ICRC Customary International Humanitarian Law Study (“Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated..”)

²¹ Rule 11, ICRC Customary International Law Study; Art. 51, Additional Protocol I.

²² Rule 12, ICRC Customary International Humanitarian Law Study; Art. 51, Additional Protocol I.

Additionally, an attack is considered indiscriminate and therefore prohibited, if it is an attack by bombardment by any means or methods that “treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian or civilian objects.”²³ Thus, in the context of carrying out military operations parties to a conflict must insure that the means and methods employed are of such a nature as to avoid indiscriminate targeting.

D. Precautions in attack

IHL requires an attacker to undertake “feasible precautions” to avoid and/or minimize any incidental loss of civilian life, injury to civilians and damage to civilian objects.²⁴ Relatedly, parties to a conflict “must do everything feasible to verify that targets are military objectives.”²⁵ Additionally, parties must take “all feasible precautions” in selecting the means and methods they use, “with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”²⁶ Further, parties are obligated to do “everything feasible” to “cancel or suspend an attack” if the party learns that the target is either (1) not a military objective, or (2) the attack would violate the principle of proportionality.²⁷ Parties must also “give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.”²⁸ Though these rules do not appear in treaty law regulating conduct of hostilities in NIACs, they are widely considered reflective of customary law, and are included in a number of military manuals.

E. Additional rules

There are a number of related rules that provide additional guidance concerning targeting. What follows is a brief, non-exhaustive list of these rules:

- In case of doubt, as to whether an individual is a civilian, “that person shall be considered to be a civilian.”²⁹
- In case of doubt as to whether an object that is normally dedicated to civilian purposes is being used to make an effective contribution to military, that civilian object “shall be presumed” to be civilian and not to be making such an effective contribution.³⁰
- The parties to the armed conflict “must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.”³¹

²³ Art. 51, Additional Protocol I.

²⁴ See Rule 15, ICRC Customary International Humanitarian Law Study.

²⁵ See Rule 16, ICRC Customary International Humanitarian Law Study.

²⁶ See Rule 17, ICRC Customary International Humanitarian Law Study.

²⁷ See Rule 19, ICRC Customary International Humanitarian Law Study; art. 57, Additional Protocol I.

²⁸ See Rule 20, ICRC Customary International Humanitarian Law Study; art. 57, Additional Protocol I.

²⁹ Art. 50, Additional Protocol I. Though this article appears in Additional Protocol I, which applies to IAC, an argument may be made that the presumption, as a matter of general practice, has been adopted. See, e.g., Commentary to Rule 6, ICRC Customary International Humanitarian Law Study (stating that presumption of civilian status has been included in various military manuals).

³⁰ Art. 52, Additional Protocol I. Though this article appears in the First Additional Protocol, which applies to IAC, an argument may be made that is widely considered reflective of CIL. See, e.g., Comment to Rule 10, ICRC Customary International Humanitarian Law Study (explaining this presumption is present in a number of IHL treaties and military manuals).

³¹ Rule 22, ICRC Customary International Humanitarian Law Study; Art. 51, Additional Protocol I.

- The parties to the armed conflict “must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.”³²
- The presence of civilians shall not be used to render immune from attack military objectives. Similarly, the parties to a conflict shall not direct civilians to move or congregate in such a manner as to shield military objectives from attack.³³

It is important to note that a violation of one of these rules by one party to the conflict does not release the opposing party to the conflict from their legal obligations vis-à-vis the protections owed civilians and civilian objects.³⁴

IV. Special protections afforded hospitals, medical units and medical personnel

Generally speaking, hospitals, medical units and medical personnel are afforded “special protection” under IHL, in so far as a result of their status they have heightened protections, and parties to a conflict are under additional obligations when considering targeting, directly or indirectly, hospitals, medical units and medical personnel.³⁵

They shall be protected, respected and may not be the object of attack.³⁶ As the Commentary to Additional Protocol II explains “[i]t should be recalled that respect and protection imply not only the obligation to spare the people and objects concerned, but also to actively take measures to ensure that medical units and transports are *able to perform their functions and to give them assistance where necessary*.”³⁷ The Commentary goes on to affirm that this obligation applies at all times -- even when the medical unit or hospital is not used to accommodate wounded or sick patients (provided, of course, that the medical unit is used exclusively for medical purposes).³⁸

