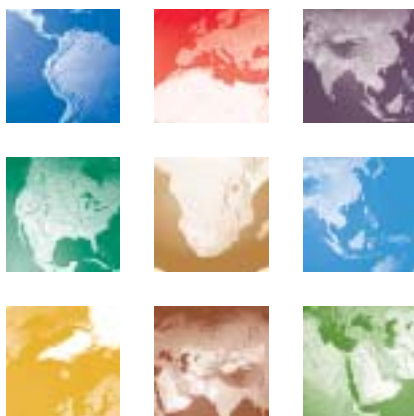


# INTERNATIONAL HUMANITARIAN LAW

Answers to your Questions



ICRC

## THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

Founded by five Swiss citizens in 1863 (Henry Dunant, Guillaume-Henri Dufour, Gustave Moynier, Louis Appia and Théodore Maunoir), the ICRC is the founding member of the International Red Cross and Red Crescent Movement.

- It is an impartial, neutral and independent humanitarian institution.
- It was born of war over 130 years ago.
- It is an organization like no other.
- Its mandate was handed down by the international community.
- It acts as a neutral intermediary between belligerents.
- As the promoter and guardian of international humanitarian law, it strives to protect and assist the victims of armed conflicts, internal disturbances and other situations of internal violence.

The ICRC is active in about 80 countries and has some 11,000 staff members (end-2001).

### The ICRC and the Movement

The International Committee of the Red Cross (ICRC) and the National Red Cross and Red Crescent Societies, together with the International Federation of Red Cross and Red Crescent Societies (the Federation), combine to form the International Red Cross and Red Crescent Movement (the Movement). As a rule, representatives of those organizations meet every four years with representatives of the States party to the Geneva Conventions at an International Conference of the Red Cross and Red Crescent.

### Basis for ICRC action

During international armed conflicts, the ICRC bases its work on the four Geneva Conventions of 1949 and Additional Protocol I of 1977 (see Q4). Those treaties lay down the ICRC's right to carry out certain activities such as bringing relief to wounded, sick or shipwrecked military personnel, visiting prisoners of war, aiding civilians and, in general terms, ensuring that those protected by humanitarian law are treated accordingly.

During non-international armed conflicts, the ICRC bases its work on Article 3 common to the four Geneva Conventions and Additional Protocol II (see *Index*). Article 3 also recognizes the ICRC's right to offer its services to the warring parties with a view to engaging in relief action and visiting people detained in connection with the conflict.

In violent situations not amounting to an armed conflict (internal disturbances and other situations of internal violence), the ICRC bases its work on Article 5 of the Movement's Statutes, which sets out among other things the ICRC's right of humanitarian initiative. That right may also be invoked in international and non-international armed conflicts.

All these articles and laws together form the mandate given to the ICRC by the international community, i.e. by the States.



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Original: English  
October 2002

## SUMMARY OF QUESTIONS

<b>1.</b> What is international humanitarian law?	4
<b>2.</b> What are the essential rules of international humanitarian law?	6
<b>3.</b> What are the origins of international humanitarian law?	8
<b>4.</b> What treaties make up international humanitarian law?	10
<b>5.</b> Who is bound by the Geneva Conventions?	12
<b>6.</b> What are <i>jus ad bellum</i> and <i>jus in bello</i> ?	14
<b>7.</b> In what situations does humanitarian law apply? For whom is it intended and who does it protect?	16
<b>8.</b> Does humanitarian law apply to the “new” conflicts?	18
<b>9.</b> How does humanitarian law adapt to new developments and what is the ICRC’s role in the process?	20
<b>10.</b> What does humanitarian law provide for in terms of material assistance to the victims of armed conflict?	22
<b>11.</b> What does humanitarian law say with regard to the restoration of family links?	24
<b>12.</b> What are the provisions of humanitarian law governing use of the emblem?	26
<b>13.</b> How does humanitarian law protect refugees and internally displaced persons?	28
<b>14.</b> What measures are available for implementing humanitarian law?	30
<b>15.</b> What is the ICRC’s role in ensuring respect for humanitarian law?	32
<b>16.</b> How are war criminals prosecuted under humanitarian law?	34
<b>17.</b> What is the difference between humanitarian law and human rights law?	36
<b>18.</b> Does humanitarian law apply to peace-keeping and peace-enforcement operations carried out by or under the auspices of the United Nations?	38
<b>19.</b> What does humanitarian law say about terrorism?	39
Index	40
Bibliography	41



Care for all wounded on the battlefield.



## WHAT IS INTERNATIONAL HUMANITARIAN LAW?

International humanitarian law forms a major part of public international law (see opposite) and comprises the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.

More precisely, what the ICRC means by international humanitarian law applicable in armed conflicts is international treaty or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international

nature; for humanitarian reasons those rules restrict the right of the parties to a conflict to use the methods and means of warfare of their choice, and protect people and property affected or liable to be affected by the conflict (see Q3, Q6 and Q17, which provide useful additional information).

### Geneva and The Hague

International humanitarian law (IHL) – also known as the law of armed conflicts or law of war – (see *Terminology* opposite), has two branches:

- the “law of Geneva”, which is designed to safeguard military personnel who are no longer taking part in the fighting and people not actively involved in hostilities, i.e. civilians;
- the “law of The Hague”, which establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming the enemy.

The two branches of IHL draw their names from the cities where each was initially codified. With the adoption of the Additional Protocols of 1977, which combine both branches, that distinction is now of merely historical and didactic value.

### Who fights whom?

An international armed conflict means fighting between the armed forces of at least two States (it should be noted that wars of national liberation have been classified as international armed conflicts).

A non-international armed conflict means fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between armed groups fighting one another. To be considered a non-international armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time.

Internal disturbances are characterized by a serious disruption of internal order resulting from acts of violence which nevertheless are not representative of an armed conflict (riots, struggles between factions or against the authorities, for example).

## Grotius and the law of nations

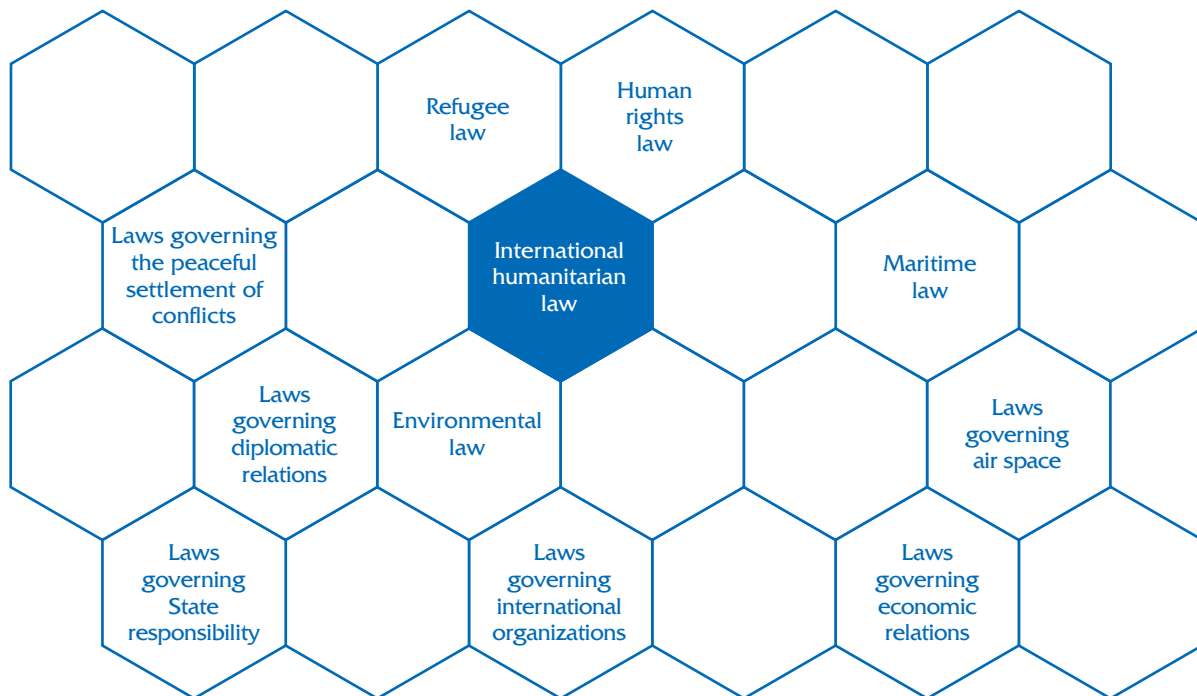
In current parlance, the law of nations is synonymous with the term “public international law” or “international law”, which is the body of rules governing relations between States and between them and other members of the international community.

