Briefing
March 2020
International
Law Programme

Seventy Years of the Geneva Conventions

What of the Future?

Emanuela-Chiara Gillard

Summary

- The 70th anniversary of the adoption of the 1949 Geneva Conventions was commemorated in 2019. But violations of the Conventions and of the 1977 Additional Protocols are widespread.
- Contemporary conflicts have been marked by violations of some of the foundational rules of international humanitarian law (IHL) relating to the protection of the wounded and sick and of providers of medical assistance.
- A further area of IHL that has come under strain and scrutiny are the rules regulating humanitarian relief operations and their application to sieges and blockades.
- War has a huge impact on children, and the treatment of children in armed conflict is another area of the law that requires further attention.
- In the current political climate, it is unlikely that new treaties will be negotiated to address emerging issues or uncertainties in the law.
- Other measures must be explored, including the adoption of domestic measures to implement existing law; support for processes that interpret the law; and initiatives to promote compliance with the law by organized armed groups.
- One overarching challenge is the interplay between IHL and counterterrorism measures. It can undermine the protections set out in IHL, and hinder principled humanitarian action and activities to promote compliance with the law by organized armed groups.

Introduction

2019 was the 70th anniversary of the adoption of the 1949 Geneva Conventions, the most extensive codification of the rules of international humanitarian law (IHL), and the only treaties to have been ratified by every state in the world. Events marking the anniversary celebrated the achievements of 1949. But challenges for the future were also noted. In particular, the law is being flouted too often; certain rules are unclear; and some experts consider that there are gaps in the legal framework. There are also questions that remain to be fully addressed in the future, such as the application of IHL to new technologies, or the responsibilities of states in 'partnered' military operations. This briefing takes three pertinent examples, and discusses possibilities for addressing these and other questions in the future.

Protection of medical care in armed conflict

There have in recent conflicts been severe and repeated violations of the rules of IHL protecting the wounded and sick, and those providing medical assistance. These rules are the most long-standing codification of IHL, and consist of three key elements:

- The entitlement of wounded and sick civilians and fighters who are *hors de combat* to receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition. No distinction may be drawn between them on any grounds other than medical ones.[1]
- The prohibition on harming, prosecuting or otherwise punishing those who provide medical assistance, regardless of the nationality, religion, status or affiliation with a party to the conflict of the person receiving such care.[2]
- The special protection afforded to healthcare facilities – hospitals, clinics, dispensaries – and transports such as ambulances. These must not be attacked. Should they be used to commit, outside their humanitarian duties, acts harmful to the enemy, they lose this protection but only once a due warning has been given, setting, whenever appropriate, a reasonable time limit within which to end such conduct, and after such warning has remained unheeded.[3]

Attention has focused on attacks against or causing damage to healthcare facilities in violation of these rules. For example, the mechanism established by UN Security Council Resolution 1612 (2005) to monitor and report on six grave violations affecting children in armed conflict includes 'attacks against hospitals'.[4] And in 2012 the World Health Assembly requested the World Health Organization to collect and report

[1] Article 12 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Article 12 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces (GC II); Article 10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I); and Article 7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (AP II).
[2] Article 18 GC I; Articles 16(1) and 17(1) AP I; and Article 10(1) AP II.
[3] Articles 19 and 21 GC I; Articles 22 and 34 GC II; Articles 12 and 13 AP I; and Article 11 AP II.
[4] UN Security Council Resolution 1612 (2005) and Secretary-General's report on Children and Armed Conflict, S/2005/72, 9 February 2005, para 68.

instances of attacks on healthcare.[5] Attacks are now being systematically recorded, but while there is now greater public awareness, this has not been accompanied by improved compliance. Attacks on healthcare facilities are dramatically visible; but a number of less evident violations, discussed below, may suggest a rejection of the foundational principles of IHL relating to the protection of healthcare, in particular to the entitlement of all wounded and sick to receive medical care. In addition to the problem of violations of the law, there are a small number of issues in respect of which the law is not clear, or where its application and protection may be compromised by the interplay with counterterrorism measures.

Attacks on healthcare facilities are dramatically visible; but a number of less evident violations may suggest a rejection of the foundational principles of IHL relating to the protection of healthcare

A first question is who constitutes 'medical personnel'. These persons are granted special protection: they must be respected and protected, and are entitled to wear the distinctive red cross or red crescent emblem. The first and second Geneva Conventions of 1949 (GC I and GC II) grant these special protections to *military* medical personnel.[6] The first Additional Protocol of 1977 to the Geneva Conventions (AP I) expands the definition to certain classes of *civilian* medical personnel.[7] In all cases, the medical personnel must be exclusively engaged in medical activities and be 'assigned' to such duties by a party to the conflict.[8] They are thus exercising their functions on the basis of the authorization by a state, which is also responsible for exercising a degree of control over them to ensure that there is no abuse of the special protected status.[9]

Military medical personnel are assigned *ex officio* by the armed forces, but IHL treaties do not lay down specific procedures for assigning civilian medical personnel, leaving it to states to do so.[10] Some recent exchanges address the question of whether the medical staff of public healthcare facilities should be considered as 'automatically' assigned by states.[11]

The position in non-international armed conflicts is more complex, particularly in respect of organized armed groups. While Article 9(1) of the second Additional Protocol of 1977 to the Geneva Conventions (AP II) sets out the same obligation to respect and protect medical personnel, and, additionally, to grant it all available help for the performance of its duties, it does not refer to 'assigned' personnel. A provision specifying that these protections related exclusively to personnel 'assigned' to these tasks was elaborated during the negotiations, based on that in AP I, but slightly amended to address specific aspects of non-international armed conflict. It provided that *both* parties to the conflict could assign medical personnel.[12]

---

[5] World Health Assembly resolution 65.20. This request led to the Attacks on Health Care initiative: see further World Health Organization (2020), 'Responding to attacks on health care', https://www.who.int/emergencies/attacks-on-health-care/en/.

