



INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

RECOMMITTING TO PROTECTION IN ARMED CONFLICT
ON THE 70TH ANNIVERSARY OF THE GENEVA CONVENTIONS

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CHAPTER 3

**NEEDS OF THE CIVILIAN
POPULATION IN INCREASINGLY
LONG CONFLICTS:
SELECTED ISSUES**

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

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

The protracted nature of many of today's armed conflicts has an impact on the needs and vulnerabilities of civilian populations.⁴³ Many humanitarian needs arise early in a conflict, but they may change, accumulate, and become exacerbated over time. For instance, protracted conflicts destroy elements of essential infrastructure, such as schools and hospitals, or seriously degrade them to the point that they become unusable. When conflicts are not resolved, displaced persons, far too often, are effectively deprived of the possibility of returning voluntarily, in safety and with dignity, to their homes. And where support services and systems collapse, new barriers arise for persons with disabilities. Such obstacles, especially if prolonged, feed rather than dissipate tensions.

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

1. INTERNALLY DISPLACED PERSONS

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

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

⁴³ See ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, 2016; available at <https://www.icrc.org/en/document/protracted-conflict-and-humanitarian-action>.

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

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

In armed conflicts, IHL protects IDPs as civilians. Better respect for IHL can contribute to reducing the scale of displacement, in addition to protecting those displaced.⁴⁶ Human rights law complements the protection afforded by IHL, but the precise relationship between the two bodies of law is subject to further clarification and evolution. As displacement remains a reality for far too many people, a stronger focus on prevention and protection is needed. This is an integral part of the ICRC's commitment to putting people and their needs at the centre of its action. In this connection, it is essential to continue working to influence and change the behaviour of parties to conflict, in order to ensure greater respect for IHL and other rules protecting IDPs. Strengthening protection for IDPs is a subject that requires further reflection.⁴⁷

The civilian character of IDP camps

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

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

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

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

⁴⁷ See, for instance, ICRC, *Translating the Kampala Convention into Practice: A Stocktaking Exercise*, 2016; available at <https://www.icrc.org/en/international-review/article/translating-kampala-convention-practice-stocktaking-exercise>; ICRC, “Strengthening legal protection for victims of armed conflicts”, 31IC/11/5.1.1, 2011.

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

Durable solutions

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

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

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

Building on and going beyond IHL, the UN Guiding Principles on Internal Displacement and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa explicitly recognize the right of IDPs to return to their former homes, integrate at the location to which they were displaced, or

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

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

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

resettle in another part of the country. Under human rights law, these durable solutions are derived from the right to freedom of movement and residence.⁵¹ Freedom of movement is also essential for IDPs to have access to livelihoods, education and health care, and to achieve a durable solution to their displacement. Restrictions on movement not only take away these possibilities but can also lead to family separation and create obstacles to family reunification. Although IHL does not contain a right to freedom of movement and residence, ensuring better respect for certain of its rules can contribute to allowing or facilitating freedom of movement. For instance, the obligation to take all feasible precautions to protect civilians and avoid causing incidental harm to them might require parties to the conflict to allow civilians to leave an area, or evacuate them from it, if they are endangered by hostilities.⁵²

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

2. THE PROTECTION OF PERSONS WITH DISABILITIES

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

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

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

The ICRC, in line with the ambitions of the Movement, has committed to strengthening disability inclusion in its protection and assistance activities and among its own staff. It is working towards incorporating the perspectives of persons with disabilities in the design, implementation and review of its humanitarian response. The ICRC also strives to promote more systematically the protection of persons with disabilities under relevant international legal frameworks, especially IHL and the Convention on the Rights of Persons with Disabilities (CRPD).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IHL and human rights law, including the CRPD, require humane treatment of detainees, without discrimination.⁵⁷ Specific measures are thus required to ensure that persons with disabilities can obtain basic services and facilities on an equal basis with other detainees. During its visits to places of detention, the ICRC has observed that detainees with disabilities were provided information about available services or facilities in accessible formats by detaining authorities, who had also adapted infrastructure to enable better access for detainees with physical impairments.

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

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

Participation of persons with disabilities in decisions concerning humanitarian action

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

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

56 ICRC, *How law protects persons with disabilities in armed conflict*, 2017; available at <https://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict>.

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

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

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

3. ACCESS TO EDUCATION

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

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

In recognition of these persistent challenges, the ICRC developed its Framework for Access to Education and an accompanying strategy for 2018–2020.⁶⁰ In tandem, the Movement adopted a resolution at the Council of Delegates in 2017, titled “Education: Related humanitarian needs”. Together, these outline operational and policy measures to strengthen responses to the impact of armed conflict and other violence on educational services. They also affirm that efforts to foster compliance with IHL rules that protect access to education are needed to address the persistent challenge of ensuring education continuity during armed conflict.⁶¹

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

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

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

The first of these challenges arises when education is a contested stake in a conflict. This includes those situations in which education is directly targeted because the language, history, or value-system taught in schools is, or is perceived to be, a vehicle for recruitment or generator of community support for one party to the conflict.⁶² The first prong of the definition of a military objective under IHL requires that the educational facility in question must – by its nature, location, purpose or use – make an effective contribution to military

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

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

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

action. Accordingly, if an educational facility merely generates support for a party to the conflict, it will not fulfil the definition of a military objective. This differentiation is crucial. For example, where the content of education provided at a school is of an ideology that increases the level of community support for one party to the conflict, this does not make a direct effective contribution to military action, even if it strengthens political commitment, or encourages recruitment or support for the war effort of an enemy party to the conflict. As a result, the school does not qualify as a military objective under IHL and must not be attacked.

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

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

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

Obligations to facilitate access to education during protracted conflicts

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

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

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

64 The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict are available at: www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf; www.protectingeducation.org/sites/default/files/documents/guidelines_en.pdf.

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

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

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

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

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