INTERNATIONAL HUMANITARIAN LAW

ANSWERS TO YOUR QUESTIONS

ICRC

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MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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ANSWERS TO YOUR QUESTIONS

The original Geneva Convention "for the amelioration of the condition of the wounded in armies in the field" was adopted in 1864, and marked the beginning of modern international humanitarian law (IHL). It was followed by many other treaties, all of which seek to embody this basic principle: war must be waged within certain limits that must be respected, in order to preserve the lives and the dignity of human beings.

The nature of warfare has changed unrecognizably since the adoption of the original Geneva Convention 150 years ago. Most contemporary armed conflicts now take place within States, rather than between States. The means and methods of warfare have become sophisticated to a degree scarcely conceivable by our forebears, the use of unmanned weapons such as drones being a good example. It is reasonable to ask: Has IHL kept up with all these changes?

Our answer is that it has. The core principles of IHL remain as relevant as ever, and IHL has indeed evolved in response to developments in armed conflict, and continues to do so. The ICRC has been actively involved for the last 150 years in strengthening IHL and keeping it up to date.

There is however no escaping the fact that armed conflict continues to exact a shocking human cost, with civilians bearing the brunt.

The true test of IHL is whether combatants, and those who command them, abide by the rules. That is why the ICRC makes strenuous efforts to achieve greater respect for IHL, and to ensure that it is adequately implemented and enforced. Ultimately, what is needed, beyond humanitarian or legal action, is the political will to spare civilians and to respect IHL.

Peter Maurer
President, International Committee of the Red Cross

1. WHAT IS IHL?

International humanitarian law (IHL) regulates relations between States, international organizations and other subjects of international law. It is a branch of public international law that consists of rules that, in times of armed conflict, seek – for humanitarian reasons – to protect persons who are not or are no longer directly participating in the hostilities, and to restrict means and methods of warfare. In other words, IHL consists of international treaty or customary rules (i.e. rules emerging from State practice and followed out of a sense of obligation) that are specifically meant to resolve humanitarian issues arising directly from armed conflict, whether of an international or a non-international character.

TERMINOLOGY

The terms 'international humanitarian law', 'law of armed conflict' and 'law of war' may be regarded as synonymous. The ICRC, international organizations, universities and States tend to favour 'international humanitarian law' (or 'humanitarian law').

GENEVA AND THE HAGUE

IHL has two branches:

- the 'law of Geneva', which is the body of rules that protects victims of armed conflict, such as military personnel who are *hors de combat* and civilians who are not or are no longer directly participating in hostilities
- the 'law of The Hague', which is the body of rules establishing the rights and obligations of belligerents in the conduct of hostilities, and which limits means and methods of warfare.

These two branches of IHL draw their names from the cities where they were initially codified. With the adoption of the Protocols of 8 June 1977 additional to the Geneva Conventions, which combine both branches, that distinction has become a matter of historical and scholarly interest.

Military necessity and humanity

IHL is a compromise between two underlying principles, of humanity and of military necessity. These two principles shape all its rules.

The principle of military necessity permits only that degree and kind of force required to achieve the legitimate purpose of a conflict, i.e. the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources. It does not, however, permit the taking of measures that would otherwise be prohibited under IHL. The principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict.

"War is in no way a relationship of man with man but a relationship between States, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers ... Since the object of war is to destroy the enemy State, it is legitimate to kill the latter's defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives."

Jean-Jacques Rousseau, 1762

Essential IHL rules

The parties to a conflict must at all times distinguish between civilians and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be made solely against military objectives. Parties to a conflict do not have an unrestricted right to choose methods or means of warfare. Using weapons or methods of warfare that are indiscriminate is forbidden, as is using those that are likely to cause superfluous injury or unnecessary suffering.

It is forbidden to wound or kill an adversary who is surrendering or who can no longer take part in the fighting. People who do not or can no longer take part in the hostilities are thus entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavourable

distinction whatsoever. The wounded and the sick must be searched for, collected and cared for as soon as circumstances permit. Medical personnel and medical facilities, transports and equipment must be spared. The red cross, red crescent or red crystal on a white background is the distinctive sign indicating that such persons and objects must be respected.

Captured combatants and civilians who find themselves under the authority of an adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. Their basic judicial guarantees must be respected in any criminal proceedings against them.

The rules summarized above make up the essence of IHL. The ICRC cast them in this form with a view to facilitating the promotion of IHL. This version does not have the authority of a legal instrument and does not in any way seek to replace the treaties in force.

"Civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

Fyodor Martens, 1899

The above, known as the Martens clause, first appeared in the preamble to the 1899 Hague Convention (II) on the laws and customs of war on land. It was inspired by and took its name from Professor Fyodor Fyodorovich Martens, the Russian delegate at the 1899 Hague Peace Conferences. The exact meaning of the Martens clause is disputed, but it is generally interpreted like this: 'anything not explicitly prohibited by IHL is not automatically permissible'. Belligerents must always remember that their actions must be in conformity with the principles of humanity and the dictates of public conscience.

Photothèque/ICRC

2. WHAT ARE *JUS AD BELLUM* AND *JUS IN BELLO*?

Jus ad bellum refers to the conditions under which States may resort to war or to the use of armed force in general. The prohibition against the use of force amongst States and the exceptions to it (self-defence and UN authorization for the use of force), set out in the United Nations Charter of 1945, are the core ingredients of *jus ad bellum* (see the box titled "On the Prohibition against War").

Jus in bello regulates the conduct of parties engaged in an armed conflict. IHL is synonymous with *jus in bello*; it seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible.

IHL applies to the belligerent parties irrespective of the reasons for the conflict or the justness of the causes for which they are fighting. If it were otherwise, implementing the law would be impossible, since every party would claim to be a victim of aggression. Moreover, IHL is intended to protect victims of armed conflicts regardless of party affiliation. That is why *jus in bello* must remain independent of *jus ad bellum*.

ON THE PROHIBITION AGAINST WAR

Until the end of the First World War, resorting to the use of armed force was regarded not as an illegal act but as an acceptable way of settling disputes.

In 1919, the Covenant of the League of Nations and, in 1928, the Treaty of Paris (the Briand-Kellogg Pact) sought to outlaw war. The adoption of the United Nations Charter in 1945 confirmed the trend: "The members of the Organization shall abstain, in their international relations, from resorting to the threat or use of force ..." However, the UN Charter upholds States' right to individual or collective self-defence in response to aggression by another State (or group of States). The UN Security Council, acting on the basis of Chapter VII of the Charter, may also decide to resort to the collective use of force in response to a threat to the peace, a breach of the peace or an act of aggression.

IHL AND THE 'RESPONSIBILITY TO PROTECT'

The Global Centre for the Responsibility to Protect was set up in 2008; it plays a major role in developing and promoting the concept of the 'responsibility to protect' (R2P), which it defines as follows:

"The responsibility to protect is a principle which seeks to ensure that the international community never again fails to act in the face of genocide and other gross forms of human rights abuse. "R2P," as it is commonly abbreviated, was adopted by heads of state and government at the World Summit in 2005 sitting as the United Nations General Assembly. The principle stipulates, first, that states have an obligation to protect their citizens from mass atrocities; second, that the international community should assist them in doing so; and, third, that, if the state in question fails to act appropriately, the responsibility to do so falls to that larger community of states. R2P should be understood as a solemn promise made by leaders of every country to all men and women endangered by mass atrocities."

The concept of R2P implies that if a State manifestly fails to comply with its obligation to protect its population from four particular crimes – genocide, war crimes, ethnic cleansing and crimes against humanity – the international community has a responsibility to take joint action to protect the people in question. Such action can take various forms: diplomacy, humanitarian measures or other peaceful means; it can also, as a last resort, involve the use of force, but only after the UN Security Council's authorization. Although R2P is referred to sometimes as an "emerging norm," it is not a binding legal obligation committing the international community, but a political instrument.

IHL provides no such basis for legalizing or legitimizing the resort to force in international relations. Neither does it prohibit States from using force for humanitarian purposes. The legality of the use of armed force in international relations is determined solely under *jus ad bellum*. It should be noted, however, that the rationale underlying R2P and the obligation to ensure respect for IHL are akin, to the extent that they emphasize the international community's responsibility to ensure respect for IHL and to prevent IHL violations, including war crimes and other international crimes. The use of force in the R2P context can also be regarded as one of the forms of joint action with the United Nations explicitly mentioned in Article 89 of Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I), which states that "in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."

The ICRC, in accordance with the Fundamental Principle of neutrality, is neither for nor against R2P military interventions. It expresses no opinion on the measures undertaken by the international community to ensure respect for IHL. There remains this crucial point however: any use of force on grounds of R2P and/or of the obligation to ensure respect for IHL must comply with the relevant obligations under IHL and human rights law. In other words, States or international organizations taking part in armed conflicts within the context of an R2P operation must respect IHL at all times.

3. WHAT ARE THE ORIGINS OF IHL?

Efforts have been made, since ancient times, to protect individuals from the worst consequences of war (see box). However, it was not until the second half of the 19th century that international treaties regulating warfare, including rights and protection for victims of armed conflicts, emerged.

Frédéric Boissonnas/ICRC

Dufour (to Dunant): "We need to see, through examples as vivid as those you have reported, what the glory of the battlefield produces in terms of torture and tears."

Dunant: "On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet ... would it not be desirable that they should take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention and inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?"

Who were the founders of contemporary IHL?

Two men played a vital role in the emergence of contemporary IHL: Henry Dunant, a Swiss businessman, and Guillaume-Henri Dufour, a Swiss army officer. In 1859, while travelling in Italy, Dunant witnessed the grim aftermath of the battle of Solferino. After returning to Geneva he recounted his experiences in a book entitled *A Memory of Solferino*, published in 1862. General Dufour, who knew something of war himself, lost no time in lending his active moral support for Dunant's ideas, notably by chairing the 1864 diplomatic conference at which the original Geneva Convention was adopted.

In 1863, together with Gustave Moynier, Louis Appia and Théodore Maunoir, Dunant and Dufour founded the 'Committee of Five', an international committee for the relief of the military wounded. This would become the International Committee of the Red Cross in 1876.

How did contemporary IHL come into being?

The Swiss government, at the prompting of the five founding members of the ICRC, convened a diplomatic conference in 1864. It was attended by 16 States, who adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This was the birth of modern IHL.

What innovations did the 1864 Convention bring about?

The Convention, which was a multilateral treaty, codified and strengthened ancient, fragmentary and scattered laws and customs of war protecting wounded and sick combatants and those caring for them. It was chiefly characterized by:

- standing written rules of universal scope to protect wounded and sick combatants
- its multilateral nature, open to all States
- the obligation to extend care to wounded and sick military personnel without discrimination (i.e. without any distinction between friend or foe)
- respect for and marking of medical personnel, transports and equipment using an emblem (red cross on a white background).

IHL PRIOR TO ITS CODIFICATION

It would be a mistake to think of the founding of the Red Cross in 1863, or the adoption of the original Geneva Convention in 1864, as the starting point of IHL as we know it today. Just as there is no society of any sort that does not have its own set of rules, so there has virtually never been a war that did not have rules, vague or precise, covering the conduct of hostilities, their outbreak and their end.

> ***"Taken as a whole, the war practices of primitive peoples illustrate various types of international rules of war known at the present time: rules distinguishing types of enemies; rules determining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct; and even rules outlawing war altogether."***
>
> Quincy Wright

The first laws of war were proclaimed several millennia before our era:

"I establish these laws to prevent the strong from oppressing the weak."
Hammurabi, King of Babylon

Many ancient texts such as the *Mahabharata*, the Bible and the Koran contain rules advocating respect for the adversary. For instance, the *Viqayet* – a text written towards the end of the 13th century, at the height of the period in which the Arabs ruled Spain – contains a veritable code for warfare.

Similarly, in medieval Europe, knights were required to follow rules of chivalry, which was a code of honour that ensured respect for the weak and for those who could not defend themselves. These examples reflect the universality of IHL.

THE LIEBER CODE

From the beginning of warfare to the advent of contemporary IHL, over 500 cartels, codes of conduct, covenants and other texts designed to regulate hostilities have been recorded. They include the Lieber Code, which came into force in April 1863. The Code is important because it was the first attempt to codify existing laws and customs of war. Unlike the original Geneva Convention (adopted a year later), however, the Code did not have the status of a treaty, as it was intended solely for soldiers fighting on the Union side in the American Civil War.

