



# 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

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### **III. TOWARDS MORE EFFECTIVE PROTECTION FOR PEOPLE IN THE HANDS OF PARTIES TO ARMED CONFLICT**

Armed conflicts inevitably produce suffering. Even in a conflict in which IHL is very well respected, there will be people who are detained and others who are killed. Often, people will be separated from their families, or go missing, during hostilities. Many of the thousands of people who go missing never return, causing anguish and long-lasting hardship for their loved ones. Distress and hardship also follow the separation of children from their families.

The vast web of rules protecting people affected by armed conflict was developed precisely to prevent or reduce, as much as possible, such harm caused by conflict. Over time, these rules have proven to be crucial in reducing suffering, and protecting people from ill-treatment or disappearance, during conflict. Even so, they continue to be tested and challenged. Some challenges have to do with attempts by parties to conflicts to narrow their protective scope in line with a narrative that seeks to exclude certain groups or people from protection. Sometimes people are detained without justification or for undefined periods of time; in such cases, they are also often at serious risk of ill-treatment and physical hardship. Other challenges arise when the necessary steps are not taken to implement IHL properly and prevent violations when conflicts break out. There is simply not enough effort put in developing the laws, systems and processes essential for making IHL effective in protecting people.

There is an urgent need for more vigorous efforts to interpret IHL obligations in good faith and make implementation and compliance with these obligations a priority in internal policies and processes. These are two of the key requirements for restoring the protective power of IHL.

Finally, two things are required to implement IHL effectively and safeguard people from harm: recognition of the specific risks people face and their distinct needs; and concrete measures to implement IHL without adverse distinction based on gender, disability, race and any other similar criteria.

In this chapter, the ICRC presents its legal views on some of these current challenges in protecting diverse people affected by armed conflict.

## 1. PEOPLE DEPRIVED OF LIBERTY IN ARMED CONFLICT

This section deals with two sets of challenges related to deprivation of liberty in armed conflict: issues related to detention by states (in both international and non-international armed conflict); and issues related to detention by non-state armed groups (in non-international armed conflict).

### A) DETENTION BY STATES

Detention by states in both international and non-international armed conflict continues to give rise to a range of concerns. Violence against detainees – ranging from murder to torture, sexual violence and other forms of ill-treatment – remains a grave concern. Lack of respect for the procedural safeguards and judicial guarantees necessary to prevent arbitrariness is also a continuing problem – as are disregard for the specific protections owed to prisoners of war and civilian internees and denial of ICRC access despite the legal obligation to facilitate it. As set out earlier in this report, there is an acute need for better implementation and enforcement of IHL by states.

This section, however, focuses on two specific challenges that partly explain the problem of non-compliance: the exclusion of persons or groups from the protective scope of IHL; and underinvestment in preparing to comply with the law governing detention.

#### i. Exclusion from protection

The exclusion of some detainees from protection is among the most concerning practices today. IHL gives states a great deal of latitude on whom to detain – whether to criminally prosecute past acts or prevent future security threats. IHL rules are aimed mainly at ensuring the humane treatment of detainees and preventing

arbitrary detention. Even so, some authorities continue to assert that these basic norms do not apply to certain detainees.

Such claims most frequently arise in situations of non-international armed conflict, where the adversary of the state in conflict is a non-state armed group. States often designate these groups and their members as 'terrorists' – a label that has no legal bearing on the application of IHL – and assert that they are undeserving of the protections that would ordinarily apply. But IHL clearly contradicts this reasoning.

The protections that IHL confers in non-international armed conflicts do not depend on the identity of the detainee or the circumstances surrounding their detention. Article 3 common to the four Geneva Conventions of 1949 (common Article 3) – the main, treaty-based source of IHL applicable in non-international armed conflict – sets out the protections applicable to detainees in such conflicts. It provides that persons who are not, or are no longer, taking active part in the hostilities "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." Protocol II of 8 June 1977 additional to the Geneva Conventions of 1949 (Additional Protocol II) likewise extends its protection to "to all persons affected by an armed conflict" with a similar prohibition against adverse distinction. The scope of customary IHL's rules similarly includes anyone detained in relation to an armed conflict.

Exclusionary interpretations of IHL are a problem not just in non-international armed conflicts; international armed conflicts can also give rise to similar problems. The fact that the parties to an international armed conflict are states does not necessarily mean that everyone captured on the battlefield will be a member of the regular armed forces. Consequently, arguments persist that certain persons fall outside the scope of treaties that ought to protect them; or worse, that they fall outside the scope of IHL entirely. The reasoning in support of this position varies – from arguments rooted in the history of treaty negotiation to a more intuitive sense that abhorrent actors cannot possibly enjoy protections under the same body of law that applies to states' military personnel. What these arguments fail to appreciate is that the Geneva Conventions and other IHL treaties are highly adapted, even intended, to guide states on how to deal with such actors. In fact, IHL applicable in international armed conflict offers a remarkable degree of certainty and sets common expectations for the handling of detainees, whether they are members of the armed forces, paramilitaries, mercenaries, private military and security companies, or anyone else.

This fine-tuning is best illustrated by the relationship between the treaties. The Third Geneva Convention protects prisoners of war – i.e. *inter alia*, members of enemy armed forces, members of certain other enemy armed forces, units or groups, and certain civilians who typically accompany the armed forces.<sup>11</sup> At the heart of the prisoner-of-war regime is respect for the honour and dignity of military personnel (and their adjuncts), and the understanding that they are not to be treated as criminals for fulfilling their duties.

For persons deprived of liberty who do not meet the criteria for prisoner-of-war protection, the Fourth Geneva Convention applies. In addition to protecting the general civilian population from the effects of armed conflict, much of the Fourth Geneva Convention regulates the imposition of security measures against individual persons who do not qualify for prisoner-of-war status but are deemed to pose a threat to the state. The Fourth Geneva Convention is not a treaty applicable only to civilians not directly participating in hostilities: its provisions clearly indicate the comprehensiveness of its scope. Article 4 of the Fourth Geneva Convention defines persons protected by the treaty as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" and who are not protected by any of the other three Geneva Conventions.<sup>12</sup> To lay to rest any doubt as to whether this definition includes persons who have directly participated in hostilities, Article 5 of the Fourth Geneva Convention explicitly addresses persons "engaged in activities hostile to the security of the State"; the treaty also dedicates a significant number of provisions to the internment of such persons for imperative reasons of security and for their prosecution for criminal offences.

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11 Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (GC III), Art. 4.

12 Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC IV), Art. 4.

Unlike the Third Geneva Convention, the Fourth Geneva Convention contains limitations based on nationality. A person cannot be excluded from the scope of the treaty because of their prior conduct or affiliation with a group deemed to be hostile, but they can if they do not meet the nationality requirements contained in Article 4 of the Convention, most evidently when they are of the same nationality as the detaining power. In addition, Article 4 contains exclusions for nationals of neutral and co-belligerent states when their state has “normal diplomatic representation in the State in whose hands they are.” The ICRC considers that for “normal diplomatic representation” to apply, the person must actually enjoy the normal diplomatic protection of their state. Persons not protected by the Fourth Geneva Convention, for reasons related to nationality, fall under the protection of Article 75 of Protocol I of 8 June 1977 additional to the Geneva Conventions of 1949 (Additional Protocol I), which is recognized as amounting to customary IHL.

