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UKRAINE WAR

Why hospital bombings remain difficult to prosecute as war crimes

With the war in Ukraine the targeting of healthcare settings has once again come under the spotlight. **Madlen Davies** reports on the efforts to gather evidence of war crimes—and why so few incidents have been successfully prosecuted

Madlen Davies *investigations editor*

Oleh Tkachenko was delivering bread when he heard an explosion. He works as a pastor in a Baptist church in Vuhledar, a city in the southern Donetsk Oblast region of Ukraine. He ran to the city's hospital immediately and saw its windows were shattered, with three people lying in the street and two on the hospital's steps. One woman was already dead. He helped a mother struggling with a pram to a bomb shelter. On the way he saw two ambulances and the first aid station completely burnt. There were hundreds of pieces of shrapnel everywhere. "At first I was puzzled," he said. "I couldn't understand what it was but then I saw the head of the rocket and I saw right away it was a cluster munition." The 24 February attack killed four civilians and injured 10 people, six of them healthcare workers, according to Human Rights Watch.¹

The attack left the hospital without power. The city now has no water source and only emergency services are running as the fighting continues. "The hospital is in a really dangerous place and it's practically impossible to work there, it's on the side where there's constant shooting," said Tkachenko. "It would be crazy to work there and take in patients. I don't think anyone is offering medical services in the town now."

Hospital attacks began on the first day of Russia's invasion of Ukraine. The World Health Organization has verified 72 attacks on health settings.²

Intentional attacks on hospitals have been illegal for more than 150 years but only two people have ever been prosecuted under international law, legal experts told *The BMJ*. They describe a slow system, remote from survivors, and a prosecutor that is not always able to arrest alleged perpetrators. As the war in Ukraine continues, and the toll of injury and death increases, many are asking why we can't better hold offenders accountable.

On 3 March, Karim Khan, prosecutor of the International Criminal Court (ICC), launched an investigation into war crimes perpetrated by Russian troops in Ukraine, and has sent investigators into the country to gather evidence.

"Attacking hospitals is a war crime under the ICC statute," said Tom Dannenbaum, assistant professor of international law at Tufts University. "So, too, is attacking medical units or people, and buildings or transports that display a red cross, red crescent, or red crystal, the international emblems of healthcare settings," he said. Indiscriminately attacking civilian

populations is also a crime, he added, so any case could include impacts on health settings.

Prosecutors from Germany, Lithuania, Poland, Slovakia, Spain, and Sweden³ have also launched probes into Russian forces' activities in Ukraine. For war crimes, a principle called universal jurisdiction applies. Unusually, it allows states to adjudicate on alleged crimes committed in other countries.

Gathering evidence

Both the Ukrainian government and the ICC have launched online portals where evidence of attacks on civilians can be sent. Thousands of volunteers from the open source intelligence community are documenting and verifying attacks on civilians—including those on hospitals and ambulances—found on social media, as well as from sources on the ground. This includes the 9 March bombing of a maternity hospital in Mariupol.

Many of these data will document the attack on the hospital itself—one human rights group, Mnemonics, previously documented 410 attacks on 270 health facilities in Syria using social media sources.⁴ But prosecutors will need to link the crime to a person to try before the court, said Dannenbaum.

Even if Russian individuals are identified, proving they deliberately hit healthcare settings is often the trickier task, said Astrid Coracini, lecturer in international law at the University of Vienna. "It's clear that hospitals were attacked," she said. "The question is whether they were targeted. Were the locations of the hospitals clear? A lot of missile strikes come from far away. So, the question is, was it clear that these buildings were hospitals? Was there a military target that was close to it?"

The difficulties are exacerbated when you try to prosecute those higher up the command chain, who weren't there on the ground, said Dannenbaum, because you can't always infer their contribution or what they knew or should have known from circumstantial evidence.

One way to establish the link is to gather evidence from members of the Russian forces who are captured and then agree to give evidence—those who either take a plea deal or who are not implicated directly in the crimes. They can provide testimony and communications clarifying who ordered what or who knew about attacks and when, Dannenbaum said.

Leonard Rubenstein, chair of the Safeguarding Health in Conflict Coalition, says the ICC will also be looking at where weapons were fired from and how precisely they were targeted. The ICC will ask intelligence agencies for intercepted communications from Russian troops. The US, which doesn't normally share intelligence with the ICC, has signalled it may cooperate in the case of Ukraine, he added.

Proof and prosecution

Outside of the ICC, other countries' prosecutors can bring claims against Russia without proving intent, instead proving recklessness, he said. Rubenstein believes this is the most likely route to a prosecution. "If you're prosecuting because the hospital was targeted, you have to prove that the hospital was targeted," he said. "But if you're bringing a case in which a hospital is part of a civilian area, you need to show that they intended to hit the civilian area. And you could use a lot of circumstantial evidence to prove that. Here in Ukraine the evidence is overwhelming."

Even still, it could be years before survivors see justice. "It's very, very slow and it's frustrating for victims and affected communities," said Dannenbaum. "It's remote. Even when the prosecutions happen—in The Hague—it's not easy for victims to attend or feel connected to the process. Those are all real challenges with the system."

