

## REPORTS AND DOCUMENTS

# International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions

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### **Executive summary**

This is the fifth report on international humanitarian law (IHL) and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference of the Red Cross and Red Crescent (International Conference). Similar reports were submitted to the International Conferences held in 2003, 2007, 2011 and 2015. The aim of all these reports is to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL; generate broader reflection on those challenges; and outline current or prospective ICRC action, positions, and areas of interest.

Like its predecessors, this report addresses only some of the contemporary challenges to IHL. It outlines a number of issues that are the focus of increased

interest among States and other actors, as well as the ICRC: the urbanization of armed conflicts; new technologies of warfare; the needs of civilians in conflicts that are, increasingly, protracted; non-State armed groups; terrorism and counterterrorism; climate change, the environment, and armed conflict; and enhancing respect for IHL. These issues include matters not addressed in previous reports, such as sieges, the use of artificial intelligence in warfare, and the protection of persons with disabilities. The report also provides an update on some of the issues that were addressed in previous reports and that remain high on the international agenda, such as the use of explosive weapons in populated areas, certain new technologies of warfare, and foreign fighters and their families.

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The introduction to the report provides a brief overview of current armed conflicts and their humanitarian consequences, and of the operational realities in which challenges to IHL arise.

Chapter II addresses contemporary and future challenges in the conduct of hostilities, focusing on selected issues related to urban warfare (section 1) and new technologies of warfare (section 2).

Increasingly, fighting takes place in cities, and this creates a number of specific challenges for parties to the conflict. The report addresses three of them. The first and fundamental one is ensuring that elementary IHL principles on the conduct of hostilities – distinction, proportionality, precautions – are applied in a way that protects civilians in urban battlefields, which are characterized by the intermingling of civilians and combatants, the proximity of civilian objects and military objectives, and a complex web of interconnected urban infrastructure. In particular, the use of explosive weapons with wide-area impact in densely populated areas continues to raise legal questions and significant humanitarian concern. Chapter II also discusses the need to ensure that sieges and encirclement tactics do not violate the rules on the protection of the civilian population – an issue that has drawn significant attention in recent conflicts.

The second section of Chapter II is devoted to new technologies of warfare – some of which have been employed in recent conflicts. It may also be expected that their use will only increase in future – with possible positive and negative consequences for the protection of civilians. Among other things, this chapter draws attention to the potential human cost of cyber warfare; outlines legal and ethical issues concerning the loss of human control over the use of force as a result of autonomy in the “critical functions” of weapon systems; and emphasizes key issues that States have to consider when implementing their responsibility to ensure that new means and methods of warfare are capable of being used in compliance with IHL.

The protracted nature of many of today’s armed conflicts has an impact on the needs and vulnerabilities of civilian populations. Chapter III presents a selection of issues under IHL that relate to the wider humanitarian debate on the protection of civilian populations. In particular, the chapter discusses how respect for IHL can

contribute to finding durable solutions for the plight of the unprecedentedly high numbers of internally displaced persons. It also recalls how IHL can address the specific capacities, experiences and perspectives of persons with disabilities during armed conflict, thereby complementing the pertinent provisions of international human rights law. The chapter also describes how IHL protects the education of children when it is a contested stake in a conflict, when the civilian value of schools is underestimated in the conduct of hostilities, and when militaries use schools.

While humanitarian concerns and IHL challenges arise in relation to operations by all parties to armed conflicts, certain issues present themselves differently when looking especially at non-State armed groups. Chapter IV is therefore devoted to IHL and non-State armed groups. It first addresses questions regarding the applicability of IHL to situations of violence involving multiple armed groups. Subsequently, the chapter discusses the legal regime protecting civilians living in territory under the *de facto* control of armed groups, and presents initial views on detention by armed groups.

Terrorism and counterterrorism have been the subjects of many policy, humanitarian, and legal debates in recent years. Chapter V highlights three issues in this area that are of particular humanitarian concern. First, it recalls the applicability of IHL to States fighting “terrorism” and non-State armed groups designated as “terrorists”, countering the narrative that IHL is not relevant to the fight against terrorism, or that some of its norms do not apply, or apply differently, to such “exceptional” circumstances. Second, the chapter expresses concerns about certain counterterrorism measures, which impede impartial humanitarian organizations’ efforts to assist and protect persons affected by armed conflict, and which are incompatible with the letter and spirit of IHL. The chapter also highlights recent developments that can contribute to resolving the tension between States’ interest in enacting effective counterterrorism measures and their obligation to facilitate principled humanitarian activities. Third, the chapter addresses the status and protection of foreign fighters and their families under IHL, focusing in particular on the needs of women and children, as well as parties’ obligations towards them.

Chapter VI focuses on the direct and indirect effects of armed conflict on climate and the environment, recalling that people affected by armed conflict are especially vulnerable to climate change and environmental degradation. The chapter also draws attention to the ICRC’s “Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict”, which are currently being revised.

The final chapter of the report, Chapter VII, discusses ways to enhance respect for IHL, which the ICRC has long considered to be the single most important challenge to IHL. The chapter presents work that the ICRC and partners have recently conducted or launched to enhance their dialogue with all parties to armed conflict. This includes the ICRC’s *Support Relationships in Armed Conflict* initiative, which aims to leverage the complex webs of support and partnering relationships in contemporary armed conflicts to strengthen

respect for IHL; an ICRC study, *Roots of Restraint in War*, that identifies sources that influence norms of behaviour in armed forces and armed groups; and the development of *Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice*.

# INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

## I. Introduction

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The 2019 International Conference of the Red Cross and Red Crescent (International Conference) coincides with the 70th anniversary of the four Geneva Conventions of 1949, the foundational treaties of the modern law of armed conflict (or international humanitarian law (IHL)).<sup>1</sup> Seven decades after their adoption, the Conventions enjoy universal ratification, frequent reaffirmation, and widespread integration into domestic law and military doctrine. Every day, armed forces implement IHL to reduce war's cost to humanity. For many, respect for the rules is a matter of professional identity and core values.

Despite these significant achievements, noncompliance with IHL remains an intractable problem. Each transgression has grave consequences for those affected, and when disregard for the rules becomes endemic in a conflict, it is devastating not only to the lives of individuals and families, but also communities, cities and, increasingly, entire regions. As much as IHL has come to be valued in international forums and in military doctrine, parties to some conflicts continue to flout its rules on a scale that is cause for serious global concern.

The last four years have seen several regionalized conflicts continue their downward spiral of violence, often fuelled by serious IHL violations. Yemen, which has become the world's largest humanitarian crisis, is facing epidemics, drug shortages, starvation and a decimated infrastructure. The pain of the conflicts in Syria continues to be felt, as displaced survivors of harrowing violence suffer appalling living conditions, separation from their families, and uncertainty about their future. Across the Sahel and Lake Chad regions, armed conflicts have continued to both spur and feed off intercommunal tensions.

1 This is the fifth report on IHL and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference. The first four reports were submitted to the International Conferences held in 2003, 2007, 2011, and 2015. The purpose of this report is to provide an overview of the main challenges that today's armed conflicts pose for IHL, to prompt discussion of these challenges, and to outline ongoing or prospective ICRC action, positions and areas of interest.

The most protracted conflicts continue to weigh down life and hinder recovery, and some of them show signs of further deterioration. Civilian casualties have spiked in Afghanistan despite intensified peace talks. In the Democratic Republic of the Congo and the Central African Republic, armed groups continue to fragment and proliferate as peace and demobilization efforts are slow to advance. Malnutrition has become chronic in South Sudan since the outbreak of conflict there. In Colombia, a recently concluded peace agreement has resulted in disarmament and political inclusion; but it has also activated new splinter groups that disagree with the accord, as well as veteran groups that see an opportunity to consolidate power. The intensity of violence in Ukraine has abated, but the six-year-old conflict shows few signs of resolution and a high potential for re-escalation. The effects of these drawn-out conflicts – on health, education, infrastructure, the economy and society – accumulate with the passage of time and the absence of space to mend. Many of these contexts have been “forgotten”: they are underreported in the media and neglected by decision-makers, leaving millions to suffer without hope.

In many instances, the fighting has caused massive displacement, leaving family members with no knowledge of one another’s whereabouts or well-being. Many of those who have been displaced are undergoing a seemingly interminable ordeal. The tidy conflict narrative of flight and return is in reality for many a life of persistent stagnation, punctuated by the trauma of repeated displacement, the health-effects of unsuitable accommodations, the distress of being unable to move freely, and the knowledge that those responsible for protecting them and ensuring their safe return are in fact reordering their place in society.

Meanwhile, other factors are doing much to exacerbate and prolong the harm caused by contemporary armed conflicts. Climate change increases the vulnerability of conflict-shaken populations to drought and other natural disasters. Social media provides a widely accessible platform for demonizing and inciting violence against communities. And failure to account for differences in how men, women, girls, and boys experience violence leaves their specific needs unrecognized and unmet.

The factors that trigger and sustain many of today’s wars may be complex, but the violations that needlessly intensify their human cost are basic: indiscriminate and deliberate attacks against civilians; torture and other forms of ill-treatment; rape and other sexual violence; attacks on hospitals, medical personnel, and the wounded themselves; hostage-taking; extrajudicial killing and summary executions. To make things worse, a spirit of vengeance has taken hold in some contexts where violations are systematically directed at adversaries who are *hors de combat* and at anyone affiliated with them.

Ensuring that warring parties recognize the applicability of IHL to all persons affected by armed conflict, regardless of their actions, is vital for ensuring respect for the law; but it is also a recurring challenge. If the period since the 2015 International Conference has seen some actors solidify their reputation for brutality, it has also seen signs of an alarming response from others: the notion that some individuals or groups are so bad that they – and sometimes even their

families or communities – are beyond the humanitarian protection of IHL. There is an urgent need to unequivocally reject such misconceptions and to reassert that, even though terrorism flagrantly contravenes the basic principle of humanity, it must be fought in a manner that is exemplary in its respect for the law. IHL reaches everyone affected by armed conflict, without exception.

For components of the International Red Cross and Red Crescent Movement (Movement) and other humanitarian organizations seeking to help in today's armed conflicts, defending the space to operate has never been more urgent. As sweeping counterterrorism legislation proliferates, outlawing broadly-defined "support" for groups and individuals designated as "terrorists", the ability of organizations to provide impartial humanitarian assistance and protection in conflict-affected areas is becoming increasingly jeopardized. Examples of good practice by States and recent positive developments at the United Nations (UN) Security Council, and at the regional level, must be taken advantage of to preserve the humanitarian space that States universally agreed upon in the Geneva Conventions.

Meanwhile, engaging parties to conflict in dialogue about their responsibilities under IHL is becoming more and more complicated. As armed groups fragment and reconstitute themselves with new, often ill-defined, hierarchies, and as governments retreat from direct involvement in extraterritorial conflicts – preferring to support other actors instead – it is becoming increasingly difficult to attribute responsibility for violations and corrective measures. In many places, the involvement of multiple actors with overlapping hierarchies and motives – political, criminal, religious, ethnic – makes it complicated and dangerous for humanitarian organizations to reach the people affected and to engage belligerents in discussions on compliance with IHL.

Addressing the less obvious challenges in interpreting and applying IHL is also vital for promoting compliance with the law. As States deploy force against a variety of threats, the foundational determination of whether the law of armed conflict applies is susceptible to manipulation. Law is subordinated to convenience when States invoke IHL and use large-scale force in situations that do not meet the legal criteria for armed conflict; or when, conversely, IHL is given no chance to fulfil its role because States, wary of negative perceptions and external constraints, deny the existence of an armed conflict even though the requirements have been unmistakably met. Moreover, as States interpret fundamental provisions of IHL with increasing elasticity – usually to defend the legality of an expedient course of action – they risk establishing regrettable legal precedents and enabling future actors to inflict harm beyond what is militarily necessary or tolerable to humanity.

Contemporary challenges for IHL go well beyond non-compliance with the rules. Transformations in the methods, means and geography of warfare continue to test the adaptability of treaty and customary law. As the world continues to urbanize, so do its conflicts, making war in cities and its consequences for civilian life, infrastructure and services a pressing concern. Many parties to conflicts have not adapted their choice of weapons and tactics to the unique vulnerabilities of

people in urban environments. In addition, technological advances in the realm of warfare present both promises and threats for the future of the law of armed conflict. The relationship between cyberspace and the battlespace, the role of artificial intelligence in targeting decisions, and the potential for non-peaceful use of outer space are all important issues that will figure prominently in discussions about the applicability of IHL to new technologies of warfare. Regardless of where these developments and debates may lead, sober analyses and perspectives are imperative: technology can provide unprecedented precision in targeting, and alternatives to physical destruction; however, innovation in weaponry must not displace rigorous legal analysis and the human decision-making demanded by IHL.

Despite these many challenges, the potential of IHL to mitigate the devastation of armed conflict for individuals, families and communities is unique; and positive examples abound. Recent years have seen armed forces make more of an investment in tracking civilian casualties and understanding their causes. Military legal advisers in some States have become more involved in upholding IHL on the battlefield. Clearance of anti-personnel landmines, risk education for communities affected, and assistance to mine victims continue apace as States parties to the Anti-Personnel Mine Ban Convention implement their obligations. Tens of thousands of conflict-related detainees have remained connected with their families; prisoners of war have been released and repatriated; and mortal remains have been returned to relatives. Non-State armed groups have made commitments against the recruitment and use of children in hostilities and against sexual violence. And daily, medical services belonging to governments and armed forces treat wounded adversaries solely based on medical need.

The endurance of the Geneva Conventions owes as much to the principles and pragmatism they embody as to the work of States, Movement components, and other international actors who have defended their relevance at crucial moments in history. Seventy years after their signing, compliance with the Conventions is far from perfect. When IHL is violated, the seriousness of the consequences, and the urgency of taking corrective measures, cannot be overstated. International judicial and fact-finding mechanisms provide a partial response; however, there is a great deal of unused leverage in the world today to stop violations as they occur. On the 70th anniversary of the Geneva Conventions, the undertaking of States to respect and ensure respect for the Conventions – stated in Article 1 common to the four Geneva Conventions – remains the best starting point to reduce the suffering and the needs of communities affected by armed conflict.



## II. Contemporary and future challenges in the conduct of hostilities

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### 1. Urbanization of armed conflicts

As the world urbanizes, so too does conflict. Increasingly, fighting takes place in urban areas, and civilians bear the brunt of it. The ICRC knows from direct observation that the use in populated areas of explosive weapons that have wide area effects continues to be a major cause of injury and death among civilians and of damage to civilian objects. Even when services that are indispensable for sustaining life in urban areas are not directly targeted, they are disrupted as an indirect result of attacks, or become more and more degraded until they are at the point of breakdown.<sup>2</sup> In some cases, services are deliberately denied to specific areas, in order to exert pressure on civilians living there. Inhabitants are left without sufficient food or water, sanitation and electricity, and deprived of health care; such privation is aggravated when cities are besieged. In addition, fighting in urban centres results in widespread displacement. Once fighting stops, unexploded ordnance and/or other forms of weapon contamination, and the lack of essential services, prevent many of the displaced from returning. Many of these consequences are not unique to cities, but they occur on a significantly larger scale in urban warfare and may require a different humanitarian response.

IHL imposes limits on the choice of means and methods of warfare, protecting civilians and civilian infrastructure against unacceptable harm and destruction. Even so, the devastating humanitarian consequences of urban warfare raise serious questions regarding how parties to such conflicts interpret

2 ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, 2015, available at: [www.icrc.org/sites/default/files/topic/file\\_plus\\_list/4249\\_urban\\_services\\_during\\_protracted\\_armed\\_conflict.pdf](http://www.icrc.org/sites/default/files/topic/file_plus_list/4249_urban_services_during_protracted_armed_conflict.pdf).

and apply relevant IHL rules. In this section, the ICRC presents its views and shares the findings of new multidisciplinary research on (a) the protection of civilians against the effects of hostilities during urban warfare; (b) the use of explosive weapons in populated areas; and (c) the protection of the civilian population during sieges.

#### a. The protection of civilians against the effects of hostilities during urban warfare

Military and civilian people and objects are often intermingled in cities. For parties involved in urban hostilities, this intermingling presents important challenges, both militarily and in terms of avoiding civilian harm. Because urban warfare endangers civilians in ways particular to it, the protection afforded by the principles and provisions of IHL is critical. Policies can also be an effective tool to protect civilians and limit the effects of urban warfare, but they must not be used to offer protection to civilians that would be weaker or less than that afforded by IHL.

IHL prohibits attacks directed at civilians and civilian objects, as well as indiscriminate attacks – that is, attacks that strike military objectives and civilians or civilian objects without distinction. IHL also prohibits attacks that may be expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated. While the existence of the principle of proportionality is uncontested and is applied daily by military commanders, the key concepts on which it relies (“incidental civilian harm”, “military advantage”, and “excessiveness”) would benefit from further clarification, which the ICRC has sought to support.<sup>3</sup>

In addition, IHL requires parties to conflict to take a range of precautions in attack and against the effects of attacks to protect civilians and civilian objects. With regard to precautions in attack, all feasible precautions must be taken to avoid or at least minimize incidental civilian harm. Feasible precautions are those that are possible in practice, taking into account all of the circumstances ruling at the time, including humanitarian and military considerations. The understanding of what precautions are feasible may evolve over time, depending on a number of factors, including technological developments, or with the identification of new techniques, tactics or procedures that make it possible to minimize incidental

3 To that end, the Université Laval and the ICRC organized a meeting of experts on the principle of proportionality: see ICRC, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, 2018, available at: [www.icrc.org/en/download/file/79184/4358\\_002\\_expert\\_meeting\\_report\\_web\\_1.pdf](http://www.icrc.org/en/download/file/79184/4358_002_expert_meeting_report_web_1.pdf). The ICRC has also taken part in processes involving experts and organized by other institutions: see International Law Association Study Group, *The Conduct Of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 2017, available at: <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=3763&StorageFileGuid=11a3fc7e-d69e-4e5a-b9dd-1761da33c8ab> (this report also discusses the notions of “military objective” and “precautions in attack”); Chatham House, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, research paper, 2018, available at: [www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf](http://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf).

civilian harm. In this regard, lessons-learned processes/exercises may bring new feasible precautions to light.

Unless circumstances do not permit, effective advance warning must be given of attacks that may affect the civilian population. Most attacks in urban areas may well do so.<sup>4</sup> The effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected. It should reach and be understood by as many civilians as possible among those who may be affected by the attack, and it should give them time to leave, find shelter, or take other measures to protect themselves. Advance warnings do not relieve the party carrying out the attack from the obligation to take other precautionary measures, and civilians who remain in the area that will be affected by the attack – whether voluntarily or not – remain protected.

The principles of distinction, proportionality and precautions are complementary, and all three must be respected for an attack to be lawful.

Debate has arisen with respect to the relevance of expected incidental harm to civilians in the form of disease and mental trauma when implementing the principles of proportionality and precautions. In the ICRC's view, it is important to consider incidental harm that is foreseeable, such as contamination when targeting a military objective in a city that contains toxic industrial chemicals, or the spread of disease due to incidental damage to municipal sewage systems. This is particularly relevant when an attacker expects to cause incidental damage to water or sewage systems in a city where cholera or other similarly contagious diseases are already present, as has been the case in some recent conflicts.

As for mental health, while IHL prohibits acts whose primary purpose is to terrorize the civilian population, psychological trauma has long been seen as an inevitable consequence of conflicts. The psychological effects of hostilities might also be less easily anticipated than physical injuries or death. Yet, it is broadly accepted today that human health encompasses physical and mental health. In this regard, there is some indication of awareness in some recent military manuals that the psychological effects of hostilities should be taken into account. This may be an area in which the practice of belligerents in the future might be influenced by evolving research and understanding. In their operations, the ICRC and its Movement partners see significant mental health and psychosocial needs, which require broader acknowledgement and better ways to address the harm caused.<sup>5</sup>

Several of the rules mentioned above apply specifically to attacks within the meaning of IHL: that is, to military operations most likely to cause harm to civilians. Nonetheless, parties to conflict must take constant care to spare the civilian population in *all* military operations. These include troop movements and

4 For hospitals and medical facilities, including those located in urban areas, that have lost their protection because they are used for acts harmful to the enemy, *there is a specific rule on warnings prior to attack*.

5 See background document, "Addressing Mental Health and Psychosocial Needs of People Affected by Armed Conflicts, Natural Disasters and Other Emergencies", 33IC/19/12.2, 2019.

manoeuvres preparatory to combat, such as during ground operations in urban areas. The specific protection afforded to particular objects may also go beyond attacks. For instance, objects indispensable to the survival of the civilian population must neither be attacked nor otherwise destroyed, removed or rendered useless. This includes a city's drinking-water supply network and installations.

Compliance with IHL during the conduct of hostilities in urban areas, as anywhere else, depends on what the commander knew, or should have known, at the time of the attack, based on information reasonably available from all sources in the circumstances. Given the intermingling of civilians and military objectives in urban areas, it is critical that information collected when planning an operation in urban areas does not focus solely on verifying that targets are military objectives – a key requirement, of course – but also on assessing the incidental civilian harm, including the indirect or “reverberating” effects, that may be expected. Practices such as assuming the presence of civilians in all civilian buildings and assessing patterns of civilian life, among others, may help overcome difficulties – created by the physical environment of a city – in accurately assessing civilian presence.

### *Challenges raised by attacks in urban areas*

Services essential to the civilian population in urban areas rely on a complex web of interconnected infrastructure systems.<sup>6</sup> The most critical infrastructure nodes within a system enable the provision of services to a large part of the population and damage to them would be most concerning when it causes the whole system to fail. Such nodes are also described as a “single point of failure”. Services depend on the operation of people, hardware and consumables, each of which can be disrupted directly or indirectly. For instance, a damaged electrical transformer can immediately shut down the supply of water to an entire neighbourhood or hospital, drastically increasing the risks posed to public health and well-being. In addition, over time, direct and indirect effects can have a cumulative impact on a particular service – leaving large parts of the system in disarray – which becomes much more difficult to address. This cumulative effect will influence the incidental-harm assessment and analysis during protracted hostilities: in the proportionality assessment, the civilian harm expected from damaging the last electric power distribution line of a city will be significantly greater than that expected from damaging one of many functioning distribution lines, as that loss can be made up by redundancy in the power distribution grid.