Grotius (see *Index*), a jurist and diplomat, was the father of the law of nations. Following the Reformation, which divided the Christian church in Europe, he took the view that the law was no longer an expression of divine justice but the fruit of human reason and that it no longer preceded action but arose from it. Hence the need to find another uniting principle for international

relations. The law of nations was to provide that principle. In his book *De jure belli ac pacis*, Grotius listed rules which are among the firmest foundations of the law of war.

## Terminology

The expressions international humanitarian law, law of armed conflicts and law of war may be regarded as equivalents. International organizations, universities and even States will tend to favor international humanitarian law (or humanitarian law), whereas the other two expressions are more commonly used by the armed forces.



N.B. This figure is not to be interpreted as an attempt to classify or rank the various branches of public international law; it merely mentions some of the more well-known ones.

"...as soon as they lay down [their arms] and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives."

## 2

## WHAT ARE THE ESSENTIAL RULES OF INTERNATIONAL HUMANITARIAN LAW?

The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be made solely against military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever. It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.

Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.

The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transports and equipment must be spared. The red cross or red crescent on a white background is the distinctive sign indicating that such persons and objects must be respected.

Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

These rules, drawn up by the ICRC, summarize the essence of international humanitarian law. They do not have the authority of a legal instrument and in no way seek to replace the treaties

in force. They were drafted with a view to facilitating the promotion of IHL (see *Index*).



### Fundamental principles of humanitarian law

Like Grotius (see p. 5 and *Index*), jurists and philosophers took an interest in the regulation of conflicts well before the first Geneva Convention of 1864 was adopted and developed.

In the 18th century, Jean-Jacques Rousseau made a major contribution by formulating the following principle about the development of war between States:

“War is in no way a relationship of man with man but a relationship between States, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers (...). Since the object of war is to destroy the enemy State, it is legitimate to kill the latter’s defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.”

In 1899, Fyodor Martens laid down the following principle for cases not covered by humanitarian law: “(...) civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

The above, known as the Martens clause, was already considered a standard part of customary law when it was incorporated in Article 1, paragraph 2, of Additional Protocol I of 1977 (see *Index*).

While Rousseau and Martens established principles of humanity, the authors of the St. Petersburg Declaration (see Q4) formulated, both explicitly and implicitly, the principles of distinction, military necessity and prevention of unnecessary suffering, as follows:

“Considering: (...) That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;  
That for this purpose it is sufficient to disable the greatest possible number of men;  
That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”

The Additional Protocols of 1977 reaffirmed and elaborated on these principles, in particular that of distinction: “(...) the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” (Art. 48, Protocol I; see also Art. 13, Protocol II).

Finally, the underlying principle of proportionality seeks to strike a balance between two diverging interests, one dictated by considerations of military need and the other by requirements of humanity when the rights or prohibitions are not absolute (see also p. 9).



“...to prevent the strong from oppressing the weak”

# 3

## WHAT ARE THE ORIGINS OF INTERNATIONAL HUMANITARIAN LAW?

To answer this question we have to ask other questions.

### What law governed armed conflicts prior to the advent of contemporary humanitarian law?

First there were unwritten rules based on customs that regulated armed conflicts. Then bilateral treaties (cartels) drafted in varying degrees of detail gradually came into force. The belligerents sometimes ratified them after the fighting was over. There were also regulations which States issued to their troops (see *The Lieber Code* opposite). The law then applicable in armed conflicts was thus limited in both time and space in that it was valid for only one battle or specific conflict. The rules also varied depending on the period, place, morals and civilization.

### Who were the precursors of contemporary humanitarian law?

Two men played an essential role in its creation: Henry Dunant and Guillaume-

Henri Dufour (see p. 2). Dunant formulated the idea in *A Memory of Solferino*, published in 1862. On the strength of his own experience of war, General Dufour lost no time in lending his active moral support, notably by chairing the 1864 Diplomatic Conference.

Dunant:

“On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet (...) would it not be desirable that they should take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention and inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?”

Dufour (to Dunant):

“We need to see, through examples as vivid as those you have reported, what the glory of the battlefield produces in terms of torture and tears.”

### How did the idea become a reality?

The Swiss government, at the prompting of the five founding members of the ICRC (see p. 2), convened the 1864 Diplomatic Conference, which was attended by 16 States who adopted the Geneva Convention for the amelioration of the condition of the wounded in armies in the field.

### What innovations did that Convention bring about?

The 1864 Geneva Convention laid the foundations for contemporary humanitarian law. It was chiefly characterized by:

- standing written rules of universal scope to protect the victims of conflicts;
- its multilateral nature, open to all States;
- the obligation to extend care without discrimination to wounded and sick military personnel;
- respect for and marking of medical personnel, transports and equipment using an emblem (red cross on a white background).

### Humanitarian law prior to its codification

It would be a mistake to claim that the founding of the Red Cross in 1863, or the adoption of the first Geneva Convention in 1864, marked the starting point of international humanitarian law as we know it today. Just as there is no society of any sort that does not have its own set of rules, so there has never been a war that did not have some vague or precise rules covering the outbreak and end of hostilities, as well as how they are conducted.

“Taken as a whole, the war practices of primitive peoples illustrate various types of international rules of war known at the present time: rules distinguishing types of enemies; rules determining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct; and even rules outlawing war altogether.” (Quincy Wright)

The first laws of war were proclaimed by major civilizations several millennia before our era: “I establish these laws to prevent the strong from oppressing the weak.” (Hammurabi, King of Babylon)

Many ancient texts such as the Mahabharata, the Bible and the Koran contain rules advocating respect for the adversary. For instance, the *Viqayet* – a text written towards the end of the 13th century, at the height of the period in which the Arabs ruled Spain – contains a veritable code for warfare. The 1864 Convention, in the form of a multilateral treaty, therefore codified and strengthened ancient, fragmentary and scattered laws and customs of war protecting the wounded and those caring for them (see opposite).

### The Lieber Code

From the beginning of warfare to the advent of contemporary humanitarian law, over 500 cartels, codes of conduct, covenants and other texts designed to regulate hostilities have been recorded. They include the Lieber Code (see *Index*), which came into force in April 1863 and is important in that it

marked the first attempt to codify the existing laws and customs of war. Unlike the first Geneva Convention (adopted a year later), however, the Code did not have the status of a treaty as it was intended solely for Union soldiers fighting in the American Civil War.



Families are deported from the Jewish ghetto in Warsaw during the Second World War.

## 4

## WHAT TREATIES MAKE UP INTERNATIONAL HUMANITARIAN LAW?

Initiated in the form of the first Geneva Convention of 1864, contemporary humanitarian law has evolved in stages, all too often after the events for which they were sorely needed, to meet the ever-growing need for humanitarian aid resulting from developments in weaponry and new types of conflict. The following are the main treaties in chronological order of adoption:

- 1864** Geneva Convention for the amelioration of the condition of the wounded in armies in the field
- 1868** Declaration of St. Petersburg (prohibiting the use of certain projectiles in wartime)
- 1899** The Hague Conventions respecting the laws and customs of war on land and the adaptation to maritime warfare of the principles of the 1864 Geneva Convention
- 1906** Review and development of the 1864 Geneva Convention
- 1907** Review of The Hague Conventions of 1899 and adoption of new Conventions
- 1925** Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare
- 1929** Two Geneva Conventions:
  - Review and development of the 1906 Geneva Convention
  - Geneva Convention relating to the treatment of prisoners of war (new)
- 1949** Four Geneva Conventions:
  - I Amelioration of the condition of the wounded and sick in armed forces in the field
  - II Amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea
  - III Treatment of prisoners of war
  - IV Protection of civilian persons in time of war (new)
- 1954** The Hague Convention for the protection of cultural property in the event of armed conflict
- 1972** Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxic weapons and on their destruction
- 1977** Two Protocols additional to the four 1949 Geneva Conventions, which strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts
- 1980** Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW), which includes:
  - the Protocol (I) on non-detectable fragments
  - the Protocol (II) on prohibitions or restrictions on the use of mines, booby traps and other devices
  - the Protocol (III) on prohibitions

- or restrictions on the use of incendiary weapons
- 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction
- 1995 Protocol relating to blinding laser weapons (Protocol IV [new] to the 1980 Convention)
- 1996 Revised Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices (Protocol II [revised] to the 1980 Convention)
- 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction
- 1998 Rome Statute of the International Criminal Court
- 1999 Protocol to the 1954 Convention on cultural property
- 2000 Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict
- 2001 Amendment to Article I of the CCW

### Prompted by events

This list clearly shows that some armed conflicts have had a more or less immediate impact on the development of humanitarian law. For example:

The First World War (1914-1918) witnessed the use of methods of warfare that were, when not completely new, at least deployed on an unprecedented scale. These included poison gas, the first aerial bombardments and the capture of hundreds of thousands of prisoners of war. The treaties of 1925 and 1929 were a response to those developments.

