

DRAFT FOR FIFTH STATE CONSULTATION

Workstream 5 – ACHIEVING MEANINGFUL PROTECTION FOR HOSPITALS IN ARMED CONFLICT

CO-CHAIRERD by Nigeria, Pakistan, Spain, Uruguay and the International Committee of the Red Cross

Overview

Medical facilities are afforded specific protection which is 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, as well as inseparable from the obligation to respect and protect medical personnel and medical transports which also benefit from specific protection under IHL. These protections are essential to maintaining the functioning of the health system as a whole during conflict. 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, with dire consequences for the continuity of health care.

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
- maintaining a network of interdependencies that enable medical facilities to function including access routes for medical personnel and patients, supply routes and essential services
- adopting measures to prevent misuse
- integrating guidance to ensure effective warnings are delivered as required under IHL
- ensuring that even where a part of a medical facility becomes a military objective, measures are taken to limit the harm by integrating health expertise in proportionality assessments, facilitating safe medical evacuations and protecting medical equipment.

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

Outcome

Medical facilities: include both military and civilian hospitals and other medical establishments and units organized for medical purposes and assigned exclusively to 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”, one of the highest levels 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”).

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- a) ensure that targeting processes, including rules of engagement or codes of conduct as relevant reflect the specific protection granted to medical facilities under IHL and issue explicit orders based on these rules.
- 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 and receive patients in case of an evacuation from another medical facility 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 health care.
- 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 health-care 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 as elaborated in section 4 of this outcome document, 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.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- 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) 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 this, including by adopting a “no weapons” policy in all medical facilities
- 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 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 take all feasible measures to 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.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- a) take administrative and technical measures to maintain a continuous flow of medical supplies and equipment to medical facilities, including those required for paediatric and maternal health. Special agreements may be concluded with the opposing party for this purpose.
- 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 safe access for medical personnel and patients, and to map water, electricity and fuel 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 and 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 is being 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, parties to armed conflict 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.

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.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- a) ensure that military manuals, rules of engagement, or codes of conduct as relevant 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. Such acts should be narrowly interpreted and in good faith 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 facility 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 facility 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 of a party to the conflict, including wounded and sick members thereof are in the medical facility for medical reasons
- medical personnel in the medical facility are providing medical care to enemy forces.

The following acts, when duly verified, and only for such time as they are taking place can be 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 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 facility within, or in proximity to, a military objective with the specific intention of shielding that military objective from the enemy’s military operations.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- a) verify reports that a medical facility is being used to commit acts harmful to the enemy using specific information confirming such acts that are reasonably available from all credible sources, such as military, medical and other public sources
- b) include in military manuals or codes of conduct as relevant 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 and thereby protects the medical facility, medical personnel and patients. The warning also allows those in charge of a medical facility – where feasible and safe – to try to influence parties to armed conflict 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 feasible precautionary measures to avoid, or at least minimize, incidental civilian harm.

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

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- 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 time limit 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
 - iv) confirm receipt once a warning is received, to the opposing party and to the relevant health authorities or the medical personnel responsible for the medical facility. Medical personnel in charge of a medical facility who receive such a warning may also communicate this with the health authorities and the parties to armed conflict provided that doing so does not endanger their safety or security.
- b) verify whether the warning has been heeded, using information reasonably available from all credible sources. If the act harmful to the enemy has ceased, 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.
- e) communicate the loss of the hospital's specific protection to the opposing party, the health authorities and the medical personnel in charge of the facility with a view to giving a further opportunity to cease misuse or to evacuate the facility.

5. Military responses to limit harm to 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, it makes an effective contribution to the enemy's military action, and
2. destroying, capturing or neutralizing it 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 on proportionality and precautions and rules deriving from them must be respected, as further elaborated under sections 6 and 7 below.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- 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 or codes of conduct as relevant, 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 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 all foreseeable direct and indirect incidental harm covering:

- the direct harm to civilians and other protected persons as well as to civilian objects expected to be caused by the attack, including:
 - the death and injury of
 - patients including wounded and sick combatants or fighters who refrain from acts of hostility, in line with the obligation to respect and protect them, 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 harm 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 this puts on the health-care system as a whole.