Medical units are defined as “establishments and other units, whether military or civilian, organized 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.”³⁹

Medical personnel are defined as permanent and temporary; the former encompasses “those assigned exclusively to medical purposes for an indeterminate period.” The latter include “those devoted exclusively to medical purposes for limited periods during the whole of such periods.” The general term of “medical personnel” covers both the permanent and temporary categories.⁴⁰ Included in this category are:

³² Rule 24, ICRC Customary International Humanitarian Law Study; Art. 51, Additional Protocol I.

³³ Art. 51, Additional Protocol I. Though this article appears in the First Additional Protocol, which applies to IAC, an argument may be made that the presumption, as a matter of general practice, has been adopted. *See, e.g.* Commentary to Rule 97, ICRC Customary International Humanitarian Law Study (stating that this prohibition has been included in various military manuals and the Statute of the International Criminal Court).

³⁴ *See, e.g.*, Art. 51, Additional Protocol I.

³⁵ *See, e.g.*, Michael Boothby, *The Law of Targeting* 233 (2013) (explaining that IHL requires protection or precautions that exceed that ordinarily afforded civilians and civilian objects for the specific class of civilian objects comprised of hospitals and civilian medical units).

³⁶ *See, e.g.*, Art. 11, Additional Protocol II.

³⁷ *See* Commentary to Art. 11, Additional Protocol II, ¶ 4714.

³⁸ *See* Commentary to Art. 11, Additional Protocol II, ¶ 4716.

³⁹ *See*, Art. 8, Additional Protocol I; Rule 28, ICRC Customary International Humanitarian Law Study.

⁴⁰ Art. 8, Additional Protocol I.

- (i) medical personnel of a party to the conflict, whether military or civilian, including those described in the First and Second Geneva Conventions, and those assigned to civil defence organizations;
- (ii) medical personnel of National Red Cross or Red Crescent Societies and other voluntary aid societies duly recognized and authorized by a party to the conflict, including the ICRC;
- (iii) medical personnel made available to a party to the conflict for humanitarian purposes by a neutral or other State which is not a party to the conflict; by a recognized and authorized aid society of such a State; or by an impartial international humanitarian organization.⁴¹

A. “Dual-use” medical objects

The term “dual use” objects is often used to characterize those objects that serve both civilian and military purposes. Because the term dual use is a popular term not defined in the Geneva Conventions, its use may lead to confusion. For example, the Group of Experts who recently drafted the HPCR Manual on Air Missile Warfare decided not to use the term in the black-letter rules of the manual for this reason.⁴² Additionally, the ICRC has been reluctant to use the term “dual use” because it is not provided for in the Geneva Conventions.⁴³ Thus, PHR has refrained from using this term.

B. Circumstances under which medical units lose their special protection[s] under IHL

The prohibition on directing attacks against hospitals and other medical units is not absolute. Under CIL applicable to NIACs the special protections accorded to hospitals and medical units cease when they are used, outside their humanitarian function, to commit acts harmful to the attacker.⁴⁴ Accordingly, an attack against medical units will be lawful only if two conditions are present: 1) the medical unit is used to commit harmful acts; and 2) these harmful acts are not related to the humanitarian function.

I. Acts harmful to the enemy

Neither the Geneva Conventions nor their Additional Protocols define expressly “acts harmful to the enemy.” Additional Protocol I, however, provides a non-exhaustive list of acts that are not be considered harmful to the enemy:

- (a) 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;
- (b) unit is guarded by a picket or by sentries or by an escort;
- (c) small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;

⁴¹ Commentary to Rule 25, ICRC Customary International Humanitarian Law Study.