Any suggestion that a person falls outside the scope of both the Third and Fourth Geneva Conventions must therefore be scrutinized closely; and importantly, the proposition that anyone affected by an armed conflict falls outside the scope of IHL entirely must be categorically rejected. To ensure proper interpretation of IHL in this regard, states should work to make sure that the scope of application of IHL is properly understood at all levels of civilian and military leadership, with the necessary emphasis on its character as a body of law designed specifically to deal with security threats of all kinds in armed conflict.

#### **ii. Underinvestment in preparedness for detention**

A second challenge is lack of preparedness to comply with IHL. Many of the problems that have vexed states carrying out detention operations during non-international armed conflicts in recent decades have stemmed from their failure to adequately take into account the infrastructure, personnel, oversight, and institutions (such as independent and impartial review bodies) needed to ensure respect for IHL. Underinvestment in preparations to comply makes it very difficult to detain people lawfully when the need arises.

Careful consideration and investment are also necessary for detention in international armed conflict. IHL is highly developed in the area of detention in international armed conflict. The Third and Fourth Geneva Conventions, together with Additional Protocol I, where applicable, and customary IHL, provide a detailed set of rules specifically adapted to deprivation of liberty in international armed conflict. But despite the clarity of the obligations and their increased relevance, if states do not take the necessary steps, well in advance, to implement their obligations, they will not be able to comply with these rules.

The risk of non-compliance arises partly from states party to the Geneva Conventions having undertaken obligations that require more than refraining from misconduct. In addition to the humane-treatment requirements that are at the foundation of IHL’s detainee protections, the Third and Fourth Geneva Conventions contain provisions that are fine-tuned to account for the specific risks to life and dignity faced by each category of detainee in the hands of a party to the conflict. Respecting these provisions – and securing the well-being of civilian and military detainees alike – requires dedicated infrastructure, institutions that are prepared and capable, and properly trained forces.

Prisoners of war, for example, benefit from a number of protections aimed at ensuring they are not treated as criminals for having merely participated in hostilities – an essential set of rules designed to prevent everything from summary execution to brutal treatment in captivity. In addition to combatant immunity, the rules governing their treatment and the conditions of their internment are geared towards preventing the detention environment from becoming punitive: prisoners of war cannot be held in close confinement or housed in penitentiaries, and their lives in captivity must in many ways closely resemble life on a military base. Without serious investment and foresight, a state confronted with a heavy influx of prisoners of war may be in violation of IHL. It will also be saddled with the difficult task of quickly designing and establishing the infrastructure necessary to provide prisoners of war with the freedom of movement they are entitled to, along with numerous other benefits under the law, such as detention with their units and access to additional food.

Respecting the Third Geneva Convention will also require adaptation of institutional policies and procedures. States need to ensure the availability of tribunals competent to make determinations concerning prisoner-of-war status under Article 5 of the Third Geneva Convention. They will also have to ensure the capacity of military disciplinary institutions to oversee large numbers of prisoners of war, as required by the Third Geneva Convention. Similar considerations apply to preparing for the internment of persons protected under the Fourth Geneva Convention. Conditions of internment must likewise be non-punitive and some additional requirements – for example, the prohibition against removing protected persons from occupied territory – will necessitate further consideration and planning. Independent and impartial review bodies will also need to be set up to hear challenges to internment decisions and carry out periodic reviews.

Personnel coming into contact with internees held under the Third and Fourth Geneva Conventions will also need to be trained in the special protections that apply. For example, the prohibition in both treaties against coercive interrogation – and the even more stringent constraints associated with the questioning of prisoners of war – may be unknown to interrogators with experience only of working in criminal justice systems or in counterterrorism. There is also, of course, the need to respect the ICRC's mandate and facilitate its fulfilment when the ICRC makes its detention visits.

The standards set out in the Conventions were developed by states themselves, at a time when they had recent experience of detaining extremely high numbers of internees. Besides being necessary to ensure the well-being of detainees, the rules are realistic and the conditions of internment they reinforce are fully achievable. But they must be planned for in advance. If states do not invest in compliance with IHL governing detention in international armed conflict, and make preparations for doing so, they will almost certainly not be able to meet those requirements should a conflict break out. And for those states with extensive experience in detention related to non-international armed conflict, even the most meticulous application of the humane-treatment standards and processes developed for those detainees will likely fall short of what is required in international armed conflicts for persons protected under the Geneva Conventions.

### **iii. Reliance on artificial intelligence and robotics during detention operations**

States are increasingly looking toward artificial intelligence and robotics to take over tasks that were traditionally performed by humans, and detention is no exception. For example, future detention operations will likely include some use of artificial intelligence in supporting decisions on who should be detained and some use of robots to support the management of detention facilities. There is no doubt that in some circumstances, technology deployed responsibly and with robust human oversight can contribute to IHL compliance. But technology can also suffer from bias, lack of transparency, and faulty programming and analysis, all of which can undermine compliance. In addition, as authorities step away from direct human contact with detainees, they will also give up critical insights required for taking well-informed and timely decisions. Direct contact builds both trust and situational awareness, which in turn can help identify problems early, maintain order without force, and ultimately ensure that the conditions of detention remain well within the limits of IHL. If detaining authorities want to ensure that their use of technology bolsters their ability to comply with the law, they must maintain a substantial degree of direct control over detention operations.

## **B) NON-STATE ARMED GROUPS AND THE PROHIBITION AGAINST ARBITRARY DETENTION**

With regard to detention by non-state armed groups in non-international armed conflicts, the ICRC estimates that about 70 such groups currently have detainees. These detainees include soldiers and fighters; civilians held in relation to armed conflicts or for ordinary criminal offences; people taken hostage for monetary or political reasons; and members of the group who are detained for disciplinary reasons.

### **i. Legal safeguards to prevent arbitrary detention**

Any deprivation of liberty has a significant impact on the detainee and their family. Detainees are at risk of ill-treatment, enforced disappearance, extrajudicial killing and poor conditions of detention, such as insufficient food (leading to malnutrition), and lack of access to health care and other basic services. The ICRC has also observed, with some frequency, that detainees experience additional stress and anxiety if they do not know why and for how long they will be detained, or how to challenge their detention.



No rule of IHL prohibits detention by non-state armed groups as such. In fact, IHL is built on the assumption that all parties to armed conflict will detain, and therefore sets limits to such detention. For instance, under IHL some forms of detention, namely hostage taking, are always unlawful.<sup>13</sup> Other forms of detention – such as detention under criminal law – are regulated in some detail under IHL.<sup>14</sup> IHL prohibits arbitrary detention.<sup>15</sup> This prohibition aims to prevent detention that is outside any regulatory framework and would leave the detainee solely in the hands – and subject to the decisions of – their captor. The ICRC takes the view that when non-state armed groups detain people for security reasons and outside criminal procedures, they must, in order to avoid arbitrariness, provide the grounds and procedures for such internment. Grounds and procedures for internment are, however, not defined in IHL applicable to non-international armed conflicts. Since 2005, the ICRC has used institutional guidelines to provide a framework – as a matter of both law and policy – for its operational dialogue on the issue.<sup>16</sup>

With a view to preventing arbitrary detention, the ICRC recommends that when a non-state armed group interns anyone it must establish a framework regulating internment – one that defines the grounds (i.e. the reasons) on which a person may be interned – and a review procedure. To be effective, grounds and procedures for internment must be established in a set of rules that are respected by the detaining party: these rules can take the form of ‘law’, a code of conduct, general orders or something similar.