4. WHAT TREATIES MAKE UP IHL? WHAT IS CUSTOMARY IHL?

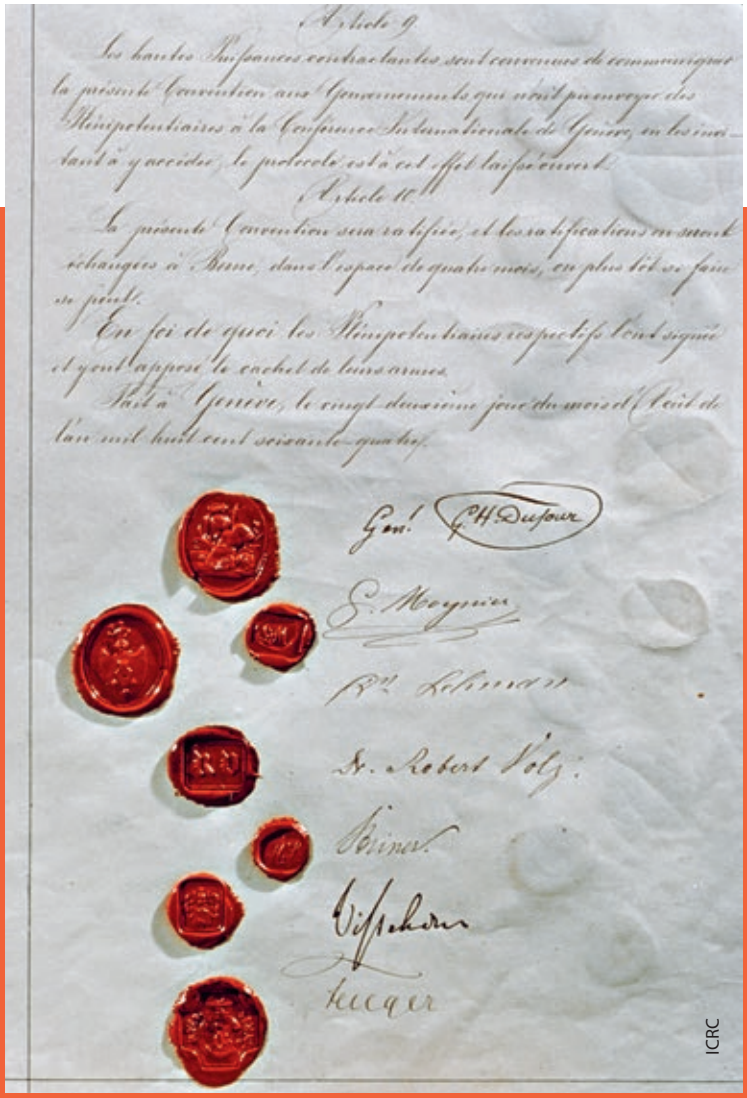
Contemporary IHL came into being with the original Geneva Convention of 1864. It has evolved in stages, to meet the ever-growing need for humanitarian aid arising from advances in weapons technology and changes in the nature of armed conflict; all too often, these developments in the law have taken place after the events for which they were sorely needed. The following are the main IHL treaties in chronological order of adoption:

1864	Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field
1868	St. Petersburg Declaration (prohibiting the use of certain projectiles in wartime)
1899	The Hague Conventions respecting the Laws and Customs of War on Land, and the adaptation to maritime warfare of the principles of the 1864 Geneva Convention
1906	Review and development of the 1864 Geneva Convention
1907	Review of The Hague Conventions of 1899 and adoption of new Conventions
1925	Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
1929	Two Geneva Conventions: • Review and development of the 1906 Geneva Convention • Geneva Convention relative to the Treatment of Prisoners of War
1949	Four Geneva Conventions: I. Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field II. Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea III. Treatment of Prisoners of War IV. Protection of Civilian Persons in Time of War
1954	The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

1972	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
1976	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
1977	Two Protocols additional to the four 1949 Geneva Conventions, strengthening protection for victims of international (Additional Protocol I) and non-international (Additional Protocol II) armed conflicts
1980	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). The CCW includes: • Protocol (I) on Non-Detectable Fragments • Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices • Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons
1989	Convention on the Rights of the Child (Article 38)
1993	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
1995	Protocol (IV) on Blinding Laser Weapons (added to the CCW of 1980)
1996	Revised Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II [revised] to the CCW of 1980)
1997	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
1998	Rome Statute of the International Criminal Court
1999	Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict
2000	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
2001	Amendment to Article I of the CCW of 1980
2003	Protocol (V) on Explosive Remnants of War (added to the CCW of 1980)
2005	Protocol additional to the Geneva Conventions, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III)
2006	International Convention for the Protection of All Persons from Enforced Disappearance
2008	Convention on Cluster Munitions
2013	Arms Trade Treaty

This list clearly shows that some armed conflicts have had a more or less immediate impact on the development of IHL:

During the First World War (1914-1918), methods of warfare, including those that were not completely new, were used on an unprecedented scale. These included poison gas, the first aerial bombardments and the capture of hundreds of thousands of prisoners of war. The treaties of 1925 and 1929 were a response to those developments.



In the Second World War (1939-1945), civilians and military personnel were killed in equal numbers, as against a ratio of 1:10 in the First World War. In 1949, the international community responded to those shocking casualty rates, and more particularly to the terrible effects the war had on civilians, by revising the conventions then in force and adopting a new instrument: the Fourth Geneva Convention for the protection of civilians.

The Additional Protocols of 1977 were a response to the consequences, in human terms, of wars of national liberation, which the 1949 Conventions only partially covered through Article 3 common to the four Geneva Conventions (*common Article 3*).

The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain almost 600 articles and are the main instruments of IHL (see Question 6).

CUSTOMARY IHL

IHL is developed by States mainly through the adoption of treaties and the formation of customary law. Customary law is formed when State practice is sufficiently dense (widespread, representative, frequent and uniform) and accompanied by a belief among States that they are legally bound to act – or prohibited from acting – in certain ways. Custom is binding on all States except those that have persistently objected, since its inception, to the practice or rule in question.

In 1995, the ICRC embarked on a detailed study of the customary rules of IHL: it took approximately ten years and was published by Cambridge University Press in 2005.
The study can be accessed on the Web at https://www.icrc.org/customary-ihl.

This database provides an updated version of the study and is divided into two parts.

- **Rules:** This presents an analysis of existing rules of customary IHL. Although extremely detailed, the study does not purport to be an exhaustive assessment of all rules in this area of law. This part of the study is available in Arabic, Chinese, English, French, Russian and Spanish. A summary of the study and a list of the rules are available in many other languages.

- **Practice:** This contains the underlying practice for the rules analysed in Part 1. It is regularly updated by the ICRC, in cooperation with the British Red Cross. Source materials are gathered by a network of ICRC delegations and by National Red Cross and Red Crescent Societies around the world and incorporated by a research team based at the Lauterpacht Centre for International Law at the University of Cambridge.

5. WHEN DOES IHL APPLY?

IHL applies only in situations of armed conflict. It offers two systems of protection: one for international armed conflict and another for non-international armed conflict. The rules applicable in a specific situation will therefore depend on the classification of the armed conflict.

A) International armed conflict (IAC)

IACs occur when one or more States resort to the use of armed force against another State. An armed conflict between a State and an international organization is also classified as an IAC.

Wars of national liberation, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, are classified as IACs under certain conditions (See Article 1, paragraph 4, and Article 96, paragraph 3, of Additional Protocol I). (See also Question 8.)


Ricardo García Vilanova/ICRC

B) Non-international armed conflict (NIAC)

Many armed conflicts today are non-international in nature. An NIAC is an armed conflict in which hostilities are taking place between the armed forces of a State and organized non-State armed groups, or between such groups. For hostilities to be considered an NIAC, they must reach a certain level of intensity and the groups involved must be sufficiently organized.

IHL treaty law establishes a distinction between NIACs within the meaning of common Article 3 and NIACs falling within the definition provided in Article 1 of Additional Protocol II.

- **Common Article 3** applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties." These include armed conflicts in which one or more organized non-State armed groups are involved. NIACs may occur between State armed forces and organized non-State armed groups or only between such groups.

- **Additional Protocol II** applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." (See Article 1, paragraph 1, of Additional Protocol II.) The definition of an NIAC in Additional Protocol II is narrower than the notion of NIAC under common Article 3 in two aspects.

    1) It introduces a requirement of territorial control, by providing that organized non-State armed groups must exercise such territorial control "as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

    2) Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups. Unlike common Article 3, Additional Protocol II does not apply to armed conflicts between organized non-State armed groups.

In this context, it must be kept in mind that Additional Protocol II "develops and supplements" common Article 3 "without modifying its existing conditions of application." (See Article 1, paragraph 1, of Additional Protocol II.) This means that this restrictive definition is relevant only for the application of Additional Protocol II; it does not extend to the law of NIAC in general.

Simultaneous existence of IAC and NIAC

In certain situations, several armed conflicts may be taking place at the same time and within the same territory. In such instances, the classification of the armed conflict and, consequently, the applicable law will depend on the relationships between the belligerents.

Consider this hypothetical example. State A is involved in an NIAC with an organized non-State armed group. State B directly intervenes on the side of the organized non-State armed group. State A and State B would then be involved in an IAC, but the armed conflict between State A and the organized armed group would remain non-international in character. If State B were to intervene on the side of State A, both State A and the organized non-State armed group and State B and the organized non-State armed group would be involved in an NIAC.

MAIN RULES APPLICABLE IN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

International armed conflict (IAC)	Non-international armed conflict (NIAC)
Four Geneva Conventions	Common Article 3
Additional Protocol I	Additional Protocol II
Customary IHL for IAC	Customary IHL for NIAC

The rules for NIACs remain less detailed than those for IACs. For instance, there is no combatant or prisoner-of-war status in the rules governing NIACs. (For definitions of 'combatants' and 'prisoners of war', see Question 7.) That is because States have not been willing to grant members of organized non-State armed groups immunity from prosecution under domestic law for taking up arms. Given the principle of State sovereignty and States' reluctance to subject internal matters to international codification, it has proven difficult to strengthen the system of protection in NIACs. It should be noted however that the important gap between treaty rules applying in IACs and those applying in NIACs is gradually being filled by customary law rules, which are often the same for all types of armed conflict.

WHAT LAW APPLIES TO INTERNAL DISTURBANCES AND TENSIONS?

Internal disturbances and tensions (such as riots and isolated and sporadic acts of violence) are characterized by acts that disrupt public order without amounting to armed conflict; they cannot be regarded as armed conflicts because the level of violence is not sufficiently high or because the persons resorting to violence are not organized as an armed group.

IHL does not apply to situations of violence that do not amount to armed conflict. Cases of this type are governed by the provisions of human rights law (see Question 9) and domestic legislation.

6. WHAT ARE THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS?

The origins of the 1949 Geneva Conventions

The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted in 1864. It was revised and developed in 1906 and 1929. Another convention, relative to the Treatment of Prisoners of War, was also adopted in 1929. In 1934, the 15th International Conference of the Red Cross met in Tokyo and approved the text of an international convention – drafted by the ICRC – on protection for civilians of enemy nationality on territory belonging to or occupied by a belligerent.


Catalina Martin-Chico/ICRC

No action was taken on that text, States refusing to convene a diplomatic conference to decide on its adoption. As a result, the provisions contained in the Tokyo draft were not applied during the Second World War. It was only in 1949, after the Second World War had ended, that States adopted the four Geneva Conventions, which remain the cornerstone of IHL. While the first three Geneva Conventions of 1949 grew out of existing treaties on the same subjects, the fourth Geneva Convention was absolutely new, being the first IHL treaty to deal specifically with the protection of civilians during armed conflict. The death toll among civilians during the Second World War was one of the reasons for the development and adoption of such a treaty.

The origins of the 1977 Additional Protocols

The 1949 Geneva Conventions were a major advance in the development of IHL. After decolonization, however, there was a need for rules applicable to wars of national liberation as well as civil wars, whose occurrence increased significantly during the Cold War. What is more, treaty rules on the conduct of hostilities had not evolved since the Hague Regulations of 1907. Since revising the Geneva Conventions might have jeopardized some of the advances made in 1949, it was decided to adopt new texts in the form of Protocols additional to the Geneva Conventions, which took place in June 1977.

In 2005, a third Protocol additional to the Geneva Conventions was adopted. This instrument recognizes an additional emblem – composed of a red frame in the shape of a square on edge on a white ground – which has come to be known as the 'red crystal'. This additional emblem is not intended to replace the red cross and red crescent but to provide a further option. The shape and the name of this additional emblem were arrived at after a long selection process, the goal of which was to create an emblem free of any political, religious or other connotation and that could be used throughout the world. (See Question 13.)

Content of the Geneva Conventions and the Additional Protocols

The **Geneva Conventions** protect every individual or category of individuals not or no longer actively involved in hostilities:

- First Geneva Convention: Wounded or sick soldiers on land and members of the armed forces' medical services
- Second Geneva Convention: Wounded, sick or shipwrecked military personnel at sea, and members of the naval forces' medical services
- Third Geneva Convention: Prisoners of war
- Fourth Geneva Conventions: Civilians, such as:
  - foreign civilians on the territory of parties to the conflict, including refugees
  - civilians in occupied territories
  - civilian detainees and internees
  - medical and religious personnel or civil defence units.

Common Article 3 provides minimum protection in non-international armed conflicts. It is regarded as a treaty in miniature, representing a minimum standard from which belligerents should never depart. The rules contained in common Article 3 are considered to be customary law. (See box.)

Additional Protocol I supplements the protection afforded by the four Geneva Conventions in international armed conflict. For example, it provides protection for wounded, sick and shipwrecked civilians and civilian medical personnel. It also contains rules on the obligation to search for missing persons and to provide humanitarian aid for the civilian population. Fundamental guarantees are provided for all persons, independently of their status. In addition, Additional Protocol I codified several rules on protection for the civilian population against the effects of hostilities.

Additional Protocol II develops and supplements common Article 3 and applies in non-international armed conflicts between the armed forces of a State and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." (On the conditions for applying Additional Protocol II, see Question 5.) Additional Protocol II strengthens protection beyond the minimum standards contained in common Article 3 by including prohibitions against direct attacks on civilians, collective punishment, acts of terrorism, rape, forced prostitution and indecent assault, slavery and pillage. It also provides rules on the treatment of persons deprived of their liberty.

COMMON ARTICLE 3

In the case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for

– An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
– The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
– The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.


Sean Maguire/ICRC

7. WHOM DOES IHL PROTECT?

IHL protects all victims of armed conflicts, including both civilians and combatants who have laid down their arms. The nature of the protection it provides varies and is determined by whether the person in question is a combatant or a civilian.