The Second World War (1939-1945) saw civilians and military personnel killed in equal numbers, as against a ratio of 1:10 in the First World War. In 1949 the international community responded to those tragic figures, and more particularly to the terrible effects the war had on civilians, by revising the Conventions then in force and adopting a new instrument: the Fourth Geneva Convention for the protection of civilians.

Later, in 1977, the Additional Protocols were a response to the effects in human terms of wars of national liberation, which the 1949 Conventions only partially covered.

### The origins of the 1949 Conventions

In 1874 a Diplomatic Conference, convened in Brussels at the initiative of Tsar Alexander II of Russia, adopted an International Declaration on the laws and customs of war. The text was not ratified, however, because some governments present were reluctant to be bound by a treaty. Even so, the Brussels draft marked an important stage in the codification of the laws of war.

In 1934, the 15th International Conference of the Red Cross met in Tokyo and approved the text of an International

Convention on the condition and protection of civilians of enemy nationality who are on territory belonging to or occupied by a belligerent, drafted by the ICRC. No action was taken on that text either, the governments refusing to convene a diplomatic conference to decide on its adoption. As a result, the Tokyo draft was not applied during the Second World War, with the consequences we all know.

### The origins of the 1977 Protocols

The 1949 Geneva Conventions marked a major advance in the development of

humanitarian law. After decolonization, however, the new States found it difficult to be bound by a set of rules which they themselves had not helped to prepare. What is more, the treaty rules on the conduct of hostilities had not evolved since the Hague treaties of 1907. Since revising the Geneva Conventions might have jeopardized some of the advances made in 1949, it was decided to strengthen protection for the victims of armed conflict by adopting new texts in the form of Protocols additional to the Geneva Conventions (see Q9).

The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain almost 600 articles and are the main instruments of IHL.



“...to work for the understanding and dissemination of knowledge of international humanitarian law...”

# 5

## WHO IS BOUND BY THE GENEVA CONVENTIONS?

Only States may become party to international treaties, and thus to the Geneva Conventions and their Additional Protocols. However, all parties to an armed conflict – whether States or non-State actors – are bound by international humanitarian law.

At the beginning of 2002, almost all the world’s States – 189, to be precise – were party to the Geneva Conventions. The fact that the treaties are among those accepted by the greatest number of countries testifies to their universality. In the case of the

Additional Protocols, 159 States were party to Protocol I and 151 to Protocol II by the same date.

### Signature, ratification, accession, reservations, succession

Multilateral treaties between States, such as the Geneva Conventions and their Additional Protocols, require two separate procedures:

#### a) signature followed by ratification

While signature does not bind a State, it does oblige the State to behave in a way which does not render the substance of the treaty meaningless when the State subsequently ratifies and solemnly undertakes to respect the treaty.

#### b) accession

This is the act whereby a State which did not sign the text of a treaty when it was adopted consents to be bound by it.

Accession has the same implications as ratification.

A newly independent State may, by means of a declaration of succession, express the desire to remain bound by a treaty which applied to its territory prior to independence. It may also make a declaration of provisional application of the treaties while examining them prior to accession or succession.

Within the context of those procedures and under certain conditions, a State may make reservations in order to exclude or modify the legal effect of certain provisions of the treaty. The main condition is that such reservations do not run counter to essential substantive elements of the treaty.

Lastly, national liberation movements covered by Article 1, paragraph 4, of Protocol I may undertake to apply the Conventions and the Protocol by following the special procedure set down in Article 96, paragraph 3, of Protocol I.



### Whose duty is it to spread knowledge of the Conventions and Protocols?

States have a legal obligation to spread knowledge of the Conventions and Protocols:

“The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.”

(Arts. 47, 48, 127 and 144 of, respectively, GC I, II, III & IV)

“The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.”

(Art. 83, Protocol I)

“This Protocol shall be disseminated as widely as possible.”

(Art. 19, Protocol II)

### The ICRC and the task of spreading knowledge of humanitarian law

Under the Statutes of the International Red Cross and Red Crescent Movement, it is the task of the ICRC to:

“(…) work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.”

(Art. 5, para. 2g)

“(…) [maintain close contact with National Societies] (…) in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law.” (Art. 5, para. 4a)

*Jus in bello*: to protect and assist victims of armed conflicts.

# 6

## WHAT ARE *JUS AD BELLUM* AND *JUS IN BELLO*?

The purpose of international humanitarian law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. It is what is known as *jus in bello* (law in war). Its provisions

apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just.

In the case of international armed conflict, it is often hard to determine which State is guilty of violating the United Nations Charter (see Q18). The application of humanitarian law does not involve the denunciation of guilty parties as that would be bound to

arouse controversy and paralyse implementation of the law, since each adversary would claim to be a victim of aggression. Moreover, IHL is intended to protect war victims and their fundamental rights, no matter to which party they belong. That is why *jus in bello* must remain independent of *jus ad bellum* or *jus contra bellum* (law on the use of force or law on the prevention of war).

### On the prohibition of war

Until the end of the First World War, resorting to armed force was regarded not as an illegal act but as an acceptable way of settling differences.

In 1919, the Covenant of the League of Nations and, in 1928, the Treaty of Paris (Briand-Kellogg Pact) sought to outlaw war. The adoption of the United Nations Charter in 1945 confirmed the trend: "The members of the Organization shall abstain, in their international relations, from resorting to the threat or use of force (...)."

When a State or group of States is attacked by another State or group of States, however, the UN Charter upholds the right to individual or collective self-defence. The UN Security Council, acting on the basis of Chapter VII of the Charter (see Q18), may also decide on the collective use of force. This may involve:

- coercive measures – aimed at restoring peace – against a State threatening international security;
- peace-keeping measures in the form of observer or peace-keeping missions.

A further instance arises within the framework of the right of peoples to self-determination: in resolution 2105 (XX) adopted in 1965, the UN General Assembly "recognizes the legitimacy of the struggle waged by peoples under colonial domination to exercise their right to self-determination and independence (...)". (See p. 16.)



Halvor Fossum/Lauritzen/CRIC



Protection of medical personnel...

## 7

## IN WHAT SITUATIONS DOES HUMANITARIAN LAW APPLY? FOR WHOM IS IT INTENDED AND WHO DOES IT PROTECT?

International humanitarian law is applicable in two situations; that is to say, it offers two systems of protection:

a) International armed conflicts (see p. 5)  
In such situations the Geneva Conventions and Additional Protocol I apply.

Humanitarian law is intended principally for the parties to the conflict and protects every individual or category of individuals not or no longer actively involved in the conflict, i.e.:

- wounded or sick military personnel in land warfare, and members of the armed forces' medical services;
- wounded, sick or shipwrecked military personnel in naval warfare, and members of the naval forces' medical services;

- prisoners of war;
- the civilian population, for example:
  - foreign civilians on the territory of parties to the conflict, including refugees;
  - civilians in occupied territories;
  - civilian detainees and internees;
  - medical and religious personnel or civil defence units.

Wars of national liberation, as defined in Article 1 of Protocol I, are classified as international armed conflicts (see p. 12).

b) Non-international armed conflicts (see p. 5)

In the event of a non-international conflict, Article 3 common to the four Conventions and Protocol II apply.