⁴² See Introduction to HPCR Manual on Air Missile Warfare, p. 6 (“The Group of Experts decided to avoid in the Black-letter Rules some popular terms that are apt to cause confusion (*e.g.*, “dual-use facilities” and “information warfare”) available at: <http://www.ihlresearch.org/amw/manual/>

⁴³ ICRC Report 03/IC/09, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003, (“A particular problem arises with regard to so-called dual-use objects, *i.e.* objects that serve both civilian and military purposes, such as airports or bridges. It should be stressed that “dual-use” is not a legal term. In the ICRC’s view, the nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I.”).

⁴⁴ See, Rule 28, ICRC Customary International Humanitarian Law Study.

(d) members of the armed forces or other combatants are in the unit for medical reasons.⁴⁵

It is clear that a hospital does not lose its protected status if it were thought to become a military objective based on location or purpose (as might be the case with an “ordinary” civilian object). Thus, of the four criteria contained in the definition of military objective (found in both Rule 8 of the ICRC Customary International Humanitarian Law Study and Article 52 of Additional Protocol I), only nature and use are left as possible bases to argue that a hospital has lost its protected status.

Generally, international commissions of inquiry and ad-hoc international criminal tribunals have adopted the view that medical units lose their protected status if they are used for military purposes. For example, in assessing the legality of an attack against a medical facility by the Israeli Defense Force (“IDF”) during the 2006 conflict with Hezbollah, the Inquiry Commission on Lebanon condemned the attack because it was not able to find any evidence that the hospital was being “used for military purposes.”⁴⁶ The Commission was not persuaded by the IDF’s general explanation that Hezbollah’s fighters were using the medical infrastructure.⁴⁷ Similarly, in the *Galić* decision of November 2006, the Appeals Chamber of the International

Criminal Tribunal for the former Yugoslavia (“ICTY”) concluded that the Fourth Geneva Convention and its Additional Protocols do not protect medical facilities that are used for military purposes.⁴⁸ More significantly, however, the Appeals Chamber of the ICTY in *Galić* provided a list of examples of acts that deprive hospitals of their special protection under IHL. These examples include:

- The use of a hospital as a shelter for able-bodied combatants or fugitives;
- The use of a hospital as an arms or ammunition dump;
- The use of a hospital as a military observation post;
- The deliberate siting of a medical unit in a position where it would impede an enemy attack; and
- Heavy fire from every window of a hospital meeting an approaching body of troops.⁴⁹

Additionally, the *Galić* decision listed the following examples of actions that *do not* justify attacks against hospitals:

- Nursing sick or wounded members of the armed forces;
- The presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service;
- The personnel of the unit are equipped with light individual weapons for their own defense or for that of the wounded and sick in their charge;
- The unit is guarded by a picket or by sentries or by an escort; and
- Members of the armed forces or other combatants are in the unit for medical reasons.⁵⁰

⁴⁵ Art. 13, Additional Protocol I. It bears noting that Additional Protocol I applies to IACs, not NIACs. The list, however, remains instructive for purposes of discerning what might amount to an “act harmful to the enemy.” See also Art. 22, First Geneva Convention.

⁴⁶ See, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, United Nations Document A/HRC/3/2, 23 November 2006, at ¶ 165.

⁴⁷ *Id.*, ¶ 170.

⁴⁸ *Galić* Case (Judgment) ICTY- 98-29-A (30 November 2006), ¶ 141.

⁴⁹ *Id.*, ¶ 342.

⁵⁰ *Id.*, ¶ 343.

In the *Galić* case, the Trial Court of the ICTY had to determine whether Stanislav Galić was responsible for conducting a shelling and sniping campaign against civilian areas of Sarajevo between 10 September 1992 and 10 August 1994. One of the incidents referred to in the charges brought against Galić was the shelling of the Kosevo Hospital. The Trial Court found that the firing on the hospital buildings was not aimed against any possible military target. But the Appeals Chambers concluded that the Trial Court's finding was partially incorrect because the Kosevo Hospital was used as a base from which to fire at Galić's forces. Therefore, the Appeals Chamber said, "fire from the hospital turned it into a target."⁵¹

But even in such circumstances -- where a hospital becomes a legitimate military objective -- the Appeals Chamber imposed a temporal restriction on the targeting of medical facilities. More specifically, the Court held that medical units used for military purposes do not become permanent military targets. As the Court put it, medical units may only be targeted "as long as it is reasonably necessary for the opposing side to respond to the military activity."⁵² Once the military activity from the hospital ceased, Galić's forces were prevented from launching attacks on it.