INTERNATIONAL ARMED CONFLICTS

Civilians

Civilians are entitled to protection in two different situations. First, they enjoy general protection against dangers arising from hostilities. (See Question 11.) Civilians, defined as all persons who are not combatants (see definition of 'combatants' below), must not be the object of attacks. The only exceptions to this rule are civilians who directly participate in hostilities, for example, by taking up arms against the enemy. In such instances, they may be targeted for attack, but only so long as they directly participate in hostilities. (See Question 11.)

Second, civilians are 'protected persons' under IHL when in the hands of a party to the conflict, provided that:

- they are not nationals of this enemy State
- they are not nationals of an ally of this enemy State (unless these two States do not enjoy normal diplomatic relations)
- they are not nationals of a neutral State, i.e. a non-belligerent State (unless these two States do not enjoy normal diplomatic relations). In occupied territories, however, nationals of a neutral State are always protected persons.

The rationale is that these civilians must be protected by IHL because they no longer enjoy the protection of their own State – either because it is at war with the State in whose power they are or because it has no diplomatic relations with that State. The aim is also to protect civilians from arbitrary acts of an adverse party because of their allegiance to its enemy.

Protected civilians are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must not be subjected to torture, cruel or degrading treatment or corporal punishment and must be protected against all acts of violence or reprisal.

Civilians are particularly at risk when they are in a territory occupied by the army of a belligerent power or when they are detained for reasons related to an armed conflict. In occupied territory, the occupying power has a particular obligation to provide food and medical supplies for protected civilians. Deportation and forced transfers are prohibited. There are also rules on confiscating or seizing property. IHL provides detailed rules protecting civilians deprived of their liberty, particularly on the conditions of their detention, the judicial and procedural guarantees to which they are entitled, and their release. (See Question 10.)

Combatants *hors de combat*

Although they do enjoy protection from superfluous injury or unnecessary suffering, combatants are not protected against the effects of hostilities. (See Question 12.) Thus, they can be attacked unless they are *hors de combat*.

All members of the armed forces of a party to the conflict (except medical and religious personnel) are defined as 'combatants'. The armed forces of a party to a conflict consist of all organized armed forces, groups and units that are under a command responsible to that party for the conduct of its

subordinates. (See Article 43, paragraphs 1 and 2, of Additional Protocol I. See also Rules 3 and 4 of the ICRC's study on customary IHL.) Typically, this includes members of the regular armed forces. It also includes members of militia or volunteer corps (so-called 'irregular' armed forces), as well as members of organized resistance movements. The Third Geneva Convention is stricter than Additional Protocol I and provides specific additional conditions that members of irregular armed forces and of organized resistance movements must meet to be regarded as prisoners of war.

Combatants are considered to be *hors de combat* when they are in the power of an adverse party, when they clearly express an intention to surrender, or when they are wounded or sick to such an extent that they are incapable of defending themselves. In each of these cases, these persons are *hors de combat* if they abstain from any hostile act and if they do not attempt to escape. As soon as a combatant is *hors de combat*, he must be shown due regard and protected.

Moreover, when combatants fall into the power of the enemy – owing to capture, surrender, mass capitulation or some other reason – they enjoy the status of 'prisoners of war'. As such, they cannot be prosecuted or punished for having directly participated in hostilities. In fact, combatants have a right to directly participate in hostilities and enjoy immunity from prosecution for their acts of belligerence. If they commit war crimes, however, they must be held responsible. (See Question 19.)

Prisoners of war are entitled to humane treatment and respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must not be subjected to torture, cruel or degrading treatment or corporal punishment and must be protected against all acts of violence or reprisal. IHL contains detailed rules protecting prisoners of war, particularly on the conditions of their detention, the judicial and procedural guarantees to which they are entitled, and their release and repatriation. (See Question 10.)

NON-INTERNATIONAL ARMED CONFLICTS

IHL does not recognize any specific categories of person in non-international armed conflicts. That is because States do not want to give members of organized non-State armed groups the status of 'combatants', which entails the right to take a direct part in hostilities. Therefore, common Article 3 and Additional Protocol II simply provide that everyone not actively involved

in hostilities, or no longer taking part in them, is entitled to protection. This enables IHL to protect civilians and those who are no longer taking a direct part in hostilities. Because there is no 'combatant' status in non-international armed conflicts, there is no prisoner-of-war status either. This means that members of organized non-State armed groups taking up arms in such a conflict may be prosecuted under domestic law for doing so.

PROTECTION FOR THE WOUNDED, SICK AND SHIPWRECKED AND FOR MEDICAL SERVICES

The wounded, sick and shipwrecked, regardless of their status, are entitled to protection. Such persons must be searched for, collected and cared for by the party to the conflict that has them in its power. Medical personnel and medical establishments, transports and equipment must be respected and protected in all circumstances. The red cross, red crescent or red crystal on a white background is the distinctive sign showing that such persons and objects must be protected. (See Question 13.)

SPECIFIC PROTECTION: WOMEN AND CHILDREN

Certain categories of person, such as women and children, have specific needs in armed conflicts and must be given particular respect and protection.

Children must receive the care and aid they require. All feasible measures must be taken to prevent children under the age of 15 from taking a direct part in hostilities and, if they have become orphaned or separated from their families as a result of an armed conflict, to ensure that they are not left to their own resources. Their maintenance, the exercise of their religion and their education should be facilitated in all circumstances. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. The death penalty must not be carried out against persons who were under the age of 18 when they committed the offence in question.

The specific protection, health and assistance needs of women affected by armed conflict must be taken into account. Pregnant women and young mothers must be treated with particular care. The prohibition against sexual violence applies equally to men and women, but it is often the case that women bear the brunt of the sexual violence that occurs during armed conflicts. Women therefore have a specific need to be protected against all forms of sexual violence – for instance, through separation from men while deprived of their liberty, except where families are accommodated as family units. Women must also be under the immediate supervision of women, not men.

FUNDAMENTAL GUARANTEES REGARDLESS OF STATUS

In addition to the protection described above, IHL provides for certain fundamental guarantees that apply to all persons *hors de combat* regardless of their status (Article 75 of Additional Protocol I; Article 4 of Additional Protocol II).

The person, honour, convictions and religious practices of all such persons must be respected. The following acts in particular are prohibited under all circumstances, whether committed by civil or military agents:

a) violence to the life, health and physical or mental well-being of persons, particularly:
   - murder
   - torture, whether physical or mental
   - corporal punishment
   - mutilation

b) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and any form of indecent assault

c) the taking of hostages

d) collective punishment

e) threats to commit any of the foregoing acts.

Finally, the fundamental guarantees accorded to all persons affected by armed conflict also include certain procedural and judicial safeguards (Article 75 of Additional Protocol I; Article 6 of Additional Protocol II).

Teun Anthony Voeten/ICRC

8. WHO IS BOUND BY IHL?

All parties to an armed conflict – whether States or organized non-State armed groups – are bound by treaty and customary rules of IHL. Rules of customary IHL apply at all times to all parties, irrespective of their ratification of IHL treaties.

States and their obligations

Only States may become parties to international treaties such as the Geneva Conventions and their Additional Protocols. As of November 2013, 195 States were party to the Geneva Conventions. The fact that the Conventions are all but universally ratified testifies to their importance. As of March 2014, 173 States were party to Additional Protocol I, 167 to Additional Protocol II and 66 to Additional Protocol III.

Organized non-State armed groups and their obligations

Organized non-State armed groups are bound – as parties to non-international armed conflict – by common Article 3 and Additional Protocol II (if the threshold for its application is met – see Question 5) provided that the State to which they belong is party to the treaties in question. In any case, they are also bound by customary IHL rules pertaining to non-international armed conflicts.

National liberation movements

National liberation movements fighting against colonial domination and alien occupation and against racist régimes in the exercise of the right of self-determination of the peoples they represent may undertake to apply the Geneva Conventions and Additional Protocol I (i.e. IHL pertaining to international armed conflicts) by means of a unilateral declaration addressed to the depositary, i.e. the Swiss Federal Council. (See Article 1, paragraph 4, and Article 96, paragraph 3, of Additional Protocol I).

Does IHL apply to peace operations carried out by or under the auspices of the United Nations?

The multifaceted nature of peace operations and the ever more difficult and violent environments in which their personnel operate make it more likely that multinational forces conducting such operations will become involved in the use of force. In such situations, the question of IHL applicability becomes very pertinent.

The issue of IHL applicability to multinational forces has been disregarded for a long time. It has often been contended that United Nations forces cannot be party to an armed conflict, and therefore cannot be bound by IHL. It has also been affirmed that multinational forces, which bear the stamp of international legitimacy, should be considered to be impartial, objective and neutral, because their only interest in any armed conflict is the restoration and preservation of international peace and security.

This view of the matter, however, dispenses with the longstanding distinction between *jus ad bellum* and *jus in bello*. As with anyone else, the applicability of IHL to multinational forces must be determined solely on the basis of the facts, irrespective of the international mandate assigned to multinational forces by the Security Council and of the designation given to the parties potentially opposed to them.

IHL will be applicable to multinational forces once they become party to an armed conflict, be it international or non-international. When multinational forces are fighting against State armed forces, the legal framework of reference will be IHL applicable to international armed conflict. When they are opposed by one or more organized non-State armed groups, the legal framework of reference will be IHL applicable to non-international armed conflict.

PEACEKEEPING AND PEACE-ENFORCEMENT OPERATIONS

Peace operations are often divided into two categories: peacekeeping and peace-enforcement.

The purpose of **peacekeeping** operations is to ensure respect for ceasefires and demarcation lines and to conclude troop withdrawal agreements. In the past few years, the scope of peacekeeping operations has been widened to cover other tasks, such as supervision of elections, forwarding of humanitarian relief, and provision of assistance in the process of national reconciliation. Members of peacekeeping forces are authorized to use force only for purposes of self-defence. Such operations take place with the consent of the parties concerned.

Peace-enforcement operations, which come under Chapter VII of the United Nations Charter, are carried out by United Nations forces or by States, groups of States or regional organizations, either at the invitation of the State concerned or with the authorization of the United Nations Security Council. These forces are given a combat mission and are authorized to use coercive measures for carrying out their mandate. The consent of the parties is not necessary.

The distinction between these two types of operation has become less clear in recent years, since peace operations often carry out tasks that are typical of both peacekeeping and peace-enforcement operations. As a result, the more general terms 'peace support operations' and 'peace operations' are being used more frequently now.

The nature of the peace operation's mandate and its designation – peacekeeping or peace-enforcement – has no bearing on IHL applicability, which is determined on the basis of the facts and of the fulfilment of the criteria for armed conflicts stemming from the relevant IHL provisions, in particular, common Articles 2 and 3.

THE OBLIGATION TO RESPECT AND ENSURE RESPECT FOR IHL

It is not only the parties to an armed conflict that have obligations under IHL. All States – and the international community as a whole – must "respect and ensure respect" for IHL.

This phrase can be found in common Article 1, which states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." (See also Article 1, paragraph 1, of Additional Protocol I.)

The obligation of parties to a conflict to respect and ensure respect also exists in customary IHL. (See Rule 139 of the ICRC's study on customary IHL.)

- "To respect" means that parties to IHL treaties must apply these treaties in good faith.
- "To ensure respect" has a broader meaning: States party to IHL treaties, whether engaged in a conflict or not, and the international community as a whole, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict.

WHOSE DUTY IS IT TO SPREAD KNOWLEDGE OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS?

States have a legal obligation to spread knowledge of the Conventions and their Additional Protocols:

"The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains." (Articles 47 and 48 of the First and Second Geneva Conventions respectively. See also Articles 127 and 144 of the Third and Fourth Geneva Conventions respectively.)

"The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population." (Article 83 of Additional Protocol I.)

"This Protocol shall be disseminated as widely as possible." (Article 19 of Additional Protocol II.)

9. WHAT IS THE DIFFERENCE BETWEEN IHL AND HUMAN RIGHTS LAW?

WHAT IS INTERNATIONAL HUMAN RIGHTS LAW?

Human rights law is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain rights that must be respected and protected by their States. The body of international human rights standards also contains numerous non-treaty-based principles and guidelines ('soft law').

The main treaties of human rights law are given below:

a) Universal instruments

- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on the Rights of the Child (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1999)
- International Convention for the Protection of All Persons from Enforced Disappearance (2006)
- Convention on the Rights of Persons with Disabilities (2006)

b) Regional instruments

- European Convention on Human Rights (1950)
- American Convention on Human Rights (1969)
- African Charter on Human and Peoples' Rights (1981).

These treaties are supervised by human rights bodies, such as the Human Rights Committee for the International Covenant on Civil and Political Rights and the European Court for Human Rights for the European Convention on Human Rights.

While IHL and human rights law have developed in their separate ways, some human rights treaties include provisions that come from IHL: for instance, the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, and the Convention on Enforced Disappearance.

IHL and international human rights law are complementary bodies of international law that share some of the same aims. Both IHL and human rights law strive to protect the lives, the health and the dignity of individuals, albeit from different angles – which is why, while very different in formulation, the essence of some of the rules is similar. For example, both IHL and human rights law prohibit torture or cruel treatment, prescribe basic rights for persons subject to criminal process, prohibit discrimination, contain provisions for the protection of women and children, and regulate aspects of the right to food and health. There are however important differences between them: their origins, the scope of their application, the bodies that implement them, and so on.

Origins

IHL, the origins of which are ancient, was codified in the second half of the 19th century, under the influence of Henry Dunant, the founding father of the International Committee of the Red Cross. (See Question 6.) Human rights law is a more recent body of law: it had its origins in certain national human rights declarations influenced by the ideas of the Enlightenment (such as the United States Declaration of Independence in 1776 and the French Declaration of the Rights of Man and of the Citizen in 1789). It was only after the Second World War that human rights law emerged, under the auspices of the United Nations, as a branch of international law . The Universal Declaration of Human Rights of 1948 first defined human rights law at the international level in a non-binding General Assembly resolution. It was only in 1966 that this Declaration was translated into universal human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966. (See box.)

