
INTERNATIONAL HUMANITARIAN LAW: A HANDBOOK FOR COMMONWEALTH PARLIAMENTARIANS



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ACKNOWLEDGMENTS

This handbook has been prepared by Professor Sarah Williams, UNSW Sydney (University of New South Wales, Australia), with research assistance by Sam Hartridge and extensive input from the British Red Cross and the Commonwealth Parliamentary Association. It draws from several other manuals and handbooks, including those prepared by the Australian Red Cross, Inter-Parliamentary Union and International Committee of the Red Cross (ICRC), and the UK House of Commons Library briefing paper.

Details of and links to those publications are provided in **Annex F**. The handbook has also benefited from the many helpful materials prepared by the ICRC, several of which are included in **Annex F** or referenced in the handbook.

The Commonwealth Parliamentary Association and the British Red Cross wish to express warm appreciation to the author of this handbook, Professor Sarah Williams and are grateful for her dedication and hard work to ensure that the handbook is of a high standard and provides a distinctive resource of practical value to Parliamentarians and parliamentary staff from Commonwealth jurisdictions.



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FOREWORD

By placing limits on the actions of combatants in times of armed conflict, International Humanitarian Law (IHL) helps to preserve a minimum of human dignity in otherwise dire situations – and it saves lives. As a body of law, IHL is complex, but its underlying principles are simple and reflect a balance between the competing requirements of humanity and military necessity. Everything possible must be done, without discrimination, to reduce the suffering of those who take no direct part in a conflict or have been put out of action by sickness, wounds, shipwreck or captivity.

To be effective in wartime, IHL must be properly implemented in times of peace. States need to become parties to relevant treaties and where necessary, enact the legislation required to give them effect in domestic law. Administrative and other measures may also be needed to ensure that a country upholds its IHL obligations. Mechanisms, such as National IHL Committees, can support such efforts.

Parliamentarians play a significant role in working with the Executive and others to promote IHL and to ensure its effective implementation. This requires Parliamentarians and parliamentary staff to be well-informed. This handbook has been specifically designed by the Commonwealth Parliamentary Association (CPA) and the British Red Cross to help achieve this goal, taking into account the specific legal traditions and practices, and values, of Commonwealth countries.

The CPA, founded in 1911, is one of the oldest established organisations in the Commonwealth. It brings together Members, regardless of gender, race, religion or culture, who are united by a community of interest, respect for the rule of law and individual rights and freedoms, and by the pursuit of the positive ideals of parliamentary democracy. It brings Parliamentarians and parliamentary staff together to exchange ideas among themselves and with experts in various fields, to identify benchmarks of good practices and new policy options they can adopt or adapt in the governance of their societies.

The history of IHL is intertwined with the history of the International Red Cross and Red Crescent Movement. It is a statutory responsibility of all National Red Cross and National Red Crescent Societies – as neutral humanitarian auxiliaries to their respective governments – to help disseminate knowledge of IHL and to ensure respect for its provisions. Since its establishment in 1870, the British Red Cross has worked in this capacity to support the British Government in matters related to IHL. Additionally, the British Red Cross works in partnership with other organisations, such as the CPA and the Commonwealth Secretariat, to promote IHL in other fora.

In modern armed conflicts, IHL is invoked by a number of different actors, including politicians, UN organs, NGOs, domestic and international media outlets, and, of course the combatants themselves. Especially in our fractured media environment, it can be difficult to find resources related to the rules of war that offer a comprehensive, understandable and objective assessment of where the law stands today.

We hope that you will find the information contained in this handbook useful to your important work as Parliamentarians and parliamentary staff.

Mr Stephen Twigg
Secretary-General
Commonwealth Parliamentary Association

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PART A: WHAT IS INTERNATIONAL HUMANITARIAN LAW AND WHY IS IT RELEVANT TO PARLIAMENTARIANS?

International Humanitarian Law (IHL) is a body of law that seeks to minimise suffering caused by war. IHL protects those not, or no longer, taking part in hostilities. This includes the sick and wounded, those caring for them, prisoners of war, and the civilian population. IHL also forbids belligerents from using weapons or tactics that inflict unnecessary suffering on their enemies. This body of law has a simple premise – even wars have rules. In other words, while death and destruction are part of warfare, and not prohibited by IHL, there are some things that must never be done.

IHL is one of the **oldest bodies of modern international law**, with the first treaties entering into force in the mid-nineteenth century. Two of these original treaties reflect the two driving premises described above. The first, the *Geneva Convention of 1864*, protected those injured on the battlefield. It also provided the legal basis for the provision of medical aid and the protection of those providing it. The second, the *1868 St Petersburg Declaration*, introduced the first restriction on the use of a weapon for humanitarian reasons and founded the prohibition on unnecessary suffering.

The principles described in this handbook have universal acceptance among states and militaries. The development and implementation of IHL promotes and upholds a rules-based international legal system and contributes directly to enhancing the rule of law and good governance and to maintaining international peace and security.

International Humanitarian Law not only affects those states that are involved in an armed conflict; rather, International Humanitarian Law benefits and should be the concern of all states.

While it is generally the Executive that is primarily responsible for IHL matters, IHL is relevant to Parliaments and to Parliamentarians. Although the nature of government and the roles of the Executive and Parliament differ across countries, Parliamentarians, including those at regional and local levels, can perform a number of important roles that can contribute to strengthening IHL. ***The Executive, Parliaments and Parliamentarians must work together to help ensure that IHL is properly implemented so as to give effect to their state's international obligations.***

IHL primarily depends on states becoming a party to its key legal instruments, and in making sure the provisions of those treaties are effectively implemented in domestic law, policies and procedures. Parliaments and Parliamentarians therefore perform **a legislative function**: they can use parliamentary procedures



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Third Commonwealth Red Cross and Red Crescent International Humanitarian Law Conference in Kuala Lumpur, Malaysia in May 2011.

to encourage their state to become a party to IHL treaties and then introduce, support and review legislation and related regulations and instruments, to make sure national law enables the state to meet its international IHL obligations.

Becoming a state party to an IHL treaty and adopting implementing legislation is only the first step. Most of the responsibility for implementing IHL will fall to the Executive and the military. Parliaments and Parliamentarians must also fulfil **an oversight function**, in checking that the military, government officials and other key actors, such as judges and prosecutors, are properly trained and familiar with IHL and have the capacity to perform their roles under IHL. This includes scrutinising the performance of the Executive and key actors and asking questions in Parliament to hold officials to account and seeking information as to how armed forces conduct operations. Linked to this is the **budgetary function** performed by Parliaments and Parliamentarians. Budgets should include sufficient resources for the state to meet its responsibilities under IHL.