Under IHL, internment is considered an exceptional measure, and one that has to be justified for each individual internee. In practice, non-state armed groups have frequently concluded that there are imperative reasons of security to detain ‘soldiers’ or ‘fighters’ of an adversary; people taking up arms against the group; ‘spies’ or ‘collaborators’ working for or with an adversary; and people planning to commit, or committing, acts of sabotage or other serious harm against the group. In other cases, however, imperative reasons of security that could justify internment do not exist. In the view of the ICRC, people may not be considered to pose an imperative security threat solely because they belong to the same family as the soldiers or fighters of the adversary; work for the adversary in a non-military capacity; support the adversary politically; share the adversary’s ideology or religion; live in a territory controlled by the adversary; or provide the adversary with food or medical care.<sup>17</sup> The internment of people on such grounds is unlawful.

When a person is interned, a review procedure is needed to prevent arbitrariness. It should include informing the person of the reasons for their internment, allowing the person to challenge these reasons, and reviewing such challenges and the need for internment regularly in an independent and impartial manner.<sup>18</sup> IHL does not define who should conduct the review, and the ICRC knows of only a few instances in which non-state armed groups have conducted internment reviews. The ICRC has observed that in some instances, non-state armed groups have used a court, commission, board, religious authority or some similar mechanism to conduct reviews. These have involved (military) judges, commanders, civilian members of the armed group, lawyers, or religious leaders.<sup>19</sup> An internee must be released as soon as the reasons for their internment no longer exist.<sup>20</sup>

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13 See common Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (AP II), Art. 4(2)(c); ICRC, Customary IHL Study: <https://ihl-databases.icrc.org/en/customary-ihl/rules> (hereafter ICRC, Customary IHL Study), Rule 96.

14 See common Article 3; AP II, Art. 6; ICRC, Customary IHL Study, Rules 100–102, which apply to non-state armed groups. See ICRC, *Commentary on the Third Geneva Convention*, 2020, paras 725–731.

15 ICRC, Customary IHL Study, Rule 99.

16 ICRC, Annex 1, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence”, in *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, ICRC, Geneva, 2007. While not all guidelines present legal obligations, and are meant to be implemented in a manner that takes into account the specific circumstances at hand, compliance with these guidelines is one means of avoiding arbitrary detention.

17 See ICRC, *Detention by Non-State Armed Groups: Obligations under International Humanitarian Law and Examples of How to Implement Them*, ICRC, Geneva, 2023 (hereafter ICRC, *Detention by Non-State Armed Groups*, 2023), p. 56.

18 See ICRC, *Commentary on the Third Geneva Convention*, 2020, paras 761–762. For further details, see ICRC, *Detention by Non-State Armed Groups*, pp. 54–57.

19 See ICRC, *Detention by Non-State Armed Groups*, p. 57.

20 ICRC, Customary IHL Study, Rule 128.

## ii. Review procedures in practice

The ICRC recognizes that implementing procedural safeguards for internees may be particularly demanding for groups with limited non-military capacity and resources. However, such reviews are essential to prevent or limit the suffering caused by arbitrary detention, and to effect the release, as soon as possible, of anyone who may not be detained. In practice, reviews should be conducted first for people with vulnerabilities (wounded or sick people, people with disabilities, children, pregnant women), ordinary civilians, and civilians associated with the adversary but not in a combat capacity. It may often be questionable that these people pose an imperative security threat. Therefore, any decision to intern them must be preceded by a thorough review process in which the internee should, wherever possible, be provided with legal assistance. The security threat posed by a uniformed and armed soldier or fighter may be less controversial, but that may change, for instance, if conflict dynamics shift, the conflict ends or if the interning party receives reliable assurances that the person will no longer participate in the fighting.

Many non-state armed groups receive support from states. States providing support, or states that partner with armed groups in military operations, have both a legal responsibility and often the capacity to help detaining authorities to fulfil their legal obligations and to prevent or end arbitrary detention.<sup>21</sup>

## 2. SEPARATED FAMILY MEMBERS, MISSING PEOPLE AND THE DEAD AND THEIR FAMILIES

In 2023, the ICRC and the International Red Cross and Red Crescent Movement's Family Links Network registered more than 65,000 new missing persons cases across the world, bringing the total number of these cases to 240,000. This is the highest number of cases registered in a single year.

Each individual case tells a story of suffering, uncertainty, and anxious waiting. Being separated from a family member, unable to maintain family contact, not knowing the fate and whereabouts of a loved one or not being able to mourn the dead are some of the deepest, unseen wounds of armed conflict.

Several factors have contributed to the alarming increase in the numbers of people who have gone missing. All too often, the personal information of those captured or killed is not collected by warring parties, or not shared with families and the ICRC's Central Tracing Agency. In some conflicts, the bodies or remains of those who have died are not treated with respect and become the objects of bargaining between warring parties, impeding identification efforts and the return of bodies or human remains to the families concerned. Moreover, if means of communication are disrupted or destroyed during hostilities, it becomes impossible for people to give news to their loved ones. Today, cases that occurred decades ago remain unresolved. In the absence of answers, families live in limbo for years.

IHL sets out obligations for state and non-state parties to armed conflicts, to prevent or address family separation, deaths and people going missing. The law is clear, but there is a need for much better implementation and compliance by warring sides, to prevent suffering among families and the rupturing of the entire social fabric.

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21 For a set of practice-based recommendations of measures that supporting states should take to ensure the lawful treatment of detainees, see ICRC, *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War*, ICRC, Geneva, 2021, pp. 61–63: <https://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce>.

## A) RESPECTING FAMILY LIFE

Under IHL, provisions aimed at ensuring the protection of family unity can be found in the Geneva Conventions of 1949 and their Additional Protocols.<sup>22</sup> The obligation to respect family life as far as possible is also part of customary IHL.<sup>23</sup> In practice this requires, to the degree possible, maintaining family unity – i.e. by accommodating families together when they are deprived of their liberty or during internal and cross-border displacement; and, when family separation cannot be avoided, by ensuring contact between family members and ensuring also that parties provide information on the fate of family members, including their whereabouts.<sup>24</sup> The ICRC has observed, in many conflicts throughout the world, that when separation occurs, family contact is not always permitted by parties as it should be, leading to an increase in the number of missing persons cases. Finally, the rules protecting family life become even more important when children are separated in the context of an armed conflict.<sup>25</sup>

## B) THE ‘RIGHT TO KNOW’ UNDER IHL

In international armed conflict, the right of families to know the fate of their relatives is set down in Article 32 of Additional Protocol I as a general principle guiding the activities – in relation to the missing and the dead – of states, parties to the conflict, and international humanitarian organizations. The ‘right of families to know’ pre-existed the adoption of Additional Protocol I.<sup>26</sup> By setting it down as a general principle in Article 32 of Additional Protocol I, IHL acknowledges this principle and incorporates it in the rules related to the protection of the missing and the dead.<sup>27</sup> In this regard, the word ‘shall’ in Article 32 of Additional Protocol I establishes a legal obligation to consider this ‘right to know’ when taking any measure to search for the missing and the dead. Similarly, under customary IHL, parties to a conflict must provide the families concerned with any information they have on the fate of those reported missing as a result of armed conflict.<sup>28</sup>

Although this right is codified in Additional Protocol I, the ICRC considers that it is also relevant in the application of various provisions of the Geneva Conventions that set out the regime for accounting for people in armed conflict.<sup>29</sup>

In this connection, IHL contains a number of specific rules, the purpose of which is to ensure that parties to conflict keep track of members of separated families, search for missing people, and do everything feasible to identify the dead and provide answers to families. These rules flow from the duty of parties to take all feasible measures to account for the missing and the dead, and from the right of families to know their fate. In practice, being ‘prompted’ by the ‘right to know’ means that different steps must be taken to clarify a person’s fate, including their whereabouts. While certain steps are prescribed by law, it is open to states and parties to conflict to design other measures to pursue this aim. In this regard, there are a number of important steps, such as registering detainees and transmitting their personal details and the location of the place of detention to the ICRC’s Central Tracing Agency; allowing the ICRC to visit places of detention; providing families with any information on the fate and whereabouts of a relative; and putting in place the operating procedures necessary to search for and identify the dead, using forensic practices and standards.