Temporal scope of application

While IHL applies exclusively in armed conflict (see Question 5), human rights law applies, in principle, at all times, i.e. in peacetime and during armed conflict. However, unlike IHL, some human rights treaties permit

governments to derogate from certain obligations during public emergencies that threaten the life of the nation. Derogation must, however, be necessary and proportional to the crisis, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including provisions of IHL. Certain human rights can never be derogated from: among them, the right to life, the prohibition against torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude and the prohibition against retroactive criminal laws.

Geographical scope of application

Another major difference between IHL and human rights law is their extraterritorial reach. That IHL governing international armed conflicts applies extraterritorially is not a subject of controversy, given that its purpose is to regulate the conduct of one or more States involved in an armed conflict on the territory of another. The same reasoning applies in non-international armed conflicts with an extraterritorial element: the parties to such conflicts cannot be absolved of their IHL obligations when the conflict reaches beyond the territory of a single State. Despite the views of a few important dissenters, it is widely accepted that human rights law applies extraterritorially based, *inter alia*, on decisions by regional and international courts. The precise extent of such application, however, is yet to be determined. Human rights bodies generally admit the extraterritorial application of human rights law when a State exercises control over a territory (e.g. occupation) or a person (e.g. detention). Human rights case law is unsettled, however, on the extraterritorial application of human rights norms governing the use of force.

Personal scope of application

IHL aims to protect persons who are not or are no longer taking direct part in hostilities. It protects civilians and combatants *hors de combat*, such as the wounded, the sick and the shipwrecked or prisoners of war. (See Question 7.) Human rights law, developed primarily for peacetime, applies to all persons within the jurisdiction of a State. Unlike IHL, it does not distinguish between combatants and civilians or provide for categories of 'protected person'.

Jérome Fontana/ICRC

Parties bound by IHL and human rights law

IHL binds all parties to an armed conflict and thus establishes an equality of rights and obligations between the State and the non-State side for the benefit of everyone who may be affected by their conduct (an essentially 'horizontal' relationship). (See Question 8.) Human rights law explicitly governs the relationship between a State and persons who are on its territory and/or subject to its jurisdiction (an essentially 'vertical' relationship), laying out the obligations of States vis à vis individuals across a wide spectrum of conduct. Thus, human rights law binds only States, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-State armed groups. The reason for this is that most groups of this kind are unable to comply with the full range of obligations under human rights law because, unlike governments, they cannot carry out the functions on which the implementation of human rights norms is premised. There is a notable exception to this generalization about non-State armed groups: those cases in which a group, usually by virtue of stable control of territory, has the ability to act like a State authority and where its human rights responsibilities may therefore be recognized *de facto*.

Substantive scope of application

IHL and human rights law share common substantive rules (such as the prohibition of torture), but they also contain very different provisions. IHL deals with many issues that are outside the purview of human rights law, such as the status of 'combatants' and 'prisoners of war', the protection of the red cross and red crescent emblems and the legality of specific kinds of weapon. Similarly, human rights law deals with aspects of life that are not regulated by IHL, such as the freedom of the press, the right to assembly, to vote, to strike, and other matters. Furthermore, there are areas that are governed by both IHL and human rights law, but in different – and sometimes contradictory – ways. This is especially the case for the use of force and detention.

- Regarding the use of force, IHL rules on the conduct of hostilities recognize that the use of lethal force is inherent to waging war. This is because the ultimate aim of military operations is to prevail over the enemy's armed forces. Parties to an armed conflict are thus permitted, or at least are not legally barred from, attacking each other's military objectives, including enemy personnel. Violence directed against those targets is not prohibited

by IHL, regardless of whether it is inflicted by a State or a non-State party to an armed conflict. Acts of violence against civilians and civilian objects – as well as indiscriminate attacks – are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians and civilian objects the effects of hostilities; and, under IHL, precautions must be taken in order to minimize civilian losses. (See Question 11.) Human rights law was conceived to protect persons from abuse by the State; it regulates, not the conduct of hostilities between parties to a conflict, but the manner in which force may be used in law enforcement. Law enforcement is predicated upon a 'capture-rather-than-kill' approach: the use of force must be the last resort for protecting life, when other means are ineffective or without promise of achieving the intended result, and must be strictly proportionate to the legitimate aim to be achieved (e.g. to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders, and to maintain public order and security).

- Concerning detention, while both IHL and human rights law provide for rules on the humane treatment of detainees, on detention conditions and on fair trial rights, differences emerge when it comes to procedural safeguards in internment, i.e. the non-criminal detention of a person based on the seriousness of the threat that his or her activity poses to the security of the detaining authority. Internment is not prohibited during armed conflict and, in general, a judicial review of the lawfulness of the detention is not required under IHL. (See Question 10.) Outside armed conflict, non-criminal (i.e. administrative) detention is highly unusual. In the vast majority of cases, people are deprived of their liberty because they are suspected of having committed a criminal offence. The International Covenant on Civil and Political Rights guarantees the right to liberty of person and provides that every individual who has been detained, for whatever reason, has the right to judicial review of the lawfulness of his or her detention. This area of human rights law is based on the assumption that the courts are functioning, that the judicial system is capable of absorbing all persons arrested at any given time regardless of their numbers, that legal counsel is available, that law enforcement officials have the capacity to perform their tasks, etc. Circumstances are very different during armed conflict, which is reflected in the provisions of IHL.

The interplay of IHL and human rights rules governing the use of force and procedural safeguards for internment, at least in international armed conflicts, must be resolved by reference to the *lex specialis*, that is the provisions of IHL that were specifically designed to deal with those two areas. (See box.)

INTERPLAY OF IHL AND HUMAN RIGHTS LAW

The interplay of IHL and human rights law remains the subject of much legal attention, particularly because of its consequences for the conduct of military operations.

In its very first statement on the application of human rights in situations of armed conflict, the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice observed that the protection provided by the International Covenant on Civil and Political Rights did not cease in times of war and that, in principle, the right not to be arbitrarily deprived of one's life applied also in hostilities. The Court added that what constituted arbitrary deprivation of life had to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities.

This statement has generally been interpreted as settling the issue of the interplay of IHL and human rights law and as implying that human rights law, deemed to apply at all times, constitutes the *lex generalis*, while IHL, whose application is triggered by the occurrence of armed conflict, constitutes the *lex specialis*. In other words, when human rights law and IHL are in conflict, the latter is deemed to prevail, since it was conceived specifically to deal with armed conflict.

While the meaning and even the utility of the doctrine of *lex specialis* have been called into question, there is a general acceptance of its indispensability for determining the interplay of IHL and human rights law. Although, generally speaking, these two branches of international law are complementary, the notion of complementarity cannot resolve the intricate legal issues of interplay that sometimes arise. In some instance, IHL and human rights rules might produce conflicting results when applied to the same facts because they reflect the different circumstances for which they were primarily developed.

Christoph von Toggenburg/ICRC

10. WHAT DOES IHL SAY ABOUT DEPRIVATION OF LIBERTY?

IHL protects all those who are not or are no longer taking direct part in hostilities (see Question 11). In addition to the general protection given to persons *hors de combat*, IHL provides specific protection for persons deprived of their liberty. These provisions vary with the type of armed conflict in question and with the status of the person detained.

Prisoners of war in international armed conflicts

Prisoners of war are combatants who have been captured (see Question 7). Their internment is not a form of punishment, but a means to prevent their further participation in the conflict. They must be released and repatriated without delay after the cessation of active hostilities. The detaining power may prosecute and detain them for war crimes they may have committed or for other violations of IHL, but not for the mere fact of having taken a direct part in hostilities. (See box for the difference between internment and detention.)

Prisoners of war must be treated humanely in all circumstances. IHL protects them against all acts of violence, as well as against intimidation, insults, and public curiosity. They are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. IHL also sets out minimum conditions of detention in detail, covering such issues as accommodation, food, clothing, hygiene and medical care. In addition, prisoners of war are entitled to exchange news with their families.

Civilian internees in international armed conflicts

A party to the conflict may subject civilians to internment if it is justified by imperative reasons of security. Internment is a security measure and may not be used as a form of punishment. This means that an internee must be released as soon as the reasons that necessitated his or her internment no longer exist.

Regarding procedural safeguards, the civilian internee must be informed of the reasons for his or her internment and must be able to have the decision reconsidered as soon as possible by an appropriate court or administrative board and if the decision is maintained, to have it reviewed periodically, and at least twice yearly.

The treatment and detention conditions for civilian internees are similar to those for prisoners of war (see above). Civilian internees must be treated humanely in all circumstances. IHL protects them against all acts of violence, as well as against intimidation, insults, and public curiosity. They are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. IHL also sets out minimum conditions of detention, covering such issues as accommodation, food, clothing, hygiene and medical care. Civilian internees must be allowed to exchange news with their families.

Persons deprived of their liberty in non-international armed conflicts

Common Article 3 provides that persons detained in the context of non-international armed conflicts must in all circumstances be treated humanely, without any adverse distinction. It also provides for fair trials affording all essential judicial guarantees. Common Article 3 is complemented by Articles 4, 5 and 6 of Additional Protocol II. These provisions contain: 1) fundamental guarantees (e.g. prohibition against violence to the life, health and physical or mental well-being of persons); 2) specific protection for persons whose liberty has been restricted, whether they are interned or detained, for reasons related to the armed conflict (e.g. women must be held in quarters separated from those of men and must be under the immediate supervision of women, not men); 3) protection for persons facing prosecution and punishment for criminal offences related to the armed conflict.

It is worth recalling that these provisions, in the same way as common Article 3, are equally binding on States and organized non-State armed groups. Also, like common Article 3, Additional Protocol II does not grant a special status to members of the armed forces or of armed groups who have fallen into enemy hands. There is no prisoner-of-war status in non-international armed conflicts. (See Question 7.) This is why the provisions establishing minimum guarantees for persons deprived of their liberty are so important.

The protection afforded to persons deprived of their liberty is less detailed and clear in non-international armed conflicts than in international armed conflicts; the IHL provisions in the latter case are also more numerous. For instance, the rules on the material conditions of detention during non-international armed conflicts are not detailed; and procedural safeguards for internees are also lacking. For these reasons, protection for persons deprived of their liberty in non-international armed conflicts has been identified by the ICRC as an area in which the law should be strengthened. (See Question 20.)

The two main forms of long-term detention in armed conflicts are internment, i.e. administrative detention for security reasons, and detention for the purposes of criminal proceedings.

– *Internment* is the term used in IHL to denote the detention of someone believed to pose a serious threat to the detaining authority's security, without the intention of bringing criminal charges against that person.

– *Detention* for the purpose of criminal proceedings is the deprivation of liberty to which a criminal suspect may be subjected, lasting until final conviction or acquittal .

HOSTAGE-TAKING

Hostage-taking – the seizure or detention of a person (the hostage), combined with threats to kill, to injure or to continue to detain the hostage, in order to compel a third party to carry out or to abstain from carrying out any act as an explicit or implicit condition for the release of the hostage – is prohibited.

Teun Anthony Oeteren/CRC

11. WHAT ARE THE MAIN IHL RULES GOVERNING HOSTILITIES?

There are three basic rules that regulate the way in which a party to an armed conflict may carry out military operations, i.e. conduct hostilities. These are the rules on distinction, proportionality and precautions. They aim to protect civilians against the effect of hostilities. In addition to these rules, there is the prohibition against causing superfluous injury or unnecessary suffering, which protects combatants and other legitimate targets of attack. These rules have been codified notably in Additional Protocol I. They exist in customary IHL for international and non-international armed conflicts.

Distinction

The basic rule of distinction requires that the parties to an armed conflict distinguish at all times between civilian persons and civilian objects on the one hand, and combatants and military objectives on the other. A party to an armed conflict may direct an attack only against combatants or military objectives. Neither the civilian population nor individual civilians may be attacked unless and for such time as they directly participate in hostilities (see box). Attacks must be strictly limited to military objectives and may not be directed against civilian objects. In so far as objects are concerned, military objectives are limited to those objects that by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Typical military objectives are establishments, buildings and positions where enemy combatants, and their matériel and armaments, are located, and military means of transportation and communication. When civilian objects are used for military purposes (e.g. a civilian train that is used to transport weapons and combatants) they may be regarded as military objectives.

The prohibition against indiscriminate attacks is derived from the principle of distinction. Indiscriminate attacks are:

- those that are not directed at a specific military objective (e.g. a soldier firing in all directions without aiming at a particular military objective, thus endangering civilians)
- those that employ a method or means of warfare that cannot be directed at a specific military objective (e.g. long-range missiles that cannot be aimed precisely at their targets)
- those that employ a method or means of warfare, the effects of which cannot be limited (e.g. a 10-tonne bomb used to destroy a single building).

Proportionality

Attacks directed against a combatant or a military objective must be in accordance with the proportionality rule. This means that it is prohibited to launch an attack that is likely to cause incidental loss of civilian life, injury to civilians, and/or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. In other words, a military objective may be attacked only after an assessment leading to the conclusion that civilian losses are not expected to outweigh the military advantage foreseen.