Given this complexity and interconnectedness of essential service systems, it is particularly important to consider not only incidental civilian harm directly

6 ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, 2015, available at: [https://wedit.icrc.org/sites/default/files/document/file\\_list/icrc-002-42491.pdf?\\_ga=2.22898744.2028601872.1564067773-1078370009.1550496897](https://wedit.icrc.org/sites/default/files/document/file_list/icrc-002-42491.pdf?_ga=2.22898744.2028601872.1564067773-1078370009.1550496897).

caused by an attack but also reverberating effects, provided they are foreseeable.<sup>7</sup> As for any type of incidental harm, what is reasonably foreseeable – or should have been foreseen – will vary, depending on the circumstances of the attack and the target; however, patterns of incidental civilian harm can be foreseen based on past experience of the effects of urban warfare. What is foreseeable will be informed and evolve, in particular, through: analysis of the effects of past attacks; studies on the effects of conflicts; better modelling of weapons' effects; better understanding of the infrastructural set-up and interdependency between services; and new technologies to better assess the condition or status of infrastructure and service delivery during the conflict. In this respect, it is important that armed forces rigorously apply short feedback loops and other lessons learned as part of the targeting cycle or other decision-making processes, to prevent the repetition of mistakes and inform future assessments of effects that had not been adequately anticipated or mitigated in the past. In particular, recent conflicts have shown the devastating effects that urban warfare has on critical civilian infrastructure and the delivery of essential services to the population, especially when explosive weapons with a wide impact area are used.

Displacement within cities, or to other areas, is one of the many harmful effects on civilians of urban warfare.<sup>8</sup> In addition to the threat to civilian lives, and the disruption of essential urban services, one of the key drivers of long-term displacement is the damage or destruction of civilian homes typically caused by the use of heavy explosive weapons. While displacement is not expressly mentioned in the principles of proportionality and precautions as a relevant type of civilian harm, depending on the circumstances it may increase the risk of death, injury or disease. More generally, the displacement of civilians expected when incidentally damaging their homes will affect the weight to be given to that damage under these principles.

Another challenge of urban warfare is that many objects are used simultaneously for military and civilian purposes. For example, a firing position might be situated on the rooftop of a civilian house or an apartment in a multistorey building used as a command post. Similarly, a power station may provide electricity to both a military barrack and the rest of the city. If its use for military purposes renders a civilian object – or the separable part thereof – a military objective, it will become a lawful target. However, the prevailing view,<sup>9</sup>

7 See *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2015, 32IC/15/11, pp. 52–53, available at: [www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf](http://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf). (Subsequent references to this report will cite it as the *IHL Challenges Report* 2015.)

8 See ICRC, *Displaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps*, ICRC, 2018, pp. 18ff., available at: <https://shop.icrc.org/displaced-in-cities-experiencing-and-responding-to-urban-internal-displacement-outside-camps-2926.html>. See also Chapter III(1) on internally displaced persons.

9 For an account of this debate with regard to proportionality, which would apply *mutatis mutandis* with regard to precautions, see ICRC, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, pp. 37–40; International Law Association Study Group, *The Conduct Of Hostilities And International Humanitarian Law: Challenges of 21st Century Warfare*, pp. 11–12.

shared by the ICRC, is that the principles of proportionality and precautions remain relevant, not only with regard to incidental damage to other civilian objects, but also in terms of the consequences for civilians of impairing the civilian use of that object. Under this view, for instance, the attack must be directed at the rooftop of the civilian house or at the specific apartment in the multi-storey building, provided it is feasible in the circumstances, to avert the possibility of civilians losing their homes and livelihoods.

Finally, during ground operations in urban areas, troops are likely to become involved in firefights and call for fire support. The danger and urgency of such situations significantly increases the likelihood and extent of incidental civilian casualties and damage – as the ICRC has observed repeatedly. As further discussed below, fire by troops in contact with the enemy, as well as fire support, must respect all the rules governing the conduct of hostilities.

### *Protecting the urban population against the effects of attacks*

Civilians can be protected most effectively when they are not in the midst of combat. Because urban warfare occurs among civilians, it is critical that parties implement their obligation to take all feasible precautions to protect civilians and civilian objects under their control from the effects of attacks. For example, avoiding to locate military objectives within or near densely populated areas, or more generally, employing strategies and tactics that take combat outside populated areas, are means to try to reduce urban fighting altogether.

When urban fighting cannot be avoided, all parties have an obligation to take precautions to spare civilians from the effects of attacks. The obligation of the party carrying out an attack to give effective advance warning is mirrored by that of the party in control of the area to remove civilians and civilian objects from the vicinity of military objectives to the maximum extent feasible.

Unfortunately, far too often in contemporary conflicts, parties do the exact opposite and deliberately endanger the civilian population and civilians under their control by using them as human shields, which is absolutely prohibited. Civilians used as human shields remain protected, and – while it does raise practical challenges – the other party must take all feasible precautions to avoid harming these civilians and must take them into account in proportionality assessments.

#### **b. The use of explosive weapons in populated areas**

One of the defining features of urban warfare is the use of explosive weapons with a wide impact area (also referred to as “heavy” explosive weapons), i.e. of weapons that typically deliver significant explosive force from afar and over a wide area.<sup>10</sup>

10 These are: i) weapons that have a wide impact area because of the large destructive radius of the individual munition used, i.e. its large blast and fragmentation range or effect (such as large bombs or missiles); ii) weapons that have a wide impact area because of the lack of accuracy of the delivery system (such as unguided indirect- fire weapons, including artillery and mortars); and iii) weapons that have a wide

While generally not a cause for concern when used in open battlefields, these weapons have devastating effects for the civilian population when employed against military objectives located in populated areas,<sup>11</sup> such as towns and cities. Their footprints are all over recent and ongoing armed conflicts such as those in Afghanistan, Gaza, Iraq, Libya, Somalia, Syria, Ukraine, and Yemen: death, severe injuries (often leading to lifelong disabilities), mental and psychological trauma, and large-scale destruction of houses, hospitals, schools, and infrastructure indispensable for the functioning of essential services – everything that makes a city work, and on which its inhabitants depend for their survival.

Beyond the direct impact on the lives, health and property of civilians, there is a wide array of indirect or reverberating effects that spread across the networks of interconnected urban services and affect a much larger part of the civilian population than those present in the immediate impact area of the attack. These increasingly known and foreseeable consequences are exacerbated in protracted armed conflicts, where the long-term and at times irreversible degradation of essential services increases the suffering of civilians. The gendered impact of heavy explosive weapons' use in populated areas is also often overlooked: the different social roles of men and women will influence the chances of who will be injured or killed – men, women, boys, or girls –, and impact the nature of the stigma faced by survivors. Moreover, heavy bombing and shelling is a major cause of displacement; displaced populations are exposed to further risks, including sexual violence, particularly against women.

### *IHL questions raised by the use of explosive weapons in populated areas*

In its 2015 report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*,<sup>12</sup> the ICRC outlined key IHL questions raised by the use of explosive weapons with a wide impact area in populated areas. Those questions are summarized here, followed by additional issues.

The use of explosive weapons with a wide impact area against military objectives located in populated areas is not prohibited *per se* under IHL, but it is regulated by the rules on the conduct of hostilities – notably the prohibition against indiscriminate attacks, the prohibition against disproportionate attacks, and the obligation to take all feasible precautions in attack. Because of the close proximity of military objectives to civilians and civilian objects, the particular vulnerability of civilians in urban environments as a result of their dependency on interlinked essential services, and the wide-area effects of the explosive weapons of concern, the use of such weapons in populated areas typically results

impact area because the weapon system is designed to deliver multiple munitions simultaneously over a wide area (such as multi-barrel rocket launchers). See ICRC, *IHL Challenges Report 2015*, p. 49.

11 The terms “populated areas” and “densely populated areas” are used interchangeably here, to refer to a concentration of civilians or of civilians and civilian objects, be it in a city, town or village, or in a non-built-up area, and be it permanent or temporary. See, notably, Art. 1(2) of Protocol III to the 1980 Convention on Certain Conventional Weapons.

12 ICRC, *IHL Challenges Report 2015*, pp. 47–53.



in significant civilian harm, raising serious questions about the interpretation and application of the relevant IHL rules.

In its 2015 report, the ICRC noted that the inherent inaccuracy of certain types of explosive weapon systems – such as many of the artillery, mortar and multiple-rocket launcher systems in use today, in particular when using unguided munitions, as well as unguided air-delivered bombs and rockets – raises serious concerns under the prohibition against indiscriminate attacks. Their low accuracy makes it very difficult to direct these weapons against a specific military objective as required by this rule: there is a high risk therefore that they will strike military objectives and civilians and civilian objects without distinction. While increasing the accuracy of delivery systems would help reduce the weapons' wide-area effects in populated areas, their accuracy could be obviated by the use of large-calibre munitions – i.e. munitions that have a large destructive radius relative to the size of the military objective – which might still be contrary to IHL.

In the 2015 report, the ICRC also noted that, in addition to the direct effects of an attack using heavy explosive weapons, indirect or reverberating effects must also be taken into account when assessing the expected incidental civilian harm as required by the rules on proportionality and on precautions in attack, insofar as they are reasonably foreseeable in the circumstances.<sup>13</sup> For example, as noted above, incidental damage caused by heavy explosive weapons to critical civilian infrastructure – such as vital water and electricity facilities and supply networks – can severely disrupt services essential to civilian survival, notably health care, the provision of electricity, and water and sanitation services. As these services are for the most part interdependent, damage to any one component of a service will often have a domino effect on other essential services, triggering humanitarian consequences far beyond a weapon's impact zone. Based on direct observation of the extensive civilian harm caused by the use of heavy explosive weapons in populated areas, there is significant doubt that armed forces sufficiently factor in such reverberating effects, as required by the rules of proportionality and precautions in attack.

Where explosive weapons with a wide impact area are used to provide covering fire for own or friendly forces under attack, some States invoke the notion of “self-defence” to suggest that IHL restrictions on the use of force, including on the choice of weapons, could be less stringent compared to such restrictions in pre-planned attacks, and to justify the use of weapons that carry a high risk of indiscriminate effects in the circumstances. However, even the use of force in “self-defence” is circumscribed by the absolute prohibitions against indiscriminate and disproportionate attacks, and by all other IHL rules governing the conduct of hostilities, which apply in defensive as well as offensive situations. In the ICRC's view, the protection of own or friendly forces is a relevant military consideration impacting on the feasibility of precautions. It is also a relevant military advantage when assessing the proportionality of an attack, but only

13 On the question of when reverberating effects are reasonably foreseeable, see Chapter 2(1)(a) on the protection of civilians against the effects of hostilities during urban warfare.



insofar as it is “concrete and direct”, which is primarily the case when troops are under attack (i.e. in “self-defence” scenarios). In all such circumstances, force protection must be balanced against humanitarian considerations, such as the extent of incidental civilian harm expected to result from the use of heavy explosive weapons. In this respect, the greater the risk of incidental civilian harm anticipated from the attack, the greater the risk to its own forces the attacking party may have to be prepared to accept. At any rate, force protection can never justify the use of indiscriminate fire as a measure to avoid the exposure of own or friendly forces.

At times, explosive weapons with a wide impact area (most commonly artillery or other indirect-fire weapon systems) are used to harass the enemy, to deny them freedom of movement, or to obstruct their activities (“harassing”, “interdiction” or “suppressive” fire). This takes the form of a continuous flow of fire – often of low or moderate intensity – intended to deliver effects over an area or on specific objects or persons, depending on the circumstances. However, to be lawful, harassing, interdiction or suppressive fire must be directed at a specific military objective, and must use means capable of being so directed. Yet in practice it is not always clear that this is the case.

When using indirect-fire weapon systems such as artillery, many armed forces apply fire adjustment techniques such as “walking fire” against a target or “bracketing” a target, in order to be able to strike the target after several rounds of fire. Such techniques consist in firing rounds progressively closer to the target, recording their impact and making adjustments (corrections) before firing “for effect” at the target (fire in salvos). Such methods of adjusting fire within a populated area in themselves pose a significant risk of civilian harm, in that the “adjustment” rounds are likely to land off-target and strike civilians and/or civilian objects. The use of such techniques in populated areas therefore raises questions under the prohibition against indiscriminate attacks.

### *Avoiding the use of wide-impact explosive weapons in populated areas*

In its 2015 report, the ICRC reiterated a position it had first expressed like this in 2011: “due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas”.<sup>14</sup>

14 *Ibid.*, pp. 48–49. The ICRC first published its position on explosive weapons in populated areas in ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2011, 32IC/15/11, pp. 40–42, available at: [www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf) (subsequent references to this report will cite it as the *IHL Challenges Report 2011*). A similar call was made by the Movement in 2013. See Resolution 7 of the 2013 Council of Delegates, “Weapons and International Humanitarian Law”, CD/13/R7, para. 4, available at: [www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r7-weapons-and-ihl-adopted-eng.pdf](http://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r7-weapons-and-ihl-adopted-eng.pdf).

The ICRC has called on all States and parties to armed conflicts to adopt a policy of avoidance of use of heavy explosive weapons in populated areas, regardless of whether or not such use would violate IHL, based on three observations:

- the grave pattern of civilian harm caused by the use of these weapons and the humanitarian and moral imperative to prevent, or at least reduce, such levels of destruction and suffering
- the objective difficulty of employing – in conformity with the prohibitions against indiscriminate and disproportionate attacks – explosive weapons with a wide impact area against military objectives situated in populated areas
- the persistent lack of clarity on how States, and parties to armed conflicts in particular, interpret and apply said IHL rules with regard to the use of heavy explosive weapons in populated areas. As the ICRC has previously stated, “there are divergent views on whether these rules sufficiently regulate the use of such weapons, or whether there is a need to clarify their interpretation or to develop new standards or rules. Based on the effects of explosive weapons in populated areas being witnessed today, there are serious questions regarding how the parties using such weapons are interpreting and applying IHL.”<sup>15</sup>

An avoidance policy suggests a presumption of non-use of such weapons owing to the high risk of incidental civilian harm, which could be reversed if sufficient mitigation measures can be taken to reduce such risk to an acceptable level. These include measures and procedures related to targeting and to the choice of weapons that significantly reduce the size of the explosive weapon’s area of impact, and other measures to minimize the likelihood and/or extent of incidental civilian harm. Such policies and practices should be developed well in advance of military operations and faithfully implemented during the conduct of hostilities, shared with partner forces or supported parties in the context of such operations, and taken into consideration when deciding on the transfer of heavy explosive weapons as well as when providing support to a party to an armed conflict.

### *Changing behaviour through “good practice”*

Given the complex challenges of conducting hostilities in urban environments, and the unique vulnerabilities of civilians living there, it is critical that military policies and practices pay sufficient attention to the protection of civilians, including in the choice of means and methods of warfare. While instances of express limitations on heavy explosive weapons and associated methods of warfare in populated areas can be found, these are scattered or mission-specific and rarely part of a consistent approach towards military operations conducted in such environments. Information available to the ICRC to date indicates that only a limited number of States appear to have specific guidance and training on urban warfare or the

15 See ICRC, *IHL Challenges Report 2015*, p. 51.

conduct of hostilities in populated areas – although some positive movement can be seen.

To support policy development in this regard by States and parties to armed conflicts, the ICRC recommended, in a recently published report, a number of good practices for implementing an avoidance policy and for facilitating compliance with IHL rules on the conduct of hostilities in populated areas.

In light of the large-scale destruction and civilian suffering witnessed in today's armed conflicts, the ICRC continues to call on all parties to armed conflict to take urgent action by reviewing their military policies and practice and by ensuring that their doctrine, education, training and weapons are adapted to the specificities of urban and other populated environments and to the vulnerability of civilians therein.

### c. The protection of the civilian population during sieges

The history of warfare is full of instances of sieges being used as a method of warfare. Some of them are notorious for their exceedingly high death tolls. Contemporary conflicts in the Middle East have again drawn the attention of the international community to sieges and other encirclement tactics.

Sieges often have grave consequences for large numbers of civilians. Recent sieges were accompanied by bombardment and sometimes intense fighting between besieging and besieged forces, creating constant danger for the civilians trapped in the besieged area. Little or no electricity and degraded public services are also characteristic features of sieges. Families are forced to make impossible choices with the little food and water available. Factors such as age, gender-specific roles, or disabilities, may exacerbate difficulties in accessing scarce resources. The consequences are hunger, malnutrition, dehydration, illness, injury and death.

#### *The notion of "siege"*

There is no definition of "siege" or "encirclement" under IHL. A siege can be described as a tactic to encircle an enemy's armed forces, in order to prevent their movement or cut them off from support and supply channels. The ultimate aim of a siege is usually to force the enemy to surrender, historically through starvation and thirst, though in contemporary conflicts besieging forces usually attempt to capture the besieged area through hostilities. Sieges or other forms of encirclement may also be part of a larger operational plan: for instance, they can be used to isolate pockets of enemy forces left behind during an invasion.

A siege that does not involve attempts to capture an area through assault may be aimed at obtaining a military advantage in relative safety for the armed forces of the besieging party. It avoids the hazards of urban fighting for the besieging party and may also be a means to limit the heavy civilian casualties often associated with urban fighting.

Conversely, sieges that do involve attempts to capture an area through assault may increase the intensity of the fighting and the associated risks of

incidental harm for civilians. This is particularly the case if the besieged forces are left with no option other than to fight or surrender.

Under IHL, it is not prohibited to besiege an area where there are only enemy forces or to block their reinforcement or resupply, including to achieve their surrender through starvation. It is also not prohibited to attack military objectives within a besieged area, provided such attacks can be carried out in conformity with the principles of distinction, proportionality and precautions.

Unfortunately, civilians are often trapped within when entire towns or other populated areas are besieged, causing unspeakable suffering. IHL offers vital protection to these civilians by imposing limits to what the parties can do during such sieges.

### *The scope of the parties' obligation to allow civilians to leave a besieged area*

Throughout history, besieging and besieged forces have prevented civilians from leaving besieged areas. For the besieging forces, the main purpose was often to hasten the surrender of the besieged forces, because civilians have to rely on the same supplies as the enemy forces. At the Nuremberg trials, the practice of using artillery to prevent civilians from leaving a besieged area was deemed an extreme, but not unlawful, measure.

The law has evolved considerably since then. It has developed even beyond the essential, but limited, provisions of the Geneva Conventions on the evacuation of specific categories of vulnerable people.

Today, sieges are lawful only when directed exclusively against an enemy's armed forces.

First, shooting at or otherwise attacking civilians fleeing a besieged area would amount to a direct attack on civilians and is absolutely prohibited.

Second, IHL rules apply to the conduct of hostilities during sieges. As shown in the following paragraphs, the implementation of several rules stemming from the principle of precautions requires both parties to allow civilians to leave the besieged area whenever feasible. In particular, constant care must be taken to spare the civilian population in all military operations, and all feasible precautions must be taken, notably in the choice of means and methods of warfare, to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. In a besieged area where hostilities are taking place, and in view of the risk that poses to them, one obvious precautionary measure is to evacuate civilians, or at least allow them to leave. Parties must also give effective advance warnings of attacks that may affect the civilian population, the purpose of which is precisely to enable civilians to take measures to protect themselves.

The besieged party has obligations, too. It must take all feasible precautions to protect the civilian population under its control from the effects of attacks. This can entail allowing civilians to leave or otherwise removing them from the vicinity of military objectives, for example by evacuating them from a besieged area where hostilities are ongoing or expected to take place.

The besieged party might be tempted to prevent the civilian population from leaving because having a besieged area cleared of civilians would make it easier for the besieging forces to starve out the besieged forces, or give the former more leeway when attacking military objectives in the besieged area. However, IHL categorically prohibits using the presence of civilians to render certain areas immune from military operations, for instance in attempts to impede the military operations of the besieging forces. This would amount to using the civilian population as human shields.

Finally, treaty and customary IHL prohibit the starvation of the civilian population as a method of warfare. The implication is that the plight of civilians deprived of supplies essential to their survival in a besieged area can no longer be used by a besieging party as a legitimate means to subdue its enemy. It is therefore the ICRC's view that a belligerent aiming to use starvation as a method of warfare against enemy forces, besieged in an area in which civilians are also trapped, must allow the civilians to leave the besieged area, because experience shows that in practice these civilians will share the privation caused by a siege and may be expected to be left with their basic needs unmet.

### *The protection of civilians leaving, or being evacuated from, a besieged area*

Civilians may flee a besieged or otherwise encircled area or be voluntarily evacuated; they may also be evacuated against their will by a party to the conflict.

The issue of forcible evacuation of a besieged area has raised questions with respect to forced displacement. Under IHL, forced displacement is prohibited, unless the security of the civilians involved or imperative military reasons so demand. Prohibited acts of forced displacement can include those resulting from unlawful acts under IHL by the parties in order to coerce civilians to leave, including in the conduct of hostilities.<sup>16</sup> As hostilities during sieges entail a high risk of incidental civilian casualties, the security of the civilians involved may require their evacuation from the besieged area, but the evacuation must not be carried out in a way that would amount to forced displacement as a result of unlawful acts.

To ensure that displacement is not forced or unlawful, it must last no longer than required by the circumstances. Displaced persons have a right to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.<sup>17</sup> Although temporary evacuations may be necessary, and even legally required, sieges must not be used to compel civilians to permanently leave a particular area.

From a practical perspective, safe evacuations are best organized when the parties to the conflict agree on the necessary procedures. In the absence of such an

16 ICTY, *Prosecutor v. Milomir Stakic*, Judgment (Appeals Chamber), IT-97-24-A, 22 March 2006, paras 281, 284–287; ICTY, *Prosecutor v. Blagojevic and Jokic*, Judgment (Trial Judgment), IT-02-60-T, 17 January 2005, paras 596 and 600–601.