22 GC III, Arts 70, 71 and 72; GC IV, Arts 25, 26, 27(1), 49(3), 82, 106, 107 and 108; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (AP I), Arts 74, 75(4) and 77(4); AP II, Arts 4(3)(b) and 5(2)(a); ICRC Customary IHL Study, Rules, 105, 117, 119, 120, 124, 125 and 131.

23 ICRC, Customary IHL Study, Rule 105.

24 ICRC, Customary IHL Study, explanation on Rule 105.

25 See section III. 3) of this report on the separation of children from their families by parties to armed conflict.

26 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva/Martinus Nijhoff, Leiden, 1987 (hereafter ICRC, *Commentary on the Additional Protocols*, 1987), paras 1200–1201. See also ICRC, Customary IHL Study, explanation on Rule 117.

27 ICRC, Customary IHL Study, explanation on Rule 117.

28 ICRC, Customary IHL Study, Rule 117.

29 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., ICRC, Geneva, 2016 (ICRC, *Commentary on the First Geneva Convention*, 2016), paras 1530, 1599, 1600, 1635, 1663 and 1716; ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., ICRC, Geneva, 2017, paras 1706, 1776, 1777, 1811 and 1841; and ICRC, *Commentary on the Third Geneva Convention*, 2020, para. 4721.

International human rights law also contains obligations relevant to clarifying the fate and whereabouts of missing and dead people. For example, the International Convention for the Protection of all Persons from Enforced Disappearance explicitly recognizes the right to know the truth in relation to enforced disappearances. This means that the families of victims of enforced disappearance – who are also victims themselves – must be informed of the circumstances of the disappearance; the progress and results of the investigation and the fate of those disappeared.

### **C) RECORDING AND PROVIDING INFORMATION ON SEPARATED FAMILY MEMBERS, MISSING PEOPLE AND THE DEAD**

IHL foresees a number of different processes to ensure that parties to armed conflicts account for separated family members, missing people and the dead in the most efficient and protective manner. For these obligations to be complied with effectively in the event of a conflict, states need to have systems in place in peacetime that can be activated and made operational rapidly. Here, in other words, the main challenge is ensuring the following: investment, in peacetime, in adapting domestic legal frameworks; coordination between all those who need to be involved in the functioning of these systems; and proper training for all these personnel. As in the case of detention, discussed above, preparedness is vitally important for ensuring that when conflict breaks out, states can comply with their obligations.

In international armed conflicts, the Geneva Conventions aim to prevent those falling into the hands of a warring party from going missing. They do this mainly by ensuring that information on the identity and status of these people is collected and that the powers, countries concerned, and families are properly informed of the identity of those who have fallen into the hands of a party to a conflict and what has happened to them. This must be done through the ICRC's Central Tracing Agency,<sup>30</sup> which acts as a neutral intermediary between the parties to the conflict. Parties must record information on wounded, sick, shipwrecked, and dead enemy military personnel; prisoners of war and persons protected under the Fourth Geneva Convention who are kept in custody for more than two weeks, in assigned residence or interned; and, in occupied territories, children whose identity is in doubt. To this effect, states must establish a national information bureau<sup>31</sup> and official graves registration services.

In non-international armed conflicts, IHL provides fewer details on the processes parties to the conflict should put in place to comply with obligations to record and transmit information on separated family members, missing people and the dead – though the basic rules of IHL and human rights law outlined above apply. To establish practical solutions, parties to conflict should consider concluding special agreements, as foreseen under common Article 3, to record and transmit information on people deprived of their liberty as well as to facilitate the search for missing people and the identification of the dead.

It should be kept in mind that IHL obligations concerning separated family members, missing people and dead continue to apply after the end of an armed conflict. States should put in place national mechanisms to search for missing people and identify the dead, in order to provide individualized answers and support to families.<sup>32</sup>

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30 Other processes aiming at accounting for people who have fallen in the hands of a party to the conflict include the obligation of the Detaining Power to allow prisoners of war ( GC III, Art. 70 and GCIII Annex IV) and internees (GC IV Art. 106, GC IV and Annex III) to fill in and send capture and internment cards to the ICRC's CTA and the families, and the obligation to allow the ICRC to access places of detention (GC III, Arts 125 and 126; GC IV, Arts 14.2 and 14.3; ICRC, Customary IHL Study, Rule 124).

31 ICRC, *Overview of the Legal Framework Governing National Information Bureaux*, ICRC, Geneva, 2022: <https://www.icrc.org/en/publication/4616-overview-legal-framework-governing-national-information-bureaux>.

32 ICRC, *National Mechanisms for Missing Persons: A Toolbox*, ICRC, Geneva, 2022: <https://missingpersons.icrc.org/library/national-mechanisms-missing-persons-toolbox>.

## D) RESPECTING THE DEAD

The respectful treatment of the dead transcends cultures and religions and is a fundamental tenet of IHL. Their protection first and foremost seeks to preserve their dignity and prevent them from becoming missing persons. As a body of law applicable in armed conflict, where it can be anticipated that people will die even if the law is fully respected, IHL contains clear rules laying down obligations for parties to armed conflicts regarding the dead and their families. These obligations are particularly elaborate in IHL applicable to international armed conflicts. In any armed conflict, IHL requires parties, as a minimum, to take all feasible measures to search for, collect and evacuate the dead, regardless of the party to which they belong and no matter whether they have taken a direct part in hostilities. Parties must bury the dead in a respectful manner; record all available information and take all possible measures to identify them; and finally, record and mark the location of their graves.

Although there are neither treaty provisions nor a customary IHL rule dealing specifically with the return of the dead to the families concerned in non-international armed conflicts, there is a growing trend towards the recognition that parties must endeavour to facilitate the return of the dead to the families upon their request.<sup>33</sup> This is in line with the obligation to respect family life and with the right of families to know the fate of their relatives. Forensic practice and standards should guide parties in implementing their obligations, particularly in order to return the remains and the belongings of the dead under dignified conditions and in accordance with the wishes of their families.<sup>34</sup>

To effectively protect separated family members, missing people and the dead, as well as their families, states and parties to armed conflict must be aware of and must be prepared to uphold their IHL obligations. This requires taking practical measures even before the outbreak of a conflict.<sup>35</sup> When that is not done, wars unnecessarily lead to family separation and to people going missing, leaving families without answers in their wake.

These rules aim to prevent and address one of the most painful consequences of armed conflicts. Even if conflicts are fought in full respect of IHL, people will become separated from their families, detained, or killed. It is precisely to lessen the suffering of their families that IHL contains such elaborate rules.

The ICRC and its Central Tracing Agency work with National Red Cross and Red Crescent Societies, through the global Family Links Network, to keep families together, reunite them and help them stay in touch; prevent people from going missing, search for missing people; and protect the dignity of the dead and support their families. In 2023, members of separated families were put in touch with one another. More than 2,020,000 phone calls between separated families were facilitated and 16,680 missing persons cases were resolved by clarifying their fate or whereabouts.