[6] Articles 24–26 and 40 GC I; and Articles 36 and 42 GC II.

[7] Articles 8(c) and 18 AP I.

[8] The corresponding provision in the English-language version of Article 24 GC I used the term 'engaged' in a range of medical activities, but the French version referred to persons 'assigned' to conduct them, and there is general agreement that the requirement is one of 'assignment'. See ICRC (2016), Commentary to the First Geneva Convention (2nd edition), (ICRC Commentary to GC I) para 1972.

[9] See for example Bothe, M., Partsch, K. J. and Solf, W. A. (eds) (2013), *New Rules for Victims of Armed Conflicts*, 2nd ed., Leiden and Boston: Nijhoff, pp. 104–105.

[10] See for example Sassòli, M. (2019), 'Joint Blog Series: Medical care in armed conflict PART I, Humanitarian Law and Policy, 24 January 2019, https://blogs.icrc.org/law-and-policy/2019/01/24/joint-blog-series-medical-care-armed-conflict-part-i/; and Liivoja, R. (2019), 'Status of medical personnel: Clear as mud?', Humanitarian Law and Policy, 25 February 2019, https://blogs.icrc.org/law-and-policy/2019/02/25/status-medical-personnel-clear-as-mud/.

[11] Ibid.

[12] Sandoz, Y., Swinarski, C. and Zimmermann, B. (eds) (1987), *Commentary on the Additional Protocols of 8 June 1977* (ICRC Commentary to the APs), Geneva, Nijhoff, paras 4661–4669.

However, as part of the radical shortening of the draft, this provision was not included in the version of the text that was adopted. What does this mean? That there is no requirement that personnel be assigned in non-international armed conflict? This is unlikely, in view of the reference in Article 12 AP II to the entitlement of medical personnel to wear the distinctive emblem, 'under the direction of the competent authority concerned'.[13] Rather, this suggests that the 'competent authorities' of both states *and* organized armed groups are entitled to assign medical personnel. Drawing on the approach adopted for states in international armed conflicts, the precise formal measure by which this is done is not significant. What matters more is that the personnel only conduct medical activities and that the group exercises some degree of control to ensure the status is not abused.

Whatever position is adopted on this question, it is important to bear in mind that the question of who is 'assigned' medical personnel is only relevant to the *special* protections to which they are entitled. It is clear that other civilians who provide medical care remain civilians, and that they must be respected and protected as such. This also includes the staff of international non-governmental organizations providing medical care who, with the exception of staff of national red cross/red crescent societies in certain circumstances,[14] are not 'assigned' by parties to conflict – and who frequently would not wish to be assigned by parties to a conflict as this could negatively affect perceptions of their neutrality and independence.[15]

It is equally clear that providing assistance to the wounded and sick – including enemy fighters – does not lead to a loss of special protection for 'assigned' personnel, does not amount to direct participation in hostilities,[16] and is not a reason for punishment. IHL treaty provisions applicable in both international and non-international armed conflict expressly prohibit punishing any person for having carried out medical activities, regardless of who benefits from them.[17]

Despite this very clear prohibition, in recent years, in a number of contexts, people have been harassed, investigated, prosecuted and imprisoned, and at times ill-treated, for having provided medical care.[18] Individuals have been listed under UN sanctions among other things for having provided medical care to members of groups designated as terrorist that are parties to non-international armed conflict.[19]

---

[13] The ICC Statute war crime of 'internationally directing attacks against … personnel using the distinctive emblems of the Geneva Conventions in conformity with international law' in non-international armed conflict also suggests that there are people entitled to display the distinctive emblems in non-international armed conflicts. Article 8(2)(e)(ii) ICC Statute.
[14] Article 26 GC I and Article 8(c) AP I.
[15] UN Security Council Resolution 2286 (2016) on healthcare in conflict avoids the discussion of 'assigned' medical personnel, referring instead to medical personnel and 'humanitarian personnel exclusively engaged in medical duties'.
[16] See for example Sassòli (2019), Joint Blog series: Medical care in armed conflict PART I; and Livoja (2019), Status of medical personnel: Clear as mud?.
[17] Article 16 AP I and Article 10 AP II.
[18] See for example Buissonniere M., Woznick S. and Rubenstein L., with Hannah J. (2018), *The Criminalization of Healthcare*, University of Essex, John Hopkins Bloomberg School of Public Health and Safeguarding Health in Conflict, https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf; Koteiche R., Murad S. and Heisler M. (2019), '*My Only Crime Was That I was a Doctor': How the Syrian Government Targets Health Workers for Arrest, Detention, and Torture*, Physicians for Human Rights, https://phr.org/wp-content/uploads/2019/12/PHR-Detention-of-Syrian-Health-Workers-Full-Report-Dec-2019_English-1.pdf; and Bouchet-Saulnier, F. (2018), 'How CT Measures and Other Sanctions Are Concretely Impacting Humanitarian Action?', *Proceedings of the Bruges Colloquium: Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts*, 19th Bruges Colloquium, 18–19 October 2018, p. 206.
[19] Gillard, E.-C. (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*, Research Paper, London: Royal Institute of International Affairs, p. 14, https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-02-humanitarian-action-non-state-armed-groups-gillard.pdf.