17 See Chapter III(1) on internally displaced persons.

agreement, both parties remain obliged to take all feasible precautions to avoid causing incidental harm to civilians fleeing during hostilities.

In case of displacement, regardless of whether civilians flee or are evacuated from a besieged area, all possible measures must be taken to ensure that the civilians in question are received under satisfactory conditions of shelter, hygiene, health, safety (including from sexual and gender-based violence) and nutrition and that members of the same family are not separated.

The besieging party may decide to screen displaced persons for security reasons, such as finding out whether members of the besieged forces intermingled with the civilians leaving the besieged area. Screening and other security measures undertaken by the besieging party must be conducted with full respect for IHL and human rights law, particularly with regard to humane treatment, living conditions and relevant procedural safeguards in cases of detention, and the prohibition against collective punishment.

### *The protection of civilians and the wounded and sick who remain in a besieged or encircled area*

Civilians who remain in a besieged area continue to be protected as civilians, unless and for such time as they take a direct part in hostilities. The mere fact of remaining in a besieged area – whether voluntarily, forcibly, or as human shields – does not amount to taking a direct part in hostilities. In addition, the presence of besieged fighters among the civilian population does not mean that the civilians lose their protection from direct attack. The besieged and besieging forces therefore remain bound by all the rules protecting civilians against the effects of hostilities.<sup>18</sup>

Furthermore, the IHL rules on starvation and on relief operations are designed to ensure – in combination – that civilians are not deprived of supplies essential to their survival.

First, in addition to the prohibition against using starvation of the civilian population as a method of warfare, IHL prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population. Even when such objects are also used by the enemy armed forces, operations against them are prohibited if they can be expected to leave the civilian population with such insufficient quantities of food or water as to cause its starvation.

Second, during a siege, the parties continue to be bound by IHL obligations relating to relief operations and humanitarian access. IHL provides that impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not being met. Once impartial humanitarian relief operations have been agreed to, the parties to the armed conflict – which retain the right to control the humanitarian nature of relief consignments – must allow and facilitate rapid and unimpeded passage of these relief operations.

18 See Chapter II(1)(a) on the protection of civilians against the effects of hostilities during urban warfare.

The commander of a besieged force who is not in a position to provide the supplies essential to the survival of the civilian population under its control must consent to humanitarian relief operations for civilians. Similarly, the commander of a besieging force must allow humanitarian access to and relief operations for civilians remaining in the besieged area. This is subject to the parties' right of control and ability to impose temporary and geographically limited restrictions required by military necessity at the time and place of on-going hostilities.

Finally, IHL contains extensive rules relating to respect and protection for the wounded and sick, as well as the persons and objects assigned to care for them. The Geneva Conventions contain a few explicit provisions on the evacuation of the wounded and sick from besieged areas and the passage of medical personnel and medical equipment into such areas. More generally, parties must take all possible measures to search for, collect and evacuate the sick and wounded, and must provide – to the fullest extent practicable and with the least possible delay – the medical care and attention required by their condition. All these rules apply not only to civilians; they also benefit wounded and sick members of an enemy's armed forces. The applicability of these rules to sieges is uncontested.

## **2. New technologies of warfare**

New technologies are changing human interaction profoundly – including in times of armed conflict. Many States are investing heavily in the development of means and methods of warfare that rely on digital technology. Cyber tools, increasingly autonomous weapon systems, and artificial intelligence are being used in contemporary armed conflicts. The ICRC closely follows the development of new means and methods of warfare and their use by militaries; it also engages all relevant stakeholders on the applicability of IHL to the use of these new means and methods of warfare.

Technological advances can have positive consequences for the protection of civilians in armed conflict: weapons can be used with more precision, military decisions can be better informed, and military aims can be achieved without the use of kinetic force or physical destruction. At the same time, new means of warfare and the way they are employed can pose new risks to combatants and civilians, and can challenge the interpretation and implementation of IHL. The ICRC's assessment of the foreseeable humanitarian impact of new technologies of warfare, and the challenges they may pose to existing IHL rules, focuses on interrelated legal, military, technical, ethical, and humanitarian considerations.

IHL is applicable to the development and use of new weaponry and new technological developments in warfare – whether they involve (a) cyber technology; (b) autonomous weapon systems; (c) artificial intelligence and machine learning; or (d) outer space. States that develop or acquire such weapons or means of warfare are responsible for ensuring that they can be used in compliance with IHL (e).



## a. Cyber operations, their potential human cost, and the protection afforded by IHL

The use of cyber operations during armed conflicts is a reality. While only a few States have publicly acknowledged using such operations, an increasing number of States are developing military cyber capabilities, and the use of such capabilities is likely to increase.

The ICRC understands “cyber warfare” to mean operations against a computer, a computer system or network, or another connected device, through a data stream, when used as means or methods of warfare in the context of an armed conflict. Cyber warfare raises questions about precisely how certain provisions of IHL apply to these operations, and whether IHL is adequate or whether, building on existing law, it might require further development.

The use of cyber operations may offer alternatives that other means or methods of warfare do not, but it also carries risks. On the one hand, cyber operations may enable militaries to achieve their objectives without harming civilians or causing permanent physical damage to civilian infrastructure. On the other hand, recent cyber operations – which have been primarily conducted outside the context of armed conflict – show that sophisticated actors have developed the capability to disrupt the provision of essential services to the civilian population.

### *Understanding cyber operations and their potential human cost*

To develop a realistic assessment of cyber capabilities and their potential human cost in light of their technical characteristics, in November 2018 the ICRC invited experts from all parts of the world to share their knowledge about the technical possibilities, expected use, and potential effects of cyber operations.<sup>19</sup>

Cyber operations can pose a particular threat for certain elements of civilian infrastructure. One area of concern for the ICRC, given its mandate, is the health-care sector. In this regard, research shows that the health-care sector appears to be particularly vulnerable to direct cyber attacks and incidental harm from such attacks directed elsewhere. Its vulnerability is a consequence of increased digitization and interconnectivity in health care. For example, medical devices in hospitals are connected to the hospital network, and biomedical devices such as pacemakers and insulin pumps are sometimes remotely connected through the internet. This growth of connectivity increases the sector’s digital dependence and “attack surface” and leaves it exposed, especially when these developments are not matched by a corresponding improvement in cyber security.

Critical civilian infrastructure – including electrical, water, and sanitation facilities – is another area in which cyber attacks can cause significant harm to the civilian population. This infrastructure is often operated by industrial control systems. A cyber attack against an industrial control system requires specific

<sup>19</sup> See ICRC, *The Potential Human Cost of Cyber Operations*, 2019, available at: [www.icrc.org/en/download/file/96008/the-potential-human-cost-of-cyber-operations.pdf](http://www.icrc.org/en/download/file/96008/the-potential-human-cost-of-cyber-operations.pdf).



expertise and sophistication, as well as specifically designed cyber tools. While attacks against industrial control systems have been less frequent than other types of cyber operations, their frequency is reportedly increasing, and the severity of the threat has evolved more rapidly than anticipated only a few years ago.

Beyond the vulnerability of specific sectors, there are at least three technical characteristics of cyber operations that are cause for concern.

First, cyber operations carry a risk of overreaction and escalation, simply due to the fact that it may be extremely difficult – if not impossible – for the target of a cyber attack to detect whether the attacker’s aim is to spy or to cause physical damage. As the aim of a cyber operation might be identified only after the target system has been harmed, there is a risk that the target will imagine the worst-case scenario and react much more strongly than it would have done if it had known that the attacker’s true intent was limited to espionage, for example.

Second, cyber tools and methods can proliferate in a unique manner, one that is difficult to control. Today, sophisticated cyber attacks are carried out only by the most advanced and best-resourced actors. But once a cyber tool has been used, stolen or leaked, or becomes available in some other way, actors other than those who developed it may be able to find it, reverse-engineer it, and repurpose it for their own – possibly malicious – ends.

Third, while it is not impossible to determine who created or launched a particular cyber attack, attributing an attack tends to be difficult. Identifying actors who violate IHL in cyberspace and holding them responsible is likely to remain challenging. The perception that it will be easier to deny responsibility for such attacks may also weaken the taboo against their use – and may make actors less scrupulous about violating international law by using them.

While cyber operations have exposed the vulnerability of essential services, they have not, fortunately, caused major human harm so far. However, much is unknown in terms of technological evolution, the capabilities and the tools developed by the most sophisticated actors, and the extent to which the increased use of cyber operations during armed conflicts might be different from the trends observed so far.

### *The limits that IHL sets for cyber warfare*

The ICRC welcomes the fact that an increasing number of States and international organizations are acknowledging that IHL applies to cyber operations during armed conflicts. It urges all States to recognize the protection that IHL offers against the potential human cost of cyber operations. For example, belligerents must respect and protect medical facilities and personnel at all times, which means that cyber attacks against the health-care sector during armed conflict would – in most cases – violate IHL. Likewise, IHL specifically prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population.

More generally, IHL prohibits directing cyber attacks against civilian infrastructure, as well as indiscriminate and disproportionate cyber attacks. For

instance, even if the infrastructure or parts of it become military objectives (such as a discrete part of a power grid), IHL requires that only those parts be attacked, and that there be no excessive damage to the remaining civilian parts of the grid or to other civilian infrastructure relying on the electricity provided by the grid. IHL also requires parties to conflict to take all feasible precautions to avoid or at least minimize incidental harm to civilians and civilian objects when carrying out a cyber attack.

Notwithstanding the interconnectivity that characterizes cyberspace, the principles of distinction, proportionality and precautions can and must be respected. A careful examination of the way cyber tools operate shows that they are not necessarily indiscriminate. While some of the cyber tools that we know of were designed to self-propagate and indiscriminately affect widely used computer systems, they did not do these things by chance: the ability to self-propagate usually needs to be specifically included in the design of such tools. Furthermore, attacking specific targets may require custom-made cyber tools, which might make it difficult to carry out such attacks on a large scale or indiscriminately.

In fact, many of the cyber attacks that have been observed appear to have been rather discriminate from a technical perspective. This does not mean they were lawful or would have been lawful if carried out in a conflict; on the contrary, in the ICRC's view, a number of the cyber attacks that have been reported in public sources would be prohibited during armed conflict. However, their technical characteristics show that cyber operations can be very precisely designed to have an effect only on specific targets, which makes them capable of being used in compliance with IHL principles and rules.

IHL rules protecting civilian objects can, however, provide the full scope of legal protection only if States recognize that cyber operations that impair the functionality of civilian infrastructure are subject to the rules governing attacks under IHL.<sup>20</sup> Moreover, data has become an essential component of the digital domain and a cornerstone of life in many societies. However, different views exist on whether civilian data should be considered as civilian objects and therefore be protected under IHL principles and rules governing the conduct of hostilities. In the ICRC's view, the conclusion that deleting or tampering with essential civilian data would not be prohibited by IHL in today's ever more data-reliant world seems difficult to reconcile with the object and purpose of this body of law.<sup>21</sup> Put simply, the replacement of paper files and documents with digital files in the form of data should not decrease the protection that IHL affords to them.

Finally, parties to armed conflicts must take all feasible precautions to protect civilians and civilian objects under their control against the effects of attacks. This is one of the few IHL obligations that States are required to implement in peacetime.

Affirming that IHL applies to cyber warfare should not be misunderstood as encouragement to militarize cyberspace or as legitimizing cyber warfare. Any use

20 See ICRC, *IHL Challenges Report 2015*, p. 41.

21 See ICRC, *IHL Challenges Report 2015*, p. 43.

of force by States, whether cyber or kinetic in nature, will always be governed by the UN Charter and relevant rules of customary international law. IHL affords the civilian population an additional layer of protection against the effects of hostilities.

In the coming years, the ICRC will continue to follow the evolution of cyber operations and their potential human cost, in particular during armed conflicts. It will explore avenues to reduce that cost and work towards building consensus on the interpretation of existing IHL rules and, if necessary, on the development of complementary rules that afford effective protection to civilians.

### *The use of digital technology during armed conflicts for purposes other than as means and methods of warfare*

In recent conflicts, certain uses of digital technology other than as means and methods of warfare have led to an increase in activities that adversely affect civilian populations. For example, misinformation and disinformation campaigns, and online propaganda, have fused on social media, leading in some contexts to increased tensions and violence against and between communities. Unprecedented levels of surveillance of the civilian population have caused anxiety and increasing numbers of arrests, in some instances possibly based on disinformation. Disinformation and surveillance are not unique or new to armed conflicts; however, the greater scope and force-multiplying effect provided by digital technology can exacerbate – and add to – the existing vulnerabilities of persons affected by armed conflicts.<sup>22</sup> Developments in artificial intelligence and machine learning are also relevant in this regard.<sup>23</sup> IHL does not necessarily prohibit such activities, but it does prohibit acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Moreover, parties to armed conflict must not encourage violations of IHL. Other bodies of law, including international human rights law, might also be relevant when assessing surveillance and disinformation.

The global digital transformation is changing not only warfare but also the nature of humanitarian action. Digital technologies can be leveraged to support humanitarian programmes, for instance by capturing and using data to inform and adjust responses or by facilitating two-way communication between humanitarian staff and populations affected by conflicts.<sup>24</sup> For example, the ICRC analyses “big data” to anticipate, understand, and respond to humanitarian crises, and uses internet-based tools to interact with beneficiaries as well as with parties to armed conflicts. The ICRC also uses digital tools to restore family links and, if possible, to facilitate communication between detainees and their loved ones; the ICRC does all this also to help parties to implement their IHL obligations. These new possibilities entail new responsibilities: humanitarian organizations need to

22 See ICRC, *Digital Risks in Situations of Armed Conflict*, 2019, available at: [www.icrc.org/sites/default/files/event/file\\_list/icrc\\_symposium\\_on\\_digital\\_risks\\_-\\_event\\_report.pdf](http://www.icrc.org/sites/default/files/event/file_list/icrc_symposium_on_digital_risks_-_event_report.pdf).

23 See Chapter II(2)(c) on artificial intelligence and machine learning.

24 See ICRC *Strategy 2019–2022*, “Strategic Orientation 5: Embracing the Digital Transformation”, pp. 22–23, available at: <https://shop.icrc.org/icrc/pdf/view/id/2844>.

strengthen their digital literacy and data-protection measures, in accordance with the “do no harm” principle.<sup>25</sup> The ICRC encourages further research, discussion, and concrete steps by all relevant actors to enable humanitarian actors to safely adapt their operations to digital changes.

## b. Autonomous weapon systems

The ICRC understands autonomous weapon systems as: *Any weapon system with autonomy in its critical functions. That is, a weapon system that can select and attack targets without human intervention.* Autonomy in critical functions – already found in some existing weapons to a limited extent, such as air defence systems, active protection systems, and some loitering weapons – is a feature that could be incorporated in any weapon system.

The most important aspect of autonomy in weapon systems – from a humanitarian, legal and ethical perspective – is that the weapon system self-initiates, or triggers, an attack in response to its environment, based on a generalized target profile. To varying degrees, the user of the weapon will know neither the specific target nor the exact timing and location of the attack that will result. Autonomous weapon systems are, therefore, clearly distinguishable from other weapon systems, where the specific timing, location and target are chosen by the user at the point of launch or activation.

The ICRC’s primary concern is loss of human control over the use of force as a result of autonomy in the critical functions of weapon systems. Depending on the constraints under which a system operates, the user’s uncertainty about the exact timing, location and circumstances of the attack(s) may put civilians at risk from the unpredictable consequences of the attack(s). It also raises legal questions, since combatants must make context specific judgements to comply with IHL. And it raises ethical concerns as well, because human agency in decisions to use force is necessary in order to uphold moral responsibility and human dignity.

Fuller understanding of the legal,<sup>26</sup> military,<sup>27</sup> ethical,<sup>28</sup> and technical<sup>29</sup> aspects of autonomous weapon systems has enabled the ICRC to refine its

25 See ICRC and Privacy International, *The Humanitarian Metadata Problem: “Doing No Harm” in the Digital Era*, 2018, available at: [www.icrc.org/en/download/file/85089/the\\_humanitarian\\_metadata\\_problem\\_-\\_icrc\\_and\\_privacy\\_international.pdf](http://www.icrc.org/en/download/file/85089/the_humanitarian_metadata_problem_-_icrc_and_privacy_international.pdf).

26 Neil Davison, “A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law”, in *UNODA Occasional Papers*, No. 30, November 2017, available at: [www.icrc.org/en/document/autonomous-weapon-systems-under-international-humanitarian-law](http://www.icrc.org/en/document/autonomous-weapon-systems-under-international-humanitarian-law); ICRC, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects*, 2014: available at [www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014](http://www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014).

27 See ICRC, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons*, 2016, available at: [www.icrc.org/en/publication/4283-autonomous-weapons-systems](http://www.icrc.org/en/publication/4283-autonomous-weapons-systems).

28 See ICRC, *Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?*, 2018, available at: [www.icrc.org/en/document/ethics-and-autonomous-weapon-systems-ethical-basis-human-control](http://www.icrc.org/en/document/ethics-and-autonomous-weapon-systems-ethical-basis-human-control).

29 See ICRC, *Autonomy, Artificial Intelligence and Robotics: Technical Aspects of Human Control*, 2019, available at: [www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control](http://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control).

views.<sup>30</sup> It continues to espouse a human-centred approach, based on its reading of the law and ethical considerations for humans in armed conflict.<sup>31</sup>

### *Human control under IHL*

The ICRC holds that legal obligations under IHL rules on the conduct of hostilities must be fulfilled by those persons who plan, decide on, and carry out military operations. It is humans, not machines, that comply with and implement these rules, and it is humans who can be held accountable for violations. Whatever the machine, computer program, or weapon system used, individuals and parties to conflicts remain responsible for their effects.

Certain limits on autonomy in weapon systems can be deduced from existing rules on the conduct of hostilities – notably the rules of distinction, proportionality and precautions in attack – which require complex assessments based on the circumstances prevailing at the time of the decision to attack, but also during an attack. Combatants must make these assessments reasonably proximate in time to the attack. Where these assessments form part of planning assumptions, they must have continuing validity until the execution of the attack. Hence, commanders or operators must retain a level of human control over weapon systems sufficient to allow them to make context-specific judgments to apply the law in carrying out attacks.

Human control can take various forms during the development and testing of a weapon system (“development stage”); the taking of the decision to activate the weapon system (“activation stage”); and the operation of the weapon system as it selects and attacks targets (“operation stage”). Human control at the activation and operation stages is the most important factor for ensuring compliance with the rules on the conduct of hostilities. Human control during the development stage provides a means to set and test control measures that will ensure human control in use. However, control measures at the development stage alone – meaning control in design – will not be sufficient.

Importantly, however, existing IHL rules do not provide all the answers. Although States agree on the importance of human control – or “human responsibility”<sup>32</sup> – for legal compliance, opinion varies on what this means in practice. Further, purely legal interpretations do not accommodate the ethical concerns raised by the loss of human control over the use of force in armed conflict.

30 See ICRC, *IHL Challenges Report 2011*, pp. 39–40. On definitions in particular, see ICRC, *IHL Challenges Report 2015*, p.45.

31 See ICRC, *Statements to the Group of Governmental Experts on Lethal Autonomous Weapons Systems*, March 2019, available at: [www.unog.ch/80256EE600585943/\(httpPages\)/5535B644C2AE8F28C1258433002BBF14?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/5535B644C2AE8F28C1258433002BBF14?OpenDocument).

32 United Nations, *Report of the 2018 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, CCW/GGE.1/2018/3, 23 October 2018.

## *Towards limits on autonomy in weapon systems*

In the ICRC's view, the unique characteristics of autonomous weapon systems, and the associated risks of loss of control over the use of force in armed conflict, mean that internationally agreed limits are needed to ensure compliance with IHL and to protect humanity.

Insofar as the sufficiency of existing law – particularly IHL – is concerned, it is clear, as shown above, that existing IHL rules – in particular distinction, proportionality, and precautions in attack – already provide limits to autonomy in weapon systems. A weapon with autonomy in its critical functions that is unsupervised, unpredictable and unconstrained in time and space would be unlawful, because humans must make the context-specific judgments that take into account complex and not easily quantifiable rules and principles.

However, it is also clear that existing IHL rules do not provide all the answers. What level of human supervision, intervention and ability to deactivate is needed? What is the minimum level of predictability and reliability of the weapon system in its environment of use? What constraints are needed for tasks, targets, operational environments, time of operation, and geographical scope of operation?

Moreover, the limits dictated by ethical concerns may go beyond those found in existing law. Anxieties about the loss of human agency in decisions to use force, diffusion of moral responsibility, and loss of human dignity are most acute with autonomous weapon systems that present risks for human life, and especially with the notion of anti-personnel systems designed to target humans directly. The principles of humanity may demand limits on or prohibitions against particular types of autonomous weapons and/or their use in certain environments.

At a minimum, there remains an urgent need for agreement on the type and degree of human control necessary in practice to ensure both compliance with IHL and ethical acceptability.

### **c. Artificial intelligence and machine learning**

Artificial intelligence (AI) systems are computer programs that carry out tasks – often associated with human intelligence – that require cognition, planning, reasoning or learning. Machine learning systems are AI systems that are “trained” on and “learn” from data, which ultimately define the way they function. Both are complex software tools, or algorithms, that can be applied to many different tasks. However, AI and machine learning systems are distinct from the “simple” algorithms used for tasks that do not require these capacities. The potential implications for armed conflict – and for the ICRC's humanitarian work – are broad.<sup>33</sup> There are at least three overlapping areas that are relevant from a humanitarian perspective.

33 See ICRC, *Artificial Intelligence and Machine Learning in Armed Conflict: A Human-Centred Approach*, 2019, available at: [www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control](http://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control).