Parliamentarians can also perform **a leadership and advocacy function**. They can educate the public about IHL, explaining its importance, and make statements supporting IHL, its implementation and enforcement. Additionally, they can contribute to more informed and less-politicised discourse on IHL issues, thereby upholding and reinforcing the neutral character of IHL as a body of law. By working across parties and approaching IHL issues on an all-party basis, Parliamentarians can support a united approach to IHL.



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An ICRC employee speaks to members of the ELN armed group about the principles of the International Humanitarian Law and the obligation to respect the lives of the civilian population, health personnel, and the sick or wounded.

Where necessary, Parliamentarians can use ‘fact-finding’ parliamentary procedures and call on officials to provide information, to take action or to explain actions already taken (or not taken). Where the Executive fails to act, Parliamentarians can work with other actors, in particular civil society or international officials, to prompt action.

Further, Parliamentarians provide important **information, education, support and advocacy functions** for their constituents. For IHL to be effective, it must be understood and disseminated in times of peace. The experiences and diversity of constituents in many countries means that IHL is becoming increasingly relevant to their work with and on behalf of their constituencies, even in countries not currently engaged in armed conflict.

Of course, for states directly affected by armed conflict or with members of their armed forces contributing to multinational peace operations, IHL has even greater significance and immediacy. Parliamentarians play an important role in **implementing IHL and supporting the enforcement of IHL**, including through the national legal system. This requires ensuring that all parties to the conflict comply with IHL, including the obligation to prevent and punish violations.



Parliamentarians are thus essential to ensuring that their state meets its obligations under IHL. This handbook aims to assist Parliamentarians to understand and fulfil their vital role. As a general point, success in this role requires Parliamentarians to develop a level of familiarity with the nature of their legal system (whether monist or dualist, common law or civil law), and relevant parliamentary procedures and Legislative and Executive processes at the national level. Ministries, including Ministries of Defence and Foreign Affairs, may play different roles in relation to various aspects of IHL and it is important for Parliamentarians to understand where responsibility for IHL lies.

Importantly, the obligations of each state differ depending on which treaties that state is a party to and how the state has decided to give effect to its treaty obligations under national law. As an essential first step, Parliamentarians should familiarise themselves with the IHL treaties to which their country is party, the obligations contained in those treaties and associated legislation and instruments. The armed forces of many states also have military manuals, which set out that state's understanding of IHL principles and rules and how the state intends to apply IHL in its own activities.

This handbook does not detail the varied procedures and processes existing across different Commonwealth countries. **Annex C** sets out a list of treaties to which each state is party (*current as at December 2021*), while the ICRC website provides a current list of treaties as well as a database that provides details of relevant national legislation.

Relevant links:

- <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp>
- <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCountry.xsp>

Instead, this handbook provides details on key aspects of IHL and suggests different ways in which Parliamentarians might be able to perform the roles identified. It also highlights specific topics of concern that are most likely to arise in performing those roles, as well as identifying contemporary challenges for IHL.



PART B: WHAT IS INTERNATIONAL HUMANITARIAN LAW? WHAT ARE THE MAIN PRINCIPLES AND RULES OF INTERNATIONAL HUMANITARIAN LAW?

B.1 What is IHL and what does it do?

IHL, also known as the law of war, law of armed conflict or the *jus in bello*, is the body of international law that applies in armed conflict.

IHL accepts that parties to an armed conflict will need to use force to ‘win the war’ and that this will likely result in some death and destruction. To minimise this likely harm, IHL regulates *how* wars are fought.

At its essence, IHL seeks to strike a balance between two fundamental principles: military necessity and humanity. The **principle of military necessity** permits a party to an armed conflict to use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.

The **principle of humanity** forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes. The specific rules of IHL reflect this balance. IHL protects certain people and objects and limits the methods and means used to wage war.

IHL is a non-politicised, neutral body of law, and does not consider the legitimacy of why an actor has resorted to violence. IHL applies to all parties to a conflict, regardless of the reasons leading to the conflict or the political affiliations of the actors concerned.

IHL has a practical focus: it assists the military to know what actions it can lawfully take during armed conflict.

IHL applies only in the context of an armed conflict, although it creates certain obligations for states to perform in peacetime (for example, to educate the armed forces and the public on what IHL requires).

IHL is a distinct body of law from international refugee law, international human rights law and international criminal law, although IHL will often apply alongside these bodies of law (see **Part D.4** on page 54 and **Part D.5** on page 56).

IHL also applies alongside national law, in particular constitutional law, criminal law and military law. This is particularly important regarding non-international armed conflicts (NIACs, see **Part B.4** on page 13).



B.2 What does IHL not do?

IHL is not concerned with the circumstances leading to the armed conflict itself or the legality of the armed conflict. Another area of international law, the law on the use of force or *jus ad bellum*, answers these questions.

The rules on the use of force (*jus ad bellum*) are set out in the **Charter of the United Nations, 1945** (UN Charter) and supplemented by customary international law. While the primary rules are clear, there is some uncertainty concerning the application of the rules and possible exceptions that may exist. Note also that the UN Charter provisions apply only to the use of force by states. They do not apply to the use of force by non-state actors. Issues concerning the legality of the use of force by a state(s) are increasingly finding their way into parliamentary, political and public debates. However, it is important to distinguish between the legal justification for why a state enters an armed conflict in the first place and what that state is permitted to do while conducting military operations.

IHL largely does not regulate how a party to a conflict treats its own forces. Instead, IHL is concerned with protecting those who come within the power of the enemy. National law and, as relevant, human rights law regulate obligations toward a state's own forces. For example, IHL does not regulate claims that a state has not provided adequate food or equipment for military personnel during conflict or that troops have been the victim of 'friendly fire'.

Members of the Nigerian Navy Ship Unity approach HM Canadian Ship Kingston for a Joint Maritime exercise during Operation Projection in March 2018.



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B.3 Where do we find IHL?

We find IHL in treaties between states, customary international law and in certain non-binding instruments, known as 'soft law'.

