

DRAFT FOR FOURTH STATE CONSULTATION

Workstream 5 – ACHIEVING MEANINGFUL PROTECTION FOR HOSPITALS IN ARMED CONFLICT

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Overview

Medical facilities are afforded one of the highest levels of protection under international humanitarian law (IHL) because they are indispensable to saving lives in armed conflict. Respecting and protecting them is a core legal obligation and a practical necessity to meet the obligation to care for the wounded and sick. However, contemporary conflicts reveal a deeply troubling pattern of medical facilities being denied the supplies and essential services required for their functioning, subjected to attack or misused for military purposes.

The workstream confirmed that when the existing rules of IHL are fully respected, attacks against medical facilities and their misuse for military purposes would be much less likely to occur. The outcomes provide concrete measures that parties to armed conflict can take to comply with IHL obligations, including:

- establishing coordination platforms with medical providers
- mapping medical facilities, supply routes and the essential services on which they rely
- adopting measures to prevent misuse
- integrating guidance to ensure effective warnings are delivered as required under IHL.

Together, these measures are intended to strengthen protection for medical facilities, so that they can remain sanctuaries from the fighting and deliver life-saving health services, even in the darkest moments of conflict.

Outcome

Medical facilities: include both military and civilian hospitals, other medical establishments and units organized for medical purposes, including for the care for wounded and sick persons or for the prevention of disease. Such medical facilities may be fixed or mobile, permanent or temporary.

1. Ensuring specific protection of medical facilities

All medical facilities performing medical functions benefit from “specific protection”, the highest level of protection under IHL, above and beyond the general protection granted to civilian objects. Parties to an armed conflict are obligated to respect and protect medical facilities in all circumstances.

To respect medical facilities, parties to an armed conflict are prohibited from attacking them and must refrain from other military interference with their medical functions. They must also refrain from misusing medical facilities for military purposes outside their humanitarian function to commit acts harmful to the enemy (referred to as “misuse of medical facilities for military purposes”).

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) ensure that targeting processes, including rules of engagement, reflect the specific protection granted to medical facilities under IHL.
- b) identify, map and regularly update the location of medical facilities both within the area of operations and the immediate vicinity of such operations, with the support of medical providers wherever feasible. It is also necessary to assess their importance and capacity to deliver medical care depending on the type of facility in question, e.g. hospital, clinic, primary health care centre or first-aid post. This information can be used to guide and inform military operations with a view to protecting medical facilities and maintaining access to healthcare.
- c) develop and continuously update a list of “no-strike” and “restricted fire” areas, based on regularly updated mapping, to identify the locations of all medical facilities, and the essential services that enable their functioning, including water, fuel and electricity systems.
- d) establish a coordination platform with health-care providers, to:
 - i) address potential disruption of medical services due to military operations
 - ii) re-establish full delivery of healthcare services as soon as possible
 - iii) develop medical evacuation procedures while ensuring continuity of care in the exceptional case when part of a hospital becomes liable to attack.

2. Avoiding the misuse of medical facilities for military purposes, outside their humanitarian function

To respect medical facilities, all practical measures must be taken to avoid any misuse of such facilities for military purposes.

Misusing a medical facility to carry out acts harmful to the enemy does not necessarily, in itself, fulfil the two-pronged test to meet the definition of a military objective provided in Article 52(2) of Protocol I of 8 June 1977 additional to the Geneva Conventions. Unless it does so, the medical facility even after losing its specific protection is not liable to attack.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) commit to never misusing medical facilities for military purposes
- b) issue explicit orders prohibiting any misuse of medical facilities for military purposes, and provide training and clear orders to the armed forces to this end

- c) adopt a “no weapons” policy in all medical facilities to ensure that weapons are not used in medical facilities for any purpose other than those expressly allowed under IHL, and take all measures necessary to implement that policy
- d) identify military alternatives to misusing medical facilities outside their humanitarian functions for military purposes; ensure that armed forces understand that, even if no feasible alternatives are found, the misuse of medical facilities for military purposes remains prohibited.

