



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 4

**IHL AND NON-STATE
ARMED GROUPS**

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

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

The multiplication of armed groups, their diverse nature, and the different ways in which they operate make it increasingly difficult for humanitarian organizations to operate safely and engage effectively with non-State armed groups on IHL compliance. Moreover, numerous legal challenges arise in relation to the evolving operations of non-State armed groups. These include questions regarding the applicability of IHL to situations of violence involving multiple armed groups, and questions on the protection that IHL, and possibly other fields of international law, provide for persons affected by armed conflict. In this chapter, the ICRC presents its views on (1) the applicability of IHL to conflicts involving multiple non-State armed groups; (2) the legal regime protecting persons living in territory under the *de facto* control of non-State armed groups; and (3) legal and practical dilemmas regarding detention by armed groups.

1. THE APPLICABILITY OF IHL TO CONFLICTS INVOLVING MULTIPLE NON-STATE ARMED GROUPS

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

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

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

68 ICRC, *Strategy 2019–2022*, p. 8; available at <https://www.icrc.org/en/publication/4354-icrc-strategy-2019-2022>.

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

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

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

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

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

The applicability of IHL to splinter groups

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

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

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

A second question is whether the confrontations between the group and its adversary have crossed a certain threshold of violence, such that the relationship between them is now one of armed conflict. This has to be assessed on a case-by-case basis, taking into account the realities of fluid armed conflicts.

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

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

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

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

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

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

2. THE LEGAL REGIME PROTECTING PERSONS LIVING IN TERRITORY UNDER THE CONTROL OF NON-STATE ARMED GROUPS

Concomitant to the many contemporary non-international armed conflicts and the multiplication of non-State armed groups, a significant number of armed groups exercise *de facto* control over territory and persons living therein. Such control may take various forms. In some contexts, armed groups exercise military control over territory while State organs continue to be present and provide certain services – such as health care, education, or public welfare. In other contexts, non-State armed groups exercise *de facto* control over territory and State forces or organs are no longer present. In these situations, and in particular if territorial control is prolonged, some non-State armed groups may develop State-like capacities and provide services for the population.

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

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

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

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

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

For as long as IHL applies, its rules, which contain fundamental humanitarian protections, apply to the treatment by non-State armed groups of persons living under their control. Within territory controlled by a State or non-State party to a conflict, parties to the conflict are bound by IHL in connection with all acts having a "nexus" or link to the armed conflict. The nexus requirement has been understood to mean that an act must be "shaped by or dependent upon the environment – the armed conflict – in which it is committed" – in other words, that the armed conflict played an essential role in a person's ability, decision, and objective to engage in certain conduct.⁷² The nexus requirement ensures that the relationship between the State and the population, or between members of the population, continues to be regulated only by its obligations under human rights law, unless an act has a nexus to the conflict. It has been argued that in territory under the *de facto* control of a non-State party to a non-international armed conflict, only acts with a narrow link to the conflict would have such a nexus: thus, acts of the non-State armed groups that aim primarily to maintain law and order among the civilian population, or the provision of essential services, would fall outside the scope of IHL, and would be governed by other bodies of law, including human rights law. The other view, submitted here, is that the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their *de facto* control is inherently linked to the conflict in question. The armed conflict plays a substantial part in the group's ability to control the lives of those living under its control and the manner in which such control is exercised. As a result, IHL applies and therefore protects persons living in territory under the *de facto* control of non-State armed groups.

Protective rules provided by international law and their limitations

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

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

IHL applicable in non-international armed conflict does not, however, contain rules addressing issues such as the provision of public order and safety, the possible collection of taxes, or the adoption of laws regulating life in such territory.⁷³ IHL applicable in non-international armed conflict tends to be less elaborate, or silent, on the protection of certain other rights, in particular the political, economic, social, and cultural rights of the

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

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

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

population.⁷⁴ Issues pertaining to the relationship between citizens and authorities are primarily the purview of human rights law. Ensuring continued protection of the human rights of persons living in territory under the *de facto* control of armed groups is, however, challenging as a matter of law and practice.

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

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

3. DETENTION BY NON-STATE ARMED GROUPS

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

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

The treatment of detainees, and the judicial or other procedures – if any – applied to their deprivation of liberty, also vary, depending on the reasons for their detention. Persons deprived of their liberty by armed groups include members of an adversary's security forces and individuals suspected of supporting the adversary; persons arrested for common crimes in territories under their *de facto* control; an armed group's own members; or hostages, the latter necessarily held in violation of IHL. The reasons for which armed groups

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

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

⁷⁶ See ICRC, “Reports and documents: Protecting people deprived of their liberty”, *International Review of the Red Cross*, Vol. 98, No. 903, 2016, pp. 1043–1066.

deprive individuals of their liberty are often multiple and overlapping: ensuring their security and weakening an adversary by rendering its forces *hors de combat*; maintaining “law and order”; or ensuring discipline within their own ranks. They also detain with the aim of exchanging detainees with the adversary; to demonstrate their power by holding detainees; or to extract money.

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

The complex realities outlined above pose legal challenges at different levels, many of which are yet to be resolved. For certain rules, such as those on the treatment of detainees and their conditions of detention, the challenge may be one of ensuring that non-State armed groups know and accept the law and integrate its provisions into their internal rules and organizational culture; have practical guidance to implement IHL in different operational contexts; and dispose of the requisite material resources to ensure humane conditions of detention. More complex legal issues arise regarding the prohibition against arbitrary detention; IHL rules on fair trials; procedural safeguards required for internment; and the prohibition against detainee transfers in violation of the principle of *non-refoulement*. For instance, fair-trial obligations require that sentences be based on “law” and be pronounced by a “regularly constituted court”, such as those commonly operating in State legal systems. Moreover, in the ICRC’s view, ensuring that internment does not amount to arbitrary detention requires that grounds for internment be defined in a document binding for the detaining forces, and internment decisions be reviewed by an “independent and impartial review body”.⁷⁷ It remains to be clarified what these and other legal notions mean in the context of detention by armed groups, and how armed groups can implement such rules.

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

77 ICRC, “Internment in armed conflict: Basic rules and challenges”, opinion paper, 2014; available at <https://www.icrc.org/en/download/file/3223/security-detention-position-paper-icrc-11-2014.pdf%20>.