



INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

BUILDING A CULTURE OF COMPLIANCE FOR IHL TO PROTECT HUMANITY
IN TODAY'S AND FUTURE CONFLICTS

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
INTRODUCTION.....	6
I. THE PROHIBITION OF NUCLEAR WEAPONS: PROTECTING HUMANITY FROM UNSPEAKABLE SUFFERING	10
1. Nuclear weapons and IHL.....	12
2. The Treaty on the Prohibition of Nuclear Weapons.....	12
II. CLARIFYING THE LEGAL FRAMEWORK: ‘GREY ZONES’, ‘COMPETITION’, ‘HYBRID WARFARE’ OR ‘PROXY WARFARE’	14
III. TOWARDS MORE EFFECTIVE PROTECTION FOR PEOPLE IN THE HANDS OF PARTIES TO ARMED CONFLICT	18
1. People deprived of liberty in armed conflict.....	19
A) Detention by states	19
B) Non-state armed groups and the prohibition against arbitrary detention.....	22
2. Separated family members, missing people and the dead and their families.....	24
A) Respecting family life	25
B) The ‘right to know’ under IHL.....	25
C) Recording and providing information on separated family members, missing people and the dead.....	26
D) Respecting the dead	27
3. The separation of children from their families.....	28
A) Key legal provisions in international and non-international armed conflict.....	29
B) Legal grounds and safeguards.....	29
4. Protecting diverse people.....	31
A) Reflecting gendered impacts of armed conflicts in applying IHL.....	31
B) Interpreting and implementing IHL in a disability-inclusive manner	33
IV. BALANCING IN GOOD FAITH THE PRINCIPLES OF HUMANITY AND MILITARY NECESSITY IN THE CONDUCT OF HOSTILITIES	36
1. The urbanization of armed conflict.....	37
A) Heavy explosive weapons in populated areas: A change in mindset is urgently required	38
B) Protection of critical infrastructure enabling essential services to civilians.....	40
2. The protection of medical facilities.....	42
A) Acts harmful to the enemy and their consequences	43
B) The warning requirement	43
C) Further constraints on attacks against medical facilities that have lost their protection.....	44
3. Food security	45
A) The prohibition against using starvation of civilians as a method of warfare.....	45
B) Objects indispensable to the survival of the civilian population	46
C) Other pertinent rules.....	47
D) Challenges to effective protection in practice.....	48
4. Protection of the natural environment	49
A) Implementing IHL to protect the natural environment during armed conflict	49
B) Protection of the natural environment by the general rules on the conduct of hostilities	50
C) Clarifying the “widespread, long-term and severe” threshold of prohibited damage to the natural environment	51
D) Protected environmental zones in armed conflict.....	51

5. Reinforcing the stigma associated with anti-personnel mines and cluster munitions	52
A) Faithfully implementing the APMBC and the CCM.....	53
B) Reinforcing the humanitarian norms underpinning the APMBC and the CCM.....	54
V. APPLYING IHL TO NEW TECHNOLOGIES OF WARFARE.....	56
1. Cyber operations, information operations and other digital threats.....	57
A) IHL limits on cyber operations.....	57
B) IHL limits on information operations.....	58
C) Risks and legal limits when civilians are drawn closer to hostilities through the use of digital technology.....	59
2. Autonomous weapon systems	60
A) Humans must determine the lawfulness of attacks.....	61
B) Challenges in assessing the lawfulness of attacks carried out using AWS.....	61
C) The need for new international law rules on AWS.....	63
3. Artificial intelligence in military planning and decision-making	64
A) Under IHL, humans must make legal determinations.....	64
B) AI is not suited to all tasks.....	65
C) Potential for AI-decision-support systems to support compliance with IHL and mitigation of civilian harm.....	66
D) Preserving time and space for human deliberation.....	66
4. Reducing the human cost of military operations in outer space	67
A) Existing limits under international law on military operations in, or in relation to, outer space	67
B) Working together to prevent and address the risk of civilian harm due to military space operations	68
VI. PROTECTING AND FACILITATING IMPARTIAL HUMANITARIAN WORK IN EVOLVING CONFLICTS	70
1. Maintaining space for humanitarian action in sanctions and counter-terrorism measures.....	71
A) Considering IHL in sanctions and counter-terrorism measures.....	71
B) Remaining challenges in sanctions frameworks	72
C) IHL compliance when implementing counter-terrorism measures.....	73
2. Protecting humanitarian organizations against digital threats.....	73
A) Cyber operations that breach and disrupt the IT systems of humanitarian organizations.....	74
B) Disinformation that undermines the reputation and operations of humanitarian organizations	74
VII. BUILDING A CULTURE OF COMPLIANCE WITH IHL	76
1. Bringing IHL home: States' implementation of IHL and the repression of violations	78
A) Ratifying core IHL treaties.....	78
B) Adopting national implementation measures.....	78
C) Investigating and suppressing IHL violations.....	79
D) Investing in IHL education.....	79
E) Sharing good practices	80
2. Building bridges for IHL through dialogue with cultural and legal frameworks.....	80
3. Ensuring respect for IHL in the transfer of weapons	81
A) The international legal obligation to respect IHL in arms-transfer decisions.....	82
B) Closing the gap between commitment and practice: Ensuring respect for IHL in arms-transfer decisions.....	82
4. Respect for IHL and easing the path to peace	83
CONCLUSION	84