The ICC has a proposed budget of €158m for 2022,⁵ a fraction of many countries' defence budgets. A coalition of civil society groups has been calling for it to be given the funds it needs to bring justice to victims.⁶ The ICC has also asked for additional donations so it can carry out its investigation in Ukraine, and Lithuania has already donated €100 000, according to media reports.⁷

Even after a successful prosecution—there have been just six convictions for war crimes since the ICC was founded in 2002—getting custody of the perpetrator is difficult. Russia, like Syria before it, is not party to the Rome Statute, the ICC's governing treaty, and so is not obligated to cooperate with it. This is the reason the ICC cannot investigate alleged war crimes in Syria. Ukraine, which gave the ICC jurisdiction in a declaration in 2014, could prosecute captured commanders and try them in its domestic courts. But unless there is a change in regime in Russia, it is unlikely President Putin or military leaders will be handed over to the court, unless they travel to countries with extradition orders.

The fact that the international justice system only applies to the countries that sign up to it is a "big flaw," said Rubenstein. If they are not a member of the ICC, and many authoritarian regimes aren't, a case must be referred by the UN Security Council. Its five permanent members, China, France, Russia, the UK, and the US, have a veto. There are proposals to disallow vetoes in cases of atrocities, but the proposal is likely to be hamstrung as it will need to be agreed by all members, he said.

Still, the lawyers and experts contacted by *The BMJ* were optimistic the ICC would bring charges against individuals for war crimes in Ukraine.

Prevention

Zahed Katurji, who went by the alias Hamza Al Kateab for protection in Syria, worked as a trauma doctor in east Aleppo while it was under siege from 2012 to 2016. He describes another flaw in the system: as part of its deconfliction mechanism, the UN Office for the Coordination of Humanitarian Affairs (OCHA) asked him for hospital locations to share with the Assad regime and Russian forces, in the belief that this would stop the facilities being targeted. "Most

of those hospitals were attacked," said Katurji. "It was literally like a target menu."

Katurji, whose organisation Action For Sama has launched the Stop Bombing Hospitals campaign, said OCHA published hospital locations but there was no afterthought or investigation when they were hit. "It puts a lot of pressure on local health workers. We had a long, long debate—do we provide these locations or not? What if we provide the locations and a hospital is attacked? What if we don't and a hospital is attacked and then we'd be blamed because we didn't share the locations." A spokesperson for OCHA told *The BMJ* that the deconfliction mechanism is voluntary.

While prosecuting war crimes provides accountability, many would like to see prevention. Countries could better train soldiers, and lawyers could be deployed all the way down the chain to advise on military strategy and targeting decisions, as has occurred in some armies. "It's not foolproof," said Dannenbaum. "It's not as though doing that is going to eliminate war crimes or avoid excesses in armed conflicts, but it's another way in which compliance can be enhanced."

The UN Security Council unanimously adopted a resolution in 2016 asking governments to engage in a series of activities to prevent attacks on healthcare facilities and hold perpetrators accountable for them. Hardly any countries have implemented it domestically or championed changes on the international front, said Rubenstein. "That shows a complete failure of the international system," he said.

The only successful prosecution of a hospital attack under international law

In November 1991, during the Croatian war of independence, the Yugoslavian People's Army (JNA) took hundreds of people seeking refuge at the city hospital in Vukovar, east Croatia, and transported them 50 km away to a farm in Ovčara. More than 250 people—including patients, hospital staff, and non-Serb soldiers that had been defending the city—were then taken to a nearby ravine and killed; their bodies buried in a mass grave.

In 2007 a colonel and a captain serving in the JNA were convicted of war crimes in the International Criminal Tribunal for the former Yugoslavia (ICTY) and 15 others were later convicted in domestic courts. It remains the only case of a successful prosecution of an attack on a health setting under international law.

In another case decided by the ICTY in 2006, the Appeals Chamber found that Koševo hospital in Sarajevo was regularly targeted when the city came under siege in 1992. However, it was deemed that it had become a legitimate military target because it was used as a base to fire mortars at the Sarajevo-Romanija Corps forces.

Outside The Hague there have been prosecutions in domestic courts. In 2010 in the Democratic Republic of Congo, Barnaba Yonga Tshopena, a leader of the Front for Patriotic Resistance in Ituri militia, was convicted of several war crimes, including attacking and pillaging hospitals.

Additional reporting: Lily Hyde.

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- 1 Ukraine: Russian cluster munition hits hospital. Human Rights Watch. 2022. www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital.
- 2 WHO. Surveillance system for attacks on health care. <https://extranet.who.int/ssa/LeftMenu/In-dex.aspx>.
- 3 Twitter. <https://twitter.com/VenediktovaIV/status/1505593414787739648>.
- 4 Targeting health, attacks against medical facilities in Syria. 2021. <https://medical.syrianarchive.org>.
- 5 International Criminal Court. Proposed budget 2022. https://asp.icc-cpi.int/icc-docs/asp_docs/ASP20/ICC-ASP-20-10-ENG.pdf.

- 6 Coalition for the International Criminal Court. A sufficient budget. www.coalitionfortheicc.org/fight/state-support/sufficient-budget.
- 7 Lithuania intends to allocate €100 000 to Hague Process over war in Ukraine. Delfi 2022. www.delfi.lt/en/politics/lithuania-intends-to-allocate-eur-100-000-to-hague-process-over-war-in-ukraine.d.