

War, Protection and the Law: the ICRC's Approach to International Humanitarian Law

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Introduction

Ladies and gentlemen,

It is my great pleasure to accept the FCO's legal directorate's kind invitation to deliver this year's international law lecture. The organisers were kind enough to give me **free rein in the choice of topic**, signalling their interest in having me speak on the **law of war**. Acutely aware that your last guest speaker was none other than Harold Koh, I thought it might be wise not to venture too deeply into the intricacies of international humanitarian law (IHL). I have decided instead to give you a **bird's eye view** into how a pragmatic Swiss association, mandated by States through the Geneva Conventions, with a workforce of 13 000 employees operating in close to 90 countries, **works with international law to save lives and protect the most vulnerable**. To do so, I will focus on some of the most challenging IHL questions being tackled by the ICRC today.

This is a story of continuity and change. **Continuity** because IHL is as needed today, as it was 150 years ago when the first Geneva Convention was adopted and 100 years ago when WWI started. This is evident from the staggering devastation and human costs inflicted by current armed conflicts. **Change** because the nature of conflict is evolving, the needs of people caught up in situations of violence are becoming increasingly complex, and the most basic tenets of IHL are severely undermined and blatantly disrespected in a number of contexts today. While IHL continues to be firmly present in all of the ICRC's life-saving and protection efforts as a tool to prevent human suffering, changes in the environment have made it necessary for us to consider **other**

bodies of law, to tackle certain **gaps in the existing law**, to find **new ways of generating respect for the law**, and to closely monitor the impact of **new technologies on warfare** in order to inject IHL considerations in the debate.

IHL and human rights law

During my **recent field missions** to Central African Republic, Iraq, Kenya, South Sudan or Syria, I witnessed how complex today's armed violence has become. There is both a proliferation and an increased fragmentation of armed actors; confrontation areas are continuously shifting and spreading into densely populated areas; and the intensity of the violence is constantly evolving. This reality is further compounded by the weakness of certain States, which leads to open space for criminal violence committed by a range of actors - including civilians - in an unstable environment. In the midst of such complexity, it can be tremendously **challenging to identify what international legal framework applies to whom**. Yet this fundamental assessment has huge implications on the ground because it determines what use of force is permitted, who can be detained under what regime, who is protected, what type of protection exists, etc.

In this regard, it bears emphasis that IHL is the **legal regime tailored to the specific situations of armed conflict**, and is only applicable in such situations. It limits the effects of armed conflict by protecting persons, who are not or are no longer directly participating in hostilities and by restricting the weapons, belligerents may deploy and the way in which they use them. Outside situations of armed conflict, IHL does not apply. Other bodies of law will then govern the situation, including human rights law, which in fact continues to apply irrespective of whether or not a situation can be described as an armed conflict.

This **complementarity between IHL and human rights law** should not, however, detract from the general differences in their respective scope when applied in armed conflicts. Allow me here to recall **three main differences**:

First, IHL imposes **legal obligations on States and organized non-State armed groups**, while only States have legal obligations under human rights law. In other words, one can legitimately talk to armed groups about their obligations under IHL. While in itself this is not sufficient to obtain compliance with the law, it is a strong starting point for having a dialogue with groups about victims of armed conflict.

Second, IHL is designed to **regulate situations that take place outside one's territory**. In contrast, the extent of the extraterritorial application of human rights law to military operations is controversial. In Iraq, Afghanistan, Mali, Libya and elsewhere, the ICRC's interactions with the UK, the French, the US and other foreign troops on their detention practices and use force are framed by IHL. The still evolving jurisprudence of the European Court of Human Rights and recent decisions of domestic courts here in the UK point to a shift towards recognizing the application of human rights law abroad, primarily in cases that involve a State detaining persons outside its territory. Uncertainties persist however regarding the extraterritorial use of force, where there is no effective control over persons or territory.

