



# THE 'ETHICALIZATION' OF LAW

FUNDAMENTAL QUESTIONS, DANGERS AND OPPORTUNITIES FROM AN INTERDISCIPLINARY PERSPECTIVE



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## THE INTERSECTION OF MEDICAL ETHICS AND INTERNATIONAL HUMANITARIAN LAW – WHERE THE BOUNDARIES FOR PHYSICIANS IN ARMED CONFLICT ARE

(Abstract)

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## **The Intersection of Medical Ethics and International Humanitarian Law**

### **Where the Boundaries for Physicians in Armed Conflict are**

#### **Abstract**

The media are full of reports about physicians in armed conflicts. From the hospitals in Misrata where rebels and wounded civilians are treated, over Gaza where ambulances were attacked and used for attacks, over the detention facilities in the 'war on terror', physicians are closely involved with armed conflicts. They are indispensable to suture wounds, to treat the sick, and care for prisoners of war.

The presentation at the Symposium will discuss what medical ethics guide physicians in armed conflict and how these interact with international humanitarian law. Pursuant to article 16 Additional Protocol I to the Geneva Conventions: 'Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick [...]'

Accordingly, physicians cannot be forced to violate medical ethics. It can be surmised that they, hence, should act in accordance with medical ethics. But what medical ethics apply in armed conflict and do they apply universally? The open term used in international humanitarian law thus 'ethicalizes' the area of law – yet without sufficient clarity, the reference will lead to confusion rather than increased protection.

Seeing the lack of ethical guidelines on an international level and the insufficient level of protection of a pluralistic approach for those in need of medical care in armed conflict, most scholars refer to the World Medical Association for reference to international guidelines of medical ethics in armed conflict. It is essential to examine the WMA's *International Code of Medical Ethics* and its *Regulations in Times of Armed Conflict*. Due to certain legitimacy deficits concerning its procedure and origin, legitimacy being defined as the justification of the authority of an organization or institution to make binding rules, the WMA cannot make binding rules for physicians worldwide.

However, with no international legal definition of medical ethics, there is so far no satisfactory option for filling the open term. The most convincing option for interpreting medical ethics in the sense of the Additional Protocols is a combinational approach. First of all, the humanitarian principles of international humanitarian law itself provide a guideline on the relevant qualities of medical care and on the guiding principles in armed conflict, for example impartial triage is essential, whereas questions regarding the beginning of life are not. Yet this should be supplemented where appropriate by those WMA principles that correspond to international humanitarian law and the general ethical discourse. In that way, the opening of international humanitarian law to ethical standards is legitimate because it would build on existing norms. For a practical example, the principle of informed consent is prominent in the WMA documents and the general ethical discourse, whereas in international humanitarian law it was almost completely omitted. As the principle is compatible with international humanitarian law and with the guiding principles of international humanitarian law, it should also be applicable in armed conflicts. Thus, short of an 'ethicalization', a broad and ethically inspired interpretation of international humanitarian law can fill some *lacunae* relating to the treatment of the wounded and sick and others in need of medical care.

In the laws of armed conflict, the reference to ethics opens the system up for considerations of medical ethics that may be lifesaving for those to be treated. Without sufficient clarity, however, the reference remains an empty letter that neither guides physicians nor reinforces protected persons.