



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 7

ENHANCING RESPECT FOR IHL

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

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

1. INVESTIGATIONS IN ARMED CONFLICT

Investigations into alleged violations of IHL are recognized as critical for the proper application of this body of law in both international and non-international armed conflict, and are a way for parties to armed conflict to enhance respect for IHL on the ground.

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

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

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

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

93 Geneva Academy of International Humanitarian Law and Human Rights and ICRC, *Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice*, 2019; available at <https://www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice>.

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

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

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

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

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

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

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

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

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

2. ROOTS OF RESTRAINT IN WAR

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

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

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

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

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

96 ICRC, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, 2004; available at <https://www.icrc.org/en/publication/0853-roots-behaviour-war-understanding-and-preventing-ihl-violations>.

97 ICRC, *The Roots of Restraint in War*, 2018; available at <https://www.icrc.org/en/publication/roots-restraint-war>.

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

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

3. “SUPPORT RELATIONSHIPS” IN ARMED CONFLICT

As throughout much of the history of warfare, contemporary armed conflicts involve a multiplicity of actors, including States, non-State actors and international organizations. Some fight one another, and others support one another through military partnerships, alliances, and coalitions. This support takes various forms, such as: provision of training and equipment; arms transfers; institutional capacity support; financial aid; cyber operations; hosting of troops; provision of private contractors; and intelligence sharing. The ICRC is able to report that these complex webs of support and partner relationships have become increasingly prevalent and are a key feature of almost every major context of conflict in which it operates.⁹⁸

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

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

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

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

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

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

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

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

Ensuring respect for IHL includes an obligation not to encourage, aid or assist in violations of IHL, as well as a due-diligence obligation to take proactive steps to influence parties to conflict and bring them to an attitude of respect for IHL. The obligation to ensure respect for IHL is an obligation of means and not of result, and States have very broad discretion in choosing measures with which to exercise influence.

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

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

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

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

4. IHL IN ACTION: RESPECT FOR THE LAW ON THE BATTLEFIELD

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

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

Such a discourse is dangerous, as it renders violations banal and risks creating an environment where they may become more acceptable. What is needed is nuanced discourse on the subject, because the perception that IHL is continuously violated and therefore ineffective does not reflect the reality of contemporary armed conflicts. Instances of respect for IHL, though underreported, are a daily occurrence.

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

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

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

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

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

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