Other examples of difficulties in the interpretation or application of this area of IHL include how wounded and sick members of the armed forces or military medical personnel are to be considered in proportionality analyses undertaken for the purpose of targeting;[20] what actions amount to 'acts harmful to the enemy' leading to loss of special protection for medical personnel; and the extent of belligerents' obligations to provide medical care to civilians in areas where they are conducting military operations.[21]

The entitlement to receive medical care and the protections of those who provide it are the core of these rules, and these rules are clear

While these examples, and the questions discussed above, are indicative of a lack of clarity or possibly a gap in IHL, they relate to issues described as 'peripheral' to the legal framework protecting medical care in armed conflict. The entitlement to receive medical care and the protections of those who provide it are the core of these rules, and these rules are clear. But problems can arise because of tensions between IHL and other bodies of law – principally international and domestic counterterrorism measures – that prohibit providing assistance to groups designated as terrorist, groups that are also frequently parties to non-international armed conflicts. Overly broad counterterrorism prohibitions are impeding humanitarian actors from conducting operations as envisaged by IHL, and in accordance with humanitarian principles, in a number of ways; but the criminalization of the provision of medical care is the most stark and problematic manifestation of the tensions, as it is contrary to the express prohibition in IHL on punishing those who provide medical care.

Sieges, starvation of civilians as a method of warfare, and other practices that may deprive civilians of objects indispensable to their survival

A second set of rules of IHL that have been brought dramatically to the fore in recent conflicts are those aimed at ensuring civilians' access to objects indispensable to their survival. Situations that have raised questions about rules of IHL on humanitarian relief operations and their interplay with other parts of public international law include the severe limitations imposed by the government of Bashar al-Assad during the civil war in Syria, essentially amounting to a refusal to allow relief operations for civilians under the control of organized armed groups; the sieges imposed by all parties to the conflict in Syria; the maritime interdiction operations off the coast of Yemen; and the naval blockade of Gaza. These rules had until recently received limited attention. But in many – if not most – armed conflicts, far more deaths occur as a result of humanitarian crises *created* by the conflict than from the hostilities *themselves*.[22]

Latterly, a number of steps have been taken to advance the normative framework relevant to food insecurity in armed conflict. In April 2018 Switzerland proposed an amendment to the Statute of the International Criminal Court (ICC) to include

[20] See for example ICRC Commentary to GC I, paras 1353–1357; Corn, G. and Culliver, A. (2017), 'Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk', *Georgia Journal of International and Comparative Law*, 45(3), p. 445, doi:10.2139/ssrn.2884854; and Kleffner, J. K. (2018), 'Military Collaterals And Ius In Bello Proportionality', *Israel Yearbook on Human Rights*, 48, pp. 43–61, doi:10.1163/9789004382183_004; and Sari, A. and Tinkler, K. (2019), 'Collateral Damage and the Enemy', *British Yearbook of International Law*, doi:10.1093/bybil/brz004.
[21] Spiegel, P., Garber, K., Kushner, A. and Wise, P. (2018), *The Mosul Trauma Response: A Case Study*, Johns Hopkins Center for Humanitarian Health.
[22] Wenger, A. and Mason, S. J. A. (2008), 'The civilianisation of armed conflict: trends and implications', *International Review of the Red Cross*, 90(872), p. 842, doi:10.1017/s1816383109000277.

the starvation of civilians as a war crime in non-international armed conflicts.[23] The amendment was adopted by consensus in December 2019.[24] And in May 2018 the UN Security Council adopted a landmark resolution on conflict-induced food insecurity.[25]

In May 2018 the UN Security Council adopted a landmark resolution on conflict-induced food insecurity

Expert discussions have also considered the rules of IHL relevant to preventing or minimizing conflict-related food insecurity – either in general terms or in specific situations such as sieges. The key elements of the rules regulating humanitarian relief operations were analysed in detail in the 2016 *Oxford Guidance on the Law Relating to Humanitarian Relief Operations*.[26] Among other things, the Guidance considers which party's consent is required as a matter of law in non-international armed conflicts; and develops a framework for analysis of what constitutes arbitrary withholding of consent to offers to conduct relief operations, as well as the consequences of unlawful withholding of consent.

Starvation of civilians as a method of warfare

The precise scope of the prohibition of starvation of civilians as a method of warfare has received considerable attention, including at the end of 2019 in the lead-up to the consideration by the Assembly of States Parties to the ICC Statute of the Swiss-proposed amendment.[27] There is general agreement that the term 'starvation' should be given a wide interpretation that goes beyond just deprivation of food and water, to include deprivation of other goods essential to survival in a particular context, such as heating oil or blankets.[28] Less clear is whether the prohibition only relates to situations where the belligerent resorting to this method of warfare has the *purpose* of starving the civilian population; or whether it also covers situations where, although not the purpose of a particular course of action, the starvation of the civilian population is its *foreseeable consequence*.

Article 54 AP I suggests a narrow interpretation that only prohibits conduct whose *purpose* is to starve civilians. Paragraph (1) only prohibits starvation 'as a method of warfare', suggesting that what is prohibited are not the results but rather the use of a particular way of fighting. The *travaux* to what became Article 54 AP I, as well as commentaries to the APs, would indicate that only 'deliberate starvation' of civilians

[23] ICC Assembly of States Parties, Report of the Working Group on Amendments, ICC-ASP/17/35, 29 November 2018, §§ 9–11; UN Doc C.N.399.2019.TREATIES-XVIII.10, Switzerland: Proposal of Amendment, 30 August 2019.
[24] ICC Assembly of States Parties, Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, 6 December 2019, ICC-ASP/18/Res.5.
[25] UN Security Council Resolution 2417 (2018).
[26] Akande, D. and Gillard, E. (2016), *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, University of Oxford and United Nations Office for the Coordination of Humanitarian Affairs, https://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf.
[27] See for example Coco, A., de Hemptinne, J. and Lander, B. (eds) (2019), Special Issue on Starvation in International Law, *Journal of International Criminal Justice*, 17(4).
[28] See for example Akande, D. and Gillard, E.-C. (2019), 'Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law', *Journal of International Criminal Justice,* 17(4), pp. 753–779, doi: 10.1093/jicj/mqz050.

is prohibited.[29] Relevant state practice essentially takes the form of military manuals, the majority of which repeat the wording of Articles 54 AP I and 14 AP II. Those that do enter into a substantive discussion support a narrower interpretation.[30]

This said, the prohibitions in paragraphs (2) and (3) of Article 54 AP I on attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population suggest that there may be situations where measures that may foreseeably lead to starvation are prohibited, even where they are not taken with the purpose of starving the civilian population. Where the action is taken against such objects because they are used in direct support of military action, what is prohibited is conduct that may be expected to cause starvation or forced movement of civilians.[31] However, in cases in which starvation or food insecurity arises not as a result of *attacks* on objects indispensable for the survival of the civilian population, but because of other acts, such as denial of humanitarian access, it is the general prohibition of starvation of civilians as a method of warfare in Article 54(1) that is relevant, and the conduct in question must have the *purpose* of causing the starvation of the civilian population.