The ICRC is committed to continuing to provide legal and technical support to states and parties to conflict in connection with separated family members, missing people and the dead.

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33 See ICRC, Customary IHL Study, explanation on Rule 114 (acknowledging that it is not clear if this arises from a sense of legal obligation).

34 ICRC, Guiding Principles for the Dignified Management of the Dead in Humanitarian Emergencies and to Prevent Them Becoming Missing Persons, ICRC, Geneva, 2021: <https://www.icrc.org/en/publication/4586-guiding-principles-dignified-management-dead-humanitarian-emergencies-and-prevent>; ICRC, *The Forensic Human Identification Process: An Integrated Approach*, ICRC, Geneva, 2022: <https://shop.icrc.org/the-forensic-human-identification-process-an-integrated-approach-pdf-en.html>.

35 The need for states and parties to armed conflict to take actions such as these was emphasized in Resolution 2474 (2019) of the UN Security Council.

### 3. THE SEPARATION OF CHILDREN FROM THEIR FAMILIES

Children become separated from their families quickly and in numerous ways during war. Sometimes they are lost during displacement, in the chaos of shifting front lines, or while sheltering from attack. Separation takes place when an adult or child is detained, recruited, hospitalized, or killed. In some cases, parties to armed conflict deliberately separate children from their families, in a manner that violates IHL and international human rights law.

For children, separation from their families is the beginning of a gauntlet. Their essential needs fall through cracks, and they are less defended from the hazards, violence and exploitation that war ushers in. Amid the deprivation and disarray of armed conflict, the family unit is generally the best protective mechanism for the health, safety and well-being of a child.

Section III. 2) above sets out IHL's protections for separated families. It furthermore recalls that provisions aimed at ensuring the protection of family unity are set out in the Geneva Conventions and their Additional Protocols,<sup>36</sup> and that respect for family life is part of customary IHL.<sup>37</sup> Limits on separating a child from their parents are also set out in Articles 9 and 16 of the Convention on the Rights of the Child (CRC). These rules presuppose that when a family is under the control of a party to armed conflict, keeping children with their families is the default measure. Only under limited and legally prescribed conditions can parties to armed conflict lawfully separate a child from their family. Moreover, such measures must comply with IHL's requirements to treat children with special respect and protection.<sup>38</sup> For states party to the CRC, this entails respect for their best interests as a primary consideration in actions that concern them.<sup>39</sup>

Since 1949, IHL has set out rules governing – and limiting – the separation of families during evacuations, transfers and deportations, driven by the harrowing experiences that pulled thousands of families apart during the Second World War. Seventy-five years later, children in contexts including Afghanistan, Gaza, Syria, Sudan, and Ukraine continue to endure a gauntlet of being moved without a loved one's hand to hold.<sup>40</sup>

The rules of IHL governing the evacuation, transfer and deportation of children draw a line that separates lawful, potentially life-saving evacuations from unlawful transfer or deportation. They reflect the recognition that, on the one hand, evacuation can be life-saving and in the best interest of the child when done right. Under certain conditions, the ICRC may play a role in such evacuations.<sup>41</sup> But even then, the ICRC has insisted that evacuation of children cannot be undertaken lightly: the law requires a range of safeguards and measures to prevent irreparable harm.<sup>42</sup> Rushed or badly organized evacuations can expose children to family separation – in some cases unlawfully – and leave them without care in high-risk environments. Particularly for young children, evacuations can result in permanent loss of their identity. At worst, children have died along the way.

36 GC III, Arts 70, 71 and 72; GC IV, Arts 25, 26, 27(1), 49(3), 82, 106, 107 and 108; AP I, Arts 74, 75(4) and 77(4); AP II, Arts 4(3)(b) and 5(2)(a); ICRC, Customary IHL Study, Rules 105, 117, 119, 120, 124, 125 and 131.

37 ICRC, Customary IHL Study, Rule 105.

38 Including GC IV, Arts 24, 38(5), 50(5) and 76(5); AP I, Art. 77; AP II, Art. 4(3); ICRC, Customary IHL Study, Rule 135.

39 Convention on the Rights of the Child, 20 November 1989, Art. 3.

40 For one example, see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, ICRC, Geneva, 2019, (hereafter *2019 Challenges Report*), Chapter 5.3 (hereafter *2019 Challenges Report*), regarding the international law protecting children associated with 'foreign fighters'.

41 See ICRC, "Sudan: Relief as ICRC evacuated 300 children 'towards safety, away from the sounds of gunfire'", 9 June 2023: [www.icrc.org/en/document/sudan-relief-icrc-evacuates-300-children](http://www.icrc.org/en/document/sudan-relief-icrc-evacuates-300-children). See also the reference to the ICRC's Central Tracing Agency in AP I, Art. 78(3).

42 See, for example, ICRC, UNICEF, UNHCR and IFRC, Joint statement on the evacuation of unaccompanied children from Rwanda, 1994: [www.refworld.org/policy/statements/unhcr/1994/en/29395](http://www.refworld.org/policy/statements/unhcr/1994/en/29395). See also ICRC, *2019 Challenges Report*, Chapter 2.1.C, regarding the protection of civilians leaving, or being evacuated from, a besieged area.

The rules also reflect recognition, on the other hand, of the risk that an evacuation conducted by a party to a conflict might be presented as necessary for the health or safety of children in order to cover up the war crime of unlawful transfer or deportation.<sup>43</sup> States drafting the Geneva Conventions of 1949 were mindful of this very risk, and sought to prevent evacuations conducted for ideological reasons.<sup>44</sup> The drafters of Additional Protocols I and II held a similar concern, namely that Occupying Powers might “abuse their discretion” by masking evacuations conducted for political reasons as evacuations carried out for reasons of “safety”.<sup>45</sup> Thus under IHL, an evacuation by a party to a conflict is not automatically lawful because the party is evacuating children for reasons of health or safety. An evacuation has to comply with additional rules. These have to do with the preservation of family links, the temporary nature of the evacuation and several other context-specific requirements.

## A) KEY LEGAL PROVISIONS IN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

Several IHL provisions deal directly with the evacuation, transfer and deportation of children.

In international armed conflict, Article 24(2) of the Fourth Geneva Convention provides that parties to the conflict must facilitate the reception of certain unaccompanied children in a neutral country and respect a number of safeguards while doing so. For states party to Additional Protocol I, Article 78 of that treaty supplements the Fourth Geneva Convention in the case of evacuations of all children other than own nationals to foreign countries. At the same time, Article 49 of the Fourth Geneva Convention prohibits forcible transfers or deportations of protected persons within or outside occupied territory.<sup>46</sup> In the case that a child is not protected by these IHL provisions because it is being evacuated by its state of nationality, states party to the CRC remain bound to respect the child’s best interests, identity and family life.<sup>47</sup>

In non-international armed conflict to which Additional Protocol II applies, Article 4(3)(e) of that treaty stipulates that, pursuant to certain conditions, measures shall be taken to temporarily remove children from the area in which hostilities are taking place. Any evacuation of children is a displacement that must also comply with Article 17 of Additional Protocol II, which prohibits forced movement of civilians unless the security of the civilians involved or imperative military reasons so demand.<sup>48</sup>

In both international and non-international armed conflicts, the provisions mentioned above that specifically address evacuations, transfers and deportations must be interpreted in their context, in light of their purpose, and together with any relevant rules of international law applicable in the relations between the parties. This includes the rules of IHL and human rights law, as applicable, that require that family unity be maintained by default – meaning, unless certain conditions are fulfilled, as outlined below. It also includes IHL’s rule that children are entitled to special respect and protection; for states party to the CRC, this entails respect for their best interests as a primary consideration in actions that concern them.