B.3.1 IHL treaties

The core IHL treaties are the four **Geneva Conventions of 1949** and their two **Additional Protocols of 1977**. There are also other treaties that deal with specific aspects of IHL, for example, regulating the use of certain weapons, protection of specific objects such as cultural property and establishing international courts for the prosecution of war crimes.

Annex B lists the treaties relevant to IHL, with a short description of each. Details of which Commonwealth member states are party to various IHL instruments are set out in **Annex C**. Information as to when a treaty entered into force for that state and whether the state has filed any reservations or interpretative declarations to a treaty can be found on the ICRC website, see here: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp>.

Annex D contains further information about how a state may become a party to a treaty and make a reservation or interpretative declaration to a treaty.

You should become familiar with the procedures relevant to when and how your country becomes a party to a treaty, and the roles of the government and Parliamentarians in this process.

A treaty will normally create obligations for a state, which may require adoption of legislation depending on whether your system requires implementing legislation to give effect to treaties in national law. Later sections of this manual consider implementation of IHL in national law.

You should familiarise yourself with how your country implements international legal obligations in national law and the role of Parliament in this process.



B.3.2 Customary IHL

We also find IHL in rules of **customary international law**. Customary international law consists of rules that have generally developed over time. It is created through the actions (or inaction) of states that are undertaken out of a sense of legal obligation (that is, not for political or moral reasons) and through official statements. Importantly, unlike treaties which only bind states that are parties to them, customary international law binds all states, even those states that have had no part in its formation. Customary IHL may also bind actors other than states, in particular members of an organised armed group (**OAG**) (see **Part B.5** on page 16).

Customary IHL rules may develop in parallel with treaty obligations. In this case, the formulation of the relevant customary IHL rule is essentially the same as the treaty provision. Customary IHL may also develop separately from treaties, particularly where there is no treaty that addresses a particular issue. For example, given the scarcity of treaty provisions applicable in NIAC (see **Part B.4** on page 13), customary IHL has developed to address gaps in protection. Judgments of national and international courts, while not sources of IHL themselves, may help us to identify the content of customary IHL. Similarly, the military manuals of armed forces in several countries can contain detailed statements as to that state's understanding of IHL principles and rules and can be considered evidence of state practice for the purpose of identifying customary IHL.

Some states will play a particularly important role in the formation of customary IHL. These states are those that are '*speciallly affected*' by the rule because they play an important role in the area that the law addresses. For example, states that perform a large amount of maritime activity or naval missions will be '*speciallly affected*' states in the context of customary rules of naval warfare. The behaviour and views of these states have greater weight in determining whether a norm has achieved customary IHL status. Conversely, some states may object to a particular norm becoming a legal rule. Where a state objects persistently, it may not be required to comply with the newly formed law.

The ICRC has compiled a set of customary IHL rules, which draws on an extensive study of state practice, updated regularly, found at: <http://icrc.org/customary-ihl/>. Note, however, that some states have expressed objections to the study, both as to its methodology and the content of specific rules.

B.3.3 IHL soft law

Soft law refers to a type of instrument that, although it may appear to be legal in nature, is not legally binding and cannot be enforced against the parties. This manual refers to several examples of soft law that supplement treaty based and customary IHL, for example, the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (2008)*, discussed in **Part D.7** on page 58.



What can Parliamentarians do to further the development of IHL?

As a Parliamentarian, you can:

- Avoid politicising matters relating to the development of IHL and seek cross-party support for initiatives, wherever possible.
- Familiarise yourself with how your state enters into treaties, the respective roles of the Executive and the Legislature, relevant national processes and whether treaties will have direct effect in national law or will require implementing legislation.
- Identify which IHL (and IHL related) treaties your state is a party to, when a particular treaty entered into force for your state, the key obligations contained in that treaty, whether your state entered any reservations or declarations to that treaty and which Ministry (or Ministries) is responsible for adopting legislation.
- Understand why your state is not a party to any IHL treaties. This may include asking questions in Parliament to determine why your state has not become a party, and if there are any legal, political, practical or financial barriers to it doing so. If appropriate, you may encourage your state to become a party to a particular treaty, for example, by asking the government to start the process towards becoming a party.
- Where your state has signed but not ratified a treaty, determine why, and see if the reasons for delay can be overcome.
- If a challenge to ratification is the need for legislation or parliamentary time to consider draft legislation, explore the possibility of introducing a Member's Bill or using other parliamentary procedures.
- Encourage the relevant national authorities in your state to participate in negotiations for draft treaties and to discuss their proposed national position on key provisions.
- Engage in parliamentary debates or review processes (including via Parliamentary Committees) on ratification or accession to a treaty and on necessary domestic legislation.
- Carefully consider whether any reservation or interpretative declaration to a treaty proposed by the national authorities is appropriate to and permitted by the treaty and should be supported by Parliament. Where they are not, use parliamentary processes to challenge their inclusion.
- Periodically reassess previously entered reservations to determine if the justification for their inclusion remains and, if not, encourage the government to withdraw them.
- Make sure that where certain treaties provide for the option of making specific declarations, those declarations are made on ratification or accession to the treaty.
- Where your state may be considering withdrawal from a treaty, engage in discussion with government officials to understand the reasons for withdrawal and, if appropriate, ensure that the proposed withdrawal is subject to parliamentary scrutiny.
- As necessary, seek additional advice from IHL experts, including the ICRC advisory service on IHL (<https://www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law>) or your National Red Cross or Red Crescent Society (for a list of contacts in each jurisdiction please visit: <https://media.ifrc.org/ifrc/who-we-are/national-societies/national-societies-directory/>).



B.4 When and where does IHL apply?

The application of IHL to a particular situation depends upon: (1) whether there is, in fact, an armed conflict; and, if so, (2) which type of armed conflict it is.

IHL **does not apply** to situations of violence and internal disturbances that do not amount to an armed conflict. National law and human rights law apply to these situations, not IHL.

IHL applies **different rules** depending on what type of armed conflict exists. The rules concerning IAC are more extensive than the rules that apply in NIAC.