Precautions

A party to an armed conflict must take constant care to spare civilians or civilian objects when carrying out military operations. The party conducting an attack must do everything feasible to verify that the targets are military objectives. It must choose means and methods of attack that avoid, or at least keep to a minimum, the incidental harm to civilians and civilian property. It must refrain from launching an attack if it seems clear that the losses or damage caused would be excessive in relation to the concrete and direct military advantage anticipated. Effective warning must be given of attacks that may affect the civilian population, unless circumstances do not permit. Precautions must also be taken against the effects of attacks. For example, military objectives must not, as far as possible, be situated in the vicinity of civilian populations and civilian objects; all other necessary precautions must also be taken.

Prohibition against causing superfluous injury or unnecessary suffering

Employing weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is prohibited. This prohibition refers specifically to combatants: it says that weapons of certain kinds are prohibited because they harm combatants in unacceptable ways. Although the rule is generally accepted, there is disagreement about the proper way to decide whether a weapon causes superfluous injury or unnecessary suffering. The International Court of Justice defined unnecessary suffering as "harm greater than that unavoidable to achieve legitimate military objectives" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996). For instance, the rule against targeting soldiers' eyes with lasers, as laid down in Protocol IV to the Convention on Certain Conventional Weapons (see Question 12) was inspired by the belief that deliberately causing permanent blindness in this fashion amounted to the infliction of superfluous injury or unnecessary suffering.

DIRECT PARTICIPATION IN HOSTILITIES

Civilians are protected against attacks, unless and for such time as they directly participate in hostilities. To clarify what this means in practice, the ICRC conducted several meetings of experts at which this notion was discussed. In 2009, the ICRC published a document based on these discussions: *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. Interpretive Guidance* stipulates that civilians are considered to be participating directly in hostilities when they carry out specific acts as part of the conduct of hostilities between parties to an armed conflict. In order to qualify as direct participation in hostilities, a specific act must meet the following criteria cumulatively:

1. The act must reach a certain ***threshold of harm***. This is the case when the act will likely adversely affect the military operations or military capacity of a belligerent party. It could also be the case when the act will likely injure or kill civilians or render combatants *hors de combat* or will destroy civilian objects.

2. There must be a ***direct causal link*** between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part.

3. There must be a ***belligerent nexus***. This means that the act must be specifically designed to directly cause the required threshold of harm in support of a belligerent party and to the detriment of another.

Civilian are regarded as directly participating in hostilities, and lose their protection against attack, if and for as long as they carry out such acts. Moreover, measures preparatory to the execution of a specific act that constitutes direct participation in hostilities, as well as the deployment to and the return from the location of its execution, are included in the concept of direct participation in hostilities.

12. HOW DOES IHL REGULATE THE MEANS AND METHODS OF WARFARE?

The right of parties to a conflict to choose means or methods of warfare is not unrestricted. IHL prohibits the use of means and methods of warfare that are indiscriminate or that cause superfluous injury or unnecessary suffering. (See Question 11.) Specific restrictions/prohibitions concerning means of warfare (weapons) and prohibitions against methods of warfare have been derived from these principles.

MEANS OF WARFARE

The use of a specific weapon in armed conflict can be completely prohibited and the weapon itself considered unlawful (e.g. anti-personnel mines, cluster munitions, chemical weapons). Alternatively, its use may be restricted in certain situations (e.g. the prohibition against using air-delivered incendiary weapons against a military objective situated in an area with a concentration of civilians).

Anti-personnel mines

Under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), States must not under any circumstances use, develop, produce, stockpile or transfer anti-personnel mines, or help anyone else to do so. They must also destroy all existing stockpiles of anti-personnel mines and within a fixed time period, clear land where these devices have been laid.

Cluster munitions

The Convention on Cluster Munitions (2008) prohibits the use, production, stockpiling and transfer of cluster munitions (a bomb, shell, rocket or missile that releases a large number of small explosive submunitions). In addition to these prohibitions, States possessing cluster munitions are required to destroy their stockpiles of these weapons and to clear land contaminated by remnants of cluster munitions (unexploded cluster munitions and submunitions from a past conflict). There are also specific obligations on providing assistance to victims of cluster munitions.

Ursula Meissner/ICRC

Other conventional weapons

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) of 1980 also contains prohibitions against and restrictions on certain kinds of weapon:

- Protocol I of the CCW prohibits the use of any weapon, the primary effect of which is to injure by fragments that are not detectable in the human body by X-rays.
- Protocol II prohibits or restricts the use of mines (both anti-personnel and anti-vehicle), booby-traps and other similar devices. This Protocol was amended and new regulations added in 1996.
- Protocol III regulates the use of incendiary weapons, or weapons that are primarily designed to set fire to objects or to burn persons through the action of flame or heat, such as napalm bombs and flame throwers.
- Protocol IV prohibits the use and transfer of laser weapons specifically designed to cause permanent blindness.
- Protocol V requires the parties to a conflict to take measures to reduce the dangers posed by explosive remnants of war (unexploded and abandoned ordnance).

Initially, the CCW and its Protocols applied only in international armed conflicts (except Protocol II as amended in 1996), but the amendment of Article 1 of the Convention, on 21 December 2001, extended the application of these treaties to non-international armed conflict.

Chemical and biological weapons

The international community banned the use of chemical and biological weapons after World War I (the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare). This ban was reinforced in 1972 (the Biological Weapons Convention) and 1993 (the Chemical Weapons Convention) by prohibiting, in addition to their use, the development, stockpiling and transfer of these weapons, and requiring that stockpiles be destroyed. The Chemical Weapons Convention also prohibits the use of riot-control agents (e.g. tear gas) as a method of warfare.

Nuclear weapons

There is no comprehensive or universal ban on the use of nuclear weapons. The Nuclear Non-Proliferation Treaty of 1968 primarily aims to prevent the spread of nuclear weapons and to advance the goal of nuclear disarmament.

However, in 1996, the International Court of Justice, in an advisory opinion, confirmed that IHL applied to nuclear weapons, particularly the IHL principle of distinction and the prohibition against causing unnecessary suffering. In applying these and related rules to nuclear weapons, the Court concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court was however unable to decide whether, even in the extreme circumstance of a threat to the survival of the State, the use of nuclear weapons would be legitimate.

In 2011, the Council of Delegates of the International Red Cross and Red Crescent Movement (consisting of the ICRC, the International Federation of Red Cross and Red Crescent Societies and all the National Red Cross and Red Crescent Societies) adopted a milestone resolution, "Working towards the elimination of nuclear weapons," which outlines the Movement's position on nuclear weapons. The resolution stated that the Council found it difficult to envisage how any use of nuclear weapons could be compatible with the rules of IHL, in particular the rules of distinction, precaution and proportionality. It also appealed to all States to ensure that nuclear weapons were never again used and to pursue with urgency and determination negotiations to prohibit and eliminate nuclear weapons through a binding international agreement.

ENSURING THAT NEW WEAPONS ARE CONSISTENT WITH IHL

IHL also seeks to regulate developments in weapons technology and the acquisition of new weapons by States. Article 36 of Additional Protocol I requires each State Party to ensure that the use of any new weapon, means or method of warfare that it studies, develops, acquires or adopts will comply with the rules of international law that are binding on that State. Assessments carried out to this end will contribute to ensuring that the State's armed forces can conduct hostilities in accordance with that State's international obligations.

METHODS OF WARFARE

A number of methods of warfare are specifically prohibited under treaty and customary IHL. A few examples are given below.

Denial of quarter

Ordering that no quarter will be given and threatening an adversary therewith or conducting hostilities on this basis is prohibited. An adversary's forces must be given an opportunity to surrender and be taken prisoner. Wounded soldiers must be respected and protected.

Pillage

Pillage – the forcible seizure of private property by an invading or conquering army from the enemy's subjects – is prohibited.

Starvation

Starving the civilian population as a method of warfare is prohibited. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is also prohibited.

Perfidy

Killing, injuring or capturing an adversary by resort to perfidy is prohibited. Article 37 of Additional Protocol I defines 'perfidy' as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." This includes, for example, feigning injury or sickness in order to attack an enemy combatant. Ruses of war, i.e. acts intended to confuse the enemy that do not violate international law, and that respect the prohibition against perfidy, are not prohibited. This would include, for instance, the use of camouflage, decoys, mock operations, and misinformation.


Hany Hawasly/ICRC

13. WHAT ARE THE PROVISIONS OF IHL GOVERNING THE USE AND PROTECTION OF THE EMBLEM?

The red cross, red crescent, red lion and sun, and red crystal emblems are internationally recognized symbols and the visible expression of the neutral and impartial assistance and protection to which the wounded and the sick in armed conflict are entitled under IHL. These emblems have two distinct functions. First, they serve as the visible sign of the protection afforded during armed conflict to the medical personnel, units and transports of armed forces, and to religious personnel (protective use). Second, the emblems show that a person or an object is linked to the International Red Cross and Red Crescent Movement (indicative use). The Movement, as

mentioned above, consists of the ICRC, the International Federation of Red Cross and Red Crescent Societies, and all the National Red Cross and Red Crescent Societies.

Use as a protective device

The emblem is primarily intended to be used as a protective device by the medical services of armed forces on the ground, at sea and in the air. In addition, with the express authorization of the pertinent public authorities and under their control, civilian medical personnel, hospitals and other civilian medical units, and transports assigned to the treatment and care of the wounded, sick and shipwrecked in times of armed conflict may also use the protective emblem. Because the emblem is intended to represent the protection due to certain persons and objects in times of armed conflict, it should be as large as possible, so that it is visible, even from great distances. The emblem *per se* does not confer the protection. It is simply the visible sign of the protection afforded by the Geneva Conventions and their Additional Protocols.

Use as an indicative device

The emblem is also used for indicative purposes, during war or in times of peace, to show that a person or an object is linked to the Movement or to one of its components. In this instance, the emblem should be small in size in order to avoid confusing indicative and protective use.

The ICRC and the International Federation are entitled at all times to use the emblem for both protective and indicative purposes.

Misuse of the emblem

Any use of the emblem, during armed conflict or in peacetime, that is not expressly authorized by IHL constitutes misuse and is prohibited. There are three types of misuse:

- *imitation*, meaning the use of a sign that, by its shape and/or colour, may cause confusion with one of the recognized emblems;
- *usurpation*, or the use of the emblem by any person or organization that is not entitled to do so (commercial enterprises, medical establishments or pharmacies, non-governmental organizations or individuals, etc.). Usurpation also includes the failure of persons authorized to use the emblem to do so in accordance with the rules of IHL;
- *perfidy*, or the use of the emblem to feign protected status in order to kill, injure or capture an adversary (see Question 12). Perfidious use of the emblem in situations of international armed conflict is a war crime.

Misuse of the emblem during war or in peacetime may jeopardize the entire system of protection set up by IHL, because belligerent parties may lose trust in the emblem's protective function. By undermining the public significance of the emblem, misuse may also hamper safe access for the Movement to persons and communities affected by humanitarian crises and undermine its ability to deliver assistance and protection services.

IHL specifies that States must take steps to prevent and punish misuse of the emblem in wartime and peacetime alike, and to enact legislation on the use and protection of the emblem, providing for appropriate sanctions and penalties in the event of misuse.

The distinctive emblems recognized under IHL are not intended to have any religious, ethnic, racial or political significance or association.

THE EMBLEMS

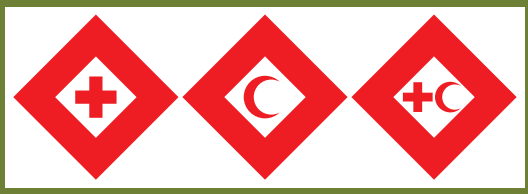
The Geneva Conventions provide for three emblems: the red cross, the red crescent, and the red lion and sun, the last of which is no longer in use.

1. The red cross, the red crescent, and the red lion and sun

In 2005, Additional Protocol III recognized an additional distinctive emblem: the red crystal (see figure 2). The red crystal emblem is intended for use under the same conditions and to serve the same purposes as the emblems defined in the Geneva Conventions. It provides an alternative for States that do not wish to display either the red cross or the red crescent.

2. The red crystal

National Societies of those States that decide to use the red crystal may incorporate one or more of the already existing emblems in it for indicative purposes (see figure 3). The main options are to include within the red crystal emblem the red cross, the red crescent, or the red cross and the red crescent side by side:



3. The red cross, the red crescent, and the red cross and the red crescent side by side

Additional Protocol III also allows the National Societies of those States that decide to use the red crystal to incorporate within the red crystal another emblem or sign that meets two conditions. First, the other emblem or sign must already be in effective use. Second, it must have been the subject of a communication through the Depositary (the Swiss Federal Council) to other High Contracting Parties (the other States party to the Geneva Conventions) and to the ICRC prior to the adoption of Additional Protocol III. Currently, the only other emblem that meets these two conditions is the red shield of David, which the Israeli National Society in Israel (Magen David Adom) has been using since the 1930s (see figure 4).

4. The red shield of David within the red crystal

Annibale Greco/ICRC

14. WHAT DOES IHL SAY ABOUT MISSING PERSONS AND THE RESTORATION OF FAMILY LINKS?

Conflict and disasters leave more than physical wounds: in the turmoil, panic and terror, family members can be separated from one another within minutes, leading to long years of anguish and uncertainty about the fate of children, spouses or parents. The Geneva Conventions and their Additional Protocols seek to ensure that people do not go missing, notably by providing obligations concerning the recording of information about persons deprived of their liberty, obligations regarding the dead, and obligations related to the right of families to know the fate of their relatives.

Persons deprived of their liberty

Each party to an armed conflict must record the personal details of every person deprived of his or her liberty, a prisoner of war, for example, or a civilian internee (see Question 10). This information must be provided to the prisoner of war or internee in the form of a capture or internment card. All these details must also be sent to relatives, either through the Protecting Powers – i.e. neutral States appointed to safeguard the interests of the parties to the conflict, and their nationals, in enemy countries (see Question 19) – or the ICRC. Persons deprived of their liberty also have the right to correspond with their families (although the right of communication can be restricted, notably where that is an absolute military necessity).