It should be noted that the conditions of application of Protocol II are stricter than those provided for by Article 3 (see p. 19). In such situations, humanitarian law is intended for the armed forces, whether regular or not, taking part in the conflict, and protects every individual or category of individuals not or no longer actively involved in the hostilities, for example:

- wounded or sick fighters;
- people deprived of their freedom as a result of the conflict;
- the civilian population;
- medical and religious personnel.



...people deprived of their freedom

...civilians

...wounded or sick fighters.

### Humanitarian law and non-international armed conflicts

Article 3 common to the four Geneva Conventions is regarded as a sort of treaty in miniature (see p. 19). Even including the provisions of Protocol II, the rules on internal armed conflicts remain less complete than those dealing with international armed conflicts (see opposite). It has proven difficult to strengthen the system of protection in non-international armed conflicts in the face of the principle of State sovereignty.

The rules contained in Article 3 are considered as customary law and represent a minimum standard from which the belligerents should never depart.

### What law applies to internal disturbances and other situations of internal violence?

International humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict. Cases of this type are governed by the provisions of human rights law (see Q17) and such measures of domestic legislation as may be invoked.



Even in “anarchic” conflicts, the humanitarian rules must apply.

# 8

## DOES HUMANITARIAN LAW APPLY TO THE “NEW” CONFLICTS?

There is much talk today of “new” conflicts. This expression covers different types of armed conflict: those known as “anarchic” conflicts and others in which group identity becomes the focal point. These terms are used fairly loosely.

“Anarchic” conflicts, the upsurge of which doubtless results from the end of the Cold War, are often marked by the partial, and sometimes even total, weakening or breakdown of State structures. In such situations, armed groups take advantage of the political vacuum in an attempt to grab power. This type of conflict is, however, marked above all by a weakening or breakdown in the chain of command within the same armed groups.

Conflicts aimed at asserting group identity often seek to exclude the adversary through “ethnic cleansing”. This consists in forcibly

displacing or even exterminating populations. Under the effect of spiralling propaganda, violence and hatred, this type of conflict strengthens group feeling to the detriment of the existing national identity, ruling out any possibility of coexistence with other groups.

International humanitarian law still applies in these “anarchic” and “identity-related” conflicts, in which the civilian population in particular is exposed to violence. Common Article 3 (see opposite) requires all armed groups, whether in rebellion or not, to respect individuals who have laid down their arms and those, such as civilians, who do not take part in the hostilities.

Consequently, it is not because a State’s structures have been weakened or are non-existent that there is a legal vacuum with regard to international law. On the

contrary, these are precisely the circumstances in which humanitarian law comes fully into its own.

Admittedly, the humanitarian rules are harder to apply in these types of conflict. The lack of discipline among belligerents, the arming of the civilian population as weapons flood the territory and the increasingly blurred distinction between fighters and civilians often cause confrontations to take an extremely brutal turn, in which there is little place for the rules of law.

As a result, this is the type of situation in which particular efforts are needed to make people aware of humanitarian law. Better knowledge of the rules of law will not solve the underlying problem which led to the conflict, but it is likely to attenuate its deadlier consequences.

### **Common Article 3: a treaty in miniature**

In the case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, 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.

To this end, the following acts are and shall remain prohibited at any time and any place whatsoever with respect to the above-mentioned persons:


- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages against personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.  
(See pp. 16 and 17.)



The Ottawa Treaty prohibits landmines.



## 9

### HOW DOES HUMANITARIAN LAW ADAPT TO NEW DEVELOPMENTS AND WHAT IS THE ICRC'S ROLE IN THE PROCESS?

International humanitarian law is developed by States through codification or State practice. These two processes usually overlap.

Widespread practice of States may crystallize customary international law. It is also State practice, sometimes combined with the activities of non-governmental organizations (NGOs), which may trigger the codification of international law. Codification takes the form

of treaties, such as conventions, covenants, protocols, or pacts. For example, a number of States had already passed national legislation which implicitly or explicitly prohibited the use of anti-personnel mines. Yet that practice was not widespread and therefore no customary law had formed. Then in 1997 a conference was convened to develop a specific convention, and the use, stockpiling, production and transfer of anti-

personnel mines became prohibited for all States which ratified the treaty.

The ICRC's role in the development of humanitarian law is to:

- monitor the changing nature of armed conflict;
- organize consultations with a view to ascertaining the possibility of reaching agreement on new rules;
- prepare draft texts for submission to diplomatic conferences.

The example of the two Protocols additional to the Geneva Conventions gives an idea of how humanitarian law is made, from the initial idea to its adoption:

- on the basis of draft rules prepared in 1956, then of resolutions adopted in the 1960s by two International Conferences of the Red Cross and by the International Human Rights Conference held in Tehran in 1968, the ICRC studied the possibility of supplementing the Conventions adopted in 1949;
- in 1969 the ICRC submitted that idea to the 21st International Conference of the Red Cross, in Istanbul; the participants, including the States party to the Geneva Conventions, mandated it accordingly and the ICRC's own lawyers embarked on the preparatory work;

- between 1971 and 1974, the ICRC organized several consultations with governments and the Movement; the United Nations was regularly given progress reports;
- in 1973 the 22nd International Conference of the Red Cross, in Tehran, considered the draft texts and fully supported the work done;
- in February 1974 the Swiss Government, as depositary of the 1949 Geneva Conventions, convened the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, in Geneva; it comprised four sessions and ended in June 1977;
- at the final session of that Conference, the 102 articles of Protocol I and the 28 articles of Protocol II were adopted by the plenipotentiaries of the 102 States represented.

## The ICRC as promoter of humanitarian law

Under the Statutes of the International Red Cross and Red Crescent Movement (see p. 13), one of the ICRC's tasks is to

prepare possible developments in international humanitarian law. It is therefore the promoter of IHL.

## A few recent developments (see also Q4)

The Protocol relating to blinding laser weapons, adopted at the Vienna Diplomatic Conference in October 1995, prohibits both the use and transfer of laser weapons, one of whose specific combat functions is to cause permanent blindness. The Protocol also requires States to take all appropriate precautions, including the training of armed forces, to avoid causing permanent blindness by the lawful use of other laser systems.

In the case of mines, the field of application of Protocol II to the 1980 Convention (see p. 10) was extended by the adoption, in Geneva on 3 May 1996, of an amended version of the Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices. The Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction, signed by 121 countries in Ottawa on 3-4 December 1997, entirely prohibits anti-personnel mines. This Convention also provides for mine-clearance and assistance to victims of mines.

IHL treaties containing rules applicable to environmental protection include Article 55 of Additional Protocol I and the Convention on the prohibition of military or any hostile use of environmental modification techniques of 10 December 1976.


However, the Gulf War of 1991 revealed that those rules were little known and sometimes imprecise. Therefore, in 1994, encouraged by the UN General Assembly and with the help of experts in the matter, the ICRC drafted Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict.

Another recent development is the San Remo Manual on international law applicable to armed conflicts at sea. The importance of that undertaking, carried out by the International Institute of Humanitarian Law with the support of the ICRC, was recognized by governments in the resolution adopted by the 26th International Conference of the Red Cross and Red Crescent, held in Geneva in 1995.

Although the Geneva Conventions and their Additional Protocols do not expressly prohibit the use of nuclear weapons, the principles and rules of IHL (see p. 7) do apply in such cases. Among other things, they require belligerents to distinguish at all times between combatants and civilians and prohibit the use of weapons likely to cause unnecessary suffering. The application of those principles to nuclear weapons was reaffirmed by the International Court of Justice in The Hague in 1996.

A further development was the adoption of the Statute of the International Criminal Court on 17 July 1998. The Statute is an important step towards reducing impunity and ensuring greater respect for humanitarian law. The new Court will have jurisdiction over war crimes committed in either international or non-international armed conflicts. Although IHL already lays down a duty to prosecute war criminals, the new Court adds to the tools available.

The latest development concerns means of combat. In December 2001, the scope of the 1980 UN Convention on prohibitions or restrictions on the use of certain conventional weapons was extended. Previously the Convention had only covered situations of international armed conflict, but the Second Review Conference amended Article 1 to include situations of non-international armed conflict.



Victims of war have the right to receive supplies indispensable to their survival.

## 10

## WHAT DOES HUMANITARIAN LAW PROVIDE FOR IN TERMS OF MATERIAL ASSISTANCE TO THE VICTIMS OF ARMED CONFLICT?

The States party to the Geneva Conventions recognize the right of victims of armed conflicts to receive supplies indispensable to their survival. That right was further developed with the adoption of the Additional Protocols in 1977.