## B) LEGAL GROUNDS AND SAFEGUARDS

The IHL provisions identified above – including those on ensuring respect for family life – must be examined closely by any party considering an evacuation involving children. The legal requirements will differ depending on who is conducting the evacuation, whether it is forcible, whether families are being evacuated together, and where they are being evacuated to and from. Each evacuation will thus need to be assessed on a case-by-case basis, in the light of applicable law. Some of the important safeguards contained in the law are highlighted below.

43 Unlawful deportation or transfer are grave breaches under GC IV, Art. 147 and AP I, Art. 85(4)(a), and can constitute war crimes in both international and non-international armed conflict under Art. 8(2)(a)(vii), 8(2)(b)(viii) and 8(2)(e)(viii) of the Rome Statute of the ICC.

44 See Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, 1949, Vol. II-A, p. 638.

45 ICRC, *Commentary on the Additional Protocols*, 1987, paras 3211 and 3227.

46 See also ICRC, *Customary IHL Study*, Rule 129.

47 See Arts 3, 7-11, *Convention on the Rights of the Child*.

48 See also ICRC, *Customary IHL Study*, Rule 129.B.

Evacuation of children must not be forcible, except on defined grounds.<sup>49</sup> Regarding voluntary evacuations, the consent or agreement of Protecting Powers, states of nationality, and/or the parents or persons who by law or custom are primarily responsible for the child's care (when they can be found) is required by the relevant rules.<sup>50</sup> This includes the consent required to separate a child from their parents, legal guardians, or persons who by law or custom are primarily responsible for the care of the child;<sup>51</sup> otherwise – that is, without consent – parties to armed conflict must not, during evacuations, separate families who are together.<sup>52</sup> Moreover, even when they are voluntary, evacuations of children to which the Additional Protocols apply must be carried out only if necessary.<sup>53</sup> Evacuations must be temporary,<sup>54</sup> and are subject to certain territorial restrictions.<sup>55</sup> Specific measures must be put in place for the satisfactory care of children during and after the evacuation.<sup>56</sup> Finally, notifying the ICRC or Protecting Powers is legally required in some cases,<sup>57</sup> and in all cases, registering evacuated unaccompanied or separated children is central to respecting their best interests, including to ensure they do not go missing and so that their families are informed of their fate and whereabouts.

Evacuations are only stopgap solutions – displacement must not be permanent. The obligations of parties to armed conflict do not end once people are in a place of care and safety. IHL rules also govern the arrangement of safe and voluntary returns,<sup>58</sup> and the reunification of families who may have become separated in the course of the evacuation.<sup>59</sup> Parties to armed conflict conducting evacuations must plan accordingly.

The purpose of these requirements is not to delay life-saving evacuations, but to address the dangers they entail and ensure that evacuations actually improve children's lives. Short-term safety and long-term protection should not be mutually exclusive objectives. Perhaps most importantly for children, the ICRC urges parties to armed conflict to bear in mind that preserving family unity is usually the best way to ensure their protection from the worst kinds of harm.

49 As per GC IV, Art. 49(2); AP II, Art. 17(1); ICRC, Customary IHL Study, Rule 129. See also defined grounds in AP I, Art. 78(1).

50 GC IV, Art. 24(2); AP II, Art. 4(3)(e); AP I, Art. 78; Regarding the views of the child, see Art. 12, Convention on the Rights of the Child.

51 AP II, Art. 4(3)(e); AP I, Art. 78; See also Art. 9, Convention on the Rights of the Child.

52 GC IV, Art. 49(3); ICRC, Customary IHL Study, Rules 105 and 131.

53 AP I, Art. 78(1) defines specific grounds; AP II, Art. 4(3)(e).

54 GC IV, Art. 49(2); AP I, Art. 78(1); A P II, Art. 4(3)(e).

55 GC IV, Arts 24(2) (neutral country) and 49(2) (must not be outside the occupied territory except when for material reasons it is impossible to avoid); A P II, Art. 4(3)(e) (a safer area within the country).

56 GC IV, Arts 24 and 49(3); AP I, Art. 78(2); A P II, Arts 4(3)(e) and 17(1); ICRC, Customary IHL Study, Rule 131.

57 GC IV, Art. 49(4); AP I, Art. 78(3). For children in occupied territory whose identity is in doubt – typically meaning unaccompanied and separated children – GC IV, Art. 50(4) also requires their registration by national information bureaus.

58 GC IV, Art. 49(2); AP I, Art. 78(3); ICRC, Customary IHL Study, Rule 132. See also Art. 12(4) of the International Covenant on Civil and Political Rights (ICCPR), among other international instruments addressing the right to return.

59 GC IV, Art. 26; AP I, Art. 74; AP II, Art. 4(3)(b); ICRC, Customary IHL Study, Rule 105.



## 4. PROTECTING DIVERSE PEOPLE

All populations are comprised of a diverse body of individuals, each of whom are affected in different ways by armed conflict. Greater awareness of how conflict affects different people differently is necessary in order to implement IHL in a manner that provides meaningful protection for people. In recent years, the ICRC has stepped up its efforts to understand this diversity more fully, particularly in relation to age, gender, and disability. Its insights are set out in the pages that follow.

### A) REFLECTING GENDERED IMPACTS OF ARMED CONFLICTS IN APPLYING IHL

Despite the guarantee of equal rights for women and men in international law, gender inequality persists in every country worldwide. It tends to be particularly pronounced in conflict-affected contexts. For example, the United Nations (UN) reports that in humanitarian settings, the share of households headed by women typically reaches 33 percent and those households report higher risks of malnutrition and food insecurity.<sup>60</sup> More generally, research now suggests that women and children die at higher rates than men from the indirect effects of armed conflicts.<sup>61</sup>

Military operations do not therefore take place on an “equal playing field” for diverse women, men, girls, and boys. The actions of warring parties can cause harm with gendered dimensions, arising both from differences in people’s biological sex as well as those related to socially ascribed roles and responsibilities. In other words, systemic gender inequality involves exposure to specific risks, influences access to resources and shapes behaviour in armed conflict. Though these gendered impacts vary with context and intersect with other identity criteria, trends are predictable. Women and girls tend to have fewer financial resources to cope with injury and property damage, and have less access to essential services and representation in decision-making bodies. Gender-based discrimination can affect the treatment of detainees, or health-care provision. It drives gendered violations of the law, including sexual violence.<sup>62</sup>

Faced with these gendered impacts, the ICRC has pledged to ensure that its humanitarian operations are more inclusive and to consider the implications for the implementation and application of IHL.<sup>63</sup> Specifically in its legal work, the ICRC has incorporated a gender perspective in its approach to updating its commentaries to the Geneva Conventions.<sup>64</sup> A series of ICRC reports published in 2022 and 2024 encourage parties to armed conflict to integrate a gender perspective into their interpretations of IHL.<sup>65</sup> Reflecting these developments, this section identifies how certain IHL rules can be applied to better take account of and reduce gendered harm in armed conflict. It also sets out corresponding practical recommendations.