The dead

Each party to a conflict must take all possible measures to search for, collect and evacuate the dead as well as prevent the despoliation of their bodies. Parties to the conflict must endeavour to facilitate the return of human remains, if the opposing party or the relatives of the deceased so request. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. All available information must be recorded prior to disposal and the location of the graves marked, in order to facilitate identification.

The right to know

IHL requires parties to international armed conflicts to take every possible measure to elucidate the fate of missing persons (see box); it also stipulates that family members are entitled to know the fate of their relatives. In principle, domestic law will define who qualifies as the 'family member of a missing person'. Even so, it is worth noting that every definition must include at least close relatives, such as:

- children born in or out of wedlock, adopted children and step-children
- life partners, whether by marriage or not
- parents (including mothers-in-law, fathers-in-law and adoptive parents)
- brothers and sisters born of the same parents or different parents, or adopted.

Each party to the conflict must search for persons reported missing by an adverse party.

The treaty rules for non-international armed conflicts are less developed. However, many of the rules described above apply to both international and non-international armed conflict as customary law.

Missing persons are individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict – international or non-international – or of some other situation of violence.

The circumstances in which people go missing are various. Here are some examples:

- Families frequently lose track of relatives who have enlisted in the armed forces or joined armed groups, for want of any means of remaining in contact with them. Members of armed forces or armed groups may be declared missing in action when they die, if they were not equipped with the necessary means of identification, such as identity tags.

- Individuals who are captured, arrested or abducted may be held in secret confinement, or in an unknown place, and die in detention. In many cases, their families do not know their whereabouts or are not allowed to visit or even correspond with them. Often, information about people deprived of their liberty is not recorded (date and place of arrest, detention, death or burial) or the records that contain such information are concealed or destroyed.

- Many people are reported missing following mass killings. In many cases, the victims' bodies are left lying where they died, hastily buried, transported elsewhere or even destroyed.

- Displaced persons and refugees, groups of people isolated by conflict and people living in occupied areas may be unable to get news to their loved ones. These situations can lead to long separations.

- Children also disappear, as a result of being separated from their families who were forced to flee sites of conflict, forcibly recruited into armed forces or armed groups, imprisoned or even adopted in haste and unceremoniously.

- Finally, when bodies are exhumed and post-mortem examinations carried out, information that can lead to the identification of a deceased person is not always stored and managed properly.

HOW DOES IHL DEAL WITH FORCED DISAPPEARANCE?

The UN Convention for the Protection of All Persons from Enforced Disappearance (2006) defines 'enforced' or forced disappearance like this:

"[T]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

Forced disappearance violates a range of IHL rules, most notably the prohibitions against arbitrary deprivation of liberty, against torture and other cruel or inhuman treatment, and against murder. In addition, in international armed conflicts, the extensive requirements concerning registration, visits and exchange of information with respect to persons deprived of their liberty are aimed, notably, at preventing forced disappearance. Parties to non-international armed conflict are also required to take steps to prevent disappearance, including through the registration of persons deprived of their liberty. The prohibition against forced disappearance should also be viewed in the light of the rule requiring respect for family life and that requiring each party to the conflict to take all feasible measures to account for persons reported missing as a result of armed conflict and to provide their family members with any information it has on their fate. The cumulative effect of these rules is that the practice of forced disappearance is prohibited by IHL.

NATIONAL INFORMATION BUREAU

The Geneva Conventions (see Article 122 of the Third Geneva Convention and Article 136 of the Fourth Geneva Convention) state that upon the outbreak of a conflict and in all cases of occupation, each party to the conflict must establish an official bureau of information for receiving and sending out information about the prisoners of war and civilian internees in its power. Each belligerent power must inform its own information bureau of all prisoners of war and civilian internees in its power and provide it with every available detail concerning the identity of these persons, so that their next-of-kin can be informed as quickly as possible. In States party to the Geneva Conventions, these bureaux are often operated by the National Red Cross or Red Crescent Society

CENTRAL TRACING AGENCY

"A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency. The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend." (Article 123 of the Third Geneva Convention; see also Article 140 of the Fourth Geneva Convention for civilian internees). The ICRC is in charge of the Agency, which was renamed the Central Tracing Agency in 1960, to reflect all the activities undertaken by the Agency, activities that include other categories of person as well, such as non-prisoners, civilians and refugees.

15. WHAT DOES IHL PROVIDE FOR IN TERMS OF HUMANITARIAN ACCESS AND ASSISTANCE?

Armed conflicts, whether international or non-international, give rise to significant needs for humanitarian assistance. Civilian populations are often deprived of basic necessities in war – food, water and shelter – and have no access to health care and other essential services. The reasons vary. Property may be destroyed as a result of combat operations and farming areas may be unusable owing to the dispersion of landmines, cluster munitions or

Omar B. Warsame/ICRC

other explosive remnants of war. Entire populations may be forced to leave their homes, abandoning their customary sources of income. In addition, economic and other infrastructure may be damaged or disrupted, affecting the stability of entire countries or regions for a prolonged period of time.

Under international law, States bear the primary responsibility for ensuring that the basic needs of civilians and civilian populations under their control are met. However, if States are unable or unwilling to discharge their responsibilities, IHL provides for relief action to be taken by others, such as humanitarian organizations, subject to the consent of the State concerned. In order to carry out their tasks, humanitarian organizations must be granted rapid and unimpeded access to the people affected.

The legal framework pertaining to humanitarian assistance can be found in the Geneva Conventions and their 1977 Additional Protocols as well as in customary IHL. IHL rules on humanitarian access and assistance establish, first, that relief actions may be authorized – and in a situation of occupation must be authorized – when civilian populations are without adequate supplies. Second, IHL sets out in detail the conditions governing such operations, with a view to facilitating the delivery of humanitarian relief to the people affected.

Obligation to undertake relief action

The relevant provisions of Additional Protocols I and II stipulate that relief activities "shall be undertaken" when the population lacks supplies essential for its survival, thereby clearly establishing a legal obligation. However, they further provide that such obligation is subject to the consent of the State concerned (except during an occupation). Thus, a balance has to be found between two apparently contradictory requirements: on the one hand relief action must be undertaken and on the other, the consent of the State concerned has to be obtained.

The conditions for giving consent vary with the context:

- In international armed conflicts – when they are not taking place on occupied territories – the parties concerned must not withhold consent on arbitrary grounds: any impediment(s) to relief action must be based on valid reasons. In particular, if it is established that a civilian population is threatened with starvation and a humanitarian organization that provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.

- In non-international armed conflicts, the same rules outlined above apply. It remains a matter of debate however whether the consent of the territorial State would be needed if the relief is for civilians in the territory controlled by the non-State armed group.

- In occupied territories, the occupying power has a duty to ensure that the population is provided with food and medical supplies. In particular, it should bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.
  If all or part of the population of an occupied territory is inadequately provided with the necessary supplies, the occupying power is under an obligation to give consent to relief schemes to aid the population.

What are the conditions under which humanitarian relief must be delivered?

The second set of rules concerns the conditions under which humanitarian relief must be delivered. These are as follows:

- Humanity, impartiality and non-discrimination: the provisions of IHL apply only to assistance that is impartial and humanitarian in character and conducted without any adverse distinction. This means, notably, that relief must be given to all persons in need, regardless of the party to which they belong, and regardless of their religion, sex, etc.

- Control: Parties allowing the passage of relief may control its delivery, notably by setting out the technical arrangements, including provisions for inspection, governing such passage.

IHL AND THE 'RIGHT TO INTERVENE ON HUMANITARIAN GROUNDS'

In so far as a 'right – or even a duty – to intervene' is tantamount to justifying armed intervention for humanitarian reasons, this is a matter not for IHL but for the rules on the legality of the use of armed force in international relations: in other words, it is a matter for *jus ad bellum*. The concept of the 'responsibility to protect' is gradually replacing the notion of a 'right' or 'duty' to intervene on humanitarian grounds (see Question 2).

The ICRC's study on customary law, published in 2005, identified the following rules on the provision of humanitarian assistance. They apply during both international and non-international armed conflict:

- Humanitarian relief: personnel and objects used for humanitarian relief operations must be respected and protected.

- The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief – if it is impartial in character and conducted without any adverse distinction – for civilians in need, subject to their right of control.

- The parties to the conflict must ensure for authorized humanitarian relief personnel the freedom of movement necessary to carry out their tasks. Only in case of imperative military necessity may their movements be temporarily restricted.

- Starving the civilian population as a method of warfare is prohibited.

16. HOW DOES IHL PROTECT REFUGEES AND INTERNALLY DISPLACED PERSONS?

Refugees are people who have crossed an international frontier and are at risk, or have been victims, of persecution in their country of origin. Internally displaced persons (IDPs), on the other hand, have not crossed an international frontier, but have also had to flee their homes. (See box below.)

Refugees are protected by refugee law – mainly the Convention Relating to the Status of Refugees (1951) and the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) – and human rights law, and

particularly by the principle of non-refoulement. They fall under the mandate of the Office of the United Nations High Commissioner for Refugees. Refugees are also protected by IHL when they are in a State involved in an armed conflict. Refugees receive, besides the general protection afforded to civilians by IHL, special protection under the Fourth Geneva Convention and Additional Protocol I. For instance, Article 44 of the Fourth Geneva Convention specifies that Detaining Powers should not treat as enemy aliens refugees who do not, in fact, enjoy the protection of any government. Article 73 of Additional Protocol I adds that refugees must be regarded as protected persons in all circumstances and without any adverse distinction.

There is however no universal treaty that specifically addresses the protection needs of IDPs. The Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which entered into force in December 2012, is the first international treaty to

address the matter of protection and assistance for IDPs. IDPs are protected by various bodies of law, including domestic law, human rights law and – if they are in a State involved in armed conflict – IHL. The United Nations Guiding Principles on Internal Displacement (1998) is a non-binding instrument of importance for IDPs. These principles reflect existing international law and are widely recognized as providing an international framework for the protection of IDPs during all phases of displacement, including return, resettlement and reintegration.

The rules of IHL for the protection of civilians, if respected, can prevent displacement. Particular mention should be made of the rules prohibiting:

- direct attacks on civilians and civilian objects or indiscriminate attacks
- starvation of the civilian population and the destruction of objects indispensable to its survival
- collective punishment – which may take the form of destruction of dwellings.

IHL also expressly prohibits compelling civilians to leave their places of residence unless their security or imperative military reasons so demand.

All possible measures must be taken to ensure that displaced civilians have satisfactory conditions of shelter, hygiene, health, safety and nutrition, and that members of the same family are not separated. Rules requiring parties to a conflict to allow relief consignments to reach civilians in need also afford protection to IDPs.

All these rules are recognized under customary IHL and apply during both international and non-international armed conflict.

WHO IS A REFUGEE?

Article 1 of the Convention Relating to the Status of Refugees, as modified by the 1967 Protocol, defines a 'refugee' as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the Cartagena Declaration (1984) on refugees have adopted a broader definition that includes people fleeing events that seriously disrupt public order, such as armed conflicts and other situations of violence.

WHO IS AN IDP?

The United Nations Guiding Principles on Internal Displacement (1998) defines IDPS as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."

MIGRANTS CAUGHT UP IN ARMED CONFLICT

There is no universally accepted definition of 'migrant' and the decision to migrate can be 'voluntary' or 'forced', although labels are much less clear-cut than in the past. Rapid-onset events such as armed conflict or disaster may be the immediate reason forcing people to leave their homes. The search for better economic opportunities, slow-onset and progressive environmental degradation, increasing suppression of rights (especially for minorities) and the availability of family networks in more stable locations may determine precisely where migrants move and for how long. The term 'mixed migration' is now used to describe the flight from armed conflict of asylum seekers, refugees and stateless people mingled with labour migrants; 'mixed migration' describes both the situation and the combination of factors that cause such shifts of population.

Many migrants will not qualify as refugees and, when they cross an international border, are, by definition, not internally displaced. Regardless of the initial cause of their displacement (or migration), the vulnerability and protection needs of these people, and the threats to their human rights that they are exposed to during their journey – including human trafficking – cannot be minimized.

There is no universal treaty that specifically addresses the matter of protection for all migrants. Provisions can be found in various bodies of law including domestic law, human rights law and – if they are in a State involved in armed conflict – IHL.

Migrants on the territory of a State involved in armed conflict are considered to be civilians.

17. WHAT OBJECTS ARE SPECIALLY PROTECTED UNDER IHL?

Civilian objects are protected from attack under general provisions of IHL. Some objects are also accorded specific protection under IHL, either because of their particular importance for the protection of victims of armed conflicts, the civilian population or mankind in general or because of their particular vulnerability to destruction and damage in times of armed conflict. Some examples are given below.

Medical units and transports

The term '**medical units'** refers to establishments and other units – military or civilian, fixed or mobile, permanent or temporary – organized for medical purposes. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units.

The term '**medical transports**' refers to any means of transportation – military or civilian, permanent or temporary – assigned exclusively to medical transportation under the control of a competent authority of a party to the conflict. This includes means of transportation by land, water or air, such as ambulances, hospital ships and medical aircraft.