3. Facilitating the functioning of medical facilities during conflicts

To protect medical facilities, as well as to protect, collect and care for the wounded and the sick, parties to an armed conflict are required to take positive measures, including all feasible measures to support the functioning of medical establishments and protect them from harm, such as looting by private persons. This includes ensuring that medical facilities receive adequate medical supplies and equipment, so they can continue to deliver medical services. Parties to an armed conflict must also ensure that medical facilities are accessible to medical personnel and patients, and retain access to essential services that are critical to their functioning, such as electricity, fuel and water.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) actively help to ensure the delivery of medical supplies and equipment to medical facilities.
- b) ensure that medical facilities retain access to vital resources such as electricity and water, so that they can continue to provide medical services.
- c) establish contact with health-care authorities and providers to create a coordination platform to guide and inform the armed forces regarding existing supply routes for medical supplies or alternative resupply routes, and to map essential services, such as water and electricity systems, that medical facilities need to function.
- d) ensure that information is gathered and shared on factors that may impact access to and delivery of health-care services. This includes information on areas affected by landmines and explosive remnants of war, curfews and other restrictions on the movement of persons and medical supplies, including across borders and in situations of occupation. Such information may, for instance, be gathered and shared through a coordination platform, as mentioned above.
- e) take particular care to ensure that curfews and other measures do not detrimentally impact the movement of medical staff, patients and supplies, so that hospitals can continue to function. At the same time, it is important to establish procedures at check points and along secured areas and routes that enable medical facilities to receive medical supplies, essential services, and remain accessible to both medical personnel and patients.

4. Ensuring that specific protection is only lost if all cumulative legal conditions are fulfilled

A medical facility shall not lose specific protection unless:

- the facility has been used to commit acts harmful to the enemy outside its humanitarian function
- a warning has been issued, setting – where appropriate, a reasonable time limit for the harmful acts to cease, and
- the above-mentioned warning goes unheeded.

Even when a medical facility has lost specific protection, belligerents still need to ensure that wounded and sick patients who cannot be evacuated from the facility remain protected and that the health

system, as a whole, can provide for the medical needs of the wounded and sick. This is in light of the fundamental obligation under the Geneva Conventions and customary IHL to collect and care for the wounded and sick and related humanitarian considerations.

Even in cases where a medical facility has lost its specific protection it must not be attacked unless it qualifies as a military objective, the rule of proportionality is respected, and all feasible precautions have been taken to avoid or in any event minimize incidental harm to the wounded and sick, medical personnel and civilians.

To achieve meaningful protection of medical facilities in armed conflict, it is essential to:

- a) ensure that the rules of engagement and military manuals stipulate the exceptional circumstances under which a medical facility may lose specific protection
- b) ensure that any decision in this regard is made at the highest level of military command.

4(a) Preventing the loss of specific protection: understanding and refraining from acts harmful to the enemy

“Acts harmful to the enemy” refers to the use of military or civilian hospitals and other medical facilities, outside their humanitarian function, to directly or indirectly interfere in military operations, thereby causing harm to the enemy. In case of doubt, such acts should be narrowly interpreted to preserve the specific protection enjoyed by medical facilities.

The following acts are not considered acts harmful to the enemy under IHL:

- the personnel of the unit are armed, and use their weapons in individual self-defence or the defence of the wounded and sick in their charge
- the medical facility is protected by armed guards or members of the armed forces equipped with light weapons to prevent looting and violence, but not to oppose the capture or control of the medical unit by the enemy forces
- small arms and ammunition taken from the wounded and sick and not yet handed back to the proper service, are found in the medical facility
- members of the armed forces, including wounded and sick combatants, are in the medical facility for medical reasons
- medical personnel in the medical facility are providing medical care to enemy soldiers or fighters.