2. Harmful acts unrelated to humanitarian duties

The fact that a medical unit is being used to commit harmful acts against a party to the conflict is not enough to deprive it of its special protection under customary IHL. There are situations in which a medical unit may interfere with military operations or become a tactical obstacle, while carrying out its humanitarian function or duties. In such cases, where the harmful act is compatible with the humanitarian activities of the medical unit, attacks are prohibited.

Although this may occur only in exceptional circumstances, the ICRC Commentary to Article 13 of Additional Protocol I⁵³ provides two examples of cases in which a harmful act can be compatible with the humanitarian duties of the medical unit:

- A mobile medical unit accidentally breaks down while it is being moved in accordance with its humanitarian function, and thereby obstructs a crossroads of military importance; and
- Radiation emitted by X-ray apparatus [...] interfere[s] with the transmission or reception of wireless messages at a military location, or with the working of a radar unit.⁵⁴

B. Obligation to give advance warning

Article 11(2) of Additional Protocol II establishes that the protection of medical units does not cease automatically after a harmful act occurs. Under this provision, also considered to reflect CIL, "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."⁵⁵ In contrast with the general precautionary measure to give warnings in order to spare the civilian population, "unless circumstances do not permit,"⁵⁶ the parties in the conflict are obliged to give warnings in the case of

⁵¹ *Galić* Case (Judgment) ICTY- 98-29-A (30 November 2006), ¶ 346.

⁵² *Id.*

⁵³ ICRC Commentary on the Additional Protocols, ¶ 552

⁵⁴ Commentary to Art. 13, Additional Protocol I.

⁵⁵ Art. 11, Additional Protocol II. This requirement is considered to be customary international law. *See, e.g.*, Commentary to Rule 28, ICRC Customary International Humanitarian Law Study.

⁵⁶ Art. 57, Additional Protocol I.

attacks against hospitals or any other medical units. This means that an attack against a medical unit generally cannot be carried out if a warning has not been given.⁵⁷ A reasonable time limit is not defined in IHL, but is understood to be the “time [the opposing party] need[s], depending on the circumstances, to change their approach, to explain themselves if a mistake has been made, or to evacuate the wounded and sick.”⁵⁸ The Commentary also provides a clear example of circumstances in which a time limit may not be appropriate -- when a “body of troops approaching a hospital [is met] by heavy fire from every window.”⁵⁹

V. Use and misuse of the emblems under IHL

A. The purpose of the emblems in IHL

The emblems are distinctive signs used by medical units, personnel and transports for two purposes: 1) to indicate that the persons and property bearing them are entitled to special protection and may not be the object of violence (protective function); and 2) to designate persons or objects connected with the National Red Cross or Red Crescent Societies (indicatory function).

The Red Cross and the Red Crescent are recognized as distinctive emblems under IHL.⁶⁰ Additional

Protocol III to the Geneva Conventions, which entered into force in 2007, introduced the Red Crystal as an additional emblem.⁶¹

B. Authorization to use the emblems under IHL

The use of the emblem in NIACs is subject to the authorization and supervision of the competent authorities -- both state and non-state --- in the State concerned.⁶² Therefore, the display of the emblem in civilian hospitals, civilian medical units and other voluntary relief societies and medical facilities, as well as their staff and civilian medical means of transport must be authorized in accordance with domestic regulations.

Although Syria is not a party to Additional Protocol II, this provision reflects the practice of States and international organizations.⁶³ Every State has the responsibility to adopt special legislation or measures regulating the use of the emblem.⁶⁴ Such controls guarantee that the emblem is effectively

⁵⁷ *Galić* Case (Judgment) ICTY- 98-29-A (30 November 2006), ¶ 344 (Stating: “... loss of protection is not instantaneous: a warning period is required.”).