The specific protection for medical units and transports under IHL is a subsidiary form of protection afforded to ensure that the wounded and the sick receive medical care. The IHL protection for medical units and transports is an old one. It can be found in the 1864 Geneva Convention or the 1899 and 1907 Hague Regulations. It was further elaborated in the First and Fourth Geneva Conventions for military medical units and transports, civilian hospitals, and certain means of medical transport. In 1977, this protection was expanded to cover, in particular, civilian medical units and transports in all circumstances. The protection for medical units and transports in non-international armed conflicts is derived implicitly from common Article 3, which requires that the wounded and the sick

be collected and cared for. This protection is also explicitly set forth in Additional Protocol II. State practice has now established the obligation to respect and protect all medical units and transports, whether civilian or military, as a norm of customary international law applicable in both international and non-international armed conflicts.

In the obligation to respect and protect medical units and transports exclusively assigned to medical purposes in all circumstances:

- **respect** means, in particular, that medical units and transports may not be attacked and that their functioning may not be unduly impeded;
- **protect** means that medical units and transports must be actively assisted in their functioning, as well as protected from attacks or undue interference by third parties. In particular, medical units must, as far as possible, not be situated in the vicinity of military objectives. Moreover, medical units and transports may under no circumstances be used to shield military objectives from attack.

If medical units and transports are used to commit, outside their humanitarian function, acts harmful to the enemy, they will lose their protection and may be subject to attacks. Before attacking them, however, a warning must be issued, setting, whenever appropriate, a reasonable time limit; the attack may be authorized only if the warning has remained unheeded. Examples of acts harmful to the enemy include the use of medical units to shelter able-bodied combatants or store arms or munitions, or as military observation posts or shields for military action. Even then, however, as with all attacks on a military objective, the rules on proportionality and precautions must be complied with for the benefit of the wounded and the sick or medical personnel who may be inside a medical unit or transport from which acts harmful to the enemy are being committed.

Finally, authorized medical units have the right to display the distinctive emblems (see Question 13). It should be noted that medical units and transports must be specifically respected and protected whether or not they display the distinctive emblem; but displaying the emblem facilitates identification.

Cultural property

Cultural property is generally protected as a civilian object. In addition, special care must be taken to avoid any damage to cultural property, as it is among the most precious civilian objects; the need for such caution becomes even more important when the cultural property in question is a vital aspect of the heritage of the people concerned.

The term '**cultural property**' refers to any movable or immovable property dedicated to religion, art, science, education or charitable purposes, or to historic monuments. Property of great importance to the cultural heritage of every people - such as architectural or historic monuments, archaeological sites, works of art, books or any building whose main and effective purpose is to contain cultural property, and centres containing a large amount of cultural property – may display and can be recognized by the emblem of the blue-and-white shield (see figure on next page).

The legal basis for providing special protection for **cultural property** is found in the 1907 Hague Regulations, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, and in the Additional Protocols of 1977. The obligation to respect and protect cultural property also exists in customary law governing both international and non-international armed conflict.

In the obligation to respect and protect cultural property:

- **respect** means that special care must be taken in military operations to avoid damage to cultural property, unless they are turned into military objectives;
- **protect** means that all seizure of or destruction or wilful damage done to cultural property is prohibited. The occupying power must also prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.

There are, in addition, further obligations to respect and protect **property that is considered of great importance to the cultural heritage of every people.**

- The 1954 Hague Convention for the Protection of Cultural Property sought to reinforce the protection for property that is considered of great importance to the cultural heritage of every people by, first, encouraging the marking of such property with a blue-and-white shield. (See adjacent figure.)

- Such property must not be the object of attack unless imperatively required by military necessity. The Second Protocol to the 1954 Hague Convention clarifies that the waiver of imperative military necessity may be invoked only when and for as long as: (1) the cultural property in question has, by its function, been made into a military objective; and (2) there is no feasible alternative for obtaining a military advantage similar to that offered by attacking that objective. The Second Protocol further requires that the existence of such necessity be established at a certain level of command and that in case of an attack, effective advance warning be given whenever circumstances permit. It should be noted that Article 53, paragraph 1, of Additional Protocol I and Article 16 of Additional Protocol II go even further: they do not provide for a waiver in case of imperative military necessity. These articles cover only a limited amount of very important cultural property, namely that which forms part of the cultural or spiritual heritage of 'peoples' (i.e. mankind). The property covered by the Additional Protocols has to be of such importance that it is sure to be recognized by everyone and may not even have to be marked.

- The military use of such property – which is likely to expose it to destruction or damage – is prohibited, unless imperatively required by military necessity. Here again, the Second Protocol to the 1954 Hague Convention clarifies that the waiver of imperative military necessity may be invoked to use cultural property for purposes that are likely to expose it to destruction or damage only "when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage." The Second Protocol further requires that the existence of such necessity be established at a certain level of command. It should be noted that Article 53, paragraph 1, of Additional Protocol I and Article 16 of Additional Protocol II go even further: they do not provide for a waiver in case of imperative military necessity.

- Any form of theft, pillage or misappropriation of such property and all acts of vandalism directed against it are prohibited.

Emblem of the blue-and-white shield to indicate protection for property that is considered of great importance to the cultural heritage of every people.

The natural environment

The term '**natural environment**' refers to the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, and outer space. It includes, for instance, all vegetation (plants, forests, etc.), wildlife, micro-organisms, soil, rocks, air, water and other natural resources, and climate.

Armed conflict can cause long-lasting damage to the natural environment. The use of certain weapons, in particular chemical or nuclear weapons, may have a long-lasting adverse impact on the environment. Such impact can be an aspect of military strategy, parties to the conflict targeting parts of the environment in order to weaken their enemy's capacities. But it may also occur as an unintended consequence of conflict. Destruction – of drains and sewers, power stations, and chemical plants and other industries – and the mere creation of rubble may result in the contamination of water sources, arable land and the air, affecting the health of entire populations. While a certain amount of environmental damage may be accepted as inherent in armed conflict, such damage must not be disproportionate.

IHL therefore recognizes a limit to environmental damage. First, the environment is generally protected as a civilian object and therefore also protected against direct attacks as well as against excessive incidental damage; IHL also requires that all feasible precautions be taken to avoid, and in any event to minimize, incidental damage to the environment. The natural environment is also accorded special protection under IHL. In fact, IHL protects the natural environment against "widespread, long-term and severe damage." In particular, methods or means of warfare that are intended, or may be expected, to cause such of damage to the natural environment

are prohibited by treaty and customary law in international armed conflicts. State practice has established this rule as a norm of customary international law, arguably in non-international armed conflicts as well.

Finally, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) of 1976 provides additional protection for the environment during times of armed conflict. ENMOD prohibits the deliberate modification of the environment in order to inflict "widespread, long-lasting or severe effects" – producing phenomena such as hurricanes, tidal waves or changes in climate – as a means of destruction, damage or injury to another State Party. Put simply, the deliberate destruction of the natural environment as a weapon is prohibited.

Tomohiro Ohsumi/Pool/REUTERS

Works and installations containing dangerous forces

The term '**works and installations containing dangerous forces**' refers to dams, dykes and nuclear electricity generating stations.

Works and installations containing dangerous forces must not be attacked even when these objects are turned into military objectives because such attacks may cause the release of dangerous forces and as a result, serious loss of civilian life. Military objectives situated at or in the vicinity of these works or installations must not be attacked either, if such an attack would lead to equally serious loss of civilian life. These rules are explicitly stated in Additional Protocol I and exist in customary law for both international and non-international armed conflicts. In order to facilitate identification of such objects, parties to the armed conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis (see below).

18. WHAT DOES IHL SAY ABOUT TERRORISM?

WHAT IS THE ICRC'S POSITION ON TERRORISM?

The ICRC strongly condemns acts of violence that are indiscriminate and spread terror among the civilian population. It has done so on many occasions.

IHL does not provide a definition of 'terrorism', but prohibits most acts committed in armed conflict that would commonly be considered 'terrorist'. It is a basic principle of IHL that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants and between civilian objects and military objectives. This principle of 'distinction' is the cornerstone of IHL (see Question 11). Many IHL rules specifically aimed at protecting civilians – such as the prohibition against deliberate or direct attacks against civilians and civilian objects, the prohibition against indiscriminate attacks or the prohibition against the use of 'human shields' – are derived from it. IHL also prohibits hostage-taking. There is no legal significance in describing deliberate acts of violence against civilians or civilian objects in situations of armed conflict as 'terrorist' because such acts already constitute serious violations of IHL.

Moreover, IHL specifically prohibits "measures" of terrorism and "acts of terrorism." Article 33 of the Fourth Geneva Convention states that "collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Article 4 of Additional Protocol II prohibits "acts of terrorism" against persons not or no longer taking part in hostilities. The main aim of these provisions is to emphasize that neither individuals nor the civilian population may be subjected to collective punishment, which, among other things, obviously terrorizes. Additional Protocols I and II also prohibit acts aimed at spreading terror among the civilian population: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (see Article 51, paragraph 2, of Additional Protocol I; Article 13, paragraph 2, of Additional Protocol II). These provisions do not prohibit lawful attacks on military targets, which may spread fear among civilians, but they outlaw attacks that specifically aim to terrorize civilians – for example, conducting shelling or sniping campaigns against civilians in urban areas.

Sean Adair

As IHL applies only during armed conflict, it does not regulate terrorist acts committed in peacetime. Such acts are however subject to law, i.e. domestic and international law, in particular human rights law. Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict must be addressed by means of domestic or international law enforcement agencies. States can take several measures to prevent or suppress terrorist acts, such as intelligence gathering, police and judicial cooperation, extradition, criminal sanctions, financial investigations, the freezing of assets or diplomatic and economic pressure on States accused of aiding suspected terrorists.

WHAT ABOUT THE SO-CALLED 'WAR ON TERRORISM'?

This is a term that has been used to describe a range of measures and operations aimed at preventing and combating terrorist attacks. These measures include intelligence gathering, financial sanctions, and judicial cooperation; they could also involve armed conflict. The legal classification of what is often called the 'global war on terror' has been the subject of considerable controversy. While the term has become part of daily parlance in certain countries, there remains a need to examine, in the light of IHL, whether it is merely a rhetorical device or whether it refers to a global armed conflict in the legal sense. Based on an analysis of the available facts, the ICRC does not share the view that a global war is being waged; it takes a case-by-case approach to the legal classification of situations of violence that are referred to colloquially as part of the 'war on terror'. Simply put, where violence reaches the threshold of armed conflict, whether international or non-international, IHL is applicable (see Question 5). Where it does not, other bodies of law come into play.

For instance, specific aspects of the fight against terrorism launched after the attacks against the United States on 11 September 2001 amount to an armed conflict as defined under IHL. The war waged by the US-led coalition in Afghanistan that started in October 2001 is an example. The Geneva Conventions and the rules of customary international law were fully applicable to that international armed conflict, which involved the US-led coalition, on the one side, and Afghanistan, on the other. However, much of the violence taking place in other parts of the world that is usually described as 'terrorist' is perpetrated by loosely organized groups (networks) or individuals that, at best, share a common ideology. It is doubtful whether these groups and networks can be characterized as party to any type of armed conflict.

'Terrorism' is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted 'fight against terrorism' rather than a 'war on terrorism'.

WHAT LAW APPLIES TO PERSONS DETAINED IN THE FIGHT AGAINST TERRORISM?

1. Persons detained in connection with an **international armed conflict** waged as part of the fight against terrorism – the case with Afghanistan until the establishment of the new government in June 2002 – are protected by IHL applicable to international armed conflicts.

   a) ***Captured combatants*** must be granted prisoner-of-war (POW) status and may be held until the end of active hostilities in that international armed conflict. POWs may not be tried merely for participating in hostilities, but they may for any war crimes they might have committed. In this case, they may be held until they have served any sentence that is imposed. If the POW status of a prisoner is in doubt, a competent tribunal must be established to rule on the issue.

   b) ***Civilians detained for imperative reasons of security*** must be accorded the protection provided for in the Fourth Geneva Convention. Combatants who do not fulfil the criteria for POW status (who, for example, do not carry arms openly) or civilians who have taken a direct part in hostilities in an international armed conflict (so-called 'unprivileged' or 'unlawful' belligerents) are protected by the Fourth Geneva Convention provided they are enemy nationals. Unlike POWs, such persons may be tried under the domestic law of the detaining State for taking up arms, as well as for any criminal acts they might have committed. They may be imprisoned until they have served any sentence that is imposed. If they are not prosecuted, they must be released as soon as the imperative reasons of security that led to their internment cease to exist.

2. Persons detained in connection with a **non-international armed conflict** waged as part of the fight against terrorism are protected by common Article 3, Additional Protocol II when applicable and the relevant rules of customary IHL. The rules of human rights law and domestic law also apply to them. They are entitled to the fair trial guarantees of IHL and human rights law if they are tried for crimes they might have committed.

3. All persons detained **outside of an armed conflict** in the fight against terrorism are protected by the domestic law of the detaining State and by human rights law. They are protected by the fair trial guarantees of these bodies of law if they are tried for crimes they might have committed.

No person captured in the fight against terrorism can be considered to be outside the law. There is no such thing as a 'black hole' in terms of legal protection.

Alyona Synenko/ICRC

19. HOW IS IHL IMPLEMENTED?

Implementation of IHL – turning the rules into action – is first and foremost the responsibility of the States that are party to the Geneva Conventions and their Additional Protocols. This responsibility is set forth, notably, in Article 1 common to the four Geneva Conventions, which requires States to respect and ensure respect for the Conventions in all circumstances.

Some implementation measures will require the adoption of legislation or regulations. Others will require the development of educational programmes for the armed forces as well as the general public, the recruitment and/or training of personnel, the production of identity cards and other documents, the setting up of special structures, and the introduction of planning and administrative procedures. States must also prevent violations and if they occur, punish those responsible for it.