IHL recognises two types of conflict:

- **International Armed Conflict (IAC):** an international armed conflict arises whenever **one or more states resort to the use of military force against another state or states**. There is no minimum level of force required so any violence between states will engage the rules of IHL. There is no need for a formal declaration of war. This may include, for example, the situation where one state detains soldiers from a neighbouring state who have inadvertently crossed a border.
- **Non-International Armed Conflict (NIAC):** A non-international armed conflict (NIAC) is **any armed conflict that is not between two or more states**. This means at least one of the parties to the conflict will be a non-state OAG. This requires looking at the **level of organisation** of an armed group, for example, whether the organisation has formed itself into a military-like structure with defined units and insignia and has an established command structure and an internal disciplinary system. Unlike an international armed conflict, there is a **minimum threshold of intensity of violence** for a NIAC to exist and for IHL to apply.

Factors that are relevant to whether there is a sufficient level of intensity of violence include: the frequency of the clashes and the number of fighters involved; the number of civilian or military casualties; the extent of displacement of people as a result of the conflict; the use of military weapons, such as aircraft, artillery or armoured vehicles; the deployment of the armed forces, as opposed to law enforcement; and any discussion of the situation or actions taken by international bodies, such as the **United Nations (UN) Security Council** or the **UN General Assembly**.

Determining whether a situation is an armed conflict and which type it is requires a legal test that is applied based on an assessment of the factual context (what is happening on the ground) and not what the parties claim to be the situation. Situations are often fluid, meaning that a situation that does not amount to an armed conflict (due to the level of organisation or level of violence) can become an armed conflict over time.



For an IAC, the four Geneva Conventions will apply as well as **Additional Protocol I to the Geneva Conventions, 1977 (AP I)**, if your state is a party to that instrument. Many other IHL treaties apply in IAC (see **Annex B**). There are also rules of customary IHL that apply in IAC.

A subset of IHL rules applies in situations of **occupation**. A situation of occupation arises when a state exercises effective control over a territory on which it has no sovereign title, without consent. **Article 42 of The Hague Regulations of 1907** defines occupation as follows: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

Where violence reaches the threshold for a NIAC, **Article 3** common to the **Geneva Conventions (CA 3)** will apply. Certain other treaty rules applicable to NIACs may apply where the state is a party to those treaties. In particular, **Additional Protocol II to the Geneva Conventions, 1977 (AP II)** will apply during an armed conflict between a state party and an OAG. Besides the general organisation and intensity thresholds needed to trigger the application of IHL during NIAC, AP II also requires the OAG to exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. Customary IHL rules also apply to NIACs and have developed to fill some of the gaps in protection during NIACs.

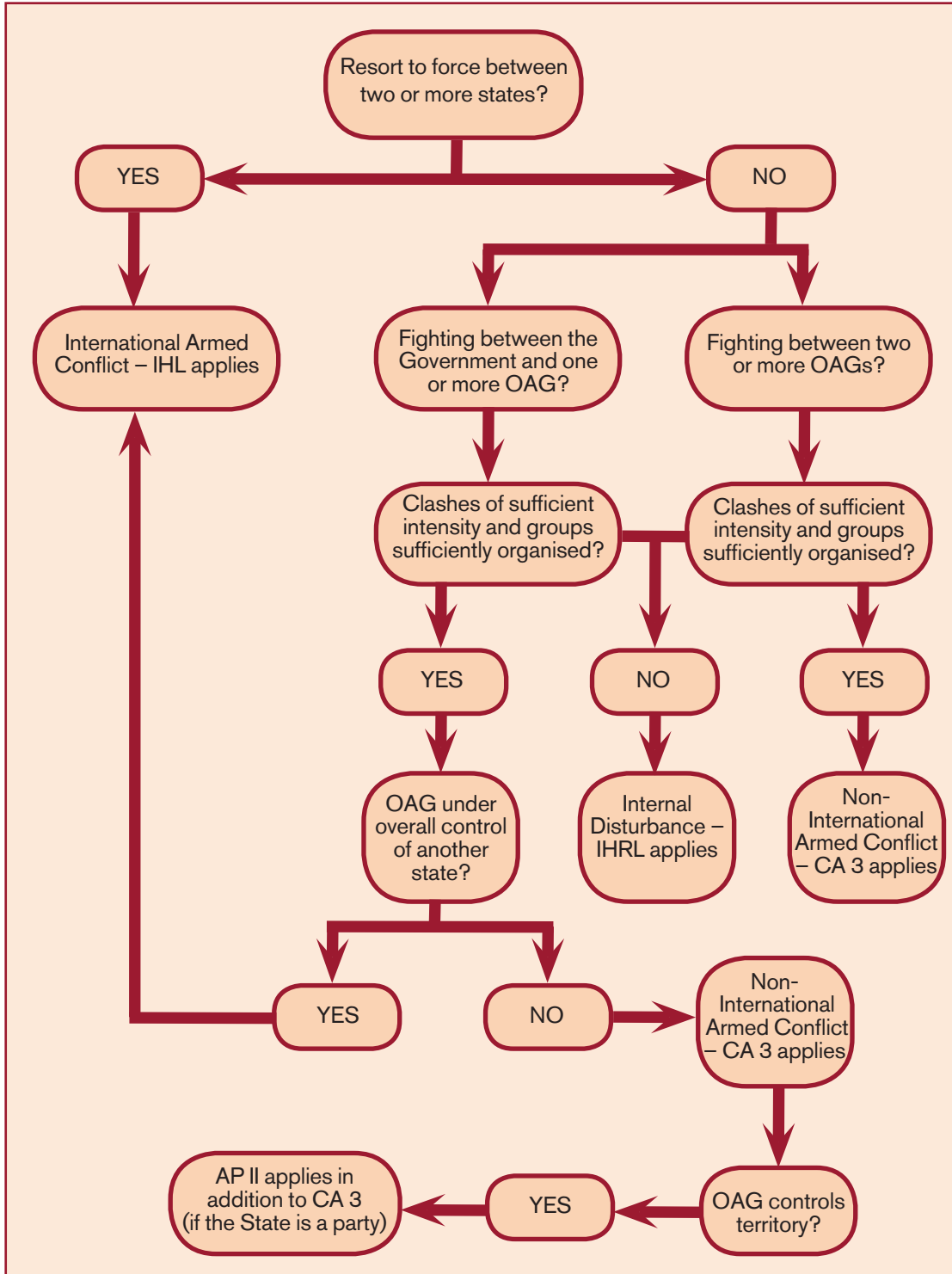
In addition to the categories of IAC and NIAC, it is possible that, in certain circumstances, a situation that would otherwise be a NIAC could be recognised as an IAC. This is sometimes referred to as an **internationalised armed conflict**. There are two situations where this can occur. The first is where an OAG is fighting the government to exercise their right to self-determination in a war of national liberation. The second is where an OAG is fighting the government within a country, and that OAG has a close relationship with another state, which effectively means there is a conflict between those two states. However, the threshold of support from the state assisting the OAG necessary to internationalise a conflict is quite high and usually requires the second state to be exercising overall control over the OAG. This is not a separate category of conflict: rather an internationalised conflict is a type of IAC, despite being between a state and an OAG.