In an international armed conflict, the right to assistance includes in particular:

- free passage for consignments of certain objects necessary to the survival of the civilian population (Art. 23, Fourth Convention, drafted to deal with blockades);
- the duty of the Occupying Power to ensure essential supplies to the population of territories it occupies (Art. 55, Fourth

Convention); if its own supplies are inadequate, the Occupying Power must agree to relief provided by outside sources (Art. 59, Fourth Convention).

Protocol I (Arts. 69 and 70) strengthens the body of rules adopted in 1949. For instance, a State at war must accept impartial humanitarian relief schemes carried out without discrimination for the population on its own territory, subject to the agreement of the parties concerned. If those conditions are met, however, it would be wrong to refuse such relief schemes, which are regarded neither as interference in the armed conflict nor as hostile acts.

In a non-international armed conflict, Protocol II (Art. 18) specifies, among other things, that if the civilian population is suffering excessive deprivation owing to a lack of supplies essential to its survival, relief actions which are of an exclusively humanitarian and impartial nature and conducted without any adverse distinction must be undertaken subject to the consent of the warring parties (see p. 19). It is now generally recognized that the State must authorize purely humanitarian relief operations of this nature.



### The ICRC and the right to assistance

The ICRC in any case has a right of initiative (see p. 2) that enables it to offer its services to parties in conflict, in particular with a view to assisting the victims. Its offer of assistance (relief

or other activities) does not constitute interference in the internal affairs of a State, since it is provided for in humanitarian law.

### Humanitarian law and the “right to intervene on humanitarian grounds”

In so far as a “right – or even a duty – to intervene” is tantamount to justifying armed intervention undertaken for humanitarian reasons, this is a matter not for humanitarian law but for the rules on the legality of the use of armed force in international relations, i.e. of *jus ad bellum* (see Q6 and Q18).

If there is armed intervention on humanitarian grounds, the ICRC must, in accordance with its mandate (see *Index*), ensure

that those engaged in the intervention observe the relevant rules of IHL; it must also endeavour to aid the victims of the conflict.

The ICRC is neither for nor against the “right to intervene”. In the light of its own experience, the issue is a political one in which the ICRC cannot become involved without jeopardizing its humanitarian work.



Family members separated by conflict should be brought together again.

# 11

## WHAT DOES HUMANITARIAN LAW SAY WITH REGARD TO THE RESTORATION OF FAMILY LINKS?

As a consequence of armed conflict, prisoners of war and civilian internees are separated from their loved ones, families are split up and people go missing. The Geneva Conventions and Protocol I contain a number of provisions for the protection of these victims. They apply in the event of international armed conflicts and empower the ICRC to carry out the following tasks:

1) Forwarding family messages and other information (Art. 25, Fourth Convention). This includes:

- receiving and registering prisoner-of-war

capture cards and civilian internment cards, the duplicates of these cards being sent to the captives' families;

- forwarding mail between people deprived of their freedom and their families;
- forwarding family news (Red Cross messages) between separated members of a family when normal postal channels are unreliable;
- receiving and transmitting death notices.

More generally, the ICRC's Central Tracing Agency acts as an intermediary between the parties to the conflict or, more

accurately, between their national information bureaux (see opposite) for the transmission of information on people protected by humanitarian law.

2) Inquiring into the whereabouts of missing persons (Art. 33, Protocol I; and Art. 26, Fourth Convention).

3) Reuniting dispersed families (see opposite, Art. 74, Protocol I; and Art. 26, Fourth Convention).

The ICRC first did this type of work during the Franco-Prussian war of 1870. Acting as an intermediary, its tracing agency in Basle set about restoring contact between prisoners of war and

their families, starting with the exchange of lists of wounded persons between the belligerents. Since then, the ICRC's Central Tracing Agency has considerably developed its activities.



### **National information bureaux**

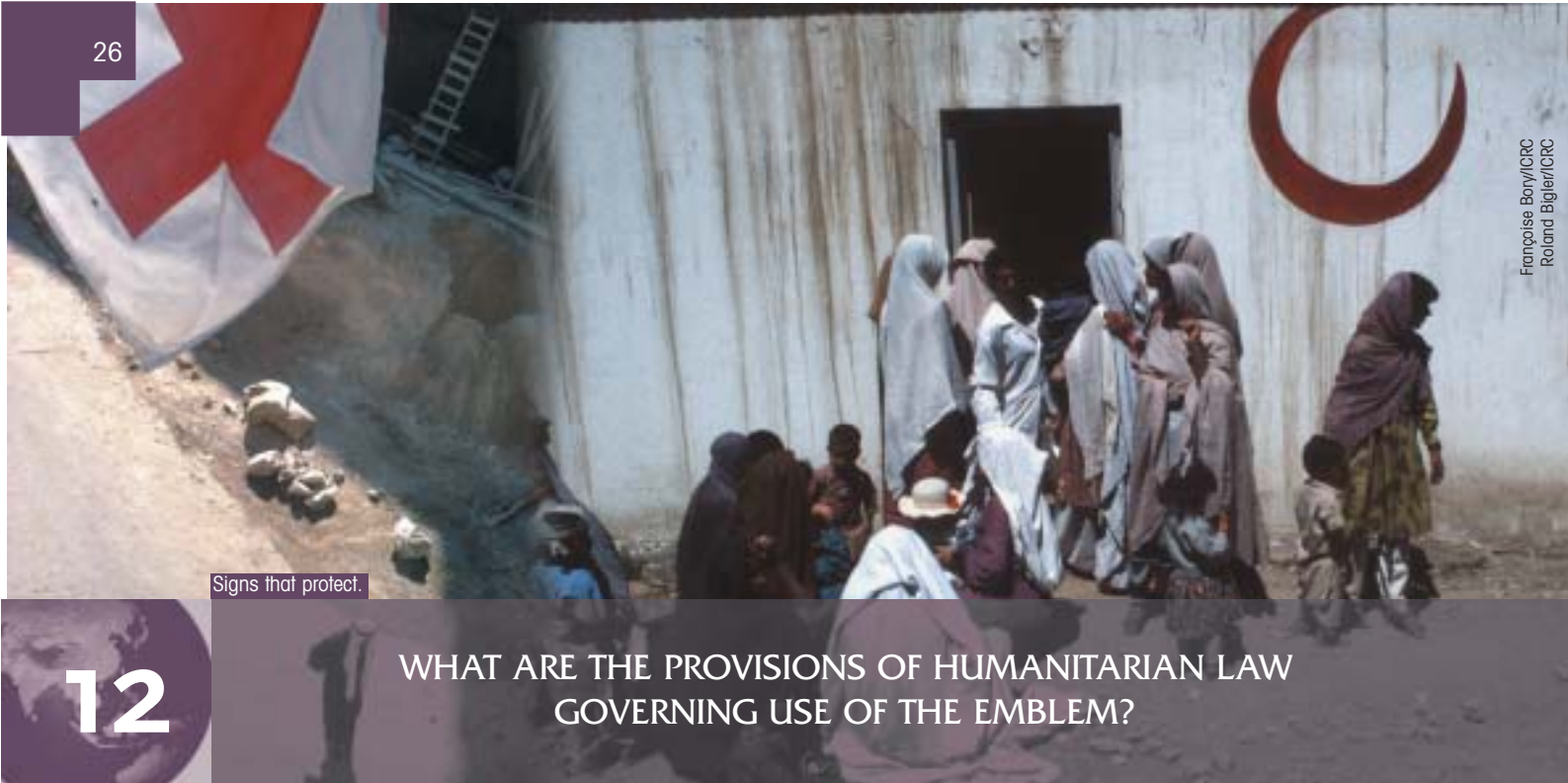
The Third Geneva Convention (Art. 122) states that upon the outbreak of hostilities each neutral or belligerent power that has enemy nationals on its territory must set up an official information bureau for the prisoners of war there. Each belligerent power must inform its own information bureau of all prisoners captured by its forces and provide the bureau with every available detail concerning the identity of these prisoners, so that their next-of-kin can be advised as quickly as possible. If there is no such bureau, as is often the case in conflicts, the ICRC itself undertakes to gather information on people protected by the Geneva Conventions.