Third, IHL does **not foresee the possibility for derogation**. In contrast, human rights law allows a State to render certain rights inapplicable, when faced with a public emergency 'threatening the life of the nation'. There is no derogation possible under IHL, because it embodies a negotiated compromise between States that was specifically designed to apply in situations that 'threaten the life of the nation', i.e. armed conflict, and that requires a clear and strong chain of accountability. IHL takes the unique circumstances of organized **violence generated by war as a given** and, through a **realistic balance of military necessity and humanitarian considerations**, sets the outer limits of acceptable behaviour. Anything less is simply not permissible.

IHL and human rights were **designed for different circumstances and may produce different outcomes when applied to similar facts on the ground**. While they ultimately share the objective of protecting persons and reducing vulnerabilities, they do so according to different criteria. This would be fine if the two never co-existed and instead, sat neatly next to each other on a linear spectrum that goes from peace to war, where human rights applies in times of peace and IHL applies in times of war.

But we all know this is not how it works. In reality, the **lack of clarity that results from the overlap can become an excuse** to lower the level of protection. In the context of the fight against terrorism, we have seen “pick and choose” approaches where reference is made to IHL, on the one hand, in order to lower the threshold on the use of force, and, on the other hand, reference is made to derogations under human rights law to lower the protection afforded to detainees.

The challenge of dealing with the two bodies of law is **well illustrated in the area of detention where overlapping legal regimes cause confusion**, but more importantly, the applicable laws **need to be further developed**.

Addressing gaps in the law: detention

In international armed conflicts, **IHL clearly delineates the grounds on which a person can be detained or interned**. The value of such clear provisions cannot be overstated. These rules of IHL resolve in advance many of the difficult questions that arise in the course of a military operation involving detention during conflict or occupation. While human rights law seeks to address many of the same vulnerabilities that detainees might face, it currently does not address these issues head-on and cannot determine solutions in advance for the difficult practical problems generated by such situations.

Things get **more complicated in situations of non-international armed conflict**, where IHL is far less precise and human rights law is more clearly applicable. As was emphasized by the UK House of Commons Defence Committee in its recent report on *UK Armed Forces Personnel and the Legal Framework for Future Operations*, the tension and overlap between the two bodies of law – IHL and human rights law – have resulted in a **lack of certainty and lack of clarity on which of the two legal regimes applies to military operations of UK armed forces in armed conflicts**.

The **reason for this lack of certainty and lack of clarity** is that IHL applicable in non-international armed conflict assumes that internment will occur, but it fails to clarify the permissible grounds and required procedural safeguards. This absence of

specificity leaves detaining authorities without pre-determined rules that they can point to as accepted protections against arbitrary detention.

In carrying out its activities in various contexts, the ICRC has **struggled with the legal ambiguities** created by the concomitant **application of IHL and human rights to persons deprived of liberty**. Confronted with large-scale extraterritorial detention by coalition forces during the non-international armed conflicts in Afghanistan and Iraq, we had to craft recommendations on grounds and procedures for detention that drew upon existing IHL and human rights law in a way that we thought realistically addressed the serious humanitarian challenges that had presented themselves. In other internal armed conflicts not involving the presence of foreign troops, we also grappled with States' diverse and complex administrative detention regimes without clarity in IHL about what exactly is expected of parties to such conflicts.

Turning to human rights law provides no greater clarity. Human rights law, in most cases, neither provides nor limits grounds for detention beyond requiring that it not be arbitrary. And where it does enumerate specific grounds, such as in the European Convention for Human Rights, the situation of armed conflict is not expressly contemplated. Insofar as procedures are concerned, judicial review and habeas corpus are human rights law's only precise safeguards against arbitrary deprivation of liberty and other rights violations. If one adds to this reality the possibility of derogation in case of emergency, notwithstanding conflicting views on whether habeas corpus is in fact derogable, there is simply no specific outer limit in human rights law on who may be detained in non-international armed conflict and according to what procedures.

Another issue that the ICRC has had to grapple with has been the **risk that a detainee who is transferred from one State to another will be subject to ill treatment by the receiving State**. In the course of our detention visits, these risks come to light either when detainees express fears about their possible transfer, or when we observe that transferred detainees have indeed been ill-treated. The general international law principle prohibiting transfers to situations of abuse is commonly known as the principle of *non-refoulement*. This principle is not, however, explicitly incorporated into IHL governing non-international armed conflicts.