IHL also recognises that, depending on the situation, there may be **overlapping conflicts**; that is more than one armed conflict occurring in a state at the same time. For example, a government might be fighting OAGs and – independently – fighting another state. Each conflict must be categorised separately (*as a IAC or a NIAC*), and different rules of IHL may apply to each of these conflicts.

Figure 1 shows the process for determining whether IHL applies, the type of conflict and which rules apply.



FIGURE 1: APPLICATION OF INTERNATIONAL HUMANITARIAN LAW



A related question is when does the application of IHL cease? This is, generally speaking, at the end of hostilities. There need not be a formal peace agreement or ceasefire – again it is a question of fact. Specific IHL obligations will continue past the end of the conflict, for example, the requirement for repatriation of prisoners of war.

B.5 To whom is IHL addressed?

IHL seeks to regulate state conduct. This means that the primary target of IHL is governments. However, IHL also seeks to regulate the conduct of a range of actors that may be involved in fighting in armed conflicts. Depending on the type of conflict, these actors may include:

- Regular military forces of the state (*i.e. Army, Navy, Air Force*);
- Civilian enforcement personnel, including police and state security services;
- Medical units;
- Civil defence units;
- Irregular forces – spies, mercenaries;
- Non-state armed groups;
- National liberation movements; and
- Individuals.

States not directly involved in the armed conflict (*known as third states*) may also have certain obligations, for example to remain neutral or to allow humanitarian access through their territory.

B.6 Where does IHL apply?

Armed conflict may take place at land, sea and in the air and, potentially, in outer space and cyberspace (see **Part D.2.1** on page 43).

In IACs, the geographic application of IHL is throughout the territory of the states that are party to the conflict, including air space and the territorial sea. Therefore, IHL will apply to territory even where there are no active military operations. However, this means that where hospitals and prisoner of war camps, for example, are located away from the main site of hostilities, IHL will still apply to them.

In NIACs, the geographic application of IHL is not as clear. Where the NIAC is internal (*i.e. within the territory of one state*), one view is that IHL applies throughout the territory of that state. Another view is that the application of IHL should be limited to parts of the state in which armed activities are occurring. Subject to any derogations, international human rights law (IHRL) would continue to apply throughout the whole territory of the affected state – either concurrently with IHL or on matters not covered by IHL (see **Part D.4** on page 54).

B.7 What are the basic principles and rules of IHL?

• B.7.1 Protected persons

IHL protects civilian persons and objects from unnecessary harm. In addition to general civilian protection, IHL extends specific protections to certain categories of people, including women, children, journalists, medical and religious personnel and nationals of neutral states. Some of these special protections are considered in more detail in **Part D: Contemporary Challenges**.

IHL also protects those combatants no longer taking part in hostilities. This includes prisoners of war, those wounded in armed conflict and the shipwrecked.

A civilian object is any object that is not a military objective. A military objective is something that by its nature, location, purpose or use makes an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage to the attacker. This means what would otherwise be a civilian object could become a military object under certain conditions.

In cases of doubt about their status, people and objects are normally presumed to be civilian. As with people, IHL provides certain objects with special protection, for example hospitals. IHL also precludes attacking or destroying objects indispensable to the civilian population, for example, poisoning drinking wells or applying a 'scorched earth' policy. Works containing dangerous forces such as dams or nuclear facilities are also protected.

The extent and nature of the special protection accorded depends on the category of object in question. Importantly, these objects are not completely immune from lawful attack and the rules provide for the circumstances in which the protection may be waived.

• B.7.2 Distinction

Parties to a conflict must distinguish at all times between civilians and civilian objects and combatants and military objectives. IHL prohibits both deliberate attacks on civilians and indiscriminate attacks.

The civilian population and civilian objects must not be the target of direct attack. Parties to a conflict should direct attacks only at combatants and military objectives. Civilians may be attacked only if they are directly participating in hostilities (see **Part D.1.3 on page 40**).

An attack is indiscriminate if it is not capable of distinguishing between civilians or civilian objects and military objectives. In attacking combatants or military objectives, a party to a conflict must do so in a manner and using weapons that allows the party to discriminate between civilians or civilian objects and military objectives. Indiscriminate attacks also occur where the effects of the attack cannot be limited as required by IHL.

- **B.7.3 Proportionality**

Where a party directs an attack against a lawful target, the party must also ensure that the injury to civilians and civilian property is not excessive in relation to the concrete and direct military advantage anticipated by the attack.

IHL thus requires an assessment of the military advantage likely to be gained from a particular attack compared to the likely injury to civilians and civilian objects. This is not an easy assessment to make, and cannot be reduced to a mathematical equation. A military commander must act reasonably in the circumstances prevailing at the time using the knowledge they have acquired in fulfilment of their obligation to take precautions in attack (see *below*). The assessment is forward looking, and so the lawfulness of an attack is not judged by the outcome alone, but it must include what the commander knew and expected to occur at the time.

- **B.7.4 Precautions in attack**

Linked to the requirement for an attack to be proportionate is the obligation on the parties to a conflict to take all feasible precautions to minimise the likely harm to civilians and civilian objects.

The ***Convention on Certain Conventional Weapons*** defines feasible precautions as “*those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.*”

This may include confirming intelligence that an object is a legitimate target, issuing a warning to the civilian population that an attack is imminent and allowing an opportunity to leave, or attacking at times when civilian casualties will be lower (*for example, attacking a munitions factory at night when fewer people will be inside*).

The feasibility of a precaution is assessed against the circumstances prevailing at the time; for example, if a warning would undermine a surprise attack, it would not be considered feasible.



• B.7.5 Regulating the means and methods of warfare

IHL also protects civilians and civilian objects by creating prohibitions and limits on certain means (*weapons*) and methods of warfare. The prohibitions on certain types of weapons also protect those participating in conflict from unnecessary suffering.