Sieges

The application of the rules regulating humanitarian relief operations to sieges has also been the subject of discussion.[32] IHL treaties refer to 'besieged' or 'encircled' areas, but do not define them. Nor are sieges defined in other areas of public international law. Unlike occupation, or naval blockades, there are no specific conditions that must be met for a siege to be established, and for specific rules to become applicable. The essence of siege operations is the isolation of besieged enemy forces in terms of their separation from reinforcements and logistical supplies. Sieges typically combine two constituent elements: the encirclement of an area, and bombardment – the frequency and intensity of which will vary.

Concerns about the compatibility of sieges with modern rules of IHL arise because attacks into besieged areas and the isolation of the besieged forces will also adversely impact any civilians in the besieged areas. Sieges are not prohibited as such under IHL. The besieging party is entitled to attack forces and other military objectives in besieged areas, and to limit supplies that reach them. However, in doing so it

[29] See for example the ICRC Commentary: 'The term "starvation" is generally understood by everyone. To use it as a method of warfare would be to provoke it *deliberately* [emphasis added], causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.' ICRC Commentary on the APs, para 2089, and para 4791 in relation to non-international armed conflicts.
[30] Australia's *Commanders' Guide* notes that AP I prohibits starvation of civilians as a method of warfare and explains that 'Military operations involving collateral deprivation are not unlawful as long as the object is not to starve the civilian population.' *Commanders' Guide* (1994), para 907. The UK *Military Manual* states that: 'The law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example, by cutting off enemy supply lines which are also used for the transportation of food, or if civilians through fear of military operations abandon agricultural land or are not prepared to risk bringing food supplies into areas where fighting is going on.' UK Ministry of Defence (2004), *The Joint Service Manual of the Law of Armed Conflict*, Section 5.27.1. The US *Law of War Manual* specifies that: 'Starvation specifically directed against the enemy civilian population … is prohibited.' US Department of Defense (2016), *US Department of Defense Law of War Manual*, para 5.20.1.
[31] Article 54(3)(b) AP I.
[32] See for example Gillard, E.-C. (2019), *Sieges, the Law and Protecting Civilians*, Briefing, London: Royal Institute of International Affairs, https://www.chathamhouse.org/sites/default/files/publications/research/2019-06-27-Sieges-Protecting-Civilians_0.pdf; and Gaggioli, G. (2020, forthcoming), 'Besieging Cities and Humanitarian Access', ICRC and College of Europe, *Proceedings of the 20th Bruges Colloquium, Legal Challenges for Protecting and Assisting in Current Armed Conflicts*.

must comply with all relevant rules of IHL. Three sets of rules are particularly pertinent. The first comprises the rules regulating the conduct of hostilities; these are primarily of relevance to the bombardment dimension of sieges. The second set is the prohibition of starvation of civilians as a method of warfare, as well as the rules regulating humanitarian relief operations; these are of relevance to the encirclement dimension. The third comprises the rules on evacuations, which can provide a way of alleviating the adverse effects of sieges on civilians. The besieged party must also comply with a number of rules that play an important role in protecting civilians in besieged areas, and in reducing the adverse impact of sieges on civilians.

As regards the encirclement dimension of sieges, there is a question concerning the application to sieges of the prohibition of starvation of civilians as a method of warfare. The debate above as to whether the starvation of civilians must be the *purpose* of the siege is pertinent. Additional arguments that are specific to sieges have been advanced.[33] Some consider that all methods of warfare must, as highlighted by the ICJ in the Nuclear Weapons Advisory Opinion, comply with the principle of distinction. While starvation of *fighters* as a method of warfare is permissible, it must not be applied in a manner that is indiscriminate. If belligerents resort to the starvation of fighters, for example by means of a siege, they must not do so in a manner that is indiscriminate and thus also causes the starvation of civilians.

Others consider that while the prohibition covers only the deliberate starvation of civilians, measures that may have the 'incidental' effect of causing the starvation of civilians – including operations to starve fighters, such as sieges – must not be disproportionate: i.e. the anticipated military advantage of such measures must not be excessive in relation to the civilian deaths or injuries (including from starvation) that they may be expected to cause. This approach has to rely on the claim that the mere encirclement of an area constitutes an 'attack', bringing the rule of proportionality into play; or on the existence of a broader principle of proportionality applicable to all rules of IHL.[34]

Whatever position is adopted with regard to the scope of the prohibition of starvation, the general rules regulating humanitarian relief operations will become applicable whenever civilians are inadequately provided with goods essential to their survival. If respected, these rules will prevent starvation from occurring.

Children

According to Save the Children, one child in six globally is affected by armed conflict.[35] Hostilities are increasingly being conducted in urban areas, exacerbating the impact of conflict on children. They are killed or injured, are frequently displaced, and are unable to access medical care or education.