⁵⁸ See Commentary to Art. 11, Additional Protocol II, ¶ 4727.

⁵⁹ See Commentary to Art. 11, Additional Protocol II, ¶ 4728.

⁶⁰ In addition to the Red Cross and the Red Crescent, the Red Lion was also recognized as an emblem for a long time. However, it fell in to disuse and no State has used this emblem since 1980.

⁶¹ Syria is not a Contracting Party to Additional Protocol III.

⁶² See, e.g., Art. 12, Additional Protocol II. In a non-international armed conflict, this authority will fall on the legitimate government and the armed group or groups fighting the legitimate government. This is one of the reasons why IHL requires non-state armed groups to have a certain degree of organization, and therefore the capacity to comply with IHL, in order to be considered parties to an armed conflict.

⁶³ See, e.g., “The Protection of the Red Cross / Red Crescent Emblems,” ICRC Legal Fact Sheet, March 25, 2014 (describing the obligations of States regarding the national implementation of the norms applicable to this particular aspect of international humanitarian law), available at: <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/57jnwg.htm>.

⁶⁴ *Id.*

respected by restricting its use to the medical service or personnel of the parties and humanitarian organizations only.

This does not mean, however, that humanitarian relief organizations are required to obtain permission to use the emblem in order to perform their functions. According to the ICRC Commentary to Additional Protocol II, the use of the emblem is optional.⁶⁵ An obligation to display the emblem would diminish, rather than enhance, the protections afforded to medical units, especially in conflicts where they are deliberately targeted in order to deny medical care to the civilian population. In other words, the special protections that medical units enjoy under IHL derive from the humanitarian function they perform, not the use of a distinctive emblem.⁶⁶ Accordingly, failure to display the distinctive emblem does not deprive medical units of their protected status.⁶⁷

C. Misuse of the emblem

The parties to the conflict and humanitarian relief organizations may only use the emblem in accordance with IHL. Any use not expressly authorized by IHL constitutes a misuse of the emblem. These are two examples of misuse of the emblem:

1. Usurpation: the use of the emblem by bodies or persons not entitled to do so (commercial enterprises, pharmacists, private doctors, and ordinary individuals, etc.);⁶⁸
2. Perfidy: making use of the emblem in time of conflict to protect combatants or military equipment.⁶⁹

VI. Interference in the provision of medical assistance

Relatedly, though not an issue that falls within a targeting analysis, is the freedom afforded medical personnel to carry out medical duties. For instance, Common Article Three states “[t]he wounded and sick shall be collected and cared for.”⁷⁰ Thus, implicit in this directive -- which applies to states and armed groups -- is the ability of medical personnel to carry out their duties without interference. Additionally, under Article 10 of Additional Protocol II medical professionals “shall not be compelled to refrain from acts required by the rules of medical ethics or other rules designed for the benefit of the wounded and sick. . .”⁷¹ The ICRC Study is very clear that “[t]he wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.”⁷² Thus, any actions taken outside a hospital or medical unit designed to impede the ability of medical professionals to undertake their medical duties is prohibited under a number of rules of IHL.

⁶⁵ Commentary on the Additional Protocols, ¶ 4733.

⁶⁶ Commentary to Rule 30, ICRC Customary International Humanitarian Law Study

⁶⁷ See Commentary to Article 72(d) of the HPCR Manual on Air Missile Warfare (“Medical units and transports, as well as medical and religious personnel, enjoy a protected status from the moment they have been identified as such, and *shortcomings in the means of identification cannot be used as a pretext for failing to protect their status*”) (emphasis added)., Available at: <http://www.ihlresearch.org/amw/manual/>.

⁶⁸ Article 53, first Geneva Convention.

⁶⁹ Perfidy is generally defined as any acts inviting the confidence of an adversary to lead him to believe he is entitled to, or is obliged to accord, protections under the rules of international law applicable in armed conflict, with the intent to betray that confidence.

⁷⁰ Common Article Three, four Geneva Conventions.

⁷¹ Art. 10, Additional Protocol II.

⁷² Rule 110, ICRC, Study on Customary International Humanitarian Law.