



## War and what we make of the law

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*Preventing the catastrophic human cost of war is a central purpose of modern international law. Some norms, like those found in the UN Charter, set out to eliminate war altogether, requiring the peaceful resolution of disputes instead. Other rules, like those found in the Geneva Conventions, step in to protect us when all else has failed. The Conventions, which every country has joined, are at the heart of the law of armed conflict: a set of rules that constrain the behavior of warring parties during a conflict, no matter how it might have started, and no matter who is at fault.*

*In this post, ICRC's chief legal officer and head of the legal division Cordula Droege asserts that it is time to remember that the purpose of international humanitarian law is to protect lives, not legitimize large-scale devastation.*

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Understood in simplest terms, the law of armed conflict acknowledges that both sides will inevitably kill, injure, detain, and destroy, but it prohibits them from dehumanizing their adversary. Turning this apparent contradiction into binding rules is the work of the *Geneva Conventions* and a multitude of other treaties and norms. They confront the dilemma of making war humane not by pretending to resolve it, but by setting an equilibrium between two irreconcilable imperatives – military necessity and our common humanity.

A vast set of rules threads this needle across all facets of warfare: targeting, the choice of weapons, detention, interrogation, prosecution and punishment, caring for the wounded and sick, and the treatment of populations under a party's control, to name a few. In each category, international humanitarian law (IHL) sets an outer limit of acceptable behavior – a boundary drawn for the simple reason that stepping over it would efface our humanity in a way that even war cannot justify.

Some acts are always prohibited: torture, rape, taking hostages, targeting civilians and the wounded. In other areas the rules are more nuanced: incidental civilian casualties must be avoided, or at least minimized; and where they are unavoidable, they are subject to strict limitations. Altogether, IHL contains hundreds of rules that protect life, health, and human dignity. It is modest and imperfect – it seeks only to guarantee a modicum of humanity in situations where our humanity has already been largely compromised.

The pragmatism of this approach is where the law of war finds its strength. IHL enjoys universal support in part because it reflects careful consideration of how armed conflicts are fought and won. It is a safety net that allows armed forces to fulfil their purpose while mitigating some of the worst consequences of war. But despite having so much going for it, the law is under immense strain. How can we continue to believe in the laws of war when so many civilians die in conflicts, often by being deliberately targeted, but also when military operations carried out without care to spare the civilian population are portrayed as lawful? Is it that the rules are inadequate? Is it that they aren't enforced?

What exactly is the problem?

### **Non-compliance, impunity, and skirting the law's limits**

Noncompliance and impunity are obvious ones. The yawning gap between agreed rules and the reality on the ground has always been a serious challenge to the law of armed conflict. Violations happen in plain sight, giving rise to justifiable disillusion and even cynicism. States, international institutions, and non-state armed groups (who often enjoy governmental support) all must do more to stop impunity.

But noncompliance is only part of the challenge. There are more subtle, yet equally pernicious forces at work. The Geneva Conventions were designed to prevent the recurrence of horrors inflicted on soldiers and civilians during two world wars. More recently though, parties to armed conflicts have used IHL to justify their actions when they depart from the expectations that would ordinarily apply in peacetime, especially those concerning human rights.

In short, armed conflict, as governed by IHL, has come to be seen as an alternative moral and ethical landscape — a space in which states consider themselves free to apply an extraordinary degree of military force and control, inside and outside their own territory, while being able to maintain the stance of law-abiding actors.

Technically speaking, this view isn't always entirely wrong; but it misses the point in dangerous ways. Yes, IHL is realistic about how much killing and destruction will inevitably occur in war. But there is a difference between the law *assuming* a degree of violence and the law *enabling* it. IHL draws red lines; it doesn't set standards for model behavior.