The Geneva Conventions and Additional Protocols include a number of provisions that aim to address the particular needs and vulnerabilities of children. In 2000, efforts were made to enhance the legal protection afforded to children by increasing

[33] Ibid.
[34] See for example Gaggioli (2020, forthcoming), 'Besieging Cities and Humanitarian Access'.
[35] Save the Children (2018), *The War on Children: Time to end grave violations against children in conflict*, London: Save the Children International, https://www.savethechildren.org.uk/content/dam/global/reports/education-and-child-protection/war_on_children-web.pdf.

the minimum age for participation in hostilities from that of 15 years in the Additional Protocols. The outcome of the negotiations was less than what had been desired: the Optional Protocol to the Convention on the Rights of the Child increased the minimum age of recruitment or use of children to 18 for organized armed groups, but did so only for *compulsory* recruitment for states; and merely required states to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 do not take a direct part in hostilities.[36]

As in other areas of IHL, the development of new law is unlikely at present. Moreover, it is principally violations of the general rules on conduct of hostilities or humanitarian relief operations that underlie children's plight, and it is difficult to see how these could be revised just for the benefit of children. Instead, the impact on children is a factor that belligerents should systematically and specifically consider when adopting precautions.

A number of initiatives have been undertaken since 2000 with the aim of promoting compliance with existing law. These include the monitoring and reporting framework established by the UN Security Council in 2005,[37] and the Safe Schools Declaration of 2015.[38] The Security Council mechanism focuses on the six grave violations of IHL against children that the international community found most pressing in 2005: recruitment or use; killing and maiming; abductions; sexual violence; attacks against school or hospitals; and denial of humanitarian access. These remain tragically relevant, but are by no means the only areas where compliance with the law must be enhanced. In 2020, other areas of IHL that warrant particular attention include the displacement of children and their deprivation of liberty.

Deprivation of liberty puts children in a situation of extreme vulnerability, but has only received limited attention; this area of law could benefit from clarification.[39] IHL treaties contain some provisions that specifically focus on children deprived of their liberty, but do not systematically consider how children should be treated in the range of possible situations in which they may be deprived of their liberty. Some international human rights law treaties and soft law instruments address certain aspects of the deprivation of liberty of children, but they are not comprehensive. These existing rules could be usefully brought together in a single comprehensive document that addresses every step in the deprivation of liberty, from capture to release. Like similar exercises, this would clarify existing law, contribute to compliance during armed conflict, and inform policies.

[36] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, Articles 1, 2 and 4.
[37] UN Security Council Resolution 1612 (2005); and Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Monitoring and Reporting on Grave Violations', https://childrenandarmedconflict.un.org/tools-for-action/monitoring-and-reporting/.
[38] The Safe Schools Declaration is an intergovernmental political agreement that outlines a set of commitments to strengthen the protection of education from attack and restrict use of schools and universities for military purposes. It seeks to ensure the continuity of safe education during armed conflict. The Global Coalition to Protect Education from Attack (2020), 'The Safe Schools Declaration', https://ssd.protectingeducation.org/.
[39] Manfred Nowak's 2019 study on children deprived of liberty includes a chapter on armed conflict, but this is descriptive rather than legal. Nowak, M. (2019), *United Nations Global Study on Children Deprived of Liberty*, https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/1.

The 1949 Geneva Conventions and IHL lawmaking 70 years on

The achievements of negotiators in 1949 – and with also in 1977 – stand in stark contrast with more recent treaty-making efforts in the field of IHL, where successful initiatives have been rare. 1949 saw the negotiation and adoption in parallel of four different treaties addressing subjects as varied as the protection of wounded and sick members of the armed forces, the deprivation of liberty of prisoners of war, and the protection of the civilian population, including in occupation; the first codification of rules applicable in non-international armed conflict; and the inclusion of provisions establishing individual criminal responsibility. Not only is the range of topics striking in itself, but so is the degree of detail in which these issues were addressed, and the clarity of the provisions.

Since 1977, and with the exception of the 1998 Statute of the International Criminal Court,[40] the instruments of IHL that have been adopted have focused on very specific issues, usually in the field of weapons regulation.[41] Even in this field, some negotiations were started and abandoned, or have been on the agenda for many years but remain inconclusive.[42] Other endeavours, such as the Swiss/ICRC initiative on strengthening compliance with IHL, have had to be abandoned.[43]

In the current international climate, states are unlikely to engage in similar, or even in less ambitious, treaty-making exercises – whether to clarify how existing rules of IHL apply to emerging technologies; to address perceived gaps in the law; or to develop the law by expanding its protections. In view of this, future endeavours should focus on clarifying existing law rather than attempt to develop it, and on promoting compliance. A number of different actors – states, civil society, international institutions and organized armed groups – have responsibilities and roles in this making and 'shaping' of IHL.[44]

National authorities

While it is states – and in particular the executive branch of government – that 'develop' IHL by negotiating and adopting new binding standards, other parts of states have a role in implementing and interpreting it. Parliaments may adopt legislation to give effect to the state's IHL international obligations or, as in the case of counterterrorism, adopt laws that may affect the implementation of IHL. Domestic courts are also dealing with questions of IHL with increasing frequency in criminal and civil proceedings, as are quasi-judicial processes such as public inquiries.

---

[40] Rome Statute of the International Criminal Court, 17 July 1998.
[41] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997; Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention), 28 November 2003; Convention on Cluster Munitions, 30 May 2008; Arms Trade Treaty, 2 April 2013; and Treaty on the Prohibition of Nuclear Weapons, 7 July 2017.
[42] Parties to the Convention on Certain Conventional Weapons (CCW) have been unable to reach consensus on starting negotiations on a number of topics, including the establishment a compliance mechanism, and a provision to ban small-calibre bullets. Negotiations on limiting the use of anti-vehicle mines remain stalled. For a summary, see Arms Control Association (2017), 'Convention on Certain Conventional Weapons (CCW) At a Glance', https://www.armscontrol.org/factsheets/CCW.
[43] Durham, H. (2018), 'Strengthening compliance with IHL; Disappointment and hope', Humanitarian Law and Policy, 14 December 2018, https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/.
[44] Sivakumaran, S. (2018), 'Making and Shaping the Law of Armed Conflict', *Current Legal Problems*, 71(1), p. 119, doi: 10.1093/clp/cuy004.