I. THE PROHIBITION OF NUCLEAR WEAPONS: PROTECTING HUMANITY FROM UNSPEAKABLE SUFFERING

Since 1945, the International Red Cross and Red Crescent Movement (Movement) has repeatedly voiced its concern about the devastating humanitarian consequences of nuclear weapons, and has called on states to prohibit these weapons. The ICRC first called for the abolition of nuclear weapons in the aftermath of the atomic bombing of Hiroshima, where ICRC staff saw the catastrophic consequences of the use of nuclear weapons while working alongside the Japanese Red Cross to care for tens of thousands of wounded and dying civilians. The experience had a profound impact on the ICRC and on the Movement as a whole.

In the decades that followed, the Movement continued to regularly call for the prohibition and elimination of nuclear weapons. Further impetus for this was provided by growing evidence that it would not be possible to provide a meaningful humanitarian response in the event of the use of nuclear weapons.¹ If a nuclear weapon were to be detonated in or near a populated area, it would cause an overwhelming number of casualties, and most local medical facilities having been destroyed, huge numbers of people will be left needing treatment. Assistance providers would face serious risks associated with exposure to radiation.

Because of their immense and horrifying destructive potential, nuclear weapons have been the object of sustained international political and legal attention since their development and first use in 1945.² Recent developments have given new urgency to the issue and highlighted the relevance of IHL in addressing it.

The risk of nuclear weapons being used is at its highest since the darkest moments of the Cold War. Growing international and regional tensions have been accompanied by an alarming rise in nuclear rhetoric, and explicit and implicit threats to use nuclear weapons have been made. Theories of nuclear deterrence are regaining vigour and the role of nuclear weapons in military doctrines and security policies is growing rather than diminishing. The modernization of nuclear arsenals continues unabated: smaller nuclear weapons are being developed, and these are claimed to be more “usable” and intended for tactical military use. There are also concerns that artificial intelligence may be introduced into the command-and-control systems of nuclear weapons.

At the same time, the nuclear disarmament and non-proliferation framework is eroding, with several treaties and agreements having been terminated or abandoned, and others under stress. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is still widely regarded as the cornerstone of global nuclear non-proliferation and disarmament efforts, but progress in implementing its disarmament provisions has long been stalled, disarmament and risk-reduction measures agreed at review conferences have not been implemented and states parties have been unable to agree on further measures.

In these troubling circumstances, IHL assumes an important role in maintaining and reinforcing the taboo against the use of nuclear weapons and providing the basis for new legal measures to advance their elimination, such as the Treaty on the Prohibition of Nuclear Weapons (TPNW).

1 See, for example, Dominique Loyer and Robin Coupland, “International assistance for victims of use of nuclear, radiological, biological and chemical weapons: Time for a reality check?” *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, pp. 329–340; and John Borrie and Tim Caughley, *An Illusion of Safety: Challenges of Nuclear Weapon Detonations for United Nations Humanitarian Coordination and Response* (UNIDIR/2014/6), United Nations Institute for Disarmament Research, UNIDIR, Geneva, 2014: <https://unidir.org/publication/an-illusion-of-safety-challenges-of-nuclear-weapon-detonations-for-united-nations-humanitarian-coordination-and-response>.