### **Central Tracing Agency**

"A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency. The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as quickly as possible to the country of origin of the prisoners of war or to the Power on which they depend (...)." (Art. 123, Third Convention)

### **Dispersed families**

"Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible (...)." (Art. 26, Fourth Convention)



Signs that protect.

# 12

## WHAT ARE THE PROVISIONS OF HUMANITARIAN LAW GOVERNING USE OF THE EMBLEM?

The Geneva Conventions mention three emblems: the red cross, the red crescent and the red lion and sun, although only the first two are now being used.

The Conventions and their Additional Protocols contain several articles on the emblem. Among other things, they specify the use, size, purpose and placing of the emblem, the persons and property it protects, who can use it, what respect for the emblem entails and the penalties for misuse (see opposite).

In times of armed conflict, the emblem may be used as a protective device only by:

- armed forces' medical services;
- National Red Cross and Red Crescent Societies duly recognized and authorized by their governments to lend assistance to the medical services of armed forces; the National Societies may use the emblem for protective purposes only for those of their personnel and equipment assisting official medical services in wartime, provided that those personnel and equipment perform the same functions – and only those functions – and are subject to military law and regulations;
- civilian hospitals and other medical facilities recognized as such by the government and authorized to display the emblem for protective purposes (first-aid posts, ambulances, etc.);
- other voluntary relief agencies subject to the same conditions as National Societies: they must have government recognition and authorization, may use the emblem only for personnel and equipment allocated exclusively to medical services, and must be subject to military law and regulations.

International humanitarian law also specifies that each State party to the Geneva Conventions is required to take steps to prevent and punish misuse of the emblem in wartime and peacetime alike, and to enact a law on the protection of the emblem.



### Use of the emblem

Use of the emblem for protective purposes is a visible manifestation of the protection accorded by the Geneva Conventions to medical personnel, units and transports.

Use of the emblem for indicative purposes in wartime or in times of peace shows that a person or item of property has a link with the International Red Cross and Red Crescent Movement.

The ICRC is entitled at all times to use the emblem for both protective and indicative purposes.

### Misuse of the emblem

Any use not expressly authorized by IHL constitutes a misuse of the emblem. There are three types of misuse:

- imitation, meaning the use of a sign which, by its shape and/or colour, may cause confusion with the emblem;
- usurpation, i.e. the use of the emblem by bodies or persons not entitled to do so (commercial enterprises, pharmacists, private doctors, non-governmental organizations and ordinary individuals, etc.); if persons normally authorized to use the emblem fail to do so in accordance with the rules in the Conventions and Protocols, this also constitutes usurpation;
- perfidy, i.e. making use of the emblem in time of conflict to protect combatants or military equipment; perfidious use of the emblem is a war crime in both international and non-international armed conflict.

Misuse of the emblem for protective purposes in time of war jeopardizes the system of protection set up by IHL.

Misuse of the emblem for indicative purposes undermines its image in the eyes of the public and consequently reduces its protective power in time of war.

The States party to the Geneva Conventions have undertaken to introduce penal measures for preventing and repressing misuse of the emblem in wartime and peacetime alike.



Respect for humanitarian law prevents forced displacement.

# 13

## HOW DOES HUMANITARIAN LAW PROTECT REFUGEES AND INTERNALLY DISPLACED PERSONS?

Refugees are people who have fled their countries, while internally displaced persons (IDPs) are those who have not left their country's territory.

Refugees enjoy first and foremost the protection afforded them by refugee law (see opposite) and the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). If they are in a State involved in an armed conflict, refugees are also protected by international humanitarian law. Apart from the general protection afforded by IHL to civilians, refugees also receive special protection under the Fourth Geneva Convention and Additional Protocol I. This additional protection recognizes the vulnerability of refugees as aliens in the hands of a party to the conflict and the absence of protection by their State of nationality.

IDPs are protected by various bodies of law, principally national law, human rights law and, if they are in a State undergoing armed conflict, international humanitarian law.

If IDPs are in a State which is involved in an armed conflict, they are considered civilians – provided they do not take an active part in the hostilities – and, as such, are entitled to the protection afforded to civilians.

When they are respected, these rules play an important role in preventing displacement, as it is often their violation which leads to displacement. In addition, humanitarian law expressly prohibits compelling civilians to leave their places of residence unless their security or imperative military reasons so demand.

Once displaced, IDPs are protected from the effects of hostilities by the general rules governing the protection of civilians and humanitarian assistance set out above.

The general rules of humanitarian law for the protection of civilians, if respected, can prevent displacement. If not, they can offer protection during displacement. Particular mention should be made of the following rules, which prohibit:

- attacks on civilians and civilian objects or the conduct of hostilities in an indiscriminate manner;
- starvation of the civilian population and the destruction of objects indispensable to its survival;
- collective punishments – which often take the form of destruction of dwellings.

There are also the rules requiring parties to a conflict to allow relief consignments to reach civilian populations in need.



### Definition of a refugee

According to Article 1 of the 1951 UN Convention on the status of refugees, the term “refugee” applies to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.”

The 1969 Convention of the Organization of African Unity on refugee problems in Africa and the 1984 Cartagena Declaration on refugees have broadened that definition to include people fleeing events which seriously disrupt public order, such as armed conflicts and disturbances.



Spreading knowledge of humanitarian law.

# 14

## WHAT MEASURES ARE AVAILABLE FOR IMPLEMENTING HUMANITARIAN LAW?

The following implementation measures must be taken.

Preventive measures, based on the duty of States to comply with humanitarian law. They include:

- spreading knowledge of IHL;
- training qualified personnel to facilitate the implementation of IHL, and the appointment of legal advisers in the armed forces;
- adopting legislative and statutory provisions to ensure compliance with IHL;
- translating the texts of the Conventions.

Measures for monitoring compliance with the provisions of humanitarian law for the duration of the conflict:

- action by the Protecting Powers or their substitutes;
- ICRC action (see Q15).

Repressive measures, based on the duty of the parties to the conflict to prevent and put a halt to all violations. Mechanisms for repression include:

- the obligation for the national courts to repress grave breaches considered as war crimes (for international tribunals, see Q16);
- the criminal liability and disciplinary responsibility of superiors, and the duty of military commanders to repress and denounce offences;
- mutual assistance between States on criminal matters.

Apart from the fact that they are inherent in any consistent legal construct, these repressive measures also serve as a deterrent.

There are other implementation measures, which encompass prevention, control and repression; the last two are derived chiefly from the duty of States to ensure respect for humanitarian law. They include:

- the enquiry procedure;
- the International Fact-Finding Commission;
- the examination procedures concerning the application and interpretation of legal provisions;
- cooperation with the United Nations.

Diplomatic efforts and pressure from the media and public opinion also help ensure implementation of IHL.

## Legal provisions for implementation

NB: see p.13 for articles on promoting knowledge of the Conventions and Protocols.

"The High Contracting Parties shall (...) in peacetime endeavour (...) to train qualified personnel to facilitate the application of the Conventions and of this Protocol (...)." (Art. 6, Protocol I)

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." (Article 1 common to the four Conventions)

"The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject." (Art. 82, Protocol I)

"The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs (...)." (Art. 45, Second Convention)

"The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof." (Art. 48/49/128/145 common to the four Conventions)

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...). Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." (Art. 49/50/129/146 common to the four Conventions)

"The present Convention shall be applied with the cooperation and the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers." (Art. 8, GC I, II, III; and Art. 9, GC IV)

"The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention (...). If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention." (Art. 10, GC I, II, III; and Art. 11, GC IV)


"The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol." (Art. 7, Protocol I)

"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief." (Art. 9/9/9/10 common to the four Conventions)

"In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter." (Art. 89, Protocol I)

"The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol (...). When circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition (...)." (Art. 88, Protocol I)

"An International Fact-Finding Commission (...) consisting of 15 members of high moral standing and acknowledged impartiality shall be established. (...) The Commission shall be competent to: i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol (...)." (Art. 90, Protocol I)



The ICRC reminds parties to armed conflict of their obligations to allow the registration and repatriation of prisoners of war.



## 15

### WHAT IS THE ICRC'S ROLE IN ENSURING RESPECT FOR HUMANITARIAN LAW?

As the promoter and guardian of international humanitarian law, the ICRC must encourage respect for the law. It does so by spreading knowledge of the humanitarian rules and by reminding parties to conflicts of their obligations.