The ICRC frequently encounters **detention facilities with poor material conditions**, including inadequate food, shelter, hygiene and medical care. Detainees are often cut off from their families and other contact with the outside world. And the fact of their detention is in many cases not registered by the authorities, let alone notified to close relatives. The specific needs of women and children, including those having to do with medical care and basic security, are often not met. And a number of other particularly vulnerable groups, such as the elderly and disabled, lack sufficient attention to their own needs. While all these aspects are heavily regulated by the Geneva Conventions applicable in IAC, IHL governing NIAC is significantly lacking in detailed, universally applicable norms.

As a result, the ICRC believes that, in addition to grounds and procedures for detention and conditions of detention, **the protection of particularly vulnerable categories of detainees and the transfer of detainees from one authority to another** should also be the subjects of an effort to strengthen IHL protecting persons deprived of their liberty. Members of the 2011 International Red Cross and Red Crescent Conference, including all States parties to the Geneva Conventions, agreed with us. In Resolution 1 adopted by consensus by this Conference, they invited the ICRC, in cooperation with States, to pursue research, analysis and consultation and to propose a range of options and recommendations for strengthening IHL in this area.

Other processes - different in scope - for strengthening the protection of persons deprived of liberty are also currently underway. These include the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners, coming primarily from a criminal justice perspective, and the work of human rights bodies like that of the Working Group on Arbitrary Detention of the Human Rights Committee. The ICRC actively participates in these processes by sharing its legal expertise and operational practice.

Ensuring respect for existing law

Ladies and gentlemen,

Let me now turn to what the ICRC believes is the single biggest challenge facing IHL today. An impressive array of treaty and customary law is available but the real difficulty lies in **persuading parties to the conflict to comply with the rules by which they are bound.**

Promoting respect for IHL has formed an **integral part of the ICRC's protection activities for decades.** This is in line with the role conferred on our institution by States. Proximity to arms carriers and victims is critical to ensure that our legal reading is well founded and, conversely, that the practical solutions we put forward to address the needs of affected populations are compatible with what the law says. Day in and day out, ICRC delegates work to improve compliance with IHL, by being present on the ground, including in places of detention, and by formulating specific recommendations to the authorities – be they State or non-State actors – to address concrete humanitarian problems. As you know, the ICRC's preferred method of work is **bilateral confidential dialogue.** Confidentiality is crucial for maintaining an enduring relationship of trust with all parties to the conflict, and guaranteeing access, acceptance and the security of our staff. It is particularly critical in order to open channels of communication with the security apparatus of certain States who often operate under special rules of confidentiality themselves.

This is **not meant as a veiled criticism of organisations that publicly advocate for the rights of victims,** denounce violations, or prosecute perpetrators. Organisations such as Human Rights Watch and Amnesty International play a key role in drawing attention to the plight of individuals and communities caught up in war, and raise awareness about important issues, many of which stem from violations of the law of war. They too are protection actors. International criminal tribunals make significant contributions to clarifying IHL, while combating impunity. These other institutions pursue similar objectives through different channels. For the ICRC to preserve its operational space, it must remain at arms length from these other channels. In the specific case of international court proceedings, the ICRC has been granted immunity from testimony. This includes an obligation on States to respect the confidentiality of information and the institution's right to non-disclosure.

ICRC's strategy for ensuring respect for IHL is not limited to confidential dialogue on specific violations of the law. **It also entails a number of prevention activities aimed at fostering understanding and acceptance of IHL**, as well as **assisting authorities** in the implementation of IHL in domestic law. The ICRC reaches out to the military, the police and non-State armed groups to advise on how best to integrate relevant norms of IHL into their doctrine and practice. This is not a one-way street, as such outreach also presents opportunities for us to better understand what motivates weapon carriers to respect or disrespect IHL. Beyond direct outreach, **ICRC's networking efforts also target influential circles**, including religious and community leaders, representatives of faith-based non-governmental organizations and scholars. Exchanges with this 'outer circle' enable us to better understand how value systems, in particular religious ones, relate to the law of war, and to identify commonalities between those value systems and IHL. This may be especially relevant when certain non-State armed groups reject IHL as a whole in the conviction that it is a Western creation.