The first area is the use of AI and machine learning tools to control military hardware, in particular the growing diversity of unmanned robotic systems – in the air, on land, and at sea. AI may enable greater autonomy in robotic platforms, whether armed or unarmed. For the ICRC, autonomous weapon systems are the immediate concern (see above). AI and machine learning software – particularly for “automatic target recognition” – could become a basis for future autonomous weapon systems, amplifying core concerns about loss of human control and unpredictability. However, not all autonomous weapons incorporate AI.<sup>34</sup>

The second area is the application of AI and machine learning to cyber warfare: AI-enabled cyber capabilities could automatically search for vulnerabilities to exploit, or simultaneously defend against cyber attacks while launching counter-attacks, and could therefore increase the speed, number and types of attacks and their consequences. These developments will be relevant to discussions about the potential human cost of cyber warfare. AI and machine learning are also relevant to information operations, in particular the creation and spread of false information (whether intended to deceive or not). AI-enabled systems can generate “fake” information – whether text, audio, photos or video – that is increasingly difficult to distinguish from “real” information and might be used by parties to a conflict to manipulate opinion and influence decisions. These digital risks can pose real dangers for civilians (see above).<sup>35</sup>

The third area, and the one with perhaps the most far-reaching implications, is the use of AI and machine learning systems for decision-making. AI may enable widespread collection and analysis of multiple data sources to identify people or objects, assess “patterns of life” or behaviour, make recommendations for courses of action, or make predictions about future actions or situations. The possible uses of these “decision-support” or “automated decision-making” systems are extremely broad: they range from decisions about whom – or what – to attack and when, and whom to detain and for how long, to decisions about overall military strategy – even on use of nuclear weapons – as well as specific operations, including attempts to predict, or pre-empt, adversaries.

AI and machine learning-based systems can facilitate faster and broader collection and analysis of available information. This may enable better decisions by humans in conducting military operations in compliance with IHL and minimizing risks for civilians. However, the same algorithmically-generated analyses, or predictions, might also facilitate wrong decisions, violations of IHL and exacerbated risks for civilians. The challenge consists in using all the capacities of AI to improve respect for IHL in situations of armed conflict, while at the same time remaining aware of the significant limitations of the technology, particularly with respect to unpredictability, lack of transparency, and bias. The use of AI in weapon systems must be approached with great caution.

34 ICRC, *Autonomy, Artificial Intelligence and Robotics: Technical Aspects of Human Control*, 2019, available at: [www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control](http://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control).

35 See ICRC, *Digital Risks in Situations of Armed Conflict*.



### *A human-centred approach*

AI and machine learning systems could have profound implications for the role of humans in armed conflict. The ICRC is convinced of the necessity of taking a human-centred, and humanity-centred, approach to the use of these technologies in armed conflict.

It will be essential to preserve human control and judgement in using AI and machine learning for tasks, and in decisions, that may have serious consequences for people's lives, and in circumstances where the tasks – or decisions – are governed by specific IHL rules. AI and machine learning systems remain tools that must be used to serve human actors, and augment and improve human decision-making, not to replace them.

Ensuring human control and judgement in AI-enabled tasks and decisions that present risks to human life, liberty, and dignity will be needed for compliance with IHL and to preserve a measure of humanity in armed conflict. In order for humans to meaningfully play their role, these systems may need to be designed and used to inform decision-making at “human speed” rather than accelerate decisions to “machine speed”.

The nature of human-AI interaction required will likely depend on the specific application, the associated consequences, and the particular IHL rules and other pertinent law that apply in the circumstances – as well as on ethical considerations.

However, ensuring human control and judgement in the use of AI systems will not be sufficient in itself. In order to build trust in the functioning of a given AI system, it will be important to ensure, including through weapon reviews: predictability and reliability – or safety – in the operation of the system and the consequences of its use; transparency – or explainability – in how the system functions and why it reaches its output; and lack of bias in the design and use of the system.

#### **d. Humanitarian consequences and constraints under IHL related to the potential use of weapons in outer space**

Military use of space objects has been an integral part of warfare for several decades. It includes the use of satellite imagery to support the identification of enemy targets and the use of satellite communication systems for command-and-control, and more recently, for remotely controlled means of warfare. The weaponization of outer space would further increase the likelihood of hostilities in outer space, with potentially significant humanitarian consequences for civilians on earth.

The exact scope of the potential humanitarian consequences of the use of weapons in outer space is uncertain. It is clear, however, that the use of weapons in outer space – be it through kinetic or non-kinetic means (such as electronic, cyber or directed energy attacks), using space – and/or ground-based weapon systems – could directly or incidentally disrupt, damage, destroy or disable



civilian or dual-use space objects on which safety-critical civilian activities and essential civilian services depend. This includes the navigation satellite systems (such as BeiDou, Galileo, GLONASS, and GPS) that are increasingly employed in civilian vehicles, shipping, and air traffic controls. Satellites are also critical for the weather services used for disaster prevention and mitigation, and for the satellite phone services on which the delivery of humanitarian assistance and emergency relief is reliant.

The use of weapons in outer space would not occur in a legal vacuum. It is constrained by existing law, notably the Outer Space Treaty,<sup>36</sup> the UN Charter, and IHL rules governing means and methods of warfare.

The applicability of IHL in outer space is confirmed by Article III of the Outer Space Treaty, which states that international law applies to the use of outer space; and IHL forms part of international law. Furthermore, the International Court of Justice has recalled that the established principles and rules of IHL applicable in armed conflict apply “to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future”.<sup>37</sup> In terms of treaty law, the four 1949 Geneva Conventions and Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I) apply “to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties”.<sup>38</sup> Article 49(3) of Additional Protocol I shows that the Protocol’s rules on the conduct of hostilities are meant to apply to all types of warfare that may affect civilians on land. This would include hostilities in outer space.

IHL applies to any military operations conducted as part of an armed conflict, including those occurring in outer space, regardless of whether or not the use of force is lawful under the UN Charter (*jus ad bellum*). IHL does not legitimize the use of force in outer space; nor does it encourage the militarization or weaponization of outer space. The sole aim of IHL is to preserve a measure of humanity in the midst of armed conflict, notably to protect civilians.

The Outer Space Treaty prohibits the placement in orbit around the earth of objects carrying nuclear weapons or other weapons of mass destruction, the instalment of such weapons on celestial bodies, and the stationing of such weapons in outer space in any manner. It also forbids the establishment of military bases, installations and fortifications, the testing of any type of weapon, and the conduct of military manoeuvres on celestial bodies; it also requires that celestial bodies be used exclusively for peaceful purposes. For its part, IHL notably prohibits weapons that are indiscriminate by nature, as well as a number of other specific types of weapon. These prohibitions are not limited to the terrestrial domains.

36 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies.

37 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 86.

38 Art. 1(3), Additional Protocol I; Art. 2 common to the four 1949 Geneva Conventions.

Even when resorting to weapons that are not prohibited, a belligerent has to respect the IHL rules governing the conduct of hostilities. These include the principle of distinction, the prohibition against indiscriminate and disproportionate attacks, and the obligation to take precautions in attack and against the effects of attack. Furthermore, attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. While specific protections, such as the latter, apply to a broad range of military operations, the rules affording general protection to civilian objects apply mostly in relation to attacks. Under IHL, a kinetic operation against a space object would constitute an attack. However, a space object could also be disabled (rendered dysfunctional) without being physically damaged, for example by directed energy/laser weapons or a cyber attack. In the ICRC's view, such non-kinetic operations would constitute attacks under IHL.

IHL forbids targeting civilian objects in outer space. However, civilian satellites or some of their hosted payloads may also be used by the armed forces, meaning they are of a dual-use nature. They may become military objectives, provided that their use for military purposes is such that they fulfil the definition under Article 52(2) of Additional Protocol I. If such a dual-use satellite or its payload is attacked, the expected incidental harm to civilians and civilian objects, directly or through knock-on effects, must be taken into consideration while assessing the legality of the attack under the principles of proportionality and precautions. Furthermore, the consequences for civilians of putting an end to or impairing the civilian use of the targeted satellite or payload must also be considered. As noted above, disabling the civilian functions of satellites could disrupt large segments of modern-day societies, especially if they support safety-critical civilian activities and essential civilian services on earth.

Another issue of concern is the risk posed by space debris. Debris can be created by a number of space activities. A kinetic attack on a satellite, for example, risks causing far more debris than other space activities. Debris may continue to travel in the orbits in which it was produced for decades or more. Given the speed at which it travels, debris risks damaging other satellites supporting civilian activities and services. This would have to be considered in – and may limit – the choice of means and methods of warfare in outer space.

The ICRC is concerned by the potentially high human cost of the use of weapons in outer space. It recommends that future multilateral processes acknowledge:

- the potentially significant humanitarian consequences, for civilians on earth, of the use of weapons in outer space
- the protection afforded by the IHL rules that restrict belligerents' choice of means and methods of warfare, including in outer space.<sup>39</sup>

39 See also ICRC, "Humanitarian Consequences and Constraints under International Humanitarian Law (IHL) related to the Potential Use of Weapons in Outer Space", working paper submitted to the Group of Government Experts on Further Practical Measures for the Prevention of an Arms Race in Outer Space, 2019, available at: <https://undocs.org/GE-PAROS/2019/WP.1>.

As with the development of any new means or methods of warfare, the weaponization of outer space is not inevitable but a choice. States may decide to set limits in this regard for a range of reasons, including humanitarian ones. The fact that IHL applies does not prevent States from agreeing on additional rules to prohibit or limit specific military activities or weapons in outer space, as they did in the Outer Space Treaty. States may decide that further prohibitions or limitations may be warranted to reduce the risks of the significant civilian harm that could ensue from the use of weapons in outer space.

#### e. Challenges posed by certain new technologies of warfare to legal reviews of new weapons

As noted above, the development and use of new technologies of warfare, such as autonomous weapon systems or military cyber capabilities, do not occur in a legal vacuum. As with all weapon systems, they must be capable of use in compliance with IHL, particularly its rules on the conduct of hostilities. The responsibility for ensuring this rests with every State that is developing, acquiring and using these new technologies of warfare. In this respect, legal reviews are as critical now as they were when Article 36 of Additional Protocol I was conceived during the Cold War arms race. To assist States in implementing this obligation, in 2006, the ICRC published *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*. What follows is drawn from that *Guide* and addresses new questions regarding the challenges to legal reviews posed by new technologies of warfare.

Every State party to Additional Protocol I is obliged to determine whether the employment of a new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law.<sup>40</sup> In the ICRC's view, the requirement to carry out legal review of new weapons also flows from the obligation to ensure respect for IHL under Article 1 common to the Geneva Conventions.<sup>41</sup> Besides these legal requirements, all States also have an interest in assessing the lawfulness of new weapons. Legal reviews are a critical measure to help ensure that a State's armed forces can conduct hostilities in accordance with that State's international obligations. They also help prevent the costly consequences of approving and procuring a weapon the use of which is likely to be restricted or prohibited.

40 Sweden and the United States, for example, first established mechanisms for legal review in 1974, three years before the adoption of Additional Protocol I.

41 This is also the view of some States. See Australia, "The Australian Article 36 Review Process", working paper submitted to the Group of Government Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), 2018, para. 3, available at: [https://unog.ch/80256EDD006B8954/\(httpAssets\)/46CA9DABE945FDF9C12582FE00380420/\\$file/2018\\_GGE+LAWS\\_August\\_Working+paper\\_Australia.pdf](https://unog.ch/80256EDD006B8954/(httpAssets)/46CA9DABE945FDF9C12582FE00380420/$file/2018_GGE+LAWS_August_Working+paper_Australia.pdf); The Netherlands and Switzerland, "Weapons Review Mechanisms", working paper submitted to the CCW, 2017, para. 17.

Weapon systems of all types should be subjected to legal review, including physical systems (hardware) and digital systems (software). This extends to military cyber capabilities intended for use or expected to be used in the conduct of hostilities. It also includes software components that form part of the weapon system (the “means” of warfare) or the way in which the system will be used (the “method” of warfare), such as software that controls a physical system or supports decision-making processes for use of that weapon system. Since a weapon cannot be assessed in isolation from the way in which it will be used, the normal or expected use of the weapon must be considered in the legal review.

Weapons that include a software component that permits the critical functions of selection and attack of targets (the defining characteristics of autonomous weapon systems) to be triggered by the weapon system’s environment, rather than by a commander, make it challenging to assess whether the weapon can be used in compliance with IHL rules. A reviewer will need to be satisfied that the proposed weapon’s design and method of use will not prevent a commander from exercising the judgement required by IHL. If the reviewer is not satisfied of this, they must not allow the weapon to be used; alternatively, they may need to impose limitations on the weapon’s use to ensure the commander’s ability to comply with IHL.

Foreseeing the effects of weapon systems through testing may become increasingly difficult, as weapon systems become more complex or are given more freedom of action in their tasks, and therefore become less predictable, such as weapon systems that incorporate machine learning. Unpredictability in the functioning of the system, and the interaction of the system with a dynamic environment, cannot be simulated in advance of use. This challenge will be compounded, in some cases, by the inability of the commander to understand how a weapon system using artificial intelligence – particularly machine learning – reaches its output from a given input, which makes it difficult (if not impossible) to foresee the consequences of its use.

For legal reviews to be effective, States that develop or acquire new weapon technologies need to navigate these complexities. Therefore, legal reviews of weapons, means and methods of warfare, relying on these new technologies may need to be conducted at an earlier stage of weapon development, and at shorter intervals, than for more traditional technologies, and may need to be repeated during development. The unique characteristics of new technologies and the related processes of legal review require new standards of testing and validation. States should also share information about their legal-review mechanisms and, to the extent feasible, about the substantive results of their legal reviews, especially where a weapon’s compatibility with IHL may be in question – so that other States will not encounter the same problems and can benefit from reviewing States’ conclusions on whether the use of the weapon in question is prohibited or restricted by IHL. When States exchange information about conducting legal reviews of new technologies, it can help build expertise and identify good practices, and also assist States that wish to establish or strengthen their own mechanisms.

# INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

## III. Needs of the civilian population in increasingly long conflicts: Selected issues

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The needs of civilian populations affected by armed conflict are multifaceted and complex. They range from protection from direct harm, and against the effects of hostilities, to basic needs such as food, water and medical care, education for children, psychosocial support, knowing the fate and whereabouts of missing family members, and hearing from a loved one in detention. Civilians may also need protection against crime, including sexual violence.

To ensure that people are effectively protected, and their suffering diminished, action is needed on at least three interconnected levels. First, it is the responsibility of parties to armed conflicts to implement their international legal obligations, many of which are concerned with safeguarding the fundamental rights and meeting the needs of the civilian population. Second, individuals and communities are agents of their own protection who will know their needs. With sufficient information and support, they may find ways to overcome the difficulties created by armed conflict. Their efforts to protect themselves must not be hindered. And third, humanitarian action needs to be designed with people, their needs, and their specific vulnerabilities at the centre.<sup>42</sup> This means that their perspectives and knowledge of the context must be incorporated in the design and implementation of a humanitarian response, and their questions and concerns regarding humanitarian action taken seriously.

The protracted nature of many of today's armed conflicts has an impact on the needs and vulnerabilities of civilian populations.<sup>43</sup> Many humanitarian needs arise early in a conflict, but they may change, accumulate, and become exacerbated over time. For instance, protracted conflicts destroy elements of

42 See ICRC, *Professional Standards for Protection Work*, 2018, available at: <https://professionalstandards.icrc.org/index.html>

43 See ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, 2016, available at: [www.icrc.org/en/document/protracted-conflict-and-humanitarian-action](http://www.icrc.org/en/document/protracted-conflict-and-humanitarian-action)

essential infrastructure, such as schools and hospitals, or seriously degrade them to the point that they become unusable. When conflicts are not resolved, displaced persons, far too often, are effectively deprived of the possibility of returning voluntarily, in safety and with dignity, to their homes. And where support services and systems collapse, new barriers arise for persons with disabilities. Such obstacles, especially if prolonged, feed rather than dissipate tensions.

Fundamental IHL norms on the protection of the civilian population in armed conflict apply from the start of an armed conflict at least until its end. IHL applies regardless of the length of a conflict; its rules prohibit certain conduct at all times and aim to alleviate the humanitarian consequences of warfare whenever they arise. This chapter presents the ICRC's views on the ways in which IHL – complemented by other bodies of international law – protects (1) internally displaced persons; (2) persons with disabilities; and (3) children's access to education.

## 1. Internally displaced persons

At the end of 2018, 41.3 million people were displaced within their own country by armed conflict and violence – the highest figure ever recorded.<sup>44</sup> Many have been displaced for long periods or forced to move multiple times, including due to protracted conflicts. In armed conflicts, internally displaced persons (IDPs) are often among the most vulnerable civilians. They can become separated from their families or go missing and live precariously. As the world's population becomes ever more urbanized, people are increasingly displaced to, between, or within cities. Cities are theatres of war but can also become places of refuge. A recent ICRC study – on strengthening the humanitarian response to urban displacement in cities at war – found that people who wish to flee to avoid danger may be prevented from doing so and those who have fled may remain at risk during displacement.<sup>45</sup> Critical civilian infrastructure may be damaged or destroyed by conflict, leading to service disruption, further affecting people's living conditions and potentially causing new displacement. When IDPs seek safety in cities spared from the hostilities, they often face problems because they lack official documentation and adequate access to essential services, accommodation and employment.

In armed conflicts, IHL protects IDPs as civilians. Better respect for IHL can contribute to reducing the scale of displacement, in addition to protecting those displaced.<sup>46</sup> Human rights law complements the protection afforded by

44 Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2019*, pp. v and 48.

45 ICRC, *Displaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps*, 2018, available at: <https://shop.icrc.org/icrc/pdf/view/id/2820>.

46 ICRC, *Displacement In Times Of Armed Conflict: How International Humanitarian Law Protects In War, And Why It Matters*, 2019, available at: [www.icrc.org/en/document/ihl-displacement](http://www.icrc.org/en/document/ihl-displacement). This study is an exploratory research, which does not necessarily reflect the institutional views of the ICRC, that deals with the role and contribution of respect of IHL in relation to displacement.

IHL, but the precise relationship between the two bodies of law is subject to further clarification and evolution. As displacement remains a reality for far too many people, a stronger focus on prevention and protection is needed. This is an integral part of the ICRC's commitment to putting people and their needs at the centre of its action. In this connection, it is essential to continue working to influence and change the behaviour of parties to conflict, in order to ensure greater respect for IHL and other rules protecting IDPs. Strengthening protection for IDPs is a subject that requires further reflection.<sup>47</sup>

### *The civilian character of IDP camps*

Camps may be necessary as an exceptional measure but should not be the default solution to displacement. In the short term, camps can facilitate the provision of emergency assistance. In the long-term, however, they can prevent people from resuming a normal life and can undermine traditional coping mechanisms. Moreover, in some armed conflicts, non-State armed groups infiltrate or settle in camps, affecting the protection of civilians. Their presence has – at times – resulted in direct attacks against a camp by their adversary, or in child recruitment and sexual violence by their members, particularly against women and girls. It is critical to protect civilians and the civilian – and humanitarian – character of camps.

Measures to ensure the civilian character of camps must, however, comply with applicable law. For instance, to prevent armed groups from entering camps, authorities may establish screening processes to identify and, where relevant, separate these individuals. However, such screening can lead to family separation and to persons going missing. Those identified as security threats – usually men and boys – are often taken into custody, and experience has shown that this is not always done in conformity with the law. Movement in and out of camps may be restricted, which often also narrows IDPs' access to livelihoods and essential services. Restrictions on movement, for instance imposed in screening processes or on persons living in camps, can also, in some cases, amount to deprivation of liberty. Whether restriction of movement rises to the level of deprivation of liberty depends on the actual situation; ultimately, the difference between the two lies in the degree or intensity of the specific restriction.

Preserving the civilian and humanitarian character of camps is fundamental to protecting IDPs. IHL can contribute to realizing this objective. Under this body of law, camps qualify as civilian objects and are entitled to protection against direct attacks, unless and for such time as they, or parts of them, become military objectives. Since combatants, fighters and civilians who

47 See, for instance, ICRC, *Translating the Kampala Convention into Practice: A Stocktaking Exercise*, 2016, available at: [www.icrc.org/en/international-review/article/translating-kampala-convention-practice-stocktaking-exercise](http://www.icrc.org/en/international-review/article/translating-kampala-convention-practice-stocktaking-exercise); ICRC, "Strengthening Legal Protection for Victims of Armed Conflicts", 31IC/11/5.1.1, 2011.



directly participate in hostilities may be subject to direct attack, their presence in the vicinity of or within camps presents a danger to the camps and their inhabitants. To maintain the civilian character of camps, it is thus essential to distinguish combatants and fighters from civilians, as well as civilians who directly participate in hostilities from those who do not. However, even when camps, or parts of them, are used for military purposes in a manner that would make them military objectives, parties to conflict must respect all rules related to the conduct of hostilities, including the principles of distinction, proportionality and precautions. Importantly, the mere presence of armed forces or armed groups within a camp does not, in itself, make all or part of that camp a military objective. Additionally, parties must take all feasible precautions to protect camps under their control against the effects of attacks, notably by avoiding, to the extent feasible, locating military objectives inside camps or in their vicinity.

The ICRC and the Office of the UN High Commissioner for Refugees (UNHCR) published an aide-mémoire to address the dilemmas that arise in maintaining the civilian and humanitarian character of camps, clarify how legal frameworks can contribute to resolving these dilemmas, and provide operational guidance to humanitarian and other actors.<sup>48</sup> It provides an overview of IHL rules that can contribute to safeguarding the civilian character of camps; the aide-mémoire also gives an overview of other measures – including those based on other bodies of law – that can be taken to maintain the humanitarian character of camps.