IHL sets out **general prohibitions and restrictions** on the use of certain weapons and methods of warfare, namely those weapons and methods that:

- Are designed to spread terror among the civilian population;
- Do not distinguish between combatants and civilians and civilian objects;
- Cause superfluous injury or unnecessary suffering;
- Cause severe and long-term damage to the environment.

Specific restrictions or prohibitions cover the use of certain weapons, including:

- Poison and poisonous weapons;
- Chemical and biological weapons;
- Bullets that spread or explode within the body (e.g. dum-dum bullets);
- Weapons whose primary effect is to injure by fragments that cannot be detected by X-rays;
- Explosive and inflammable projectiles weighing under 400g;
- Booby-traps and similar devices;
- Incendiary weapons and weapons that are primarily designed to burn objects or people;
- Blinding laser weapons;
- Anti-personnel mines; and
- Cluster munitions.

Specific weapons treaties are included in **Annex B** while **Annex C** sets out which Commonwealth states are party to each treaty.

Prohibited methods of warfare include:

- Denying quarter: an adversary's forces must be given an opportunity to surrender and be taken prisoner;
- Pillaging private property;
- Starving the civilian population;
- Targeting objects indispensable for the survival of the civilian population;
- Reprisals directed at the civilian population or other protected persons or objects; and
- Resorting to perfidy to kill, injure or capture an adversary. **Perfidy** is "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." This includes, for instance feigning injury or sickness in order to attack an enemy.






B.8 What are the protective emblems or signs, and what and whom do they protect?

The **Geneva Conventions of 1949** and their **Third Additional Protocol, 2005 (AP III)** establish three distinctive emblems: the red cross, the red crescent and the red crystal. These three emblems are symbols of the protection given by IHL to people or facilities engaged in medical or humanitarian assistance and have the same status under international law. They are each a sign that those people and facilities must not be attacked.

Protected people include military medical and religious personnel, as well as authorised Red Cross and Red Crescent staff and volunteers. Medical sites, vehicles and equipment belonging to these protected groups may also be marked with the emblem and accorded protection.

It is a war crime to direct deliberate attacks against protected persons or facilities, as is to deliberately misuse the emblem to gain a military advantage (this is known as perfidy). Additional emblems and signs protect other objects under specific convention regimes, for example cultural property and dangerous forces. The following table shows a range of protective emblems and signs, together with what each indicates.

FIGURE 2: PROTECTIVE EMBLEMS AND SIGNS

Emblem/Sign	Indicates
	State-authorised medical and religious personnel, medical units, hospitals and medical transports, including those of the National Red Cross or Red Crescent Society.
	State-authorised protected cultural property
	Objects whose destruction would release dangerous forces: dykes, dams and nuclear power plants
	State-authorised civil defence personnel or objects
	UN personnel or objects
PW PG IC	The letters 'PW' or 'PG' can be used to mark camps that house prisoners of war (<i>prisonnier de guerre</i> in French) The letters 'IC' can be used to mark civilian internment camps.



The **Geneva Conventions** require states to adopt national legislation to regulate the use of the protective emblems in times of armed conflict and in peacetime. In many countries, use of the protective emblems requires authorisation from the Ministry of Defence or equivalent. Failure to obtain authorisation could be a criminal offence. Protecting the emblems and acting quickly to end misuse is a vital component of IHL; failure to do so risks undermining the international recognition of the emblems and the protection they provide during armed conflict.

National Red Cross and Red Crescent Societies (see below B.9, referred to as *National Societies*) can use the emblem in peacetime to indicate that a person or object is linked to the International Red Cross and Red Crescent Movement and is providing humanitarian service and works in accordance with the Movement's Fundamental Principles. National Societies also work with the national authorities to protect the emblems and to educate the public as to their role and potential misuse. Measures to protect the red cross emblem, for example, might include requiring civilian hospitals and medical facilities to use a white cross or "H" on a blue background and for other organisations to use alternative symbols such as the green and white first aid sign and the paramedic's 'Star of Life' symbol.



Alternative signs for hospitals and medical facilities



'Star of Life' symbol for ambulances



International Organization for Standardization sign for first aid

National Societies often monitor instances of misuse of the emblems and may have first responsibility to contact individuals or organisations that are responsible for the misuse. Members of the public may therefore report possible misuse to the National Society for investigation. National Societies will generally encourage anyone misusing the emblem to stop, hoping that informing them of the offence and potential implications will suffice. Failing this, incidents of misuse can be reported to the relevant national authorities for enforcement action. However, the majority of misuse cases arise due to lack of understanding of the emblems and are resolved quickly.



What can Parliamentarians do to protect the emblems?

As a Parliamentarian, you can:

- Recognise the emblems and who or what they are protecting.
- Ensure that your state has adopted the necessary legislation and, if necessary, any implementing regulations to protect the emblems, in particular through criminal prosecution. If not, use parliamentary procedures to make sure the proper legislation is adopted or that existing legislation is updated or amended.
- Understand what other measures have been put in place to protect the emblems, such as guidelines for medical facilities and other organisations as to alternative symbols they can use.
- Make sure that the Executive has put in place a procedure for detecting misuse of the emblem, including through delegation to the National Society.
- Monitor for situations of potential misuse of the emblem and report to your National Society. Some National Societies have established online apps to report misuse.
- Work with National Societies and national authorities to educate the public, in particular your constituents, about what the emblems represent, why their protection is important and how to report misuse.



B.9 What is the International Red Cross and Red Crescent Movement and what is its role in relation to IHL?

The International Red Cross and Red Crescent Movement consists of three components:

- **The International Committee of the Red Cross (ICRC)**, which focuses on the provision of assistance during armed conflict. IHL recognises key tasks that are the responsibility of the ICRC, for example, visiting prisoners of war, tracing the missing and reuniting families. The ICRC also plays a special role in promoting IHL, both its implementation and future development. It has considerable expertise and experience in the application of IHL and monitors situations of armed conflict around the world. It uses this knowledge to assist states to understand, clarify, apply and develop the law, both generally and in specific contexts.



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Monrovia central prison: an ICRC delegate speaks with a detainee. In certain circumstances, the ICRC also visits prisons in non-conflict situations.