2 United Nations General Assembly Resolution 1(I): “Establishment of a commission to deal with the problems raised by the discovery of atomic energy” (24 January 1946), created the United Nations Atomic Energy Commission and mandated it to, *inter alia*, “make specific proposals ... for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction”: [https://undocs.org/A/RES/1\(I\)](https://undocs.org/A/RES/1(I)).

1. NUCLEAR WEAPONS AND IHL

Nuclear weapons release immense quantities of heat and kinetic energy, and prolonged radiation. They have massive destructive power that is impossible to contain in space and time. Their use would cause incalculable human suffering, especially in or near populated areas, and there is no adequate humanitarian response capacity. A nuclear conflict would have catastrophic effects on people and societies around the globe, on human health, the environment, the climate, food production and socio-economic development. It would cause irreversible harm to future generations and threaten the very survival of humanity.

The principles and rules of IHL applicable to all means and methods of warfare apply to nuclear weapons, even in situations of national self-defence. In the view of the ICRC, and of the broader Movement,³ it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of IHL.

In particular, directing nuclear weapons against civilian populations or civilian objects, such as entire cities or other concentrations of civilians and civilian objects, or otherwise not directing a nuclear weapon against a specific military objective, would violate the principle of distinction. Using nuclear weapons against military objectives located in or near populated areas would violate the prohibitions of indiscriminate and disproportionate attacks. Even if used far away from populated areas, the suffering to combatants caused by radiation exposure, and the radiological contamination of the environment and risk of spread of radiation to populated areas, make it extremely doubtful that nuclear weapons could ever be used in accordance with the prohibition to use weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment and the civilian population.

In the ICRC's view, the use of and threat to use nuclear weapons is abhorrent to the principles of humanity and dictates of public conscience.

In view of the catastrophic humanitarian consequences of any use of nuclear weapons, and of the risk of escalation that any use would involve, it is a humanitarian imperative for states to ensure that they are never again used and to prohibit and eliminate them, regardless of their views on the legality of nuclear weapons under IHL.

2. THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

In July 2017, 122 states adopted the TPNW, which entered into force on 22 January 2021. As the preamble to the treaty makes clear, the TPNW is explicitly based on the principles and rules of IHL. The preamble states that “any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law”.⁴

The TPNW provides a comprehensive prohibition of nuclear weapons, which is an essential step towards their elimination. It also reinforces the stigma against their proliferation and use. The TPNW reaffirms the fundamental link between humanitarian imperatives and security, stating that the risks associated with nuclear weapons “concern the security of all humanity”, that preventing any use of nuclear weapons is the responsibility of all states, and that nuclear disarmament serves “both national and collective security interests”.⁵ By providing pathways for the elimination of nuclear arsenals, the treaty directly supports the implementation

3 Council of Delegates 2022, Resolution 7: Working towards the elimination of nuclear weapons: 2022–2027 action plan: https://rcrcconference.org/app/uploads/2022/06/CD22-R07-Nuclear-weapons_22-June-2022_EN_FINAL.pdf.

4 United Nations, *Treaty on the Prohibition of Nuclear Weapons* (2017), preamble (para. 10): <https://undocs.org/A/CONF.229/2017/8>.

5 United Nations, *Treaty on the Prohibition of Nuclear Weapons* (2017), preamble (paras 3 and 5): <https://undocs.org/A/CONF.229/2017/8>.

of existing nuclear disarmament obligations and commitments, in particular those under Article 6 of the NPT. Together with the Biological Weapons Convention and the Chemical Weapons Convention, the TPNW completes the multilateral legal regime prohibiting weapons of mass destruction. For these reasons, the TPNW constitutes a significant milestone on the path towards a world free from nuclear weapons.

In light of this, and in the context of the challenges described at the beginning of this chapter, the current priorities for the ICRC are to increase membership and support the implementation of the TPNW, promote full implementation of the NPT and commitments made at its review conferences, and urge states to take immediate and concrete steps to reduce the risk of nuclear weapons being used. Such steps include taking nuclear weapons off high alert, committing to no-first-use policies, de-prioritizing nuclear weapons in military doctrines and security policies, refraining from rhetoric that envisages or speculates about the use of nuclear weapons or that ignores or minimizes the humanitarian consequences of their use, and condemning all threats to use nuclear weapons, implicit or explicit, regardless of circumstances.