### *Durable solutions*

Armed conflicts are, increasingly, protracted; so is displacement. Durable solutions – voluntary return, local integration or resettlement in another part of the country – are needed to end displacement. Authorities often regard return as the only solution, even though some IDPs may prefer to stay and integrate locally or resettle elsewhere in the country. Returning to their homes may be the preference of a great number of IDPs. But, it may not be an option when an armed conflict is ongoing; and displaced people might, over time, feel less compelled to return, as they gradually establish themselves in their place of displacement. If voluntary, safe and dignified choices of durable solutions are not promoted, the plight of IDPs can worsen. For instance, IDPs forced to return to dangerous areas may be particularly vulnerable and may face threats to their fundamental rights. Those who have returned prematurely, or whose efforts to integrate locally are not supported, may find themselves without access to adequate housing, education, and employment, or ostracized by receiving communities.

In situations of armed conflict, greater respect for IHL can contribute to finding durable solutions to the plight of IDPs. Importantly, under IHL, if

48 UNHCR and ICRC, *Aide Memoire: Operational Guidance on Maintaining the Civilian and Humanitarian Character of Sites and Settlements*, 2018, available at: [www.icrc.org/en/document/aide-memoire-operational-guidance-maintaining-civilian-and-humanitarian-character-sites-and](http://www.icrc.org/en/document/aide-memoire-operational-guidance-maintaining-civilian-and-humanitarian-character-sites-and).



displacement results from evacuations carried out by parties to the armed conflict – for the security of the civilians involved or imperative military reasons – it must last only for as long as the conditions warranting it exist.<sup>49</sup> Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.<sup>50</sup> As part of this, the competent authorities have a duty to take measures to facilitate the voluntary and safe return and reintegration of displaced persons, as provided in some IDP-related legal instruments. Measures that parties to armed conflict can take include mine clearance; provision of assistance to cover basic needs; rehabilitation of schools; or facilitating visits by displaced persons to assess conditions in their potential place of return.

Unlike in certain legal instruments, IHL does not explicitly provide for durable solutions other than the right to return. However, greater respect for certain of its rules can contribute to facilitating *all* durable solutions. For instance, ensuring respect for the rules and principles on the conduct of hostilities protecting civilian objects can help limit the degradation or destruction of critical civilian infrastructure that provides essential services. As explosive remnants of war are among the main obstacles to safe return and resettlement in another part of the country, respect for weapons treaties can help preserve or create the conditions necessary to achieve a durable solution. In fact, explosive remnants of war continue to pose a serious risk to people's lives, impede access to homes and essential services, and exacerbate difficulties for those trying to rebuild their lives long after the end of active hostilities or even of the conflict. Finally, ensuring respect for the duty of parties to armed conflict to provide families of persons reported missing due to conflict with any information it has on their fate can facilitate the reintegration of IDPs upon return, or local integration.

Building on and going beyond IHL, the UN Guiding Principles on Internal Displacement and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa explicitly recognize the right of IDPs to return to their former homes, integrate at the location to which they were displaced, or resettle in another part of the country. Under human rights law, these durable solutions are derived from the right to freedom of movement and residence.<sup>51</sup> Freedom of movement is also essential for IDPs to have access to livelihoods, education and health care, and to achieve a durable solution to their displacement. Restrictions on movement not only take away these possibilities but can also lead to family separation and create obstacles to family reunification. Although IHL does not contain a right to freedom of movement and residence, ensuring better respect for certain of its rules can contribute to allowing or facilitating freedom of movement. For instance, the obligation to take all feasible

49 See Art. 49(2), Fourth Geneva Convention; Art. 17(1), Protocol II of 8 June 1977 additional to the Geneva Conventions (Additional Protocol II); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Volume I: *Rules* (hereafter ICRC Customary IHL Study), Cambridge University Press, 2005, Rule 75). Rule 129 and explanation, p. 460.

50 See Art. 49(2), Fourth Geneva Convention; ICRC Customary IHL Study, Rule 132 and explanation, p. 470.

51 This right may be subjected to limitation and can be derogated from in times of public emergency.

precautions to protect civilians and avoid causing incidental harm to them might require parties to the conflict to allow civilians to leave an area, or evacuate them from it, if they are endangered by hostilities.<sup>52</sup>

For the reasons outlined in this section, ensuring better respect for IHL can help not only to prevent displacement but also increase the chances that durable solutions will be available for IDPs. It is therefore important to constantly come back to the basics – that is compliance with IHL and other relevant rules – to prevent the root causes of much of the suffering created by displacement.

## 2. The protection of persons with disabilities

For persons with disabilities, armed conflict often further raises existing barriers or puts up new ones regarding access to services and support – in such areas as food, water, shelter, sanitation, health care, education, rehabilitation and transportation. Conflict-specific barriers may be physical (e.g. destruction of physical infrastructure vital for access to services), communicational (e.g. lack of accessible information on available humanitarian relief), or attitudinal (e.g. denial of participation by persons with disabilities in humanitarian activities because of the prejudiced view that persons with disabilities cannot communicate their own wishes and needs or contribute to the design of humanitarian responses). Persons with disabilities may face multiple or intersecting forms of discrimination not only on grounds of their disability but also because of age or gender norms. For instance, women and girls with disabilities may have more limited financial means, which further raises barriers to services and support for them.

Persons with disabilities may not be able to flee ongoing military operations occurring near them and might be left behind by family members or other support persons. They are at greater risk of attacks and violence, including sexual violence. They may also acquire new impairments during armed conflicts, for instance because of conflict-related injuries or traumatic experiences.

Protracted armed conflicts exacerbate the impact of the above-described consequences of armed conflict on persons with disabilities, because of the large-scale breakdown of support services and systems that they cause. Such conflicts demand greater attention to individual experiences from humanitarian organizations and a prioritization not only of the short-term, but also the long-term needs of persons with disabilities, such as needs related to education. However, a major barrier to greater inclusion of persons with disabilities in humanitarian responses is the lack of their meaningful participation in those responses and the scarcity of good-quality disability data. As a result, they often remain invisible.

The ICRC, in line with the ambitions of the Movement, has committed to strengthening disability inclusion in its protection and assistance activities and among its own staff. It is working towards incorporating the perspectives of

52 See Chapter II(1)(a) on the protection of the civilian population in situation of sieges.

persons with disabilities in the design, implementation and review of its humanitarian response. The ICRC also strives to promote more systematically the protection of persons with disabilities under relevant international legal frameworks, especially IHL and the Convention on the Rights of Persons with Disabilities (CRPD).

### *The interplay between IHL and human rights law, in particular the CRPD*

The relationship between IHL and human rights law protecting persons with disabilities, in particular the CRPD, has received significant attention in recent years. Article 11 of the CRPD addresses armed conflicts and imposes an obligation on States Parties to ensure the safety and protection of persons with disabilities in accordance with both IHL and human rights law.

It is important to unpack this obligation, especially since IHL has been repeatedly criticized as taking an outdated, medicalized approach to persons with disabilities, focusing merely on a person's individual condition (i.e. the impairment) that requires medical treatment. For this reason, IHL has sometimes been considered inadequate for addressing barriers that persons with disabilities face in other protection and assistance matters. Critics believe that IHL conflicts with the contemporary social model of disability underlying the CRPD, which characterizes disability by the interaction between persons' impairments (for instance, physical, psychosocial, intellectual or sensory) and a variety of barriers that hinder their full and effective participation in society on an equal basis with others.<sup>53</sup>

However, IHL addresses the specific capacities, experiences and perspectives of persons with disabilities in armed conflict beyond the purely medical realm. Even where persons with disabilities are not expressly mentioned in relevant IHL rules, they enjoy general protection as civilians or persons *hors de combat* during armed conflict. IHL rules protecting civilians or persons *hors de combat* are especially strong in those instances when individuals find themselves in the power of a party to a conflict, in particular an adverse party to a conflict. This includes not only situations like detention but also such circumstances as living in a territory controlled by a party to a conflict.

Under IHL, parties to conflict must treat all civilians and persons who are *hors de combat* without "adverse distinction". This may, and in some cases does, require the taking of all feasible measures to remove and prevent the raising of any barriers that persons with disabilities might face in gaining access to services or protection provided under IHL on par with other civilians and persons *hors de combat*.<sup>54</sup> When interpreted to include these positive obligations, IHL converges

<sup>53</sup> See Preamble, para. (e), and Art. 1(2) of the CRPD.

<sup>54</sup> Art. 3 common to the four 1949 Geneva Conventions (Common Art. 3); Art. 27, Fourth Geneva Convention; Art. 75, Additional Protocol I; Art. 4, Additional Protocol II.

with obligations to advance the *de facto* equality of persons with disabilities under human rights law, in particular the CRPD.

IHL is sensitive to the context in which it is applied. For instance, the obligation to treat civilians and persons *hors de combat* humanely means respecting an individual's physical and mental integrity as well as his or her inherent dignity. Today, the ICRC understands this obligation to mean that parties to armed conflict are required to consider not only the individual condition of a person, including his or her impairment, but also environmental factors, i.e. how his and her capacities and needs differ due to the socio-cultural, economic and political structures in place.

Admittedly, the terminology used in the 1949 Geneva Conventions and Additional Protocols I and II with regard to persons with disabilities was a product of those times, of that social and cultural context (e.g. references to “the infirm” and “mental disease”, using the term “disability” to describe an impairment in the context of the definition of “wounded and sick” persons). It is outdated in light of contemporary understanding of disability. This, however, does not detract from the fact that – already then – persons with disabilities were identified as requiring specific protection in armed conflict. Moreover, a contemporary reading of IHL shows more complementarity than contradiction between IHL and human rights law, particularly the CRPD, in two important ways. First, it stresses the commonalities between IHL and the CRPD. Second, it shows that the different scopes of application of IHL and the CRPD lead to additional protection for persons with disabilities during armed conflict. In this respect, it is worth noting that IHL imposes uncontested obligations on non-State armed groups, whereas the CRPD binds only States Parties to it.<sup>55</sup> Moreover, IHL may minimize or prevent harm to persons with disabilities from conflict-specific risks, including from the conduct of hostilities.

In a recent paper entitled “How law protects persons with disabilities in armed conflict”, the ICRC presented its views on how the commonalities between IHL and the CRPD, as well as additional IHL-based protection, can inform humanitarian activities that are more inclusive of persons with disabilities.<sup>56</sup> The following paragraphs present some examples.

### *Complementary roles of IHL and human rights law regarding persons with disabilities*

IHL and human rights law, including the CRPD, require humane treatment of detainees, without discrimination.<sup>57</sup> Specific measures are thus required to ensure

55 This issue is discussed further in Chapter IV(2) on the legal regime protecting persons living in territory under the control of non-State armed groups.

56 ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, 2017, available at: [www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict](http://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict).

57 See, for instance, Common Art. 3; Arts 13 and 16, Third Geneva Convention; Art. 27, Fourth Geneva Convention; Art. 75, Additional Protocol I; Art. 4, Additional Protocol II; ICRC Customary IHL Study, Rules 87–88; Art. 10, International Covenant on Civil and Political Rights; Art. 14(2) CRPD.

that persons with disabilities can obtain basic services and facilities on an equal basis with other detainees. During its visits to places of detention, the ICRC has observed that detainees with disabilities were provided information about available services or facilities in accessible formats by detaining authorities, who had also adapted infrastructure to enable better access for detainees with physical impairments.

The Geneva Conventions also explicitly require detaining powers to provide specialized services and support for the medical and rehabilitative needs of prisoners of war with disabilities (e.g. physiotherapy or psychosocial counselling services), and assistive devices (e.g. crutches, prostheses, ocular devices) to both prisoners of war and civilian internees.

In another vein, IHL rules on the conduct of hostilities – in particular the obligation to take all feasible precautions – may minimize or prevent conflict-specific harm to persons with pre-existing impairments if they are civilians or persons *hors de combat*. Feasible precautions can include taking measures to help them leave the vicinity of military objectives or evacuating them for their own safety. The Fourth Geneva Convention explicitly provides for the possibility of local agreements to evacuate persons with disabilities for their own safety from besieged or encircled areas.

### *Participation of persons with disabilities in decisions concerning humanitarian action*

The CRPD, by requiring States Parties more generally to collect disability disaggregated data to implement obligations under the CRPD, and by identifying specific barriers confronting persons with disabilities, reinforces the expectation on humanitarian organizations to collect data on persons with disabilities in humanitarian needs assessments. Furthermore, to ensure respect for their dignity and the necessary specificity in humanitarian responses, the principle of humanity implies meaningful participation of persons with disabilities in those responses. This converges with the explicit State obligations under the CRPD to ensure participation of persons with disabilities in all decisions concerning them. Data collection and meaningful participation of persons affected are also among the explicit obligations in certain weapons treaties to assist persons who have acquired impairments as a result of the use of weapons in armed conflict.<sup>58</sup>

Finally, the rules of IHL that justify or even require taking measures to ensure non-adverse distinction also provide the basis for prioritized or specific humanitarian relief for persons with disabilities as parts of populations affected in territory under the control of a party to a conflict.<sup>59</sup> In this respect, IHL converges with related obligations under the CRPD. Relevant measures include ensuring the accessibility of water, sanitation or shelter; providing support for transportation to obtain food and health care; or presenting accessible information on available relief (e.g. by using sign language, Braille or large print).

<sup>58</sup> See, for instance, Art. 5(1) and (2)(f), Convention on Cluster Munitions.

<sup>59</sup> See, for instance, Common Art. 3; Art. 70, Additional Protocol I; Art. 18(2), Additional Protocol II.

IHL also implicitly recognizes the need to proactively identify persons with disabilities in the distribution of humanitarian relief when impartial humanitarian organizations assist parties to an armed conflict in meeting their obligations.

### 3. Access to education

Too often, education is rapidly and profoundly disrupted during armed conflict. Disruption occurs when students, educational personnel, and education infrastructure are directly targeted or incidentally harmed and damaged in attacks; when military use of educational facilities impedes learning and exposes schools to attack by opposing forces; and when armed forces and armed groups recruit children or commit acts of sexual violence against them in or near schools. In addition, schools are frequently closed by authorities owing to surrounding hostilities and conflict-exacerbated resource constraints. The protection of education continuity is particularly challenging where its importance as an essential public service is undervalued by warring parties – “education can wait” – or where the delivery of education itself is a contested issue in the conflict, and thus becomes a target of attack for belligerents.

The disruption of education has long-term effects that can persist for generations. For instance, the killing of one teacher, or the destruction of one school building, can deprive an age cohort of children of education for years. In situations of protracted conflict, the degradation of basic services, including education, has a cumulative impact on children and the community. The consequences of disrupting education can also be gender-distinct: girls may be more likely to be kept home for fear of sexual violence; girls who drop out may be less likely to return; boys may be more likely to be recruited as combatants. The gravity of these consequences is confirmed by the communities with whom the ICRC works, who consistently cite education as a priority concern in situations of armed conflict; the protection of education continuity is correspondingly an important facet of the ICRC’s people-centred approach.

In recognition of these persistent challenges, the ICRC developed its Framework for Access to Education and an accompanying strategy for 2018–2020.<sup>60</sup> In tandem, the Movement adopted a resolution at the Council of Delegates in 2017, titled “Education: Related humanitarian needs”. Together, these outline operational and policy measures to strengthen responses to the impact of armed conflict and other violence on educational services. They also affirm that efforts to foster compliance with IHL rules that protect access to education are needed to address the persistent challenge of ensuring education continuity during armed conflict.<sup>61</sup>

60 ICRC, *Access to Education: Strategy 2018–2020*; available at: [www.icrc.org/en/document/access-education-strategy](http://www.icrc.org/en/document/access-education-strategy). See also ICRC, “Q&A: ICRC and Access to Education”, available at: [www.icrc.org/en/document/qa-icrc-and-access-education](http://www.icrc.org/en/document/qa-icrc-and-access-education).

61 Though not the focus of this discussion, the provisions of human rights law governing the right to education continue to apply in situations of armed conflict in complement to the IHL rules addressed here.

### *The protection of education under the IHL rules on the conduct of hostilities*

Under the IHL rules governing the conduct of hostilities, students and educational personnel are usually civilians and as such are protected from attack, unless and for such time as they directly participate in hostilities. Similarly, schools and other educational facilities are usually civilian objects and thus protected against attack, unless they are turned into military objectives. Even if they become military objectives, all feasible precautions must be taken prior to attack to avoid or at least minimize incidental harm to civilian students, personnel and facilities. Attacks expected to cause excessive harm to civilians or damage to civilian objects are prohibited.

These IHL obligations bear particular significance for three challenges that regularly disrupt the delivery of education.

The first of these challenges arises when education is a contested stake in a conflict. This includes those situations in which education is directly targeted because the language, history, or value-system taught in schools is, or is perceived to be, a vehicle for recruitment or generator of community support for one party to the conflict.<sup>62</sup> The first prong of the definition of a military objective under IHL requires that the educational facility in question must – by its nature, location, purpose or use – make an effective contribution to military action. Accordingly, if an educational facility merely generates support for a party to the conflict, it will not fulfil the definition of a military objective. This differentiation is crucial. For example, where the content of education provided at a school is of an ideology that increases the level of community support for one party to the conflict, this does not make a direct effective contribution to military action, even if it strengthens political commitment, or encourages recruitment or support for the war effort of an enemy party to the conflict. As a result, the school does not qualify as a military objective under IHL and must not be attacked.

A second challenge is whether belligerents assign sufficient value to the expected civilian harm from attacks affecting educational facilities or personnel. This value is part of the assessment required by the prohibition against attacks causing excessive civilian harm. Conceptually, the assessment process involves assigning values to the concrete and direct military advantage anticipated and to the expected incidental civilian harm; the protection of educational facilities is therefore influenced by the amount of value that military personnel assign to them in this process. The value of civilian objects is linked to their usefulness to civilians; accordingly, schools should be ascribed high civilian value. This is particularly the case given the long-term consequences of attacking a school, which may include the total loss of access to education for children in that

62 This is one among many reasons for which a school might be targeted, including where a school is more generally seen as being symbolic of one side of the conflict, or as an important point of infrastructure in resource-poor environments.



community and the corresponding impact on the daily life of the local civilian population.

A third challenge is military use of schools. While there is no specific treaty or customary IHL rule prohibiting the use of schools or other educational facilities for military purposes, such use does not occur in a legal vacuum. The military use of a particular school must be assessed in light of the obligations of parties to the conflict, as applicable, to take all feasible precautions to protect civilians and civilian objects under their control against the effects of attacks by an opposing party; to afford children special respect and protection; to comply with IHL rules on cultural property as applicable to buildings dedicated to education; and to facilitate access to education. The lawfulness of the military use of a school will be determined by the application of these rules to the specifics of a given case.<sup>63</sup>

Belligerents seeking to take steps to reduce the disruption to education caused by military use of schools may choose to implement the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict.<sup>64</sup> While in and of themselves not legally binding, the Guidelines provide useful practical recommendations as to how belligerents may reduce the impact of their military operations on the delivery of education.<sup>65</sup>

### *Obligations to facilitate access to education during protracted conflicts*

IHL also contains rules that specifically require parties to conflict to facilitate access to education. Two of these may be particularly relevant in protracted conflict if either the law of occupation or Additional Protocol II applies. The strength of the obligation to facilitate access to education articulated by these instruments demonstrates the intention of the drafters of the four Geneva Conventions in 1949 and the Additional Protocols in 1977 to recognize children's education as an essential service to be protected from disruption.

In situations of occupation, Article 50(1) of the Fourth Geneva Convention provides that the Occupying Power "shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children". The use of the term "shall" indicates that the Occupying Power is legally bound to take measures necessary to assure continuity of children's education in occupied territories. The verb "facilitate" encompasses two elements. The first is that the Occupying Power must avoid interfering with the proper working of educational institutions for children, in line with the general obligation to maintain the *status quo ante*. This includes refraining from

63 Certain States and non-State armed groups have also opted to adopt domestic laws, military orders, policies or practices that expressly regulate the military use of schools. See Human Rights Watch, *Protecting Schools from Military Use: Law, Policy, and Military Doctrine*, 2019, pp. 47–123.

64 The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict are available at: [www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe\\_schools\\_declaration.pdf](http://www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf); [www.protectingeducation.org/sites/default/files/documents/guidelines\\_en.pdf](http://www.protectingeducation.org/sites/default/files/documents/guidelines_en.pdf).

65 For the ICRC's position on the Safe Schools Declaration and Guidelines, see: [www.icrc.org/en/document/safe-schools-declaration-and-guidelines-protecting-schools-and-universities-military-use](http://www.icrc.org/en/document/safe-schools-declaration-and-guidelines-protecting-schools-and-universities-military-use).



requisitioning staff, premises, or equipment that are being used to deliver education. Abstention from interference is not, however, enough to fulfil the obligation established in Article 50(1). The second element of “facilitation” is that the Occupying Power must take positive action. For example, when the resources of educational institutions are inadequate, the Occupying Power must ensure that they receive the necessary materials to enable education to continue. This may include support for rebuilding institutions damaged by the conduct of hostilities.

In non-international armed conflicts to which Additional Protocol II applies, Article 4(3)(a) thereof requires that children “shall be provided with the care and aid they require, and in particular: they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care”. With the use of the term “shall”, this provision establishes the legal duty of State and non-State parties to ensure education continuity in the territory under their control, and to take concrete steps to this end. Article 4(3)(a) is of particular relevance to education when its substance is contested by a party to the conflict, because this rule specifies that children’s education must be in keeping with the wishes of their parent or caregivers. It thereby de-anchors the content of education from the preferences of the parties to the armed conflict. The provision also recognizes the importance of education for maintaining cultural links: at the time of drafting, Article 4(3)(a) was introduced by a cross-regional and multi-faith group of States to ensure the continuity of children’s cultural and moral links to their homes.<sup>66</sup>

Article 4(3)(a) of Additional Protocol II may be complied with in different ways. Depending on the barriers to education in a given context, ensuring that children receive an education may need the allocation of funding for teachers’ salaries, running costs of schools, or educational materials for students; the construction of educational facilities for displaced children; and coordination with humanitarian organizations to ensure access to education.

66 The Holy See introduced the provision on behalf of several co-sponsors: Austria, Belgium, Egypt, Greece, the Holy See, Nicaragua, Saudi Arabia, and Uruguay.

# INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

## IV. IHL and non-State armed groups

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A central feature of the changing geopolitical landscape of the last decade has been the proliferation of non-State armed groups. In some of the most complex recent conflicts, analysts observed hundreds, if not thousands, of groups engaging in armed violence.<sup>67</sup> Their size, structure and capabilities vary widely. While large groups with centralized and well-defined command-and-control structures continue to arise or to exist, other groups are decentralized in their structure and operate in fluid alliances. In this myriad of armed actors, the motivation for violence seems increasingly blurred between political, religious, and criminal interests.

Pursuing its mission to protect the lives and dignity of persons affected by armed conflict and other situations of violence, in 2019 the ICRC is interacting with over 400 armed groups throughout the world. Significant humanitarian and protection needs arise, for instance, when non-State armed groups take detainees or gain control over territory and populations and need to ensure the rights, safety, and dignity of the people affected. In its engagement with non-State armed groups, the ICRC seeks primarily to negotiate safe humanitarian access to assist populations affected, and to alleviate suffering by ensuring that all parties implement and uphold IHL and humanitarian principles.<sup>68</sup> To influence their behaviour, the ICRC pursues different approaches: with certain groups, it works to integrate IHL and humanitarian principles into their operations and doctrine (including codes of conduct); with others, it seeks to understand and invoke traditional or religious rules that the group follows and that reflect IHL.

The multiplication of armed groups, their diverse nature, and the different ways in which they operate make it increasingly difficult for humanitarian organizations to operate safely and engage effectively with non-State armed

67 ICRC, *The Roots of Restraint in War*, 2018, p. 13, available at: [www.icrc.org/en/publication/roots-restraint-war](http://www.icrc.org/en/publication/roots-restraint-war). These figures do not differentiate between non-State armed groups that are parties to an armed conflict as defined in IHL, and others.

68 ICRC, *Strategy 2019–2022*, p. 8, available at: [www.icrc.org/en/publication/4354-icrc-strategy-2019-2022](http://www.icrc.org/en/publication/4354-icrc-strategy-2019-2022).

groups on IHL compliance. Moreover, numerous legal challenges arise in relation to the evolving operations of non-State armed groups. These include questions regarding the applicability of IHL to situations of violence involving multiple armed groups, and questions on the protection that IHL, and possibly other fields of international law, provide for persons affected by armed conflict. In this chapter, the ICRC presents its views on (1) the applicability of IHL to conflicts involving multiple non-State armed groups; (2) the legal regime protecting persons living in territory under the *de facto* control of non-State armed groups; and (3) legal and practical dilemmas regarding detention by armed groups.

## 1. The applicability of IHL to conflicts involving multiple non-State armed groups

The presence of fluid, multiplying, and fragmenting non-State armed groups makes it increasingly challenging – factually and legally – to identify which armed group can be considered party to a particular armed conflict. This classification is of great legal and practical importance: it determines whether IHL applies to the relationship between a group and its adversary. This can have significant consequences, for instance, regarding the legal regime applicable to the use of force or deprivation of liberty by States in their operations against armed groups.

In many conflicts today, it is becoming increasingly difficult to identify groups and distinguish them from one another as they engage in fighting in the same place and against the same adversary. The ICRC and others have often described non-State armed groups as, increasingly, being organized horizontally rather than vertically, and that sociologically speaking, some of them may not even constitute one single group at all. This also gives rise to IHL questions about exactly which group or sub-group can be considered to be a party to a conflict. Similarly, as larger organized armed groups splinter, which of the resulting sub-groups remains a party to the conflict and which one does not?

### *The applicability of IHL to “alliances” or “coalitions” of non-State armed groups*

To classify a situation of violence as a non-international armed conflict, two criteria are widely acknowledged to be the most relevant: confrontations must take place between at least two organized parties and the level of violence must have reached a certain level of intensity.<sup>69</sup> When many different armed groups are involved in violence, evaluating these criteria becomes increasingly complex.

69 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, paras 421–437 (subsequent references are to ICRC *Commentary on GC I*).

One particular scenario is that of “alliances” or “coalitions” of distinct non-State armed groups that appear to be fighting together against a State or a non-State actor.

In such cases, if the level of intensity is determined by looking at each of the organized armed groups in their separate belligerent relationship with a State or another non-State armed group, the conclusion might be that the threshold of intensity required for non-international armed conflict is not reached in each and every relationship. The consequence would be that IHL does not apply to that relationship, and that the State would need to use law enforcement means (regulated by human rights law) to respond to the threat posed by that group. Yet, the reality of the situation is that it would be unrealistic to expect States to operate under different paradigms – either the law-enforcement or the conduct-of-hostilities paradigm – to respond to the different groups that *operate together*. In fact, these groups pool and marshal their military means in order to defeat the State. When several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together.

More often, probably, there will be situations in which additional groups join forces with groups already engaged in a conflict. In a pre-existing non-international armed conflict in which several organized armed groups are coordinating and collaborating in an alliance or coalition, the nature of the military support provided by the additional group will be key to determining whether that group qualifies as a party to the armed conflict.

### *The applicability of IHL to splinter groups*

It is also quite common for organized armed groups to splinter, leading to the emergence of new, often smaller, groups. Factions split off, forming their own new command structures.

In each of these cases, once the faction that has split off no longer falls under the hierarchical structure and chain of command of the original non-State party to the conflict,<sup>70</sup> the question arises whether the newly formed group qualifies as a party to a conflict.

To answer this question, each group must be evaluated separately; and the first question to analyze is whether the group displays the organization required for non-State armed groups to qualify as parties to armed conflicts.

A second question is whether the confrontations between the group and its adversary have crossed a certain threshold of violence, such that the relationship

70 Identifying the exact moment this cut occurs is difficult and depends on the circumstances. Indicators suggesting an effective breakaway include statements by the original non-State party recognizing the separation; declarations by the splinter group recognizing the separation; eruption of hostilities between the splinter group and the original non-State armed group; adherence by the original non-State armed group to a peace process while the splinter group continues to fight.

between them is now one of armed conflict. This has to be assessed on a case-by-case basis, taking into account the realities of fluid armed conflicts.

In some cases, the fighting in which the new group is engaged is entirely separate from previous hostilities, and its involvement in violence so diminished that the armed conflict threshold will not be reached. A State engaged in fighting it will have to resort to law enforcement means.

In other cases, the new organized armed group might in fact continue to fight alongside the group to which its members formerly belonged, essentially continuing the same military operations. The splintering of the two groups will make little difference for their adversary, which continues to face the same fighters, but in two separate groups. In such a situation, the contribution by the splinter group, when considered by itself, might be relatively small; but the reality for the opposing side is that the splinter group adds to the military capacity of an existing adversary.

A more difficult question will arise if the original group disengages from the conflict but the new group continues to engage in the hostilities. This has sometimes been the case, for instance, when peace agreements are concluded but splinter factions reject them and continue to fight. In such situations, the splinter group – while remaining organized – might be weakened or reduced in size, and its confrontations with the State might not reach the threshold of intensity that is required under IHL. Should the State then be required to revert to law enforcement measures even if the group continues to engage in acts of a military nature? Should the criterion for the end of a non-international armed conflict be applied, namely that hostilities have ceased and there is no real risk of their resumption? Would the classification of the situation depend on whether the State can reasonably foresee that the threshold of violence will again rise to the level of armed conflict? Or should the intensity be assessed on the basis of the intensity that existed before the group split off?

As conflicts become ever more complex, and the seemingly endless variety of non-State armed groups continues to pose factual and legal puzzles, the ICRC encourages continued reflection on how the fluidity of armed groups and the interaction between them affect the application of the legal criteria relevant for determining their involvement in non-international armed conflict.

## **2. The legal regime protecting persons living in territory under the control of non-State armed groups**

Concomitant to the many contemporary non-international armed conflicts and the multiplication of non-State armed groups, a significant number of armed groups exercise *de facto* control over territory and persons living therein. Such control may take various forms. In some contexts, armed groups exercise military control over territory while State organs continue to be present and provide certain services – such as health care, education, or public welfare. In other contexts, non-State armed groups exercise *de facto* control over territory and State forces

or organs are no longer present. In these situations, and in particular if territorial control is prolonged, some non-State armed groups may develop State-like capacities and provide services for the population.

For civilian populations, living under the *de facto* control of a non-State armed group can exacerbate pre-existing needs and vulnerabilities, create new ones, or – in other instances – provide a degree of stability in conflict-ravaged environments. Regardless of whether civilians live under the control of a State or non-State party to a conflict, their essential concerns remain the same: they need security, work and livelihoods, respect for their basic rights, and education for their children.

Unlike in international armed conflict, there is no law of occupation for non-international armed conflict, meaning there are no IHL rules explicitly designed to regulate the relationship between non-State armed groups and persons living under their control. This could give the impression that international law leaves non-State armed groups unrestrained in these situations; however, IHL does, in fact, provide essential humanitarian rules protecting civilians in armed conflicts. Beyond these rules, there is debate about the applicability of human rights law to non-State armed groups.

### *The applicability of IHL in territory under the de facto control of armed groups*

When non-State parties to armed conflicts control territory over an extended period of time, IHL continues to apply and provide protection to civilians.

IHL applies for the entire duration of a conflict. In protracted conflicts, hostilities may stall or freeze for certain periods without a peaceful settlement being reached by the parties. As was discussed in the ICRC's 2015 report on IHL and the challenges of contemporary armed conflicts, various views exist on the applicability of IHL in these situations. In the ICRC's view, non-international armed conflicts end when hostilities cease and there is no real risk of their resumption, which is rarely the case when control over territory remains contested among belligerents.<sup>71</sup>

For as long as IHL applies, its rules, which contain fundamental humanitarian protections, apply to the treatment by non-State armed groups of persons living under their control. Within territory controlled by a State or non-State party to a conflict, parties to the conflict are bound by IHL in connection with all acts having a “nexus” or link to the armed conflict. The nexus requirement has been understood to mean that an act must be “shaped by or dependent upon the environment – the armed conflict – in which it is

71 For detailed discussion of the beginning and the end of the application of IHL in non-international armed conflict, see ICRC, *IHL Challenges Report 2011* and *IHL Challenges Report 2015*; ICRC, *ICRC Commentary on GC I*, paras 483–502.

committed” – in other words, that the armed conflict played an essential role in a person’s ability, decision, and objective to engage in certain conduct.<sup>72</sup> The nexus requirement ensures that the relationship between the State and the population, or between members of the population, continues to be regulated only by its obligations under human rights law, unless an act has a nexus to the conflict. It has been argued that in territory under the *de facto* control of a non-State party to a non-international armed conflict, only acts with a narrow link to the conflict would have such a nexus: thus, acts of the non-State armed groups that aim primarily to maintain law and order among the civilian population, or the provision of essential services, would fall outside the scope of IHL, and would be governed by other bodies of law, including human rights law. The other view, submitted here, is that the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their *de facto* control is inherently linked to the conflict in question. The armed conflict plays a substantial part in the group’s ability to control the lives of those living under its control and the manner in which such control is exercised. As a result, IHL applies and therefore protects persons living in territory under the *de facto* control of non-State armed groups.

### *Protective rules provided by international law and their limitations*

IHL provides fundamental and non-derogable protection for those affected by conflict. It protects the lives and dignity of civilians and addresses their acute humanitarian needs.

IHL obliges non-State armed groups to treat civilians living under their control humanely and without any adverse distinction. It prohibits all acts of violence against life and person; it prohibits pillage; and it requires parties to conflict to respect the convictions and religious practices of civilians under their control and to take special care not to damage or destroy cultural property. IHL defines a legal protection framework for persons deprived of their liberty and prohibits the passing of sentences without a fair trial; it provides rules protecting displaced persons; it establishes a framework regulating humanitarian assistance for the civilian population; it requires parties to conflict to collect, protect and care for the wounded and sick; and, as indicated above, Additional Protocol II protects the continuous education of children.

IHL applicable in non-international armed conflict does not, however, contain rules addressing issues such as the provision of public order and safety, the possible collection of taxes, or the adoption of laws regulating life in such territory.<sup>73</sup> IHL applicable in non-international armed conflict tends to be less

72 See ICTY, *Prosecutor v. Kunarac*, Judgment (Appeals Chamber), IT-96-23&23/1, 12 June 2002, para. 58. See also ICRC, *ICRC Commentary on GC I*, para. 460.

73 In contrast, rules addressing such issues exist for situations of occupation in international armed conflict. See Arts. 43, 48, and 49, The Hague Regulations of 1907. See also Art. 64, Fourth Geneva Convention.

elaborate, or silent, on the protection of certain other rights, in particular the political, economic, social, and cultural rights of the population.<sup>74</sup> Issues pertaining to the relationship between citizens and authorities are primarily the purview of human rights law. Ensuring continued protection of the human rights of persons living in territory under the *de facto* control of armed groups is, however, challenging as a matter of law and practice.

First, unlike IHL, human rights treaties bind only States. In the view of committees of human rights experts and of courts, States have an obligation to take steps to protect—to the extent possible—the rights of persons living in their territory but under the *de facto* control of a non-State armed group. And second, it is a matter of controversy whether human rights law also binds non-State actors. In a number of instances, States—notably through resolutions adopted in UN organs such as the Security Council, the General Assembly, or the Human Rights Council—have called on non-State armed groups that exercise *de facto* control over territory to comply with human rights law in addition to respecting their IHL obligations. In the absence of relevant treaty law and owing to limited State practice, however, the applicability of human rights law to non-State armed groups is an issue that remains unsettled. Essential questions remain unanswered, such as the source, scope, and limitation of non-State armed groups’ potential human rights obligations, and the relationship between these potential obligations and those of the territorial State. Moreover, while non-State armed groups are, clearly, able to refrain from violating basic human rights, many will not have sufficient capacity to comply with the more sophisticated obligations deriving from human rights law, in particular obligations to take positive measures to protect and fulfil human rights.

To overcome these legal challenges and engage in protection-related dialogue with all parties to armed conflict, the ICRC takes a pragmatic approach and operates on the premise that “human rights responsibilities may be recognized *de facto*” if a non-State armed group exercises stable control over territory and is able to act like a State authority.<sup>75</sup> It is difficult to conclude that all non-State armed groups have human rights obligations as a matter of law; however, this approach recognizes that the needs of the civilian population living under the *de facto* control of a non-State armed group may warrant the engagement of humanitarian and human rights organizations with such groups on a broader scope of issues than those tackled by IHL applicable in non-international armed conflict. This is particularly important in protracted conflicts.

74 Dedicated human rights treaties—such as the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child, or the CRPD—also provide rights addressing certain categories of people and complementing IHL rules.

75 ICRC, *IHL Challenges Report 2011*, pp. 14–15.



### 3. Detention by non-State armed groups

More than 80 armed groups hold detainees in the countries in which the ICRC operates. Where possible, the ICRC engages with non-State armed groups, as it does with all parties to armed conflict, to ensure that the dignity and physical integrity of detainees are respected, and that they are treated in accordance with IHL and humanitarian principles; and, whenever necessary, to help detaining authorities to fulfil their obligations.

Deprivation of liberty puts people in a vulnerable situation. This vulnerability can be aggravated by various factors, such as by whom they are held and the context and reasons for their detention.<sup>76</sup> Detention by non-State armed groups often presents several practical and legal challenges. These derive primarily from the significant diversity of non-State armed groups: this diversity is related to their differing operational realities, organizational structures, material capabilities, knowledge and acceptance of international law, and motivation or ideology.

The treatment of detainees, and the judicial or other procedures – if any – applied to their deprivation of liberty, also vary, depending on the reasons for their detention. Persons deprived of their liberty by armed groups include members of an adversary's security forces and individuals suspected of supporting the adversary; persons arrested for common crimes in territories under their *de facto* control; an armed group's own members; or hostages, the latter necessarily held in violation of IHL. The reasons for which armed groups deprive individuals of their liberty are often multiple and overlapping: ensuring their security and weakening an adversary by rendering its forces *hors de combat*; maintaining "law and order"; or ensuring discipline within their own ranks. They also detain with the aim of exchanging detainees with the adversary; to demonstrate their power by holding detainees; or to extract money.

IHL contains a set of basic rules protecting all detainees held in relation to non-international armed conflict, including those held by non-State armed groups. It has rules that clearly prohibit violence to life and person. While common Article 3 is silent on conditions of detention, Additional Protocol II – when applicable – and customary IHL rules require parties to armed conflict to provide humane conditions of detention for all conflict-related detainees. Moreover, IHL prohibits the passing of sentences and the carrying out of executions without a fair trial.

The complex realities outlined above pose legal challenges at different levels, many of which are yet to be resolved. For certain rules, such as those on the treatment of detainees and their conditions of detention, the challenge may be one of ensuring that non-State armed groups know and accept the law and integrate its provisions into their internal rules and organizational culture; have practical guidance to implement IHL in different operational contexts; and dispose of the requisite material resources to ensure humane conditions of

76 See ICRC, "Reports and Documents: Protecting People Deprived of Their Liberty", *International Review of the Red Cross*, Vol. 98, No. 903, 2016, pp. 1043–1066.

detention. More complex legal issues arise regarding the prohibition against arbitrary detention; IHL rules on fair trials; procedural safeguards required for internment; and the prohibition against detainee transfers in violation of the principle of *non-refoulement*. For instance, fair-trial obligations require that sentences be based on “law” and be pronounced by a “regularly constituted court”, such as those commonly operating in State legal systems. Moreover, in the ICRC’s view, ensuring that internment does not amount to arbitrary detention requires that grounds for internment be defined in a document binding for the detaining forces, and internment decisions be reviewed by an “independent and impartial review body”.<sup>77</sup> It remains to be clarified what these and other legal notions mean in the context of detention by armed groups, and how armed groups can implement such rules.

The combination of practical challenges and a lack of clarity on, and respect for, legal norms protecting detainees in the hands of non-State armed groups often creates significant humanitarian needs. It is important to identify ways in which different armed groups can implement applicable IHL rules. The ICRC also continues to adapt its strategies for using IHL and humanitarian principles to improve protection for detainees in the hands of non-State armed groups.

<sup>77</sup> ICRC, “Internment in Armed Conflict: Basic Rules and Challenges”, opinion paper, 2014, available at: [www.icrc.org/en/download/file/3223/security-detention-position-paper-icrc-11-2014.pdf%20](http://www.icrc.org/en/download/file/3223/security-detention-position-paper-icrc-11-2014.pdf%20).

## V. Terrorism, counterterrorism measures, and IHL

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In recent years, States have had to confront a threat emanating from individuals and non-State armed groups that resort to acts of terrorism. In response, States and international organizations have developed increasingly robust counterterrorism measures. There is no doubt that it is legitimate and necessary for States to act at the national, regional and international level to ensure their security and the security of their population. Acts of terrorism negate the basic principle of humanity and go against the principles underlying IHL. The ICRC condemns acts of terrorism regardless of their perpetrators, whether or not they are committed in the context of armed conflict.

At the same time, the ICRC is concerned about the humanitarian consequences of counterterrorism operations. In many contexts, especially in Africa, the Middle East and Asia, counterterrorism operations have been conducted in the context of armed conflict by State armed forces – alone, in coalitions, or under the auspices of an international organization. The ICRC is worried by the frequently held misperception that IHL does not apply or applies in a modified manner to groups or persons designated as terrorists, and to their families.

This chapter (1) seeks to clarify some aspects of the applicability of IHL to counterterrorism operations; (2) draws attention to the fact that counterterrorism measures can have real and adverse effects on the humanitarian work of impartial humanitarian organizations, including the ICRC; and (3) discusses the status and protection of foreign fighters and their families under IHL, focusing in particular on the needs of women and children.

### **1. The applicability of IHL to States fighting “terrorism” and non-State armed groups designated as “terrorists”**

The ICRC has, for many years now, been observing three key challenges to the applicability of IHL to counterterrorism operations.

First, some States deny that IHL applies to their counterterrorism operations – even in the face of plainly obvious situations of armed conflict – out of a concern that recognizing the existence of an armed conflict could somehow legitimize “terrorists”. This concern is as prevalent today as ever – despite the fact that IHL norms (notably common Article 3) expressly recognize that the applicability of IHL does not confer any legal status on a non-State party to an armed conflict. Denying that non-State armed groups designated as “terrorists” can be party to a non-international armed conflict is problematic, as it greatly impedes application of the fundamental rules that IHL sets out for both State and non-State parties to conflict (for instance, the rules on the conduct of hostilities or the rules governing humanitarian access), and may jeopardize the effective application of the protection contained therein.

Second, there is a tendency among some States to consider any act of violence by a non-State armed group in an armed conflict as an act of terrorism, and therefore necessarily unlawful, even when the act in question is not in fact prohibited under IHL. This approach is likely to diminish any incentive to comply with IHL.

Third, some States have developed a discourse according to which the *exceptional* threat posed by non-State armed groups designated as “terrorist” requires an *exceptional* response. Some States are dehumanizing adversaries and employing rhetoric to indicate that actors designated as “terrorist” are undeserving of the protection of international law, including IHL: this is an alarming trend, and the ICRC has been following it closely.

Fortunately, these positions are not shared by all stakeholders involved in the fight against terrorism. Many States recognize that IHL applies to their counterterrorism operations when the conditions for its application are met. The determination as to whether an armed confrontation involving such groups amounts to an armed conflict, or is part of one, needs to be made objectively and exclusively on the basis of the facts on the ground and the recognized criteria for conflict classification under IHL.

Thus, if a non-State armed group that has been designated as “terrorist” is sufficiently organized for the purposes of IHL, and is involved in sufficiently intense armed confrontations with the State or other armed groups, the situation will amount to a non-international armed conflict, and will be governed by IHL. In contrast, situations of violence involving individuals or groups designated as “terrorist” but remaining below the threshold of armed conflict are not governed by IHL. In such situations, human rights law will govern counterterrorism operations.<sup>78</sup>

78 In addition to IHL and human rights law, international and regional instruments addressing terrorism may apply, such as the International Convention for the Suppression of Terrorist Bombings (1997), the International Convention for the Suppression of the Financing of Terrorism (1999), the Council of Europe Convention on the Prevention of Terrorism (2005), or the Shanghai Convention on Combating Terrorism (2001). In the ICRC’s view, instruments aimed at combating terrorism should never define those acts as “terrorist” that are governed by IHL and not prohibited by it when committed during armed conflict, such as attacks against military objectives or military personnel.