There is scope for governments, without proposing new treaty negotiations, to act domestically to clarify the law and to take measures to give effect to the law in their activities. Such measures include policies and detailed operational directives by the armed forces on the targeting cycle, including to record the impact on civilians and feed this information back into the targeting loop; measures to give effect to the obligation to investigate possible violations, as set out in the ICRC/Geneva Academy's recent *Guidelines on Investigation of Violations of IHL*;[45] and steps taken by other parts of government to ensure compliance with IHL – for instance in the field of arms transfers.

The UK is, for example, currently undertaking a review of its strategy on the protection of civilians in armed conflict. In this review, and in other such policies, the UK has the opportunity to consider various aspects of IHL and to adopt processes and measures to assist understanding and enhance compliance.

Without the enforcement of criminal law, in respect of both a state's own troops and those of others, the likelihood of continuing violations of the law increases

States must also ensure that their authorities are well equipped and resourced to undertake the necessary investigations and prosecutions of war crimes of which they have suspicion or knowledge – both by their own forces and by others. Without the enforcement of criminal law, in respect of both a state's own troops and those of others, the likelihood of continuing violations of the law increases. As noted by UN Secretary-General António Guterres in his 2019 report on the protection of civilians in armed conflict, despite some examples of national prosecutions and investigations, efforts to ensure accountability fall far short of what is required. Closing this gap means addressing problems of political will, and of capacity and resources, at the national level. Allegations of serious crimes under international law require investigation and prosecution wherever and whenever they occur. Accountability must be systematic and universal. It must also respond to the need for reparations for violations of the law.[46] For the purpose of such enforcement, and for compliance with IHL more generally, the necessary recording of civilian injuries and deaths must be undertaken.

In this area, too, initiatives to clarify the law are extremely useful. A case in point is the G8 Declaration on Preventing Sexual Violence in Conflict of 2013,[47] which serves as a high-level reminder that rape and other forms of serious sexual violence in armed conflict are war crimes and grave breaches of IHL, and that all states must search for and prosecute or extradite any individual alleged to have committed or ordered such a grave breach, regardless of nationality.

Civil society

It is the ICRC, of course, that has traditionally taken the lead in seeking to ensure respect for IHL by a multitude of initiatives, some of which focused on the clarification of the law.[48] There is further scope for civil society, with or without governments,

[45] Lubell, N., Pejic, J. and Simmons, C. (2019), *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy and Good Practice*, Geneva Academy and ICRC, https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf.
[46] UN Secretary-General's report on the Protection of Civilians in Armed Conflict, UN Doc S/2019/373, 7 May 2019, paras 61–62.
[47] G8 Declaration on Preventing Sexual Violence in Conflict, 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_-_FINAL.pdf.
[48] For example, the 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.

to make efforts to clarify existing law and to provide guidance on its implementation. Recent examples where this has been done include: the 2014 *Guidelines on Safe Schools*;[49] the 2016 *Practitioners' Guide to Human Rights Law in Armed Conflict*;[50] the 2016 *Oxford Guidance on the Law Relating to Humanitarian Relief Operations*; the 2018 Chatham House paper on *Proportionality in the Conduct of Hostilities*;[51] and the 2019 Geneva Academy/ICRC *Guidelines on Investigation of Violations of IHL*. These documents set out existing law, at times bringing together relevant rules from different areas of international law, and suggest good practices for implementing obligations and enhancing protection, sometimes over and above what is required by the letter of the law as a matter of policy.

All these exercises were initiated and for the most part led by civil society, academia or think-tanks, rather than commissioned and convened by states. The nature of the formal involvement of states varied: at times state representatives were involved in the expert discussions for the elaboration of the documents in their 'personal capacity', or states were consulted on the substance. The most significant involvement of states is in the Safe Schools Declaration, linked to the Guidelines, which states can endorse.[52]

None of these documents is binding *per se*. Nor was there an intention that they be turned into binding instruments.[53] Even so, such documents can be extremely influential. In clearly elaborating existing law on a particular issue, they can focus the attention of the armed forces on particular issues, and can provide clarity and guidance for refining military manuals or elaborating military doctrine and policies: to states when adopting legislation; and to courts, quasi-judicial bodies and intergovernmental organizations.

Among the other legal issues raised in contemporary armed conflicts that could benefit from similar clarification processes include the deprivation of liberty of children in armed conflict; and the interplay between the rules regulating blockades and other maritime interdictions and those regulating humanitarian relief operations.

International institutions

A range of intergovernmental bodies are applying IHL or otherwise considering the lawfulness of the activities of belligerents in situations of armed conflict. These include bodies tasked with reviewing compliance with international human rights law (IHRL) such as the European Court of Human Rights, and the various UN human rights treaty bodies such as the Human Rights Committee, or the Committee against Torture; and ad hoc bodies – commissions of inquiry or fact finding mechanisms – established by the UN Security Council or the Human Rights Council (HRC), as well as UN sanctions