Some States also increasingly **challenge the humanitarian consensus inherent in IHL**. For instance, they perceive humanitarian action with the officially proclaimed intention to ensure greater respect for IHL as serving in reality the political agenda of States and the actors undertaking these actions. As a consequence, IHL and humanitarian action have increasingly come under suspicion by certain States, coupled with a reassertion of State sovereignty. The current debate on **humanitarian access in Syria** is illustrative of this trend. Some argue that the Government is arbitrarily refusing international humanitarian relief to civilians and that this arbitrary refusal entitles humanitarian organizations to engage in "cross-border" relief efforts without the consent of the Government. Some argue that new legal concepts, such as the responsibility to protect, can provide guidance to bridge the gap between addressing needs and respecting sovereign objections. Others simply refuse to engage in the name of State sovereignty.

In my view, this **debate may have lost sight of the objective**. For the ICRC, it is of utmost importance that the conversations on Syria not weaken the consensus on the law amongst the High Contracting Parties. We must work hard to avoid double standards in the interpretation of the law while searching for practical solutions to allow

assistance and protection activities to happen, even where different legal interpretations persist. This is the reason why the ICRC's first and foremost efforts is to negotiate the expansion of our presence and activities in Syria and to scale up our programming in neighbouring countries, in order to increase our ability to address the dire needs on the ground.

Health Care in Danger

Let me now turn to one of the ICRC's main areas of concern: **the protection of health care**. For the ICRC and of the Red Cross and Red Crescent Movement, this subject is foundational. Not only were the wounded and sick at the origin of the ICRC, they were also at the origin of IHL treaty law. Unlike 150 years ago, the problem today is not the lack of agreement on the rules but a rampant disrespect for the existing law. The multifaceted nature of the violence against health-care delivery observed in many of the contexts in which ICRC operates led us to initiate a multi-year project aimed at changing widespread practices of disrespect for the wounded and sick, and those who care for them. While there does not appear to be a need for new international law in this area, there is nevertheless work to be done on domestic legislation and space for health professionals to share good practices in mitigating the risks they and their patients face, in situations of crisis.

Leveraging its first hand experience of the problem, the ICRC gathered data from 1800 events of violence against health-care workers and health facilities in 23 contexts. In addition to direct attacks against health care personnel, facilities and vehicles, we documented a number of indirect forms of violence like obstruction of ambulances at checkpoints, harassment and threats against health-care workers, and disrupted care to wounded enemies. We learnt that most incidents affect local rather than international health-care providers and that nurses and doctors are more likely to be threatened than directly attacked. This may result in a significant humanitarian problem, as entire populations suffer when health-care personnel flee. Finally, our research confirmed that the local collapse of a health-care system can have public health repercussions at regional or even global level, as we witnessed with the re-

emergence of polio in the Afghan-Pakistan, Syrian, Central African and Nigerian contexts.

The picture that emerges from our data makes a strong argument for collective action, involving States, National Red Cross and Red Crescent Societies, UN agencies, professional associations of health-care practitioners, armed groups, and a range of civil society organisations. So far, we have held consultations with cross segments of these stakeholders, on a variety of themes such as military practice, national legislation, ambulance services, the security of health-care facilities, medical ethics, and the role of religious leaders. We have also ventured into relatively new territory, reaching out to the World Health Organisation to get the issue on the agenda of their Assembly.

All of these **consultations have produced sets of recommendations and identified good practices**. The challenge now is to move towards implementation of these recommendations. In order to tackle this complex humanitarian problem there is not a single solution. Each context faces specific problems that can best be addressed locally, with the support of a body of good practice that ICRC is helping to gather and develop.

There are encouraging signs. For instance, Colombia has developed a series of regulations, practical tools and training for their first responders that have made a difference on the ground. In Yemen, under the auspices of the Prime Minister, the government signed a declaration to protect the medical mission in late 2012. Since then, workshops have gathered hospitals and authorities to work jointly on the issue. Very recently, a study day was organized with religious leaders in Gaza to discuss ways of enhancing the protection of health-care in armed conflict and other emergencies. While the challenges of making the delivery of health-care safer remain daunting in many contexts, we should also be encouraged by the positive response the project has elicited so far.