All too often today, the protective purpose of IHL is set aside and the rules are literally turned on their head: instead of being interpreted to protect civilians, the absence of clear violations are invoked to justify a level of death, injury and destruction that is precisely what IHL intended to avoid. It was "awful but lawful," goes the refrain that might follow a bout of devastating civilian casualties. And in some cases, it might well have been. But since when is merely not breaking the law a source of pride? Shouldn't the response be consternation about having come so close to the line? Compliance with IHL needs to be about fulfilling its humanitarian purpose, not skirting the limits.

### **Interpretation divorced from purpose**

Meanwhile, the rules themselves are being interpreted in a manner that is increasingly divorced from their purpose. Like any body of law, IHL has its share of ambiguity. The law is indeterminate in some areas because laws sometimes need to avoid being over-prescriptive. Indeterminacy is not in itself a problem, but it does shift a lot of importance onto properly factoring the assumptions underlying the rules into our interpretations. Those foundational principles, especially those relating to the worth of human life, are under threat today.

Here's an illustration. International law does not prohibit all civilian casualties during a bombardment campaign. But it does require that they be avoided as much as possible; and, critically, it prohibits any incidental civilian harm that is disproportionate to the military advantage of eliminating a lawful target. It's a balancing test – a common feature of law, both international and domestic. When applied in good faith, this rule can save a lot of lives (and it has). But it rests on the assumption that civilian life carries a certain weight; and, critically, that *all* civilian life carries *equal* weight.

It's easy to see why – for reasons that are as obvious as they are appalling – commanders would devalue the lives of those associated with their adversaries. But it's also easy to understand how diminishing the worth of civilian life will eventually gut the law of its meaning. IHL can only make a difference to the life, health and dignity of victims of armed conflict if it is interpreted in a way that is meant to genuinely protect them. What purpose can humanitarian law possibly serve if the people it is meant to protect have already been dehumanized?

This tendency becomes all the more nefarious when we consider that most states care about some victims of some armed conflicts more than others. This is just one example of how IHL is being undermined through self-serving interpretations that are intended to allow permissive military operations in the moment. But over the long-term, if the expedient application of IHL continues to proliferate, we'll watch helplessly as the law's delicate balance tips away from saving lives and it becomes simply another tool in the service of military might.

## How states can step into the breach

States need to act to reverse these trends. In domestic systems, courts and legislatures often step in to keep laws on their intended course. Those institutions are few and far between on the international plane, and it is up to national governments to make sure that IHL fulfils its intended purpose. There is a lot they can do, beginning by applying IHL in good faith, aware of the consequences of interpretations that sacrifice the law's humanitarian purpose to military expediency.

States can also lead by example and hold everyone to the same standards, without favor. They can influence each other by placing conditions on military assistance and arms transfers. They can reduce uncertainty in the law by joining treaties they have not yet ratified. And they can hold violators to account in their domestic courts.

No one can seriously argue that the law of armed conflict is unfit for purpose – states and their militaries purposefully crafted it in the aftermath of two world wars – and no government in the world denies that it is bound by IHL. But instrumentalizing it in the service of political ends can threaten its very essence, and ultimately its legitimacy. Governments and their legal advisors need to take their responsibility to uphold the laws of war seriously – not just the rules, but the spirit of the law.

The Geneva Conventions were born out of the rubble of Warsaw and Leningrad, to counter the complete dehumanization of millions of civilians and of prisoners. They are 75 years old this year, complemented by their Additional Protocols of 1977 and other international humanitarian law rules that strengthen the protection of civilians. Much has been achieved, but when we look at the rubble of Raqqa, of Aleppo, of Mariupol, and Gaza, or when we look at the inhumane prison conditions in which people are held in so many of today's conflicts, it is not good enough. Victims of armed conflicts do not need a culture of lip service to IHL. They don't need to be told the deaths in their community weren't war crimes. They need a culture of compliance in which states steer well clear of violations and hold their forces to the highest standards.

And to those who through their rigorous legal argumentation prevail in justifying the fact that a life-saving hospital was lawfully destroyed, or that the horrific pain inflicted on a detainee was technically not torture: you will have won the battle, but we will all be losing the war.

**Editor's note:** This article was originally published on [Just Security](#) and is available [here](#).

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