[49] Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict, 2014.
[50] Murray, D. (2016), *Practitioners' Guide to Human Rights Law in Armed Conflict*.
[51] Gillard E.-C. (2018), *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Research Paper, London: Royal Institute of International Affairs, https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf.
[52] As of February 2020, 102 states had endorsed the Safe Schools Declaration; see Norwegian Government Security and Service Organisation (2020), 'States that have endorsed the Safe Schools Declaration', https://www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools_declaration/id2460245/.
[53] Compare this with the 1998 Guiding Principles on Internal Displacement, which were elaborated by experts with the intention that they would be adopted by states as a treaty. While this never occurred, precisely because states refused to adopt an instrument they had not negotiated, the Guiding Principles nonetheless proved extremely influential, frequently forming the basis of domestic legislation and also playing a key role in shaping the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

panels of experts. Such bodies may have a mandate that expressly includes IHL, like the UN Committee on the Rights of the Child, or the Committee on the Rights of Persons with Disabilities, the HRC Universal Periodic Review, and the African Court of Justice and Human Rights; or they may be applying IHRL in situations of armed conflict – like for example the European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee – which similarly requires an understanding of IHL and its interplay with IHRL.[54]

States, and in particular the armed forces, have expressed concern about the involvement of IHRL bodies

States, and in particular the armed forces, have expressed concern about the involvement of IHRL bodies, and of IHRL-focused non-governmental organizations in IHL oversight for a variety of reasons. At times they – rightly – point out that politicized mandates that only focus on the behaviour of one party to a conflict can impair their capacity to properly apply IHL. At other times, the reservations are due to these bodies' perceived lack of understanding of IHL, or arise from general opposition to the involvement of IHRL bodies in situations of armed conflict. Ways must be found to address these concerns where possible, and enhance these bodies' familiarity with IHL.[55]

Two key opportunities for doing this are, first, when a particular entity is tasked with considering a situation; and, second, by enhancing the IHL expertise of the entities. The first opportunity arises only for entities that consider situations of armed conflict and/or IHL in an ad hoc manner – i.e. commissions of inquiries, fact-finding missions or sanctions panels of experts, the mandates of which are set on a case-by-case basis. It is not relevant to permanent bodies such as the various human rights courts or HRC treaty bodies whose jurisdiction or mandates have been set by their founding instruments. With regard to the ad hoc bodies, efforts should be made to ensure that the tasks with which they are mandated are compatible with IHL – compatible in the sense that they must consider the behaviour of all parties to a conflict rather than simply the one(s) perceived as most responsible for the violations. An opponent's conduct may be determinative of the lawfulness of a belligerent's act. For example, what might appear as an unlawful attack against a civilian object might in fact be permissible if the enemy had put it to a military use. A further source of concern is the tendency for such ad hoc bodies to consider the situation through the lens of criminal responsibility, and consequently to make determinations about the commission of war crimes rather than violations of IHL. This, too, is frequently the consequence of how their mandates are formulated in resolutions of the UN HRC or Security Council. As a matter of law, both issues could be avoided by careful drafting of the mandates; in practice however, the resolutions are adopted in politicized forums, where states' legal advisers hold little sway or have limited involvement. Members of the various bodies should interpret the mandate in a manner that permits the proper application of IHL.

And this leads to the second opportunity: enhancing the familiarity with IHL of members of ad hoc and permanent bodies. This can be itself be done in three ways, the first of which being when they are selected. If an ad hoc body is mandated to consider a situation of armed conflict, competence in IHL should be one of the

[54] The application of IHRL in situations of armed conflict and its interplay with IHL have been the subject of considerable debate in the past decade; the substantive discussion is beyond the scope of this briefing.
[55] Max, E. (2019), *Implementing International Humanitarian Law Through Human Rights Mechanisms*: *Opportunity or Utopia*?, Geneva Academy Working Paper.

selection criteria. Following the example of the UN sanctions panels of experts, the procedures for appointing members of the ad hoc bodies should be modified. Positions should be advertised so that a range of experts could apply for them, rather than solely relying on nominations by states or the relevant secretariats. The same approach could not be adopted for the human rights treaty bodies and human rights courts, but expertise in IHL could be included among the various criteria for eligibility.

Second, the various entities should be able to rely on people with expertise in IHL. This can include specialists within the relevant secretariats, or designated external experts, like the Special Adviser on IHL to the ICC Prosecutor. Consideration could be given to consulting the International Humanitarian Fact-Finding Commission, either as an institution or through nomination of individual experts to provide assistance.

Third, training in IHL should be systematically provided to members of the various bodies and secretariat staff. A further possibility would be to allow third-party submissions by civil society organizations, something that the Human Rights Committee is already doing during its elaboration of General Comments. While some submissions are likely to fall within the 'activist' camp, others are likely to contribute to a more accurate understanding and application of IHL.

Organized armed groups

States have repeatedly made the point that it is only states that make new law, and this is a prerogative that they are guarding jealously. Their assertions have been prompted by the perceived intrusions of civil society in lawmaking, as well as by suggestions that organized armed groups that are parties to armed conflicts may also have a role to play.

While there is no question that such groups are bound by IHL, they are not involved in its formal creation or development. They cannot ratify treaties; their practice does not constitute 'state practice' for the development of customary rules; and at present they do not participate in treaty negotiations. This is simply a reflection of the state-centric nature of public international law. However, it has consequences for efforts to ensure that such groups comply with IHL.

Those engaging with organized armed groups believe that finding ways for the groups to formally take on obligations themselves, rather than being held to those obligations assumed by the very state they are fighting, can be symbolically important and can contribute to better compliance. Moreover, such assumption of responsibilities can be a starting point for further engagement with the groups to encourage them to give effect to their obligations, including by training their forces, adopting measures to implement them in their operations, and investigating violations.