If after taking all feasible precautionary measures, the expected incidental harm to the wounded and sick, medical personnel and civilians and civilian objects under the proportionality assessment is

excessive when compared to the concrete and direct military advantage anticipated, the attack is prohibited under the rule of proportionality.

Given the foreseeable direct and indirect incidental 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.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- a) involve public health or medical experts in evaluating the expected incidental harm to the medical facility for the purpose of the proportionality assessment
- b) take into account the extent to which the health system is already degraded or under strain by the hostilities, and the consequent impact on the health system as a whole over time when assessing the proportionality of any attacks that may affect a medical facility
- c) take into consideration the measures 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

Parties to armed conflict must take constant care to spare civilians and civilian objects 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 a 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 attacks 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, and in any event minimize, 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 infrastructure that enables its functioning which has become a military objective. 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.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- 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. Wherever feasible, use light weapons if fighting takes place in the vicinity of medical facilities.

- b) prepare a contingency plan to address disruptions to health services that:
 - i) ensures adequate medical supplies, and water, electricity and fuel reserves are available to maintain continuity of care in the event of they are destroyed or damaged or otherwise no longer available
 - ii) identifies referral health facilities based on a regularly updated mapping of medical facilities to rapidly restore health services in the area, ensuring that paediatric and sexual and reproductive-health-care needs are taken into account
 - iii) provides guidelines on safe evacuations.
- c) facilitate medical evacuations, wherever possible, before launching an attack, while ensuring that the wounded and sick, and pregnant and post-partum women and newborns, have access to continued medical care.
- d) 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.
- e) take all feasible measures to:
 - i) protect medical equipment from damage and destruction
 - ii) pay special attention to the presence of potentially dangerous equipment, such as oxygen tanks and biological or chemical hazards that risk expanding the effects of the attack
 - iii) take into account the integrated nature of systems within medical facilities where damage to one component, such as oxygen supply, power or sterilization, can risk disrupting the entire continuum of medical and surgical care.
- f) if it becomes apparent that it is not feasible to evacuate patients under the circumstances, cancel or suspend the attack or exercise maximum restraint in attacking the medical facility, as the continued presence of patients increases the likelihood that the attack would cause excessive incidental harm and therefore violate the rule of proportionality.

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

States and parties to the conflict must comply with their IHL obligations to respect and protect medical facilities. Measures can be taken in peacetime to fulfil that obligation, by adopting legislation and taking practical measures to fully integrate the protection of medical facilities into military manuals and rules of engagement, or codes of conduct as relevant ensuring that IHL rules are known and understood through instruction and training for the armed forces or armed groups and all decision makers who have a role in implementation.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- 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 as well as in codes of conduct as relevant
- b) ensure that these obligations and recommendations are also covered in training for military personnel, or members of armed groups 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. This contributes to deterring future violations and improves compliance with the law.

Therefore, 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.

The following measures, which reflect a combination of existing law and good practices, are particularly important to achieving meaningful protection for hospitals:

- 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) ensure all military decisions affecting medical facilities are subject to domestic review, including as part of lessons learned exercises
- c) where circumstances permit, make use of existing neutral and independent mechanisms, as applicable under the law, such as the International Humanitarian Fact Finding Commission, 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
- d) implement relevant United Nations Security Council resolutions, especially Resolution 2286 (2016) on the protection of the wounded and sick, medical facilities, personnel and transport as well as humanitarian personnel exclusively engaged in medical duties in armed conflict, Resolution 1998 (2011) on children and armed conflict, condemning attacks against hospitals under international law and calling upon parties listed in the secretary-general's annual report

on children and armed conflict to address such violations including through time-bound action plans

- e) 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”
- f) 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 as applicable before the International Criminal Court. In all cases adopt appropriate remedial measures to prevent further violations
- g) use existing means to hold states responsible for breaching their IHL obligations to respect and protect medical facilities including where relevant through the International Court of Justice
- h) consider enacting appropriate penal or disciplinary sanctions to address the misuse of medical facilities for military purposes
- i) train members of the judiciary and prosecutors and forensic experts on the conduct of hostilities and the specific protection granted to medical facilities under IHL.