- **National Red Cross and Red Crescent Societies (192 as at February 2022).** National Societies play an important role under IHL and must, in general, be allowed to carry out humanitarian activities during armed conflict. National Societies should be established pursuant to national law, as they can only be admitted to the Movement if their state is party to the Geneva Conventions and has granted authority for the society to be constituted. National Societies are auxiliaries to their respective countries' public authorities in the humanitarian field. National Societies work separately and alongside national authorities to promote the implementation of IHL in their respective states and to educate the public about the significance and provisions of IHL.



With the exception of Nauru, each Commonwealth country has established a National Society. Contact details for each National Society can be found here: <https://media.ifrc.org/ifrc/who-we-are/national-societies/national-societies-directory/>.

Many states have established an IHL Committee, which includes representatives of their National Society. Some countries with a federal structure, for example Australia, have also established IHL Committees at the state level. A list of Commonwealth states that have established an IHL Committee is included in **Annex E**. The ICRC provides details for each IHL Committee, including legal basis, mandate, membership and contact details, here: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>. For practical advice to facilitate the establishment and operation of National IHL Committees, see: https://www.icrc.org/en/doc/assets/files/other/practical_advice.pdf.



Hygiene kits and other non-food aid items are distributed by the Syrian Arab Red Crescent to people, many supporting family members or children with disabilities, in the suburbs of Damascus in Syria.

- **The International Federation of Red Cross and Red Crescent Societies (IFRC)** co-ordinates international relief provided by National Societies for victims of natural disasters, and for refugees and displaced persons outside conflict zones. It also supports National Societies with their own activities, helping them plan and implement disaster response and development projects for vulnerable people in their local communities. More information concerning the IFRC is found at: <https://media.ifrc.org/ifrc/>.



Seven fundamental principles guide the ICRC, the IFRC and the National Societies in their work.

The Fundamental Principles of the International Red Cross and Red Crescent Movement

Humanity

The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

Impartiality

The Movement makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality

In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence

The Movement is independent. The National Societies, whilst auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

Voluntary Service

It is a voluntary relief movement not prompted in any manner by desire for gain.

Unity

There can be only one Red Cross or Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality

The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

All three components of the Movement participate alongside states parties to the **Geneva Conventions in the International Conference of the Red Cross and Red Crescent**, the highest deliberative body for the Movement. Resolutions adopted at the Conference are joint commitments by the Movement and states parties to advance agreed actions. This emphasises the close relationship between states parties and the components of the Movement, and the significant role of the Movement in advancing IHL.

Due to its unique role and special international status, and in light of the seven Fundamental Principles, the Movement works in a specific way. The Movement does not take side in conflicts and attempts to avoid controversies. The ICRC will generally deal directly with states and non-state actors on a confidential basis and only makes public statements about its dialogue with the parties to a conflict or about IHL violations on an exceptional basis. Similarly, the National Societies focus on the provision of assistance without discrimination and they do not take sides in conflicts or engage in political debates.

What can Parliamentarians do to support the International Red Cross and Red Crescent Movement?

As a Parliamentarian, you can:

- Understand the different components of the Movement and their role in promoting and giving effect to IHL, as well as their modes of operation and the importance of the Movement's seven Fundamental Principles.
- Where your state does not have a National Society, support the establishment of a National Society, including adopting necessary legislation.
- Support your National Society in initiatives to educate the public about IHL and its implementation.
- If one is in place, contact the IHL Committee in your state at the national level or local level of government to see if you can offer support.
- Refer constituents who may require additional resources on IHL to the ICRC website (see: <https://www.icrc.org/en/war-and-law>) or to the National Society where one exists in your state.
- Advocate for continued support for the National Society by the national authorities, both regarding engagement with the National Society by government actors and through provision of adequate funding.



B.10 How is IHL implemented?

In addition to those provisions that apply to states in times of armed conflict, IHL also creates a number of obligations for states that are applicable in **peacetime**. These obligations are specific rules that underpin a state's overarching duty to respect IHL at all times.

Peacetime obligations include:

- **Adopting implementing legislation:** several IHL obligations may require the state to adopt additional laws or to modify existing provisions. For example, a state will need to ensure that its national law includes provisions enabling prosecution of individuals that are accused of committing war crimes (see **Part C.1.3** on page 31) and to protect the emblems (see **Part B.8** on page 20). For some states, implementing legislation will need to be in place *before* the state can ratify or accede to the relevant treaty. Guidance on national legislation required to implement specific treaties, including model laws, is found here: <https://www.icrc.org/en/document/national-implementation-ihl-model-laws>. The ICRC has also prepared a detailed manual on domestic implementation of IHL, which provides guidance as to required legislation and processes: <https://www.icrc.org/en/doc/resources/documents/publication/pdvd40.htm>.
- **Training:** states must conduct training for military personnel and other actors who may become subject to IHL so that those deployed are aware of IHL obligations that may apply to their activities.
- **Dissemination and education:** to spread knowledge of IHL within the armed forces, civil service, the media and within the general population. This may include development of IHL courses in universities and schools, building training capacity for instructors, specific courses targeted at certain key actors, for example journalists, medical professionals, the judiciary or those in the arts community (*regarding cultural heritage*), developing online IHL modules and public events or general courses aimed at exposing the general public to IHL and contemporary IHL issues.
- **Legal Advice:** states must train and make available suitably qualified lawyers to provide specific advice on IHL both during peacetime and in times of conflict, both to military and civilian actors (e.g. *in relevant government departments as well as the armed forces*).
- **Precautions:** states must, to the greatest extent possible, take a number of steps to protect civilians and civilian objects, including specially protected objects, during peacetime. This includes actions such as: locating military bases away from civilian population centres; avoiding as far as possible creating facilities for dual-use (e.g. *a power plant that supplies electricity to both civilian neighbourhoods and a military base*); and identifying specially protected objects (*including by the use of an appropriate emblem or entering the object on to schedules, for example, lists of cultural property*) and making arrangements for their protection or relocation in conflict.



- **Planning:** states should develop and test rules of engagement and tactics, techniques and procedures concerning targeting for application in possible conflict situations.
- **Weapons purchase, testing and development:** states should review the legality of weapons in their inventory throughout their operational lifecycle. They should ensure that proper limitations are in place for restricted weapons. They should not purchase, develop, use or stockpile any prohibited weapons and should destroy any existing stockpiles of such weapons.
- **Budget:** states should specifically set aside funds for the dissemination and implementation of IHL.

What can Parliamentarians do to support implementation of IHL?