PREVENTION, MONITORING AND REPRESSION

States have a duty, in peacetime and during armed conflicts, to take certain legal and practical measures aimed at ensuring full compliance with IHL. IHL treaties also provide for a number of mechanisms to ensure compliance with the law.

These rules and mechanisms can be broadly divided into three categories.

1. **Preventive measures**
   - Spreading knowledge of IHL (dissemination of IHL)
   - Translating IHL treaties into the national language(s)
   - Transforming IHL into domestic law where necessary and adopting legislative and statutory provisions to ensure compliance with IHL
   - Training personnel to facilitate the implementation of IHL and appointing legal advisers in the armed forces
   - Preventing war crimes and punishing those who commit them
   - Ensuring respect for the red cross, red crescent and red crystal emblems.

2. **Measures and mechanisms to monitor compliance with IHL for the duration of a conflict**
   - **Protecting Powers or their substitutes.** Protecting Powers are neutral States appointed to safeguard the interests of the parties to the conflict, and their nationals, in enemy countries. The role of the Protecting Power is to conduct relief and protection operations in aid of victims and to supervise compliance with IHL, by visiting prisoners of war or civilian internees, for example. An international organization that 'offers all guarantees of impartiality and efficacy' may act as a substitute for a Protecting Power.
   - **Enquiry procedure.** An enquiry must be instituted into alleged violations if requested by a party to the conflict and if the parties concerned agree on the procedures to be followed.
   - **International Humanitarian Fact-Finding Commission.** This commission, established under Article 90 of Additional Protocol I, may inquire into alleged grave breaches or other serious violations of the Geneva Conventions or Additional Protocol I and facilitate through its good offices the restoration of respect for the Geneva Conventions. Although its formal competence extends only to situations of international armed conflict, the Commission has expressed willingness to conduct investigations in connection with non-international armed conflicts, if the parties consent to it.

- **Cooperation with the United Nations.** In the event of serious violations of IHL, States party to the Geneva Conventions and its Additional Protocols must act in cooperation with the United Nations and in conformity with the United Nations Charter.
- **ICRC.** The ICRC is a key component of the monitoring process by virtue of the mandate entrusted to it under the Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement (see Question 20).

3. Measures of repression

These are based on the duties of the parties to the conflict to prevent and put a halt to all violations. Relevant duties include the following in particular:

- the duty of States to repress, through domestic prosecutions, violations considered to be war crimes
- the duty of military commanders to initiate disciplinary or penal action against violators of the Geneva Conventions and Additional Protocols
- the duty of States to ensure criminal and disciplinary responsibility of superiors if they failed to take all feasible measures within their power to prevent or repress IHL breaches
- obligations between States to provide mutual assistance on criminal matters.

These measures serve as an important deterrent against violations (see Question 21).

The principal cause of suffering in armed conflicts is inability to respect the law in force, whether for lack of means or political will, rather than the deficiency or absence of rules. In recent years, the emphasis has been on developing criminal law procedures to prosecute and punish those who have committed serious violations of IHL, but appropriate means for halting and redressing violations when they occur are still lacking. Most of the procedures provided under IHL have not or have almost never been used in practice. What is more, these procedures apply only in cases of international armed conflict. It is true that some monitoring and implementing mechanisms have been developed outside the ambit of IHL, but they have their limitations. For all these reasons, the ICRC believes that the mechanisms for monitoring and ensuring compliance with IHL must be strengthened (see Question 20).

20. WHAT IS THE ICRC'S ROLE IN DEVELOPING AND ENSURING RESPECT FOR IHL?

As the guardian and promoter of IHL, the ICRC takes action to protect and assist victims of armed conflicts and other situations of violence, and to foster respect for the law. (See box.) It does the latter, notably by spreading knowledge of IHL, by supporting its implementation at the domestic level, by monitoring respect for it and by reminding parties to conflicts of their obligations. The ICRC also plays an important role in the development of IHL.


Vladimir Mentik/ICRC

THE ICRC'S MISSION STATEMENT

"The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence."

Protection activities

The ICRC's activities to protect people during armed conflict and other situations of violence are aimed at obtaining full respect for applicable law. The ICRC cannot physically protect people. Instead, it seeks to minimize the dangers to which they are exposed, prevent and put an end to the abuses to which they are subjected, draw attention to their rights, and make their voices heard. In other words, the ICRC monitors respect for IHL and reports violations to the pertinent authorities. Protection activities include detention work (visiting prisons, assessing detention conditions, etc.), protection of the civilian population and restoration of family links.

Assistance activities

The aim of ICRC assistance is to preserve the lives and/or restore the dignity of individuals or communities adversely affected by armed conflict or other situations of violence. Assistance activities principally address the consequences of violations of IHL. They may also tackle the causes and circumstances of these violations by reducing exposure to risk. Assistance activities vary with the situation. They cover a broad range: from the provision of food or medicines to capacity building for the delivery of essential services, such as rehabilitation of water supplies or medical facilities and the training of primary-health-care personnel, surgeons and prosthetic/orthotic technicians.

The **Statutes of the International Red Cross and Red Crescent Movement** specify that the ICRC's role includes the following in particular:

"to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law" (Article 5, paragraph 2 (c))

"to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (Article 5, paragraph 2 (g)).

Dissemination and implementation of the law

Ignorance of the law is a major obstacle to respecting it. For this reason, the ICRC reminds States of their obligation to make IHL widely known. It also takes action to this end, encouraging incorporation of IHL in educational programmes, military training and university curricula. The ICRC further reminds States that they must take all the steps necessary to ensure that the law is implemented at the domestic level and applied effectively. It does so chiefly through its Advisory Service on IHL, which provides technical guidance to States and helps their authorities adopt domestic implementing laws and regulations.

Monitoring respect for IHL and reminding belligerent parties of their obligations

The four Geneva Conventions and their Additional Protocols give the ICRC a specific mandate to act in the event of armed conflict. During international armed conflicts, the ICRC has a right to visit prisoners of war and civilian internees to make sure that their treatment and the conditions in which they are being held are consonant with IHL. Information on the detainees must be sent to the ICRC's Central Tracing Agency, which ensures that detainees do not go missing. The ICRC also provides humanitarian assistance, such as consignments of foodstuffs, medical supplies and clothing, to people in need.

In addition to the tasks incumbent upon it under IHL treaties, the ICRC has a broad right of initiative (see common Article 3, Article 9 of the First, Second and Third Geneva Conventions, and Article 10 of the Fourth Geneva Convention). It may always offer its services to the parties to a conflict. The ICRC also has a right of initiative – recognized in the Statutes of the International Red Cross and Red Crescent Movement – in situations that do not reach the threshold of an armed conflict, but that warrant humanitarian action. In situations where IHL does not apply, the ICRC may offer its services to governments without that offer constituting interference in the internal affairs of the State concerned.

On the strength of the conclusions it draws from its protection and assistance work, the ICRC makes confidential representations to the relevant authorities in the event of violations of IHL. Confidentiality is one of the main working methods of the ICRC. It is a long-standing ICRC policy and a practice that derives directly from the principles of neutrality and impartiality. It enables the ICRC to establish and maintain a constructive dialogue with parties to an armed conflict and other stakeholders; to have access to conflict areas, places of detention and victims of armed conflict and other situations of violence; and to ensure the security of its beneficiaries and of its staff. Bilateral confidential representations to the parties to a conflict is the ICRC's preferred mode of action to put an end to violations of IHL or of other fundamental rules protecting persons in situations of violence, or to prevent the occurrence of such violations. However, this mode of action is complementary to others. In particular, the ICRC reserves the right to issue a public denunciation of specific violations of IHL if: (1) the violations are major and repeated or likely to be repeated; (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources; (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts (i.e. calling on third parties to influence the conduct of parties to a conflict who commit violations of IHL) have failed to put an end to the violations; and (4) such publicity is in the interest of the persons or populations affected or threatened.

Development of IHL

Treaties developing IHL are adopted by States. Under the Statutes of the International Red Cross and Red Crescent Movement, the ICRC also has a mandate to "prepare any development" of IHL. In order to fulfil this mandate,

the ICRC, notably, prepares draft texts for submission to diplomatic conferences. For instance, the first drafts of the Geneva Conventions were drawn up by the ICRC in consultation with States, submitted and further discussed, modified and finally adopted at diplomatic conferences. The ICRC also organizes consultations with States and other interested parties with a view to ascertaining the possibility of reaching agreement on new rules or otherwise strengthening IHL. For instance, following the 31st International Conference of the Red Cross and Red Crescent, and the adoption of Resolution 1: Strengthening Legal Protection for Victims of Armed Conflicts (see: http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm), the ICRC has engaged in consultations with States in order to strengthen IHL in the fields of detention and strengthen compliance with IHL (see Questions 10 and 19).

Christopher Scott/ICRC

21. HOW ARE SUSPECTED WAR CRIMINALS PROSECUTED UNDER INTERNATIONAL LAW?

War crimes are serious violations of IHL committed during international or non-international armed conflicts. Definitions or lists of war crimes can be found in various legal texts, including the Statute of the International Military Tribunal established after the Second World War in Nuremberg, the Geneva Conventions and their Additional Protocols, the Statutes and case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Rome Statute of the International Criminal Court, and other international and 'mixed' tribunals.

Article 8 of the Statute of the International Criminal Court contains a list of war crimes that States drew up in treaty form; it is also a useful guide to the acts that States generally consider to be serious violations of IHL under customary international law. The legislation and case law of various countries also contain definitions of war crimes.

What are war crimes?

The following acts are among those classified as war crimes:

- wilful killing of a protected person (e.g. wounded or sick combatant, prisoner of war, civilian)
- torture or inhuman treatment of a protected person
- wilfully causing great suffering or serious injury to a protected person
- attacking the civilian population
- unlawful deportation or transfer
- using prohibited weapons or methods of warfare
- making improper use of the red cross or red crescent emblem or other protective signs
- perfidiously wounding or killing individuals belonging to a hostile nation or army
- pillage of public or private property.

Although IHL treaties pertaining to non-international armed conflicts do not contain any provisions on the criminalization of serious IHL violations, nowadays it is recognized that the notion of war crimes under customary international law also covers serious violations committed in non-international armed conflicts. (See Rule 156 of the ICRC's study on customary IHL and Article 8, paragraph 2 c), d), e) and f) of the Rome Statute.)

What are crimes against humanity and genocide?

International law recognizes other types of crime such as crimes against humanity and genocide. Crimes against humanity are essentially atrocities committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack. Examples of such atrocities include murder, extermination, enslavement, deportation, imprisonment, torture, rape, and persecution on various grounds.

Under the Statute of the International Criminal Court, the crime of genocide covers various "acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such." The acts in question are the following: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group.

States' obligations: Prosecution or extradition of alleged war criminals

On becoming party to the Geneva Conventions or Additional Protocol I, States undertake to enact legislation necessary to punish persons guilty of what are known as 'grave breaches' of the Conventions and the Protocol. States are also bound to prosecute in their own courts any person suspected of having committed a grave breach, or to hand that person over for trial in another State.

A State's criminal laws generally apply only to crimes committed on its territory or by its own nationals, but States are increasingly passing laws that enable their courts to prosecute crimes committed outside their territory. Under IHL, States are required to seek out and punish any person who has committed a grave breach of IHL – irrespective of his nationality or the place where the offence was committed. This principle, known as universal jurisdiction, is essential to guarantee that grave breaches are effectively repressed. Universal jurisdiction provides the basis in international law for State laws that enable courts in one State to prosecute persons who have committed international crimes in a different State.

Criminal proceedings for serious violations of IHL, i.e. war crimes including – but not limited to – grave breaches, must in some circumstances be brought by national authorities. The ICRC's study on customary IHL confirms that States have the obligation to investigate war crimes allegedly committed by their nationals or armed forces, or by others on their territory, as well as other war crimes over which they have jurisdiction. They also have an obligation to prosecute, if appropriate, persons suspected of war crimes.

WHAT IS THE ROLE OF INTERNATIONAL COURTS?

The International Criminal Court (ICC), set up by States under the Rome Statute, came into force on 1 July 2002. It represents a milestone in the international community's fight to end impunity for war crimes, genocide, crimes against humanity and the crime of aggression. Though States have the primary responsibility for prosecuting suspected war criminals, the ICC may act – if the criteria required to establish its jurisdiction are met – when domestic courts are unwilling or unable to do so.

Before the ICC, International Criminal Tribunals for the former Yugoslavia and Rwanda (known as the ICTY and ICTR), were set up by the United Nations Security Council in 1993 and 1994 to try persons accused of committing war crimes during the conflicts in those countries. The Mechanism for International Criminal Tribunals – established by the Security Council on 22 December 2010 – has been tasked with carrying out the essential functions of the ICTY and ICTR after they complete their mandates and with maintaining their legacy.

Penal repression of war crimes is also carried out by a growing number of 'mixed' or special courts, established in States such as Cambodia, East Timor, and Sierra Leone. Mixed courts have elements of both domestic and international jurisdiction.

WHY ARE INTERNATIONAL CRIMES COMMITTED?

This question can be answered in various ways. Some claim that ignorance of the law is largely to blame, that it is a natural consequence of war, or that it is because international law (including IHL) lacks an effective centralized system for imposing sanctions. As a matter of fact, laws are violated and crimes committed during times of war and of peace, and regardless of whether it is national or international jurisdiction that is in force. Even so, simply surrendering to the reality of violations of IHL and halting all action that seeks to gain greater respect for this body of law, and abandoning victims of armed conflicts to their fate is not an option. . That is why violations should be ceaselessly condemned, and steps taken to prevent them and punish those who commit them. The penal repression of war crimes is an important means of implementing IHL, whether at the national or the international level.

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