#### **Dissemination and Advisory Service**

Since ignorance of the law is an obstacle to its implementation, the ICRC reminds States that they have undertaken to make the humanitarian provisions known. It also takes its own action to this end (see p. 13). The ICRC further reminds States that they

must take all the necessary steps to ensure that the law is applied effectively and therefore respected. It does so chiefly through its Advisory Service on international humanitarian law, which provides technical guidance to States and helps their authorities adopt national implementing laws and regulations.

#### **Reminding parties in conflict of their obligations**

On the strength of the conclusions it draws from its protection and assistance work, the ICRC makes confidential representations to

the relevant authorities in the event of violations of humanitarian law. If the violations are serious and repeated and it can be established with certainty that they have occurred, the ICRC reserves the right to take a public stance; it does so only if it deems such publicity to be in the interest of the people affected or threatened. This therefore remains an exceptional measure.



### The ICRC as guardian of international humanitarian law

Humanitarian law enables the ICRC to ensure that humanitarian rules are respected.

“Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour (...).” And again: “The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives.” (Art. 126, Third Convention).

NB: Article 143 of the Fourth Convention contains similar provisions relating to civilian internees.

The Movement’s Statutes specify that one of the ICRC’s roles is: “to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law.” (Art. 5, para. 2c).

Attacking civilians or their property is a war crime.

## 16

## HOW ARE WAR CRIMINALS PROSECUTED UNDER HUMANITARIAN LAW?



On becoming party to the Geneva Conventions, States undertake to enact any legislation necessary to punish persons guilty of grave breaches of the Conventions. States are also bound to prosecute in their own courts any person suspected of having committed a grave breach of the Conventions, or to hand that person over for judgment to another State. In other words, perpetrators of grave breaches, i.e. war criminals, must be prosecuted at all times and in all places,

and States are responsible for ensuring that this is done.

Generally speaking, a State's criminal laws apply only to crimes committed on its territory or by its own nationals. International humanitarian law goes further in that it requires States to seek out and punish any person who has committed a grave breach, irrespective of his nationality or the place where the offence was committed. This principle of universal

jurisdiction is essential to guarantee that grave breaches are effectively repressed.

Such prosecutions may be brought either by the national courts of the different States or by an international authority. In this connection, the International Criminal Tribunals for the former Yugoslavia and Rwanda were set up by the UN Security Council in 1993 and 1994, respectively, to try those accused of war crimes committed during the conflicts in those countries.

### Why are the humanitarian rules not always respected and violations not always repressed?

This question can be answered in various ways. Some claim that ignorance of the law is largely to blame, others that the very nature of war so wills it, or that it is because international law – and therefore humanitarian law as well – is not matched by an effective centralized system for implementing sanctions, among other things, because of the present structure of the international community. Be that as it may, whether in conflict situations or in peacetime and whether it is national or international jurisdiction that is in force, laws are violated and crimes committed.

Yet simply giving up in the face of such breaches and halting all action that seeks to gain greater respect for humanitarian law would be far more discreditable. This is why, pending a more effective system of sanctions, such acts should be relentlessly condemned and steps taken to prevent and punish them. The penal repression of war crimes must therefore be seen as one means of implementing humanitarian law, whether at national or international level.

Lastly, the international community has created a permanent International Criminal Court, which will be competent to try war crimes, crimes against humanity, and genocide.

### What is a war crime?


War crimes are understood to mean serious violations of international humanitarian law committed during international or non-international armed conflicts. Several legal texts contain definitions of war crimes, namely the Statute of the International Military Tribunal established after the Second World War in Nuremberg, the Geneva Conventions and their Additional Protocols, the Statutes and case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court. Definitions of the notion of war crime are also given in the legislation and case law of various countries. It is important to note that one single act may constitute a war crime.

The following acts are, among others, included in the definition of war crimes:

- wilful killing of a protected person (e.g. wounded or sick combatant, prisoner of war, civilian);
- torture or inhuman treatment of a protected person;

- wilfully causing great suffering to, or serious injury to the body or health of, a protected person;
- attacking the civilian population;
- unlawful deportation or transfer;
- using prohibited weapons or methods of warfare;
- making improper use of the distinctive red cross or red crescent emblem or other protective signs;
- killing or wounding perfidiously individuals belonging to a hostile nation or army;
- pillage of public or private property.

It should be noted that the International Criminal Tribunal for the former Yugoslavia has recognized that the notion of war crime under customary international law also covers serious violations committed during non-international armed conflicts. The Statute of the International Criminal Court and the Statute of the International Criminal Tribunal for Rwanda also include in their respective lists of war crimes those committed during internal armed conflicts.



Children have rights too.



# 17

## WHAT IS THE DIFFERENCE BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS LAW?

International humanitarian law and international human rights law (hereafter referred to as human rights) are complementary. Both strive to protect the lives, health and dignity of individuals, albeit from a different angle.

Humanitarian law applies in situations of armed conflict (see Q7), whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike. However, some human rights treaties permit governments to derogate from certain rights in situations of public emergency. No derogations are permitted under IHL because it was conceived for emergency situations, namely armed conflict.

Humanitarian law aims to protect people who do not or are no longer taking part in

hostilities. The rules embodied in IHL impose duties on all parties to a conflict. Human rights, being tailored primarily for peacetime, apply to everyone. Their principal goal is to protect individuals from arbitrary behaviour by their own governments. Human rights law does not deal with the conduct of hostilities.

The duty to implement IHL and human rights lies first and foremost with States. Humanitarian law obliges States to take practical and legal measures, such as enacting penal legislation and disseminating IHL. Similarly, States are bound by human rights law to accord national law with international obligations. IHL provides for several specific mechanisms that help its implementation. Notably, States are required to ensure respect also by other

States. Provision is also made for an enquiry procedure, a Protecting Power mechanism, and the International Fact-Finding Commission. In addition, the ICRC is given a key role in ensuring respect for the humanitarian rules.

Human rights implementing mechanisms are complex and, contrary to IHL, include regional systems. Supervisory bodies, such as the UN Commission on Human Rights, are either based on the UN Charter or provided for in specific treaties (for example the Human Rights Committee, which is rooted in the International Covenant on Civil and Political Rights of 1966). The Human Rights Commission and its Subcommissions have developed a mechanism of “special rapporteurs” and working groups, whose task is to monitor and report on human rights situations either

by country or by topic. Six of the main human rights treaties also provide for the establishment of committees (e.g. the Human Rights Committee) of independent experts charged with monitoring their implementation. Certain regional treaties

(European and American) also establish human rights courts. The Office of the UN High Commissioner for Human Rights (UNHCHR) plays a key part in the overall protection and promotion of human rights. Its role is to enhance the effectiveness of the

UN human rights machinery and to build up national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

### Human rights instruments

The many texts now in force include:

#### a) Universal instruments

- the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948
- the Convention on the Prevention and Punishment of the Crime of Genocide of 1948
- the International Covenant on Civil and Political Rights of 1966
- the International Covenant on Social and Economic Rights of 1966
- the Convention on the Elimination of All Forms of Discrimination against Women of 1981
- the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984
- the Convention on the Rights of the Child of 1989

#### b) Regional instruments


- the European Convention on Human Rights of 1950
- the American Convention on Human Rights of 1969
- the African Charter of Human and Peoples' Rights of 1981

### The "hard core"

The international human rights instruments contain clauses that authorize States confronted with a serious public threat to suspend the rights enshrined in them. An exception is made for certain fundamental rights laid down in each treaty, which must be respected in all circumstances and may never be waived regardless of the treaty. In particular, these include the right to life, the prohibition of torture and inhuman punishment or treatment, slavery and servitude, and the principle of legality and non-retroactivity of the law. These fundamental rights that States are bound to respect in all circumstances – even in the event of a conflict or disturbances – are known as the "hard core" of human rights.

### Points of convergence

Since humanitarian law applies precisely to the exceptional situations which constitute armed conflicts, the content of human rights law that States must respect in all circumstances (i.e. the "hard core") tends to converge with the fundamental and legal guarantees provided by humanitarian law, e.g. the prohibition of torture and summary executions (see p. 21; Art. 75, Protocol I; and Art. 6, Protocol II).



Members of peace operations must know and apply humanitarian law.