A **similar methodology may be useful to address sexual violence** on which the UK and Foreign Minister William Hague personally are showing great leadership. Understanding the dynamics behind sexual violence and identifying concrete ways to

address this complex problem requires concrete engagement in the field, collection of data, analysis of legal frameworks, gathering of best practices and formulation of policy recommendations. In that sense, the upcoming Global Summit to End Sexual Violence in Conflict is not only an opportunity to share experience and advocate against one of the recurring patterns of IHL violation, but also to strategize how to better implement existing law and develop policies in that respect.

Honing in on a new compliance mechanism

Ladies and gentlemen,

The ICRC recognizes that it is **not alone in attempting to ensure respect for IHL**. Different actors pursuing different but complementary strategies – legal, operational or political – are needed to accomplish this colossal task. In this regard, the United Nations play a noteworthy role in ensuring respect for IHL, including through resolutions on conflicts and conflict-related themes, or the establishment of independent human rights experts, observers, fact-finding missions or commissions of inquiry with a mandate that sometimes also covers IHL. The peer-to-peer monitoring mechanism for compliance in the Human Rights Council may also serve as a means to influence respect for IHL.

The limits are nevertheless very real. Looking back in time, we find that the IHL-specific mechanisms provided for by the Geneva Conventions and the first Additional Protocol have been ineffective: the Protecting Powers, the formal enquiry procedure and the International Humanitarian Fact-Finding Commission have rarely, if ever been used. The reason for their failure is that their functioning is subject to the consent of the parties concerned. What's more, they were designed for international armed conflicts whereas the majority of conflicts today are non-international in character. Turning to the UN mechanisms listed above, similar challenges overshadow their effectiveness. They too are subject to political negotiation and selective in their choice of which situations to address.

For all these reasons, the **ICRC and Switzerland have launched a consultation process** with States to identify options for strengthening compliance mechanisms. So far, these consultations confirm that there is a general concern about lack of compliance with IHL, as well as broad agreement on the need for a new mechanism. The discussions recognise that while human rights law and IHL are complementary, there are also important differences. It is acknowledged that the human rights compliance mechanisms might not adequately take into account the specificities of armed conflict or of IHL, and that it is currently not equipped to include the perspective of non-State armed groups. Overall, States consulted thus far appear to push for an IHL-specific system.

Together with Switzerland, the ICRC will continue to invest considerable efforts with a view to presenting concrete options on the contours of such a mechanism to the next International Red Cross and the Red Crescent Conference in 2015.

Monitoring and influencing the debate on new technologies of warfare

Ladies and gentlemen,

To remain an effective organisation for protecting victims of armed conflict, we must also **constantly strive to ensure that IHL remains adapted to this purpose**. While the main challenge for improving the situation of victims of armed conflicts is ensuring respect for existing norms, we also need to continue to keep abreast of the evolving ways that wars are fought in the 21st century to anticipate future humanitarian problems. The rapid evolution of military capabilities is a case in point. **New methods and means of warfare** – such as cyber warfare and autonomous weapons - have become subject to increasing debate in the humanitarian, legal and diplomatic community. Clearly, the drafters of the Geneva Conventions did not foresee such technologies. That being said, the drafters of the first Additional Protocol had the good sense to include an article that covers new weapons. The text of the article requires each State party to “determine whether the employment of any new weapon, means or methods of warfare it studies, develops, acquires or adopts would be prohibited by international law”.

Let me first turn to **cyber warfare** – that is, means and methods of warfare that consist of cyber operations amounting to, or conducted in the context of an armed conflict. While the military potential of cyber space is not yet fully understood, it appears that cyber attacks against transportation systems, electricity networks, dams, and chemical or nuclear plants are technically possible. Such attacks could have wide-reaching consequences, resulting in high numbers of civilian casualties and significant damage.