#### i. A gender perspective in service of IHL’s obligations regarding non-discrimination and the reduction of civilian harm

IHL contains rules governing the treatment of people in the power of a party to the conflict, including obligations to treat them without adverse distinction. This means without discrimination on the basis of sex, gender or any other similar criteria. What constitutes non-discriminatory treatment varies depending on the individual, and must take into account the distinct risks the individual faces, whether physical or physiological, or stemming from social, economic, cultural and political structures in society. Importantly, seemingly

60 UN Secretary-General, *Women and Peace and Security: Report of the Secretary-General*, UN Doc. S/2021/827, 27 September 2021, para. 43.

61 S. Savell, “How death outlives war: The reverberating impact of the post-9/11 wars on human health”, Watson Institute for International and Public Affairs, Brown University, 15 May 2023, p. 5: <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/Indirect%20Deaths.pdf>.

62 This gendered violation can affect all persons. See ICRC and Norwegian Red Cross, “*That Never Happens Here*”: *Sexual and Gender-Based Violence against Men, Boys and/Including LGBTQ+ Persons in Humanitarian Settings*, 2022.

63 The ICRC’s Inclusive Programming Policy (2022) sets out its commitment to incorporating an analysis of gender together with other diversity factors in its work; its Gender, Diversity, and Inclusion Policy (2024) clarifies and frames its support for gender equality.

64 ICRC, *Commentary on the Third Geneva Convention*, 2020, paras 24, 1682 and 2680.

65 ICRC, *International Humanitarian Law and a Gender Perspective in the Planning and Conduct of Military Operations*, ICRC, Geneva, 2024; ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of International Humanitarian Law*, ICRC, Geneva, 2022.

neutral IHL provisions can require gender-distinct applications in order to comply with non-discrimination requirements. For example, Article 27 of the Third Geneva Convention addresses the provision of clothing to prisoners of war without an express reference to gender – but to comply with the concomitant obligation of non-discrimination (as well as humane treatment and respect for their persons), provision of clothing adapted to a prisoner of war's gender is required.<sup>66</sup> Article 79 of the Third Geneva Convention, similarly silent on gender, addresses the election of prisoners' representatives. To apply its provisions in a non-discriminatory manner, the Detaining Power may wish to consider introducing a woman prisoners' representative (if there are women among those detained): "Either way, the representative must take into account the needs and further the well-being of all prisoners, men and women."<sup>67</sup>

A number of IHL rules further operationalize the requirement of non-discrimination by requiring specific treatment for women. These include obligations that women combatants be treated "with all consideration" or "with all the regard" due to their sex.<sup>68</sup> Detaining Powers are therefore – to provide one important example – obliged to ensure that medical services are adequately equipped to address women's health needs.<sup>69</sup> Parties to armed conflict, including non-state armed groups, have accordingly put in place a range of measures to take into account the distinct risks faced by women in detention.<sup>70</sup>

Apart from this, IHL requires parties to armed conflict to reduce civilian harm in certain ways during the conduct of military operations. The relevant IHL rules and principles on the conduct of hostilities include those on distinction, proportionality, and precautions.<sup>71</sup> These protect a civilian population made up of women, men, boys and girls, who experience harm from hostilities differently. Parties to armed conflict should therefore incorporate a gender analysis in the planning and conduct of military operations when feasible, in order to reduce expected civilian harm.

## ii. A gender perspective in practice

Incorporating a gender perspective in the application of IHL is exceedingly challenging in the highly gendered institutions and conduct associated with armed conflict. Gender remains a side-lined and contentious issue for many militaries. Gender bias and stereotypes are prevalent throughout the world, influencing the decisions that individuals make and contributing to data gaps.<sup>72</sup> The integration of a gender perspective into the application of IHL in military operations is therefore likely to rise or fall depending on a number of cumulative factors.

To begin with, legal, strategic and ethics-based reasoning can be used to establish the importance of a gender perspective among internal stakeholders, and leadership should communicate their commitment to the issue. Internal discipline influences external conduct, so the right codes of conduct and similar internal culture-shaping documents are important foundations. More broadly, conducive law, doctrine, policy and procedure are critical for institutionalizing a gender perspective in the planning, execution, and evaluation of operations.

The integration of a gender perspective into military operations will also entail fixing gender gaps in operational data. Civilian-military cooperation may help if done well: militaries should consult with stakeholders and, where appropriate, local women should be at the table if they want to be, for example through women's organizations. Gender advisers or focal points, when properly trained and in positions of influence, can inject the expertise needed to make gender-related information actionable for commanders and planning teams.

66 ICRC, *Commentary on the Third Geneva Convention*, 2020, paras 19, 1734, 1761 and 2151.

67 ICRC, *Commentary on the Third Geneva Convention*, 2020, para. 34,68.

68 GC I, Art. 12(4); GC II, Art. 12(4); GC III, Art. 14(2).

69 ICRC, *Commentary on the Third Geneva Convention*, 2020, paras 1685, 2230 and 1747 (footnote 13).

70 ICRC, *Detention by Non-State Armed Groups*, 2023, p. 35.

71 Regarding the application of a gender perspective to the IHL principles of distinction, proportionality and precautions, see: ICRC, *Gendered Impacts of Armed Conflict*, 2022, pp. 11–19.

72 The Gender Social Norms Index of the United Nations Development Programme (UNDP) reveals that 91 per cent of men and 86 per cent of women show at least one clear bias against gender equality: UNDP, *Tackling Social Norms: A Game Changer for Gender Inequalities*, UNDP, New York, 2020, p. 8.

A number of states have appointed these roles. Finally, taking the implications of force demographics into account, getting logistics right, and procuring and allocating sufficient resources can all aid the effective implementation of a gender perspective.

At the national policy level, the UN Women, Peace and Security Agenda continues to be a vector of progress, calling on states to respect and implement IHL rules that protect women and girls. Intersections between IHL and the Women, Peace and Security agenda exist, but these links can be strengthened.<sup>73</sup> Adapted to national context, resources, and priorities – and in consultation with civil society – in their Women, Peace and Security policies states could commit to, for example: interpreting IHL with a gender perspective; appointing gender advisers in armed forces; incorporating strong non-discrimination provisions in military manuals; and ensuring that domestic laws reflect international obligations regarding sexual violence.<sup>74</sup>

In the 1995 Beijing Platform for Action, 186 states agreed that the mainstreaming of a gender perspective should be promoted in decisions addressing armed conflict.<sup>75</sup> Almost thirty years later, it is still common to hear that gendered impacts are too complex or too cumbersome to take into account in military operations. To this, it is worth recalling that we live in a world of astonishing technological advancement and significant national spending on security. Including a gender perspective in the implementation of IHL is a matter of priority and resource allocation, not capability. Reducing the gendered impact of armed conflict remains under-prioritized. While there are examples of good practice among numerous armed forces and armed groups, wider uptake is a question of political will. The ICRC urges parties to armed conflicts to take seriously the protection of all civilians, equally.

## **B) INTERPRETING AND IMPLEMENTING IHL IN A DISABILITY-INCLUSIVE MANNER**

The World Health Organization estimated in 2022 that about 1.3 billion people, or about 16 per cent of the world's population, were experiencing significant disability.<sup>76</sup> In areas affected by armed conflict, these numbers might be even higher, perhaps between 18 to 30 per cent. There are lived experiences behind these numbers: of the inaccessibility of advance warnings, shelter or evacuations; of the increased risk of incidental harm; of families who face the impossible dilemma of either leaving all together, slowed down and risking attack because a family member with mobility restrictions cannot take their assistive devices with them – or leaving their loved one with a disability behind in order to save the rest of the family. Organizations of persons with disabilities have also shared other experiences with the ICRC, individually and during regional consultations bringing together persons with disabilities and members of armed forces. In one instance, a father of a child with an intellectual impairment chose to evacuate his cow instead of his child, believing the animal to be more valuable. In other instances, armed forces have attacked or detained persons with psychosocial, intellectual, hearing or visual impairments because they mistakenly believed that these persons posed a military threat: when persons with psychosocial or intellectual impairments ran excitedly towards areas of fighting; when persons with hearing impairments did not react to oral commands from soldiers; and when persons with visual impairments unfolded their white canes, which soldiers mistook for weapons.