While organized armed groups remain bound by the relevant treaty and customary law rules of IHL, a number of approaches have been developed to give them 'ownership' in the law. These include the 'Deeds of Commitment' that groups can

conclude under the auspices of the non-governmental organization Geneva Call;[56] and the 'action plans' concluded with the Office of the Special Representative of the Secretary-General for Children and Armed Conflict.[57] Organized armed groups can also enter into agreements with their opponents to give effect to specific provisions of IHL.[58] These agreements could relate to the issues envisaged by the Geneva Conventions and Additional Protocols in relation to international armed conflicts, such as establishment of various types of protected areas or the conduct of evacuations,[59] or, indeed, any other issue regulated by IHL.[60] In 2017 in eastern Ukraine, for example, belligerents were negotiating the establishment of a safety zone around two water installations on the contact line, to spare from the effects of hostilities this critical infrastructure on which people on both sides of the contact line depended.[61] These agreements not only give organized armed groups 'ownership' in IHL, but also allow precise modalities to be established and may go beyond what is required by the law.

Consideration could also be given to including or at least consulting organized armed groups in the various clarification initiatives mentioned above. While many groups are unlikely to have legal advisers who could engage in detailed discussions of the law, the mere fact of hearing the challenges facing the groups in complying with the relevant rules would be very instructive.[62]

Key to all these endeavours is the possibility for humanitarian actors and other stakeholders to engage with organized armed groups without fear of violating counterterrorism measures.

Conclusions

The 70th anniversary of the Geneva Conventions has rightly been celebrated. But there is a tendency to take too much for granted, or to focus only on the negative. The Geneva Conventions were a phenomenal achievement, as were the Additional Protocols of 1977. This achievement is implicitly recognized every time suggestions to 'reopen the rules' to develop some particular aspect of the law is met with a caution not to do so now, as 'we risk losing what we have'.

[56] At present, Geneva Call has elaborated four deeds of commitment, respectively addressing antipersonnel mines; child protection; sexual violence and gender discrimination; and the protection of healthcare.
[57] As part of the monitoring and reporting framework established by UN Security Council Resolution 1612 (2005), the Office of the Special Representative of the Secretary-General for Children and Armed Conflict can enter into plans of action with groups listed under the Secretary-General's annual report on Children in Armed Conflict for having committed five of the six grave violations of IHL identified in Resolution 1612. As of early 2020, there are 19 such action plans under implementation. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Action Plans', https://childrenandarmedconflict.un.org/tools-for-action/action-plans/.
[58] The GCs and AP I specifically envisage the possibility for parties to international armed conflicts to enter into agreements on a range of issues, including the establishment of various protected and demilitarized zones, and the conduct of evacuations (Articles 23 GC I, 14 and 15 GC IV, and 60 AP I; and Articles 15 GC I and 17 GC IV respectively). In non-international armed conflicts, common Article 3(2) GCs simply encourages parties to bring into force, by means of special agreements, all or part of the other provisions of the conventions.
[59] Articles 23 GC I, 14 and 15 GC IV, and 60 AP I; and Articles 15 GC I and 17 GC IV respectively.
[60] Common Article 3(2) GCs simply encourages parties to bring into force, by means of special agreements, all or part of the other provisions of the conventions.
[61] Gillard, E.-C. (2017), '"Safe Areas": The international legal framework', *International Review of the Red Cross*, 99(906), p. 1086, doi: 10.1017/s1816383118000474.
[62] In 2015, ahead of the World Humanitarian Summit, Geneva Call consulted a number of organized armed groups on their perception of humanitarian action, including on the relevant rules of IHL. Jackson, A. (2016), *In their words: Perceptions of armed non-State Actors on Humanitarian Action*, Geneva: Geneva Call.

Violations of the law are all unacceptable, and it is necessary to continue to strive to improve compliance and to hold perpetrators accountable. But focusing exclusively on violations gives a skewed picture of the role of IHL in conflicts today. The occasions when IHL is complied with must also be highlighted. The ICRC's *IHL in Action* project plays an extremely important role in contributing to a more positive discourse.

But there remain uncertainties in the law. This paper looks at only three examples of areas of the law that present some challenges. In the immediate future, IHL is unlikely to be developed by treaty-making. In view of this, the focus should be on finding ways to enhance compliance with existing law and, where necessary, agreeing on guidance on how to clarify or interpret the law. The adoption of measures at national level plays a key role in giving effect to existing obligations; civil society can play a role in clarifying the law; international fact-finding and human rights bodies should be supported on the occasions when they need to interpret IHL.

Finally, an overarching challenge to compliance with IHL in the past decade is the interplay between IHL and counterterrorism measures. This is a source of tensions that can undermine the protections set out in IHL, and can hinder principled humanitarian action and activities to promote compliance with the law by organized armed groups. As a matter of law, these tensions can be resolved by simple drafting in counterterrorism instruments to safeguard IHL and humanitarian action without impairing counterterrorism objectives. A number of states have started including such exceptions in domestic legislation; this is encouraging and should be replicated at the national and international level. For their part, humanitarian actors must both highlight the significant anti-diversion measures they are already taking, and recall foundational principles of IHL such as the entitlement of the wounded and sick to receive medical care, and the prohibition on punishing those who provide such care.

About the author

Emanuela-Chiara Gillard is an associate fellow with the International Law Programme at Chatham House, and a senior research fellow at the Oxford Institute for Ethics, Law and Armed Conflict.

Acknowledgments

The author is grateful to Elizabeth Wilmshurst, Distinguished Fellow, Chatham House, for her assistance in drafting this briefing, and to Chanu Peiris, manager of the International Law Programme, for her support throughout the process.

Elements of the analysis in this briefing draw on panel discussions hosted by Chatham House to mark the 70th anniversary of the Geneva Conventions. Thanks are also due to the panellists and participants for sharing their insights.

The views expressed in this briefing are the sole responsibility of the author.

This briefing was made possible by the generous support of the British Red Cross.

Cover image: Rescue of the wounded in Duma city by Syrian Red Crescent paramedics, 2 February 2018.
Photo credit: Copyright © Samer Bouidani/NurPhoto/Getty

ISBN 978 1 78413 389 4

This publication is printed on FSC-certified paper.

FSC

Typeset by Soapbox, www.soapbox.co.uk