The following acts, when duly verified, and only for such time as they are taking place are considered “acts harmful to the enemy” based on state practice:

- firing at the enemy from inside the medical facility for reasons other than individual self-defence
- setting up a firing position in a medical facility
- using a medical facility as a shelter from military operations for able-bodied combatants
- using a medical facility as a detention or interrogation centre linked to the conflict
- using a medical facility as an arms or ammunition depot
- using a medical facility as a military observation post, where it has been established that the facility is being used to support the military operations of the opposing party
- placing a medical unit within, or in proximity to, a military objective with the specific intention of shielding that military objective from the enemy’s military operations.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) verify reports that a medical facility is being used to commit acts harmful to the enemy using information reasonably available from all sources, such as military, medical and other public sources
- b) include in military manuals acts that are listed under conventional IHL as not amounting to “acts harmful to the enemy”
- c) ensure that the concept of “acts harmful to the enemy” is interpreted narrowly and any cases of ambiguity are resolved by giving precedence to fulfilling the object and purpose of specific protection granted to medical facilities.

4(b) Preventing the loss of specific protection: understanding and implementing the warning requirement

A warning must be given to allow those committing acts harmful to the enemy to terminate such acts, or, if they persist, allow sufficient time for the safe evacuation of the wounded and sick, whenever possible. The warning also allows those in charge of a medical facility – where feasible and safe – to try to influence belligerents to remedy the situation or to respond to any unfounded allegations.

The obligation to issue such a warning applies at all times and may only be forgone in very exceptional circumstances, in particular in the exercise of self-defence, when combatants approaching a medical facility come under fire from inside that facility.

Warnings do not relieve the attacking party of its obligation to respect and protect the wounded and sick, including those who could not be evacuated from the medical facility, to respect the rule of proportionality, and to take all other feasible precautionary measures to avoid, or at least minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Once a medical facility has ceased to be misused for military purposes and continues to provide medical services, it regains its protection.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) include in standard operating procedures and operational orders the following elements to inform and guide military operations and ensure that the warning issued is effective:
 - i) when issuing the warning, specify in sufficient detail the act harmful to the enemy, so that those committing the act are aware of what must be done to avoid loss of specific protection for the medical facility
 - ii) set out a reasonable deadline based on how long it could take for the harmful act to cease, for the parties to the conflict and/or hospital staff to respond to unfounded allegations and, should the harmful act persist, for the safe evacuation of patients and medical equipment, whenever possible, before any military response is initiated
 - iii) directly communicate the warning to the opposing party, the health authorities and the medical personnel in charge of the medical facility by telephone, email or any other direct method of communication, supplemented as a follow-up, only when and if appropriate, through indirect means of communication such as leaflets or published announcements.
- b) verify whether the warning has been heeded, using information reasonably available from all credible sources. If it has, the hospital retains specific protection and cannot be attacked.
- c) make all reasonable efforts to restore trust by demonstrating that the medical facility is no longer being misused for military purposes and will henceforth be exclusively used for medical services.
- d) be prepared to accord specific protection to the medical facility again as soon as there is information that acts harmful to the enemy have ceased.

5. Military responses to limit harm to only the specific part of a medical facility that qualifies as a military objective

If the warning issued goes unheeded, then the part of the medical facility being used to commit “acts harmful to the enemy” may qualify as a military objective, but only if:

1. due to its use for military purposes and not as a result of its location or purpose, a part of the medical facility makes an effective contribution to the enemy’s military action; and
2. destroying, capturing or neutralizing the part of the medical facility used to commit acts harmful to the enemy offers the attacking party a definite military advantage, in the circumstances ruling at the time.

Where a medical facility is comprised of several parts, only the smallest distinct part that is misused may qualify as a military objective, and not the facility in its entirety.

Even if part of a medical facility qualifies as a military objective, for an attack to be lawful the principles and rules on proportionality and precautions must be respected, as further elaborated under sections 6 and 7 below.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) prioritize the least harmful of the alternative military responses to launching an attack, which maximizes protection for patients who cannot be evacuated and preserves all parts of the facility that do not qualify as a military objective, for example:
 - i) contain the threat by cordoning off the area where the medical facility in question is located
 - ii) negotiate an agreement with the opposing forces to leave the medical facility, or to surrender
 - iii) consider whether a limited search operation could address the threat and would interfere less with the medical functions.