## 18

## DOES HUMANITARIAN LAW APPLY TO PEACE-KEEPING AND PEACE-ENFORCEMENT OPERATIONS CARRIED OUT BY OR UNDER THE AUSPICES OF THE UNITED NATIONS?

In situations of international and non-international armed conflict, members of military units taking part in a peace operation must respect international humanitarian law when they are actively engaged in armed confrontations against a party to the conflict. When they are not, they are considered as civilians, as long as this situation remains unchanged.

For each contingent, humanitarian law applies according to the international obligations of each troop-contributing country. States that provide troops for such

operations must ensure that their units are familiar with the humanitarian rules.

The applicability of humanitarian law to forces conducting operations under United Nations command and control was reaffirmed in the Bulletin of the UN Secretary-General issued on 6 August 1999 to mark the 50th anniversary of the adoption of the Geneva Conventions of 1949.

Under the title “Observance by United Nations forces of international humanitarian law”, the Bulletin sets out a list of fundamental principles and rules of

humanitarian law. These principles are applicable, as a minimum, to UN forces whenever they are engaged as combatants in an enforcement action or when acting in self-defence during a peace-keeping operation, to the extent and for the duration of armed engagements.


The obligation for UN forces to respect these fundamental principles and rules has also been included in the most recent agreements concluded between the United Nations and the countries in whose territory UN troops are deployed.

### Distinction and definition

The purpose of peace-keeping operations is to ensure respect for cease-fires and demarcation lines and to conclude troop-withdrawal agreements. In the past few years, the scope of operations has been extended to cover other tasks such as the supervision of elections, the forwarding of humanitarian relief, and assistance in the national reconciliation process. The use of force is authorized only in cases of legitimate defence. Such operations take place with the consent of the parties on the ground.

Peace-enforcement operations, which come under Chapter VII

of the United Nations Charter, are carried out by UN forces or by States, groups of States or regional organizations, either at the invitation of the State concerned or with the authorization of the UN Security Council. These forces are given a combat mission and are authorized to use coercive measures for carrying out their mandate. The consent of the parties is not necessarily required. The distinction between these two types of operation has become less clear in recent years. The term “peace support operations” has also started to emerge.



“Acts that spread terror...”

## WHAT DOES HUMANITARIAN LAW SAY ABOUT TERRORISM?

19

Terrorist acts may occur during armed conflicts or in time of peace. As international humanitarian law applies only in situations of armed conflict, it does not regulate terrorist acts committed in peacetime.

The requirement to distinguish between civilians and combatants, and the prohibition of attacks on civilians or indiscriminate attacks, lies at the heart of humanitarian law. In addition to an express prohibition of all acts aimed at spreading terror among the civilian population (Art. 51, para. 2, Protocol I; and Art. 13, para. 2, Protocol II), IHL also proscribes the following

acts, which could be considered as terrorist attacks:

- attacks on civilians and civilian objects (Arts. 51, para. 2, and 52, Protocol I; and Art. 13, Protocol II);
- indiscriminate attacks (Art. 51, para. 4, Protocol I);
- attacks on places of worship (Art. 53, Protocol I; and Art. 16, Protocol II);
- attacks on works and installations containing dangerous forces (Art. 56, Protocol I; and Art. 15, Protocol II);
- the taking of hostages (Art. 75, Protocol I; Art. 3 common to the four Conventions; and Art. 4, para. 2b, Protocol II);

- murder of persons not or no longer taking part in hostilities (Art. 75, Protocol I; Art. 3 common to the four Conventions; and Art. 4, para. 2a, Protocol II).

Apart from prohibiting the above acts, humanitarian law contains stipulations to repress violations of these prohibitions and mechanisms for implementing these obligations, which are much more developed than any obligation that currently exists under international conventions for the prevention and punishment of terrorism.

## INDEX

- Accession: p. 12
- Additional Protocols and/or Geneva Conventions:  
see "Geneva Conventions"
- Armed conflicts (international/non-international/"new"): pp. 4, 10, 14, 15, 16, 17, 18, 22, 24
- Article 3 (common): pp. 2, 16, 17, 18, 19,
- Assistance: pp. 22, 23
- Breaches/violations: pp. 27, 30, 31, 32, 33, 35, 39
- Development of humanitarian law: pp. 10, 11, 20, 21
- Dissemination: pp. 6, 13, 31, 32  
Definition: as an ICRC activity, consists of raising awareness of IHL, the Movement in general and the ICRC in particular, and of the Fundamental Principles that guide their actions and activities, with a view to limiting violations of the law, preventing suffering and facilitating humanitarian action.
- Diplomatic Conference: pp. 8, 11, 20, 21  
Definition: Meeting of representatives of States to adopt international treaties; one held in 1949 for the Geneva Conventions, another in 1977 for the Additional Protocols.
- Displaced people: pp. 16, 28, 29
- Emblem: pp. 6, 8, 26
- Geneva (law of): p. 4
- Geneva Conventions and/or Additional Protocols: pp. 8, 9, 10, 11, 12, 13, 16, 17, 19, 20, 21, 22, 24, 25, 26, 28, 31, 33, 39
- Grotius (Hugo de Groot (1583-1645), a Dutch jurist and diplomat who strongly influenced the theory of law and the State in general, and of international law in particular): pp. 5, 7
- Human rights: pp. 17, 35, 36, 37
- Implementation of humanitarian law: pp. 30, 31
- International Committee of the Red Cross (ICRC): pp. 8, 11, 13, 19, 20, 21, 23, 24, 25, 27, 30, 31, 33, 36, 37
- Intervention (right of): p. 23
- jus ad bellum/jus in bello*: pp. 14, 23
- Law of nations: p. 5
- Lieber Code: p. 9 (see also "Lieber, Francis")
- Lieber, Francis (professor at Colombia College (New York); at the request of Abraham Lincoln, drew up a series of instructions for Union soldiers during the American Civil War; see also "Lieber Code"): p. 9
- Mandate: pp. 2, 21, 23, 29, 31, 37
- Martens, Fyodor (Russian jurist and diplomat, author of the clause of the same name): p. 7
- National Societies: pp. 2, 13, 26
- Neutral intermediary: pp. 2, 31
- Parties (States Parties, High Contracting Parties): pp. 11, 12, 13, 14, 19, 22, 31, 32  
Definition: States that have ratified inter alia the Geneva Conventions.
- Parties to the conflict: pp. 7, 16, 19, 31  
Definition: States or movements that have taken up arms and are directly involved in a conflict.
- Peace-keeping/enforcement operations: pp. 36, 37
- People deprived of their freedom (prisoners of war, civilian internees, detainees): pp. 16, 24, 25, 31, 33
- Principles (of humanitarian law): p. 7
- Promotion: see "Dissemination"
- Protocols additional to the Geneva Conventions: see "Geneva Conventions"
- Public international law: pp. 4, 5
- Ratification: p. 12
- Refugees: pp. 16, 28, 29
- Reservations: p. 12
- Respect for humanitarian law: pp. 31, 33
- Restoration of family links: pp. 24, 25
- Right of humanitarian initiative: pp. 2, 23
- Role of the ICRC: pp. 11, 13, 19, 21, 23, 24, 25, 29, 31, 37
- Rousseau, Jean-Jacques (writer and philosopher, native of Geneva (1712-1778), author of *The Social Contract* in which he explains his principles): p. 7
- Rules (of humanitarian law): pp. 6, 17, 33
- St. Petersburg (Declaration of): pp. 7, 10
- Signature: p. 12
- Terrorism: p. 39
- The Hague (law of): p. 4
- Treaties: pp. 8, 9, 10, 11, 12, 15, 20, 21, 29, 30, 35, 37
- United Nations (UN): pp. 14, 15, 20, 21, 28, 29, 30, 33, 36, 37
- Victims (categories of): pp. 16, 19, 24, 28
- Violations: pp. 27, 31, 33, 35, 39
- War crimes: pp. 27, 33

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## MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.

It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

Even wars have limits... International humanitarian law, whose bedrock is the Geneva Conventions, is a set of rules which seek to protect people who are not, or are no longer, participating in the hostilities and to restrict the means and methods of warfare.

One of the roles of the International Committee of the Red Cross (ICRC) is to promote humanitarian law, work for its implementation and contribute to its development. “International Humanitarian Law: Answers to your Questions” examines the origins, evolution and application of that law.

For more information, go to [www.icrc.org](http://www.icrc.org)



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