Claims of “exceptionalism” have also resulted in overly permissive interpretations of IHL rules. Examples include broad interpretations of who may be lawfully targeted, under which persons involved in financing organized armed groups designated as “terrorist”, for instance, are targeted; a laxing in interpreting the principle of proportionality, permitting excessive incidental loss of civilian life, injury to civilians, and/or damage to civilian objects; and a selective approach to the rules governing deprivation of liberty of persons designated as “terrorists”, justifying, for instance, prolonged solitary confinement, deprivation of family contact, or the impossibility of challenging the lawfulness of the detention.

Such permissive interpretations risk becoming new standards far below those that have been accepted for decades. They may lead to the dismantlement of the basic protection afforded by IHL to victims of armed conflict, including persons *hors de combat*, who remain protected even if they have been designated as “terrorists”. States should reaffirm the fact that IHL is a balanced body of law and its rationale still valid. IHL permits neutralizing and overcoming the enemy while preserving standards of humanity in armed conflict. IHL includes rules allowing, for instance, lethal force to be directed against lawful targets based on the principle of military necessity, or the internment of enemies for imperative reasons of security. IHL does not hinder States from fighting terrorism effectively, while setting out a baseline of humanity that all States have agreed to respect, even in the most exceptional situations.

## 2. Counterterrorism measures and principled humanitarian action

Efforts, undertaken within the framework of counterterrorism measures, to curb direct and indirect support to so-called “terrorist organizations” have led to increased monitoring of and restraints on all activities seen as providing support or assistance to non-State armed groups or individuals designated as “terrorists”.

It is clear from various armed conflicts in the past decade that counterterrorism measures also adversely affect the ability of impartial humanitarian organizations—including the ICRC—to carry out their humanitarian activities and conduct principled humanitarian action in conflict settings. This is particularly true in areas where armed groups designated as “terrorists” are active and where principled humanitarian action is most needed. In some contexts, counterterrorism measures have prevented humanitarian relief and protection from reaching those most in need.

Among the various counterterrorism measures developed by States and international organizations, some are of particular concern: penal laws criminalizing any form of support to individuals or groups designated as “terrorists”; sanctions regimes aimed at ensuring that no resources benefit such individuals and groups; and ever stricter and more cumbersome counterterrorism clauses in funding agreements between donors and humanitarian organizations. A growing body of research shows that these measures, inadvertently or

deliberately, have impeded – or even prevented – impartial humanitarian action, to the detriment of those in need.<sup>79</sup> They can affect a variety of humanitarian activities, many of which are elements of the ICRC's mandate: visiting and providing humanitarian assistance to detainees (including family visits); delivery of aid to meet the basic needs of the civilian population in hard-to-reach areas; medical assistance to wounded and sick fighters; first-aid training; war surgery seminars; or IHL dissemination to weapon bearers.

In 2011, the ICRC raised this issue publicly and expressed its concern about the impact of counterterrorism measures on humanitarian action.<sup>80</sup> The ICRC has reiterated its position on various occasions, notably through statements before the UN General Assembly Sixth Committee and the UN Security Council.

Counterterrorism measures adopted by States and international organizations should not contradict the humanitarian principles that States have supported politically or endorsed through IHL treaties, and should not hinder impartial humanitarian organizations from carrying out their activities in a principled manner.

In legal terms, counterterrorism measures impeding principled humanitarian action are incompatible with the letter and spirit of IHL. For example, a number of counterterrorism measures criminalize one or more of the following acts: engagement with non-State armed groups designated as “terrorist”; presence in areas where these groups are active; or delivery of medical services to wounded or sick members of such groups. Such prohibitions are incompatible with three areas of IHL: the rules governing humanitarian activities, including the entitlement of impartial humanitarian organizations to offer their services and the obligation to allow and facilitate the relief activities undertaken by such organizations; the rules protecting the wounded and the sick as well as those providing medical assistance, notably the prohibition against punishing a person for performing medical duties in line with medical ethics; and the rules protecting humanitarian personnel.

Recent experience has shown that corrective or mitigating measures can carve out a humanitarian space in the counterterrorism realm. In particular, a number of “humanitarian exemptions” have been adopted in recent instruments. The objective of such exemptions is to exclude from the scope of application of counterterrorism measures exclusively humanitarian activities undertaken by impartial humanitarian organizations such as the ICRC. They have proven to be an effective way to preserve humanitarian activities, in line with the letter and

79 See Norwegian Refugee Council, *Principles under Pressure: The Impact of Counter-Terrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018; available at [www.nrc.no/resources/reports/principles-under-pressure/](http://www.nrc.no/resources/reports/principles-under-pressure/); Jessica S. Burniske and Naz Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, 2017; available at <https://pilac.law.harvard.edu/pilot-empirical-survey-study-and-comment/>; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, commissioned by the United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013; available at [www.unocha.org/sites/unocha/files/CounterTerrorism\\_Study\\_Full\\_Report.pdf](http://www.unocha.org/sites/unocha/files/CounterTerrorism_Study_Full_Report.pdf).

80 See ICRC, *IHL Challenges Report 2011*, pp. 48–53.

spirit of IHL. They also demonstrate that fighting terrorism and preserving IHL and humanitarian activities are perfectly compatible.

Despite some useful and interesting avenues such as humanitarian exemption clauses, effective policy and legal mitigation measures preserving principled humanitarian action are still all too rare. Counterterrorism concerns are prominent in the current political environment, and humanitarian space is shrinking steadily.

Many stakeholders have released statements or adopted resolutions underscoring the need for counterterrorism measures to comply with IHL (see, for instance, UN Security Council Resolution 2462 of March 2019 on combating the financing of terrorism) and not impede principled humanitarian action (see, for instance, UN General Assembly Resolution A/RES/72/284 of June 2018 on the UN Global Counter-Terrorism Strategy). It is now necessary to close the gap between these commitments and the practical measures needed to implement them. Having adopted these resolutions, States and international organizations must now find ways to effectively resolve the tension between counterterrorism measures and principled humanitarian action. The ability of impartial humanitarian organizations to carry out their exclusively humanitarian activities, and to provide relief to those who need it most, is at stake.

### 3. Status and protection of foreign fighters and their families

The phenomenon of “foreign fighters and their families” – nationals of one State who travel abroad to fight alongside a non-State armed group in the territory of another State, and the families of these persons – has grown in recent years.<sup>81</sup> A great deal of media attention within the context of the conflicts in Iraq and Syria has been directed towards the activities and fate of foreign fighters and their families. But it is imperative to recall that the wider population – beyond the media’s spotlight – also continues to suffer the devastating effects of armed conflict: people have been separated from their families; they have been displaced internally and across borders; they have been injured and killed; and their livelihoods have been destroyed. The scale of humanitarian needs arising from these conflicts is enormous, and the ICRC is working to address this suffering in a number of ways.<sup>82</sup> During this work, and alongside the pressing needs of the local population, the ICRC has identified specific concerns with regard to the treatment of foreign fighters and their families.

The phenomenon is characterized by the diversity of individual cases and the corresponding difficulty of discussing the applicable legal framework in general rather than in case-specific terms. The nature of an individual’s

81 The present section builds on the discussion of “foreign fighters” in ICRC, *IHL Challenges Report 2015*, pp. 19–20.

82 See the ICRC president’s statement of 22 March 2019, available at: [www.icrc.org/en/document/statement-icrc-president-upon-ending-5-day-visit-syria](http://www.icrc.org/en/document/statement-icrc-president-upon-ending-5-day-visit-syria).

association with a non-State armed group, the individual's nationality, and which State has jurisdiction over the individual: these are a few of the many factors that differ from case to case. Thus, generalizations about foreign fighters and their families risk omitting facts from which important legal consequences flow: for example, children may accompany family members or they may have travelled to fight alongside the non-State armed group themselves (in which case they themselves are "foreign fighters"); they may have suffered the crime of unlawful recruitment and have committed crimes themselves. Similarly, caution must be exercised to avoid oversimplification with regard to women in this context. Women may have travelled voluntarily to areas where such armed groups are active, or may be victims of trafficking; they may be both perpetrators and victims of war crimes (including though not limited to sexual violence); and may have fulfilled a wide range of roles as members or civilian affiliates of a non-State armed group.

States have taken a variety of measures to quell the perceived or potential threat posed by foreign fighters and their families, including the use of force, detention, travel bans and revocation of nationality. While most security measures taken are of a law enforcement nature and therefore governed by human rights law, IHL – where applicable – must also be considered and respected.

### *The applicability of IHL to foreign fighters and their families*

"Foreign fighter" is not a term of art in IHL.<sup>83</sup> There is no *specific* regime – and there are no rules – under IHL dealing explicitly with foreign fighters and their families. IHL deals with these individuals as it does with any other person involved in or affected by armed conflict. It governs the actions of foreign fighters and their families, as well as any measures taken by States in relation to them, when these actions and measures are taken in the context of an ongoing armed conflict. Therefore, the applicability of IHL to a situation of violence in which foreign fighters and their families are present depends on whether the criteria for the existence of an armed conflict, in particular those set out in Articles 2 and 3 common to the 1949 Geneva Conventions, are met.

When foreign fighters are engaged in military operations, relevant IHL rules on the conduct of hostilities govern their conduct. They are thus subject to the same IHL principles and rules that bind any other belligerent in the conduct of their military operations.

When foreign fighters and their families are in the power of a belligerent, notably when deprived of their liberty, they must benefit from the same protection provided by IHL rules as any other person in such a situation.

<sup>83</sup> The term "foreign fighter and their families" is used here for convenience, in awareness of the fact that the term may carry a risk of stigmatization. The ICRC observes that stigmatization affects persons associated with armed groups designated as "terrorist" – and indeed can affect a wide range of individuals who have had any contact with such groups – regardless of whether they are third-country nationals.



Accordingly, in non-international armed conflicts, common Article 3 and customary IHL – as well as Additional Protocol II as applicable – will govern their treatment. Importantly, these rules require, *inter alia*, that grounds and procedures are provided by the detaining party when foreign fighters and their families are interned for imperative reasons of security, that judicial guarantees are respected where individuals face criminal charges, and that no one is transferred to an authority if there are substantial reasons to believe that the person would be in danger of being subjected to certain fundamental rights violations if transferred. In addition, differential treatment is required on bases such as a person's state of health, age, and sex. Pursuant to customary IHL, children are entitled to special respect and protection – including if they are detained for reasons related to an armed conflict – and family life must be respected as far as possible.

The designation of foreign fighters and their families as “terrorists”, as well as any perception that they pose an exceptional security threat, have no bearing on the applicability and application of the relevant IHL rules, including those containing the protection to which these individuals are entitled. At the same time, IHL in no way prevents States from prosecuting foreign fighters for violations of law that they may have committed in relation to an armed conflict.<sup>84</sup>

The fact that IHL applies to foreign fighters and their families during armed conflict does not mean that IHL applies to all security measures taken by States against these persons. Only States that are parties to the armed conflict in which foreign fighters and their families are involved are bound by IHL. IHL rules in relation to foreign fighters and their families apply first of all in the territory in which the armed conflict is taking place. In addition, it is submitted that IHL also applies throughout the territories of all the States involved in a non-international armed conflict extraterritorially, even if hostilities related to that conflict are not taking place in their territory.<sup>85</sup> In the ICRC's view, foreign fighters and their families who are in the territory of these intervening States (notably through transfer or repatriation) benefit from the protection afforded by the applicable IHL rules – including those governing detention, family contact, and the special protection of children – in addition to applicable domestic and human rights law.

In any other situation, measures against foreign fighters and their families taken by States that are not party to an armed conflict are governed by other bodies of law, notably human rights law. All States must ensure that their counterterrorism activities and security measures against persons designated as foreign fighters and their next of kin – including prosecution and deprivation of liberty – comply with the relevant international laws and standards.

84 More specifically, in the absence of a combatant privilege and immunity under the law governing non-international armed conflict, States retain under domestic law the possibility of criminalizing acts by foreign fighters – regardless of whether or not they are lawful under IHL.

85 See ICRC, *IHL Challenges Report 2015*, p. 14.

### *International law rules protecting children associated with foreign fighters*

The need to affirm that international law must govern the treatment of foreign fighters and their families arises from a persistent legislative trend that treats these individuals as exceptional cases to whom existing law does not apply. Three issues related to the treatment of children in the foreign-fighter context are emblematic of this trend.

First, States are reticent to apply the law and standards governing the treatment of children associated with armed groups (commonly referred to as “child soldiers”) to children in the foreign-fighter context who have been trained and/or used in hostilities. However, children termed “foreign fighters” remain entitled to these legal protections. Notably, States party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict are obliged, when necessary, to accord to unlawfully recruited children all appropriate assistance for their physical and psychological recovery and their social reintegration; and to cooperate for the rehabilitation and social reintegration of such children, including through technical and financial assistance.<sup>86</sup>

The second issue relates to the principle of the best interests of the child. It is a core obligation under Article 3 of the Convention on the Rights of the Child that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Decisions regarding, for example, how to repatriate and reintegrate children in the foreign-fighter context are actions to which this obligation applies, regardless of the age of the child and the nature of their involvement with a non-State armed group.

The third, related issue is the right of all children not to be separated from their parents against the parents’ will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. This right is set out in Article 9(1) of the Convention on the Right of the Child and must be respected by States Parties in the various situations of detention and repatriation that arise for foreign-fighter families.

### *Specific humanitarian concerns with regard to female foreign fighters and female family members*

The ICRC has specific humanitarian concerns regarding the current treatment and future situation of foreign fighters and their families. The stigma and level of threat ascribed to these fighters may place them at particular risk of violations of their fundamental rights. The treatment and fate of the many women in these circumstances is at times overlooked, and requires case-by-case consideration. For

<sup>86</sup> Arts. 6(2) and 7 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).

example, thousands of foreign women are located in camps, many of them accompanied by children. Regardless of their potential culpability under domestic or international law, these women have a distinct set of needs and face specific physical and psychological risks. Their distinct needs include basic female hygiene items, and medical care for pregnant women, nursing mothers, and those who have experienced sexual violence (though importantly, sexual violence affects women, men, boys and girls in such contexts). The specific risks they face include retributive violence or collective punishment for their perceived role as foreign fighters' "brides"; statelessness of their children arising from nationality laws or policies that limit women's ability to confer citizenship; and prosecutions that fail to take account of the broad range of roles and experiences of women in the foreign-fighter context.

The ICRC emphasizes that authorities who hold foreign fighters and/or their family members must treat them humanely and in accordance with international law. It recognizes that humanely and lawfully resolving the situation of foreign nationals during or after an armed conflict is inevitably complex and takes time. What happens to foreigners is often dependent on varied legal frameworks and political decisions. Measures other than local resettlement, such as repatriation or third-State resettlement, require the cooperation of multiple States. Consequently, steps to identify and secure the best solution for each foreigner should be taken as soon as possible.

# INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

## VI. Climate, armed conflict, and the natural environment

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Climate change and environmental degradation affect populations across the globe, threatening lives and exacerbating existing vulnerabilities, inequalities, and social fragility. People, communities, and countries affected by armed conflict tend to be especially vulnerable to the consequences of climate change because conflicts limit their capacity to adapt and protect themselves. This is in part because conflicts – and especially protracted ones – harm assets required to facilitate adaptation to climate change, such as infrastructure, markets, institutions, social capital, and livelihood. Within those countries, vulnerable populations are disproportionately affected by food insecurity, loss of livelihood opportunities, health impacts and displacement, which are compounded by environmental degradation and climate change. People will keep trying to cope with and adapt to a degraded environment, growing risks of floods, droughts, extreme heat and poverty by searching for new livelihood strategies, changing their way of life or leaving their homes.

To bolster the sustainability of its humanitarian response, the ICRC has committed itself, in its institutional strategy for 2019–2022, to helping conflict-affected communities reduce their vulnerability by reinforcing their ability to adapt to the combined consequences of conflict and climate shocks. The strategy reaffirms a long-standing commitment to mitigating the impact of environmental degradation and climate change on people and to enhancing the ICRC's own environmental policies. As part of this commitment, the ICRC is also revising its 1994 Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict<sup>87</sup> to promote greater respect for existing IHL rules protecting the natural environment from the effects of armed conflict.

<sup>87</sup> The Guidelines were annexed to the *Report of the Secretary-General on the United Nations Decade of International Law* (UN Doc. A/49/323, 1994); UN General Assembly Resolution 49/50 (1994) invited all States to give due consideration to the possibility of incorporating the Guidelines in their military manuals and other instructions for military personnel.

## *Effects of armed conflict on climate and the environment*

Over 80% of all major armed conflicts between 1950 and 2000 took place directly in biodiversity hotspots that sustain around half the world's plants and many rare species of animals.<sup>88</sup> Armed conflicts have always been a threat to the environment, and environmental degradation in turn affects the well-being or even the survival of people. They can lead to environmental degradation and destruction, including by contaminating land and soil, with effects frequently extending over large areas, including to coastal and marine zones, and to water sources. These consequences of conflict can remain in place for years or decades after a war.

The environment is at risk from direct attacks or from the use of certain means or methods of warfare. It is also at risk from damage and destruction to the built environment – including industrial complexes, combustible storage and processing facilities, factories and plants, agricultural facilities, and solid- and hazardous-waste sites – across urban and rural areas. Attacks against, or incidental damage to, extractive mines and chemical facilities can lead to water, soil and land contamination, or release pollutants into the air. Explosive remnants of war can also severely affect the environment by contaminating the soil and water sources, and harming wildlife. In certain circumstances, the environmental consequences of armed conflict can also contribute to climate change. For instance, the destruction of large areas of forest can have detrimental climatic consequences. Damage to infrastructure, such as oil installations and big industrial facilities, can force large volumes of greenhouse gases and other air-borne pollution into the atmosphere.

In addition to the effects resulting from the acts of parties to armed conflicts, certain indirect effects of armed conflict are also important. These include the collapse of governance; the diminution or erosion of institutional capacities in environmental management and of the coping mechanisms employed by the civilian population; and the deterioration of entire infrastructure service systems owing to lack of proper operation and maintenance over prolonged periods of time. Furthermore, when local populations are forced to avoid or abandon certain areas, including because of environmental damage, it can lead to the unsustainable exploitation of other areas, putting the environment under even greater stress. Another important contributor to environmental damage is the exploitation of natural resources to sustain war economies or for personal gain.

### *The revised ICRC Guidelines for the Protection of the Natural Environment in Situations of Armed Conflict*

The environment is frequently one of the casualties of war – but the damage is often not visible and environmental damage tends not to be the priority of warring parties.

88 Thor Hanson *et al.*, “Warfare in Biodiversity Hotspots”, *Conservation Biology*, 23 (3), 2009, pp. 578–587.

A certain amount of environmental harm is inherent in armed conflict, but it cannot be unlimited. IHL does not address all environmental consequences of armed conflict, but it does contain rules that provide protection to the natural environment and that seek to limit the damage caused to it.

The revision of the 1994 Guidelines seeks to reflect current treaty and customary IHL. The revised Guidelines represent a selection of existing IHL rules and seek to provide clarification on the interpretation of these rules and their sources. Although the focus is on IHL, the Guidelines recall that other rules of international treaty and customary law protecting the natural environment may continue to apply in armed conflicts. The Guidelines aim to act as a reference tool that parties to conflicts can use to protect the natural environment – a tool that can help them to adopt concrete measures to promote, implement, and apply IHL rules.

Under IHL, there is no agreed legal definition of the term “natural environment”. According to the Commentary on Article 55 of Additional Protocol I, the notion of the natural environment includes everything that exists or occurs naturally and is therefore not man-made, such as the general hydrosphere, biosphere, geosphere, and atmosphere (including fauna, flora, oceans and other bodies of water, soil, and rocks). In addition, the natural environment includes natural elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water, and livestock. It is of particular significance that this understanding does not refer exclusively to organisms and inanimate objects in isolation; rather, the term “natural environment” also refers more broadly to the *system* of inextricable interrelationships between living organisms and their inanimate environment. Considering the above, and as also noted in the Commentary of Article 55, the term “natural environment” should be understood in the widest sense possible, in line with the meaning States have given this term in the context of IHL. This approach takes into account the fact that the notion of the “natural environment” may evolve over time, based on increased knowledge but also as the environment itself is subject to constant change.

IHL contains a family of rules that protect the natural environment during armed conflict. The first type of protection that IHL offers is contained in the rules that specifically protect the natural environment as such. These include the prohibitions against using means or methods of warfare that are intended, or may be expected, to cause long-term, widespread and severe damage to the natural environment. As mentioned in the ICRC’s report on strengthening IHL in 2011, the meaning of “widespread, long-term and severe” is subject to debate.<sup>89</sup> Therefore, the revised Guidelines seek to clarify these terms, while recognizing that further refinement remains necessary. IHL also explicitly prohibits attacking the natural environment in reprisal. These rules, which were

89 ICRC, “Strengthening Legal Protection for Victims of Armed Conflicts”, 31IC/11/5.1.1, 2011, available at: [www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf](http://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf).

adopted in 1977, were among the first to explicitly protect the natural environment in times of armed conflict, following the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The recognition among the drafters of Additional Protocol I of the need to protect the natural environment, particularly at a time when this was still quite a novel idea, was a significant step towards affirming the importance of this protection.

The second type of protection is contained in general IHL rules that protect the natural environment, without this being their primary purpose. Importantly, it is generally recognized today that, by default, the natural environment is civilian in character. On this basis, all parts or elements of the natural environment are civilian objects, unless parts of it become military objectives. Its various parts therefore benefit from the corresponding protection under IHL, in particular the general principles and rules on the conduct of hostilities, i.e. the principles of distinction, proportionality, and precautions. The applicability of these principles to the natural environment is widely recognized but challenges can arise in practice.