These specific risks are not due to a lack of existing IHL rules on the matter. When they are civilians or persons *hors de combat*, persons with disabilities are protected under the general IHL rules on the conduct of hostilities (based on the principles of distinction, proportionality, and precautions). When in the power of a party to an armed conflict, they benefit from fundamental guarantees, especially humane treatment, without any adverse distinction. Moreover, persons with disabilities are entitled to specific respect and protection under IHL. In practice, however, these obligations are not adequately interpreted or fully implemented to be meaningful and effective, because they do not take sufficient account of the specific barriers and risks faced by persons with disabilities.

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<sup>73</sup> For further details, see ICRC, *IHL and a Gender Perspective in the Planning and Conduct of Military Operations*, 2024.

<sup>74</sup> ICRC, *IHL and a Gender Perspective in the Planning and Conduct of Military Operations*, p. 6; See also ICRC, *Checklist: Domestic Implementation of International Humanitarian Law Prohibiting Sexual Violence*, ICRC, Geneva, 2020.

<sup>75</sup> UN, Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, 27 October 1995, para. 141.

<sup>76</sup> World Health Organization (WHO), *Global Report on Health Equity for Persons with Disabilities*, 2022: [https://www.who.int/health-topics/disability#tab=tab\\_1](https://www.who.int/health-topics/disability#tab=tab_1).

Promoting disability-inclusive interpretations and implementation of IHL is part of the ICRC's Vision 2030 on Disability. The ICRC is also seeking to become more disability-inclusive in its protection and assistance activities and as an employer.<sup>77</sup> Implementing protection activities for the benefit of persons with disabilities is also emphasized in the ICRC's Institutional Strategy (2024–2027).<sup>78</sup>

The complementarity between IHL and the Convention on the Rights of Persons with Disabilities (CRPD), which is made explicit in Article 11 of the CRPD, may help to promote disability-inclusive interpretations and implementation of IHL.<sup>79</sup> Substantively, the social and human-rights model on disability enshrined in the CRPD may help belligerents to be more inclusive by considering the diverse barriers and risks faced by different persons with disabilities. Procedurally, serious consideration of these barriers and risks requires states and parties to armed conflict to closely consult and actively involve persons with disabilities and their representative organizations in interpreting and implementing IHL (an obligation and principle under the CRPD).

IHL rules on feasible precautions in attack and against the effects of attack are an area in which awareness of the specific barriers and risks referred to above can make a significant difference for civilians with disabilities. A number of examples are given below to illustrate this point.

Awareness among parties to conflicts that persons with sensory, psychosocial, or intellectual disabilities may not be able to understand or react to the hostilities taking place around them as other persons would, may help to avoid erroneous interpretations that such persons have become lawful targets. Such awareness could contribute to better implementation of the obligation to verify that the persons to be attacked are indeed lawful targets.

Consideration of the fact that civilians with disabilities may need more time to leave the vicinity of military objectives may help to adjust the timing of attacks or delay military operations, where feasible. Factoring in this reality contributes to better implementation of the obligation to choose methods of attack to avoid, or minimize, incidental civilian harm.

The effectiveness of advance warnings of attack depends on whether as many civilians as possible can be reached and whether they would have enough time to act on the warnings. To be effective for civilians with disabilities, it is necessary that parties to armed conflicts communicate advance warnings in a variety of accessible formats (such as Braille, sign language, text messages, large print and simplified language). When deciding how much time to allow between warning and attack, attackers should take into account the fact that persons with disabilities will need more time than others to leave, access shelter or take other protective measures.

Temporary evacuations may be another feasible precaution, both in attack and against the effects of attacks.<sup>80</sup> In order for them to benefit fully from such evacuations, it is necessary to identify the persons with disabilities, ensure accessible means of transport, allow for support persons to accompany them and make sure they can take their assistive devices with them.

77 See ICRC, Vision 2030 on Disability, ICRC, Geneva: <https://shop.icrc.org/the-icrc-s-vision-2030-on-disability-pdf-en.html>.

78 See ICRC, Strategy 2024–2027, “Strategic Orientation 1: Upholding the centrality of protection and the role of a neutral intermediary”, p. 11: [shop.icrc.org/icrc-strategy-2024-2027-en-pdf.html](https://shop.icrc.org/icrc-strategy-2024-2027-en-pdf.html).

79 See further, ICRC, “Towards a disability-inclusive IHL: ICRC views and recommendations”, Humanitarian Law and Policy blog, July 2023: <https://blogs.icrc.org/law-and-policy/2023/07/06/towards-disability-inclusive-ihl-icrc-views-recommendations/>; ICRC, 2019 *Challenges Report*, pp. 41–43; ICRC, “How law protects persons with disabilities in armed conflict”, ICRC, Geneva, 2017: <https://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict#:~:text=Taking%20IHL%20as%20a%20starting%20point,%20this%20paper%20will%20identifyt.>

80 See e.g. AP I, Arts 57(2)(a)(ii) and 58(a) and (c) for relevant precautionary obligations. A specific way to implement precautions both in attack and against the effects of attack in besieged and encircled areas, as well as the specific protections applicable to groups of civilians provided by GC IV, is to draft local agreements between belligerents in order to allow those groups of civilians, including persons with disabilities, to be evacuated, in accordance with GCIV, Art 17.

Interpreting IHL obligations to treat persons with disabilities in detention, or otherwise under the control of a party to a conflict, humanely would mean, for instance, not destroying, damaging or seizing assistive devices or taking feasible measures to ensure accessibility of infrastructure or communication in places of detention.

Persons with disabilities took part in IHL-related discussions at the regional consultations mentioned above, and their views guided these consultations. In 2022, the UN Special Rapporteur on the rights of persons with disabilities, the ICRC, the International Disability Alliance, the European Disability Forum and the Diakonia International Humanitarian Law Centre jointly organized regional consultations on providing more effective protection, during armed conflict, for persons with disabilities. The consultations resulted in a number of recommendations expertly compiled by the then UN Special Rapporteur and his team.<sup>81</sup> Most notably, in the ICRC's view,<sup>82</sup> states should include persons with disabilities and their representative organizations in IHL training sessions and dissemination activities for armed forces. Disability-inclusive IHL interpretations and implementation should also be placed on the agenda of national IHL committees or similar bodies and should be incorporated in manuals on the law of armed conflict. Ideally, these efforts will eventually lead to the incorporation, in military planning and the conduct of operations, of the specific risks faced by persons with disabilities. Non-state armed groups should also be made aware of disability-inclusive interpretations and implementation of IHL, and these matters should be discussed with them – as has been done successfully on other issues, like detention or the protection of health care.

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81 See UN Special Rapporteur on the rights of persons with disabilities, *Report on the Protection of the Rights of Persons with Disabilities in the Context of Military Operations*, UN Doc. A/77/203, 2022: <https://www.ohchr.org/en/documents/thematic-reports/a77203-report-protection-rights-persons-disabilities-context-military>.

82 See ICRC, "Towards a disability-inclusive IHL: ICRC views and recommendations".