When a search operation is considered in a medical facility, specify in the rules of engagement that the authorization process for such operations includes:

 - approval by a high level of authority
 - the exceptional circumstances justifying such search operations and the documentation required, including evidence demonstrating that the anticipated level of interference likely to be caused by the search operation is proportionate to the alleged threat,

Adopt necessary measures so that the personnel authorizing and conducting searches in medical facilities ensure that such searches neither unduly impede, nor obstruct the delivery of health care services in those facilities.
- b) retain on a “sensitive targeting” list medical facilities that are removed from the “no-strike” list so that all possible measures are taken to avoid or at least minimize the harm caused and preserve their functions.

6. Ensuring respect for the principle of proportionality

The rule of proportionality must be respected both when a medical facility has lost its protection, qualifies as military objective and is liable to direct attack, and when a medical facility is located in the vicinity of a military objective.

In both cases, the proportionality assessment must take into account:

- the direct harm expected to be caused by the attack to civilians and other protected persons as well as to civilian objects, including:
 - the death and injury of patients, including wounded and sick combatants or fighters who refrain from acts of hostility, and civilians and medical personnel not directly participating in hostilities

- damage to and destruction of the medical facility's infrastructure and equipment; and
- death or a risk of deterioration in the condition of patients who cannot be evacuated safely.
- the foreseeable indirect consequences of the attack including:
 - the death of patients during evacuation due to the lack of adequate continued care
 - the longer-term harm to patients and affected populations due to the hospital's inability to operate as well as the additional strain on the health care system as a whole.

Given the direct and indirect harm expected from attacking a medical facility, it is difficult to envisage situations in which such an attack would be lawful under the rule of proportionality.

If after taking feasible precautionary measures, the expected incidental harm to the wounded and sick, medical personnel and civilians under the proportionality assessment is excessive when compared to the military advantage anticipated, the attack is prohibited under the rule of proportionality.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) involve public health or medical experts in evaluating the expected direct and indirect harm to the medical facility for the purpose of the proportionality assessment
- b) follow the recommendations on targeting processes listed under section 1, which are also relevant to respecting the rule of proportionality.

7. Ensuring respect for the principle of precautions

Belligerents must take constant care to spare civilians from the dangers arising from military operations. They must take all feasible precautions to avoid or, in any event, minimize incidental harm to the wounded and sick, medical personnel and civilians, as well as to civilian objects – such as medical equipment – in the exceptional situation when part of a hospital becomes liable to attack. Patients, medical personnel and civilians who cannot leave the medical facility for any reason whatsoever remain protected from attack.

Ensure that effects of the weapon chosen are limited, to the maximum extent possible, only to those parts of the medical facility that have lost specific protection, and take its expected effects into account in the proportionality assessment.

When conducting military operations in areas where medical facilities are located, parties to armed conflict must take all feasible precautions – in their choice of weapons and the means and methods of warfare – to avoid incidental harm to such facilities.

Belligerents must take all feasible precautions in cases where a hospital could be incidentally harmed by an attack against a military objective located in the vicinity, or in the case of attacks against dual-use infrastructure that enables its functioning. This includes taking all feasible measures to avoid or, in any event, minimize incidental harm to the wounded and sick, medical personnel and civilians. Similarly, special care should be taken not to destroy, damage or otherwise render inoperable medical equipment.

Belligerents must take all feasible precautions to protect medical facilities under their control against the effects of attacks, including by avoiding locating military objectives in, or from the vicinity of, such facilities.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) adopt a policy that certain weapons, means and methods of warfare that may be expected to produce effects that extend well beyond the targeted military objective should not be used in populated areas, including where a medical facility is located, unless sufficient mitigation measures are taken to reduce those effects and the consequent risk of harm to the medical facility

- b) prepare a contingency plan to address disruptions to health services and identify referral health facilities to rapidly restore health services in the area
- c) develop guidelines on safe evacuations and the urgent resumption of medical services
- d) facilitate medical evacuations, wherever possible, before launching an attack, while ensuring that the wounded and sick have access to continued medical care
- e) ensure the safe evacuation of the medical facility, including by negotiating an agreement with the opposing party to secure access routes to and from the facility
- f) take all feasible measures to protect medical equipment from damage and destruction, paying special attention to sensitive equipment, such as oxygen tanks, and taking into account the interconnectedness of medical facilities
- g) if it becomes apparent that it is not feasible to evacuate patients under the circumstances, exercise maximum restraint in attacking the medical facility, as the continued presence of patients increases the likelihood that the attack would cause excessive civilian harm and therefore violate the rule of proportionality.

