Chapter 47
Legal Aspects of “Medical Neutrality”*

1 Introduction: Risk and Protection

Among the large numbers of people who nowadays visit foreign countries, there are many who do this in order to offer some form of aid in the country they are visiting: development aid workers, academics who are part of an exchange programme, those accompanying food transports or other emergency supplies, aid workers in the area of health care, et cetera. They can all, in the course of these activities, become involved in situations which entail more or less serious risks for their freedom or personal dignity, health or physical or mental wellbeing or even their life. The risks occur primarily in areas where human rights are not observed very well or where some other form of insecurity prevails; the latter is most strongly the case in areas which are afflicted by war, whether in the form of international or (more often) internal armed conflict.

It goes without saying that such persons and the organizations which support them attempt to secure some form of effective protection in situations entailing such high risk; preferably of course real immunity, but even then of a kind that allows them to maintain their freedom of action as much as possible.

Public international law offers various forms of protection for aliens. A well-known position of immunity, and one which is often regarded with envy, is that of the diplomat; but that is reserved for them and for those persons who are placed on the same footing.

What is more generally applicable is so-called “diplomatic protection”, which a state may offer to every subject who becomes involved in difficulties in a foreign country (by making such a subject’s complaint against another state its own). Human rights treaties and the instruments of enforcement they contain may also often offer a certain degree of legal protection. But in practice, when push comes to shove, it appears that none of these generally applicable means offer fast and effective protection; and if effective at all, this is often only in the long term. The greater the danger and thus the more acute the need for protection, the smaller the chance appears to be that it may be achieved by these means.

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For some categories of medical aid workers a high level of protection was already achieved a long time ago: it has existed since the first Geneva Convention of 1864 for military medical personnel acting in time of war. What this amounts to is legal protection combined with de facto protection in the form of the authorized use of the red cross and the red crescent as a “protective emblem”. This does not, of course, ensure immunity on the battlefield: bullets are blind.

The “protective emblem” was introduced to safeguard medical aid to the wounded and sick (and the shipwrecked) in situations of armed conflict. International humanitarian law (IHL) attaches strict conditions to the recognition of institutions as “medical aid workers”. (Medical and other) aid workers who cannot or do not wish to meet these requirements, cannot by law claim the protection which is accorded recognized medical aid workers. But it is undeniable that they too may have a justified interest in ensuring recognition of, and deriving a degree of protection from, their special position.

One way to achieve this goal may be by resembling as closely as possible recognized medical aid organizations. In this connection the tendency may be noted to use the term “medical neutrality” as a kind of general cover and to expose all sorts of untoward behaviour as violations of this broad concept of ‘medical neutrality’.

Both “medical” and “neutrality” are existing words which may have a variety of meanings. The combination “medical neutrality”, not an existing legal concept, is therefore susceptible to all sorts of interpretations, even word games (such as the remarkable manoeuvring with the terms “active” and “passive” neutrality – a point I shall return to). But the term “medical” does in any case imply a certain restriction. Take the professor teaching criminal law at a foreign university who is taken hostage, or the aid worker instructing villagers how to work with a new water pump and who is severely wounded during a raid on the village: they may both be victims of serious infringements of their fundamental rights, but neither of them can be said to suffer an infringement of something which could be referred to as “medical neutrality”. The term cannot, in other words, serve as an umbrella protecting every person involved in foreign aid. Such attempts at terminological blurring are doomed to result in confusion and, worse, may even undermine the actually existing protection of what can without ambiguity be termed “the medical sector”.

This symposium deals, according to its title, with “medical” issues. I shall not attempt to offer an overall explanation for this term. Suffice it to say that I understand it to refer to a number of principles and fundamental questions concerning the status and (degree of) protection of persons and institutions which offer medical aid to the wounded and sick among the population, including the armed forces, of a country where human rights are threatened or that is engaged in an (international or internal) armed conflict. Hereafter, I will discuss a number of these principles and questions from primarily a legal point of view, and, to begin with, the term “neutrality”.