An attack cannot be directed against parts of the natural environment unless it is directed against a specific element of the natural environment that has become a military objective. This may be the case if, by its nature, location, purpose or use, a distinct part of the natural environment makes an effective contribution to military action, and if its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. As the intrinsic character of the natural environment is civilian, it can never by its “nature” make an effective contribution to military action, but it may make an effective contribution to military action by its location, purpose, or use. For example, a hill may contribute effectively to the military action of enemy forces if it provides them with a vantage point over their adversary’s camp. The foliage in a specific forested area may also contribute effectively to military action by providing cover for a troop manoeuvre. However, the concept of an “area” must not be interpreted so broadly that a large expanse of forest is deemed a military objective simply because combatants are located in a small portion of it. Furthermore, the contribution to military action must be “effective” and made to the actual war-fighting capabilities of the adversary and not merely towards its war-sustaining capabilities.<sup>90</sup> For instance, an area of the natural environment where the mining of high-value natural resources takes place does not make an effective contribution to military action even though it may generate significant revenue for the war effort.

Based on its civilian character, the natural environment is also protected against “incidental damage; it is prohibited to launch an attack against a military objective which may be expected to cause damage to parts of the natural environment constituting civilian objects which would be excessive in relation to the military advantage anticipated. Bearing in mind that an assessment of

90 For more on the ICRC’s position, see Laurent Gisel, “The Relevance of Revenue-Generating Objects in Relation to the Notion of Military Objective”, in *Proceedings of the Bruges Colloquium: The Additional Protocols at 40: Achievements and Challenges*, 2017, pp. 139–151.



whether damage would be “excessive” must be made in each individual case, taking into account the circumstances ruling at the time, an example of disproportionate incidental damage would be to cause an entire forest to burn when attacking a single, small enemy campsite of minor importance. It is the ICRC’s position that the foreseeable indirect, or reverberating, incidental effects of an attack must also be considered in the proportionality assessment. This is of particular importance for the protection of the natural environment, which is often affected indirectly rather than directly by hostilities. Whether an effect is reasonably foreseeable will depend on the facts of each case; however, the assessment should be informed by past practices and empirical data. Finally, in the conduct of military operations, including during troop movements or the establishment of military bases, constant care must be taken to spare civilian objects, including parts of the natural environment. Lack of scientific certainty regarding the effects on the natural environment of certain military operations does not absolve a party to conflict from taking precautions.

The natural environment is also protected by other IHL rules that seek to prevent or limit damage. These include rules on specially protected objects, such as works and installations containing dangerous forces and objects indispensable to the survival of the civilian population, as well as rules on enemy property and pillage. Moreover, protection is also granted to the natural environment through the rules on the use of certain weapons, including the prohibition against using herbicides as a method of warfare; rules on incendiary weapons; the prohibitions against using poison or poisoned weapons, biological weapons and chemical weapons; rules on landmines; and rules to minimize the impact of explosive remnants of war.

It is not enough that there are important IHL rules protecting the natural environment during armed conflict; they must be better disseminated, implemented and enforced, as well as reaffirmed and clarified. Ultimately, respect for IHL can limit the impact that armed conflict can have on the natural environment and on climate change.

# INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

## VII. Enhancing respect for IHL

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In each report on IHL and the challenges of contemporary armed conflicts, the ICRC has emphasized that the single most important challenge to IHL is lack of respect for it. Efforts to enhance respect for IHL should be taken by all parties to armed conflict; by States, at the national, regional, and international level;<sup>91</sup> and by all actors that can influence those involved in the fighting. The first – and a pivotal – responsibility that States have is to “bring IHL home”, which means to consider ratifying or acceding to IHL treaties; to integrate into domestic law IHL treaties to which the State is party; and to integrate IHL obligations into military training and all levels of military planning and decision-making.<sup>92</sup> The ICRC and National Red Cross and Red Crescent Societies have long-standing and complementary mandates in these endeavours.

Integrating IHL into domestic law and military doctrine is only the starting point for enhancing respect for it. This report presents a selection of additional, non-exhaustive legal and operational measures that can affect how IHL is respected. These include (1) effective investigation by States of their own forces for alleged violations of IHL; (2) measures by actors supporting parties to armed conflicts to further respect for IHL among those they support; (3) examining and applying the findings of the research underpinning the study on the roots of restraint in war; and (4) presenting concrete examples of IHL compliance.

### 1. Investigations in armed conflict

Investigations into alleged violations of IHL are recognized as critical for the proper application of this body of law in both international and non-international armed

91 Starting in 2011 and under a renewed International Conference mandate in 2015, the ICRC and Switzerland co-facilitated consultations and subsequently an intergovernmental process aimed at improving compliance with IHL. Participating States discussed a range of options to that end. A procedural report of the process (2015–2019) is provided in *Factual Report on the Proceedings of the Intergovernmental Process on Strengthening Respect for IHL (Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent)*, 33IC/19/9.1.

92 It is hoped that the 33rd International Conference will adopt a resolution containing a plan of action (or road map) in this respect.

conflict, and are a way for parties to armed conflict to enhance respect for IHL on the ground.

A number of States and their militaries have recognized the importance of robust domestic investigations into the lawfulness of their own actions in armed conflict. There are, however, significant differences in the various domestic legal frameworks and in practice across States in the way investigations are carried out. Clarity on a number of issues would appear to be useful, including the circumstances in which investigations should be triggered, the different forms investigations may take depending on the nature of an incident, and the principles and standards applicable during the investigation process. In 2017, the ICRC joined the Geneva Academy of International Humanitarian Law and Human Rights' work to develop guidelines for investigating violations of IHL.<sup>93</sup>

This work has been underpinned by extensive research into the domestic law and practice of States and informed by a number of meetings and bilateral engagements with military and government experts, academics and non-governmental organizations, in their personal capacity. The intention is not to set out a uniform investigation process for all States. Instead, it is to identify and present – while remaining sensitive to the differences that characterize domestic legal and investigative systems – a range of practical and legal issues that can arise in investigations or should be considered beforehand. The aim is also to provide practical assistance by setting out a general framework for investigations in armed conflict and, where relevant, the corresponding international principles and standards.<sup>94</sup>

Legal sources for a duty to investigate can be found in treaty law, *inter alia*, in the obligation of the High Contracting Parties to the Geneva Conventions and Additional Protocol I, applicable in international armed conflict, to enact any legislation necessary to provide effective penal sanctions for persons suspected of having committed or ordering the commission of grave breaches of their provisions. States have a legal obligation to search for such persons, regardless of their nationality, and to carry out criminal proceedings – which necessarily includes investigations – so as to bring the perpetrators to justice.

Other “serious violations of the laws and customs of war” – a legal term of art synonymous with “war crimes” – that may be committed in international or non-international armed conflict must also be dealt with. Under customary IHL, States must investigate all war crimes committed by their nationals or on their territory, and other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects. A list of “other serious violations of the laws and customs of war”, generally considered to reflect customary law, is provided for in the Statute of the International Criminal Court.<sup>95</sup>

93 Geneva Academy of International Humanitarian Law and Human Rights and ICRC, *Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice*, 2019, available at: [www.icrc.org/en/download/file/104871/guidelines-investigating-violations-ihl\\_policy\\_good-practice.pdf](http://www.icrc.org/en/download/file/104871/guidelines-investigating-violations-ihl_policy_good-practice.pdf).

94 The Guidelines may prove useful to other actors too, such as non-State armed groups party to non-international armed conflict.

95 See Art. 8(2)(b), (c), and (e) of the Rome Statute of the International Criminal Court (1998).

It should be noted that apart from the “repression” of grave breaches and other “serious violations of the laws and customs of war”, including by means of criminal prosecution, States also have a duty to “suppress” other violations of IHL. “Suppression” refers to administrative measures that States may take to deal with non-criminal violations of IHL, such as administrative investigations.

In practice, the existence of effective domestic procedures and mechanisms for investigations in armed conflict serves to enhance a State’s military operational effectiveness. Investigations may be a source of information on the success or failure of military operations and enable appropriate steps to be taken in the latter case. They can also assist in the identification of good practice and lessons learned. Ultimately, investigations are crucial for maintaining discipline and good order in the armed forces.

Investigations are also a form of accountability to a State’s own population, to the victims of violations of IHL and their next of kin, the population of another territory in which its military may be operating, as well as to the international community. They can demonstrate that a State is adhering to its international obligations – either by clarifying that IHL was not violated or by demonstrating that the State is addressing an alleged violation of the law and taking appropriate corrective action. A genuine effort to comply with the law and a rejection of impunity for violations may, for example, increase trust in the military’s actions. A State striving to implement its legal obligations is also helping to promote the overall credibility of the law.

The text of the Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice, published in 2019, contains 16 guidelines, each followed by a commentary. The Guidelines draw on common elements found in international law and domestic laws and policies, and are informed by State practice. The commentaries aim to provide clarification on the meaning of the guidelines and give further indication on how they could be implemented in practice.

By way of illustration, the Guidelines deal with the steps prior to the launching of an investigation in armed conflict, such as recording of military operations, internal reporting and external allegations, actions at the scene of an incident, and assessment of incidents. A separate section is devoted to administrative investigations in armed conflict, i.e. to the different types of non-criminal investigations into violations of IHL. Several guidelines focus on criminal investigations, including the standards of independence and impartiality, thoroughness, promptness, and transparency that make up effective investigation. Fair-trial guarantees and how matters of State responsibility should be approached are also considered. Other guidelines address the concept of policy-related violations of IHL, as well as the need for armed forces to have legal advisers.

## 2. Roots of restraint in war

As mentioned in earlier sections of this report, a central feature of the changing geopolitical landscape of the last decade has been the proliferation of non-State

armed groups, particularly in the Middle East and North Africa. The decentralized structure of these groups poses a hefty challenge to the ICRC's efforts to ensure that IHL is known, understood and respected by parties to armed conflicts. The ICRC's "integration approach" to generating respect for the law, which is based on the findings of its study *Roots of Behaviour in War* (2004),<sup>96</sup> consists of assisting armed forces and armed groups to incorporate IHL in their doctrine (or codes of conduct), training regimes, and mechanisms – in order to ensure compliance. This approach requires an armed organization to have a form of vertical hierarchy through which orders and discipline flow from military commanders to the rank and file. Given that most armed groups today lack this organizational structure, the ICRC required new research to identify ways in which these decentralized groups might be influenced to fight in accordance with IHL.

The research took the form of a two-year collaboration between the ICRC and academics specialized in the behaviour of armed organizations and led to the publication of a study entitled *The Roots of Restraint in War*<sup>97</sup> in June 2018. The study explores how norms of restraint are socialized in different types of armed forces and armed groups, according to their organizational structure. It identified sources of influence on the development of such norms, from the strict formal training in military academies for integrated State armed forces to the village prophets in South Sudan who, prior to battle, lead rituals for community-embedded cattle-keeping groups. The research was rich in insights on the widely varying internal and external stimuli that prompt certain kinds of behaviour.

The study delivered some important findings. First and foremost, it provided empirical evidence that higher levels of IHL training resulted in greater adoption of norms of restraint by combatants in the two State armed forces studied: the Philippine and Australian armies. Training was found to be most effective if taught intensively; when using mixed methods including classroom instruction, case-study analysis and practical field exercises; and when taught by a trainer with a great deal of credibility among the soldiers. Effectiveness should be tested under duress, in battlefield-like conditions when soldiers are exhausted, hungry and afraid; and training should aim to internalize respect for IHL in the identity among soldiers: "we don't commit abuses because it is not who we are".

Second, the study found that informal norms have a strong bearing on behaviour even within strict military hierarchies, and that these norms could potentially reinforce or undermine the formal instructions issued. Examples of nefarious informal norms and practices include hazing rituals; insignia on uniforms symbolizing extreme violence; and marching songs glorifying sexual violence. The research suggested that informal sources of socialization such as the opinion of a peer group could help to reinforce respect for IHL if understood and steered in that direction. The ICRC is now exploring the nature of informal

96 ICRC, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, 2004, available at: [www.icrc.org/en/publication/0853-roots-behaviour-war-understanding-and-preventing-ihl-violations](http://www.icrc.org/en/publication/0853-roots-behaviour-war-understanding-and-preventing-ihl-violations).

97 ICRC, *The Roots of Restraint in War*, 2018, available at: [www.icrc.org/en/publication/roots-restraint-war](http://www.icrc.org/en/publication/roots-restraint-war).

norms in six different armed forces in different parts of the world to see whether this is a potential avenue of interest for enhancing compliance with the law.

The third main finding is closely related to the second: an exclusive focus on the law is not as effective in influencing behaviour as a combination of the law and the values underpinning it. Linking the law to local norms and values gives it greater traction. The ICRC has been exploring parallels between IHL and Islamic law for many years, and the study recommends that investigation of local cultural and religious norms be intensified across many different contexts. The report gives the example of an ICRC staff member in South Sudan who struck up a conversation with some fighters about their favourite sport of wrestling. He was able to draw parallels between the fighters' explanations – for instance, that the sick, elderly and children were not worthy opponents in a wrestling match – and the IHL rules that also excluded them from the fighting. Understanding and invoking traditional norms of restraint that reflect IHL rules can resonate better than discussions only of the law, or provide an entry point into such discussions.

Initially, the study sought to explore why violence occurs. The decision to broaden its scope and examine how norms of restraint form and are socialized in armed organizations eased its way and led to unexpected findings. Not only was it easier to question soldiers and fighters about the influences that curbed violent behaviour than to ask about violations of IHL, but exploring restraint also uncovered sources of influence that had not been considered before. One armed group's preferred tactic over many years, for instance, was to attack oil pipelines running through rural areas. Tracking this pattern of violence and observing when it changed or stopped, allowed for an analysis of the reasons for the change and who or what might have influenced it. In this case, it was environmentalists who had successfully changed the armed group's behaviour, a source of influence not previously considered.

Finally, and perhaps most importantly, the research demonstrates that external entities can influence the behaviour of armed forces and armed groups. Hence, making it a criminal offence for humanitarian organizations and local communities to interact with armed groups hampers efforts to promote respect for humanitarian norms.

### **3. “Support relationships” in armed conflict**

As throughout much of the history of warfare, contemporary armed conflicts involve a multiplicity of actors, including States, non-State actors and international organizations. Some fight one another, and others support one another through military partnerships, alliances, and coalitions. This support takes various forms, such as: provision of training and equipment; arms transfers; institutional capacity support; financial aid; cyber operations; hosting of troops; provision of private contractors; and intelligence sharing. The ICRC is able to report that these complex webs of support and partner relationships have become

increasingly prevalent and are a key feature of almost every major context of conflict in which it operates.<sup>98</sup>

Under IHL, those who support parties to armed conflicts may themselves become party to that conflict, and thus bound by IHL, notably by contributing to the collective conduct of hostilities by another party against an armed group or by exerting overall control over an armed group.<sup>99</sup>

However, support provided to parties does not always reach this threshold, but it still affects the conduct of the supported party to an armed conflict, and may increase or reduce human suffering.

The ICRC is engaged in a dialogue with parties to armed conflict themselves. But this alone has appeared to be insufficient to address its concerns regarding the lack of respect for IHL in contemporary conflicts. The ICRC has therefore been developing – for some time now, through its Support Relationships in Armed Conflict initiative – its engagement with those who support such parties.

Support relationships in armed conflicts carry both risks and opportunities in connection with respect for IHL. On the one hand, complex, overt or covert, support and partner relationships carry the risk of diluting responsibility among parties to armed conflicts and those who support them. On the other hand, they are an opportunity for those who support parties to conflict to assist not only their partner's military efforts, but also their efforts to better respect IHL.

From what the ICRC has observed, the degree to which respect for IHL is factored into such support relationships seems, all too frequently, insufficient. Far too often, humanitarian considerations are trumped by political, security or economic interests. This weakens accountability for violations, which increases the severity of the humanitarian consequences of conflict and seriously undermines global peace and security.

The ICRC believes that there is a need and an opportunity for individual and collective action that aims to leverage such support relationships to positively influence partners' behaviour for the benefit of victims of armed conflict. In fact, many actors have put in place measures to promote, among the parties they support, protection of civilians and those *hors-de-combat*. These efforts should be expanded and strengthened. In the ICRC's view, these are good examples of how States can implement their obligations to respect and ensure respect for IHL, in all circumstances.<sup>100</sup>

Ensuring respect for IHL includes an obligation not to encourage, aid or assist in violations of IHL, as well as a due-diligence obligation to take proactive steps to influence parties to conflict and bring them to an attitude of respect for IHL. The obligation to ensure respect for IHL is an obligation of means and not

98 See Cordula Droege and David Tuck, "Fighting Together and International Humanitarian Law: Setting the Legal Framework", 2017, available at <https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>.

99 See ICRC, *IHL Challenges Report* 2015, pp. 22–23.

100 Art. 1 common to the four Geneva Conventions; Art. 1, Additional Protocol I; ICRC Customary IHL Study, Rules 139 and 144. See also ICRC, *ICRC Commentary on GC I*, paras 150–184.



of result, and States have very broad discretion in choosing measures with which to exercise influence.

In addition, supporting States may have obligations under other provisions of international law. For instance, parties to the Arms Trade Treaty must refrain from authorizing weapons transfers if there is a clear or substantial risk of the arms being used to commit or facilitate serious violations of IHL.

The ICRC understands there are challenges in finding concrete measures to foster better respect for IHL. States remain free to choose between different possible measures that would be adequate to ensure respect, and are not responsible if such positive measures do not succeed. The law does not provide a specific list of measures that have to be taken. Supporting actors can adopt different measures aimed at ensuring respect, as long as they conform to international law.

The ICRC has started identifying practical measures that supporting actors can use throughout their support relationships. These include assessments prior to providing support, mechanisms to identify and address partner misconduct while support is provided, and to review, limit, or suspend the support if needed. Practical measures may also include continuous, concrete and context-specific IHL training and mentoring, capacity building and assistance with a view to implementing IHL obligations where needed, as well as the preparation of an exit strategy for when the support ends. Experience shows that – beyond training – oversight and accountability are critical for the protection of victims of armed conflict in active military operations and detention. In this respect, it would be helpful for States to share their experiences.

The ICRC is conscious of the legal, policy and operational challenges that the development of such measures is likely to encounter. Aiming to improve its understanding of support relationships, it engages with actors in supporting or supported roles to discuss its recommendations, to increase their usefulness over time, and to learn from experience.

#### **4. IHL in action: Respect for the law on the battlefield**

As highlighted in the introduction to this report, on their 70th anniversary, the Geneva Conventions are among the few international treaties that have achieved universal ratification. However, they are not universally respected, as demonstrated by the tragic reports of violations in many armed conflicts, with disastrous consequences for civilians and persons *hors de combat*. The impression that IHL is more often violated than respected is reinforced by an ever-higher level of mediatization of IHL violations, which has unfortunately led to a discourse about the effectiveness of IHL and a tendency to question its impact.

Such a discourse is dangerous, as it renders violations banal and risks creating an environment where they may become more acceptable. What is needed is nuanced discourse on the subject, because the perception that IHL is continuously violated and therefore ineffective does not reflect the reality of

contemporary armed conflicts. Instances of respect for IHL, though underreported, are a daily occurrence.

IHL has continued to develop over the past few decades and has been implemented in many ways: for instance, States have adopted new treaties, legislators have translated international agreements into domestic laws, courts have created a wealth of domestic and international jurisprudence, and many armed forces train their troops in IHL. This demonstrates that States – and other parties to armed conflicts – believe that IHL matters. In many instances, belligerents state openly that they consider it in their own interest to operate in accordance with IHL, even beyond the legal and moral obligation to do so.

ICRC operations continue to encounter manifold positive examples of IHL application around the world.

Instances of respect for IHL can be seen when parties to conflict make arrangements to facilitate the implementation of specific IHL norms, such as to cooperate in searching for and/or identifying the remains of missing people. Such agreements are often trust-building measures that may pave the way for a peace process.

Changes in practices and behaviour over time may also be a sign of improving IHL compliance. This can be the case when armed actors reform their detention policies to allow family visits, when they release child soldiers and stop recruiting them, or when they adjust their rules of engagement to reduce civilian casualties.

The ICRC has decided to collect and present cases of IHL compliance to counter the narrative that IHL is constantly violated and to recall that – when respected – IHL has a positive impact on the lives of people affected by armed conflict. By shedding light on positive examples of belligerents' conduct on the ground, the ICRC seeks to encourage them to lead by example and share good practices with regard to IHL.<sup>101</sup>

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101 ICRC, *IHL in Action: Respect for the Law on the Battlefield*, available at: <https://ihl-in-action.icrc.org>.

# INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

## VIII. Conclusion

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Seventy years after their adoption, the 1949 Geneva Conventions – complemented by three Additional Protocols and customary IHL – provide a robust set of international legal rules regulating the behaviour of belligerents. IHL conveys a basic yet fundamental message: wars, even between fierce enemies, have limits. Anchored in States’ experiences during two world wars and subsequent armed conflicts, IHL was designed for the most extreme circumstances, striking a careful, pragmatic balance between military necessity and humanity.

The ICRC hopes that with this report it has brought to the fore some of the new trends and complexities of contemporary armed conflicts and the legal challenges they entail.

At the same time, the report shows that existing IHL rules – complemented by other norms of international law – are adequate for preserving a minimum of humanity in armed conflict. While exploring new and not fully answered questions, we must preserve the basics. Any interpretation or development of the law should build on existing protection that IHL provides; it should never undermine it.

Most importantly, perhaps, IHL rules can prevent atrocities only if all States take measures to implement their legal obligations, if all parties to armed conflict are committed to respecting them, and if all actors able to influence those involved in the fighting use their leverage to ensure respect for IHL. On the 70th anniversary of the four Geneva Conventions, the suffering caused by armed conflicts should be a stark reminder that it is time to recommit to protecting our common humanity in armed conflict.