8. Ensuring implementation of IHL rules governing the specific protection of medical facilities

States must comply with their IHL obligations to respect and protect medical facilities. To fulfil that obligation, they must adopt legislation and take practical measures to fully integrate the protection of medical facilities into military manuals and rules of engagement, and ensure that IHL rules are known and understood through instruction and training for the armed forces and all decision makers who have a role in implementation.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) incorporate these IHL obligations and related recommendations into military doctrine, policies and practice, including military manuals, standard operating procedures, rules of engagement, operational orders and national legal and regulatory frameworks
- b) ensure that these obligations and recommendations are also covered in training for military personnel, to encourage appropriate practice throughout the chain of command, and regularly evaluate the effectiveness of such training
- c) develop training programmes for medical personnel and all others involved in the implementation process.

9. Ensuring enforcement of IHL rules protecting medical facilities

States must enact legislation necessary to prohibit grave breaches and other serious violations of IHL and to provide effective penal sanctions for persons committing, aiding or abetting or ordering to be committed, any serious violation of IHL.

States must investigate and prosecute all serious violations of IHL and hold the perpetrators and those with command responsibility for such actions accountable.

The following serious violations of IHL affecting medical facilities must be integrated into domestic legislation as criminal offences with corresponding penalties that adequately reflect their gravity.

Attacks against medical facilities

Intentionally directing attacks against a medical facility that cannot be considered a military objective, amounts to a serious violation of IHL in both international and non-international armed conflicts.

Disproportionate attacks affecting health facilities

An attack against a medical facility or that incidentally harms a medical facility with the knowledge that the expected harm to civilians and civilian objects including the medical facility, the wounded and sick and medical personnel would be clearly excessive in relation to the concrete and direct military advantage anticipated amounts to a serious violation of IHL in both international and non-international armed conflicts.

Perfidy

Parties to an armed conflict who use medical facilities or transports with the intent of leading the opposing parties to believe they are protected, while using them to launch attacks or carry out other acts harmful to the enemy, commit acts of perfidy. If such an act of perfidy results in the death of, or injury to, individuals belonging to an adverse party, it constitutes a serious violation of IHL in both international and non-international armed conflicts.

To achieve meaningful protection for medical facilities in armed conflict, it is essential to:

- a) establish and/or strengthen existing systems to monitor, investigate, document and suppress:
 - i) allegations of attacks against medical facilities, including when the facilities in question are alleged to have lost specific protection
 - ii) military interference in the functioning of medical facilities
 - iii) misuse of medical facilities
 - iv) blocking of medical supplies.
- b) where circumstances permit, make use of existing neutral and independent mechanisms, such as the International Humanitarian Fact Finding Commission, as applicable under the law, which should be requested to document such incidents and present its findings to the parties, or to use its good offices to facilitate the restoration of an attitude of respect for IHL.
- c) implement relevant United Nations Security Council resolutions, especially resolution 2286 (2016) on the protection of the wounded and sick, medical facilities, personnel and transport in armed conflict.
- d) give effect to resolutions adopted at the 32nd International Conference of the Red Cross and Red Crescent (2015) entitled “Health care in danger: continuing to protect the delivery of health care together” and the 31st International Conference of the Red Cross and Red Crescent (2011), entitled “Health care in danger: Respecting and protecting health care”.
- e) ensure that perpetrators and those with command responsibility for such actions, in cases where attacks against medical facilities amount to grave breaches or other serious violations of IHL, are held accountable at the national or international level, including before the International Criminal Court. In all cases adopt appropriate remedial measures to prevent further violations.
- f) consider enacting appropriate penal or disciplinary sanctions to address the misuse of medical facilities for military purposes.
- g) train members of the judiciary and prosecutors on the specific protection granted to medical facilities under IHL.