As with any new technology, if cyber capabilities are used in armed conflicts, they **must comply with IHL**, in particular the principles of distinction, proportionality and precautions. The main challenge in this regard is the interconnectedness of cyber space. There is only one cyber space, and the same networks, routes and cables are shared by civilian and military users. When you or me store data through cloud computing, we do not know where the data is stored and what other data is stored there that might render the server or the network a military objective. The interconnectedness of cyber space might make it impossible to distinguish between military and civilian computer systems when launching a cyber attack. Also, the principle of proportionality requires to assess the expected incidental effects of an attack on civilians and civilian objects; but in cyber space, is it possible to do so, including to assess the indirect effects of a cyber attack on civilian networks? The anonymity that cyber space allows is another major challenge. If the perpetrator of a cyber operation cannot be identified, it might become extremely difficult to determine whether IHL is even applicable to the operation, and to do so in a timely manner.

Turning to **autonomous weapons**, also known as lethal autonomous robots, a truly autonomous weapon system would be capable of searching for, identifying and targeting an individual with lethal force. Although such weapons do not yet exist, research in this area is advancing at high speed. This should be a cause for concern, as it is far from clear whether autonomous weapons could ever meet the IHL obligations to distinguish between civilians and combatants, to carry out proportionality assessments and to take feasible precautions in attack. But even if it were technologically possible one day to enable autonomous weapons to fully comply with IHL, their deployment would raise this fundamental question: Would the dictates of the public conscience allow machines to make life-and-death decisions on the battlefield? Other questions will have to be dealt with as well. For instance, who would be held

accountable if the use of an autonomous weapon results in a war crime: the programmer, the manufacturer or the commander who deploys the weapon?

To explore the legal, technological, military and ethical aspects of the deployment of autonomous weapons and begin to answer some of these questions, the ICRC organised in March this year an **expert meeting** that gathered 21 States, including the UK, as well as a dozen independent experts.

The crucial question is not whether new technologies are good or bad in themselves. Indeed, **new technologies might also have positive effects in specific circumstances and if used in a law-abiding manner**. For instance, it might be less damaging to disrupt through a cyber operation certain services used for military and civilian purposes than to destroy such infrastructure completely through bombardment. In theory also, it may be possible to program autonomous weapons to behave more ethically and cautiously on the battlefield than a human being. In such cases, the principle of precaution arguably imposes an obligation on States to choose the less harmful means to achieve their military aim, whenever feasible. This being said, a **holistic reflection is warranted** to fully consider the risks and implications of the use of such technologies from multiple perspectives and the ICRC is urging States to consider them well before they develop such technologies. It is indeed crucial to ensure that they are not employed prematurely under conditions in which respect for IHL cannot be guaranteed.

Concluding remarks

Ladies and gentlemen,

For the past 150 years, the ICRC has continuously engaged with High Contracting Parties to **expand and solidify the legal edifice** that addresses the humanitarian impact of armed conflict. We have kept focused on our mission while constantly adapting to a changing environment. The Geneva Conventions and their Additional Protocols; the wealth of treaties regulating weapons; the range of international conventions protecting specific groups of vulnerable people; and the multitude of policy documents reaffirming the law are all testimony to a continuous effort to keep IHL relevant to the challenges of armed conflict and other situations of violence.

ICRC's main contribution has been its unique capacity to **translate its first hand experience on the ground – with the perpetrators, the victims, the parties and the leaders – into law**. Understanding the dynamics behind the violence, the effects of conflict, the reasons that lead certain groups to reject the law, the very real constraints parties face when trying to apply the rules, has greatly informed our approach to IHL as well as our operational response to people in need.

A couple of years ago, Kwame Antony Appiah advocated for enhancing the dialogue between empirical research and morality in order to overcome some of the ethical challenges of today's very fragmented societies. He came to the conclusion that an **experimental approach** to ethics was best suited to explore new areas of consensus. In closing, I would like to suggest that the law provides us with space for experimentation. As we undertake to narrow the gap between the law and the reality on the frontlines of armed conflict and violence, experimentation is needed to find ways to advance the dialogue between States and with all armed actors on how best to develop and apply this critical body of law.

I am deeply convinced that opportunities such as tonight, to exchange with a distinguished group of government officials, lawyers and academics, play a critical role in this formidable endeavour.

Thank you.

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