As a Parliamentarian, you can:

- Avoid politicising matters relating to the implementation of IHL and seek cross-party support for initiatives, wherever possible.
- Ensure that your state has appropriate implementing legislation in place. This may include encouraging the government to introduce legislation or introducing a Private Member's Bill (as relevant), participating in and encouraging your constituents to participate in consultations on actions needed to implement IHL, and scrutinising proposed legislation to make sure it complies with IHL, including through the work of Parliamentary Committees.
- Where legislation or proposed legislation does not comply with IHL, make enquiries of the relevant department or ask questions or start a debate in Parliament to try to understand why it does not comply with IHL and, if appropriate, request further amendments.
- Ensure that all IHL treaties to which your country is a party are professionally translated into all official national languages and can be easily accessed.
- Ensure the Executive has taken appropriate measures to implement IHL, such as instituting regular trainings for the military and developing appropriate rules, policies and procedures that comply, and enable compliance, with IHL; for example, those relating to correct deployment of the emblems to protect medical personnel and cultural heritage.
- Encourage the appointment of a focal point in Ministries for national programmes to help build capacity and implement IHL.
- Enquire about military expenditure on weapons and development/purchase of new weapons and their compliance with IHL. If your country does not already employ a formal weapons review process for assessing the legality of new weapons, you can encourage the government to create one. The ICRC has developed a guide to assist states to establish or improve procedures to determine the legality of new weapons:



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International Humanitarian Law Dissemination practical exercise at Jinja District Military School in Uganda.

<https://www.icrc.org/en/publication/0902-guide-legal-review-new-weapons-means-and-methods-warfare-measures-implement-article>.

- Ask questions as to how the national infrastructure has been adapted to comply with IHL, for example, location of military objectives away from the civilian population.
- Ensure that troops deployed overseas as part of national or multinational military or peacekeeping missions have received appropriate training in IHL and understand the rules under which that operation will be conducted.
- Engage in efforts to raise public awareness of IHL. This may include participating in conferences, giving speeches, media appearances, writing op-eds or making statements in Parliament or public fora. Where possible, encourage cross-party support for such efforts.
- Ensure that key actors are informed about IHL and receive information and updates, including civil servants and government officials, schools and universities, judges, prosecutors and lawyers, medical personnel, journalists and the media, and academics.
- Establish and/or encourage national bodies that support implementation of IHL, for example, a national IHL Committee or a parliamentary body or sub-committee with an IHL mandate.
- Contact and engage in discussions with other IHL bodies, either nationally or internationally and through regional or international fora.
- Make sure that sufficient budgetary and other resources are allocated as necessary.
- Where your state becomes involved in armed conflict and if necessary enhance scrutiny on the Executive to make sure that IHL continues to be respected.
- Encourage the executive to undertake a self-assessment and report on the implementation of IHL at the domestic level. For example, see the United Kingdom's Voluntary Report on the Implementation of IHL at the Domestic Level: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784696/Voluntary_Report_on_the_Implementation_of_International_Humanitarian_Law_at_Domestic_Level.pdf.

PART C: VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND ENFORCEMENT

C.I What happens if IHL is violated?

It is the unfortunate reality that the provisions of IHL are violated from time to time. This raises the question of what happens next. Although a state may be held responsible for any violation of IHL, individuals (e.g. *commanders, combatants or state officials*) may only be held criminally liable for serious violations.

• C.I.1 The responsibility of states for violating IHL

International law primarily addresses states. If a state violates an international legal rule, this engages the responsibility of that state.

However, individuals and groups of individuals carry out acts of warfare. To determine if a state is responsible for a violation of IHL, the conduct of those individuals or groups must be **attributable to the state**. International law provides a number of rules to determine attribution. In most circumstances, something done by an official of a state, including a member of the military, may be attributable to that state. Therefore, if a group of soldiers acts in a way that violates IHL, the state to which they belong will be responsible. This may be the case even if the state did not authorise the violation.

States may also be responsible for the wrongful acts of (unofficial) OAGs over which they exercise effective control.

Practically speaking, addressing the responsibility of states for violations of IHL can be difficult. Usually state responsibility is a matter for diplomatic discussion and ongoing armed conflicts are not conducive to such dialogue. This means that resolution of IHL violations often takes place through international or regional organisations, and in international judicial mechanisms or specially constituted claims commissions. These latter bodies are often constituted as part of a peace process.

Once attribution has been determined, there could be other consequences for a state which has been found liable for violations of IHL. For example, the UN Security Council could authorise sanctions (including arms embargoes, financial sanctions and travel bans) and/or the use of force against that state.



• C.1.2 The challenge of fact-finding

As well as finding an appropriate mechanism to resolve the legal aspects of IHL violations, it is often difficult to establish the facts of a particular incident or series of incidents accurately. This is for a range of reasons such as:

- areas where incidents occur are often inaccessible;
- combat destroys physical evidence and kills witnesses; and
- belligerents deliberately spread misinformation in order to gain tactical advantages or obscure misconduct.

To address these difficulties, states and international organisations have developed a range of fact-finding mechanisms. In particular, AP I established the **International Humanitarian Fact Finding Commission**, a standing body of 15 independent experts, acting in their personal capacity. The Commission's essential purpose is to contribute to implement and ensure respect for IHL in armed conflict situation, including by conducting investigations into allegations of violations of IHL. However, the Commission's operation relies on the consent of the parties to the conflict. States can prospectively accept the authority of the Commission by depositing an 'Article 90 declaration'. **Annex C** shows which Commonwealth states have made Article 90 declarations. For more information on the Commission, including a model Article 90 declaration, see <https://www.ihffc.org/index.asp?Language=EN&page=home>.

Another example of a fact-finding mechanism was the **Organisation for the Prohibition of Chemical Weapons Fact-Finding Mission** in Syria, established in 2014 "*to establish facts surrounding allegations of the use of toxic chemicals, reportedly chlorine, for hostile purposes in the Syrian Arab Republic.*"

In addition, various UN human rights mechanisms often perform a fact-finding role in situations of armed conflict. These include the special rapporteurs, independent experts and working groups established under the UN Human Rights Council's 'special procedures' (and formerly the UN Human Rights Commission). Sometimes these experts will be assigned to examine and report on a specific country. Other times they will fulfil a thematic mandate – such as 'extrajudicial, summary or arbitrary executions'. While such general mandates extend beyond situations of armed conflict, they may address possible violations of IHL.



- **C.1.3 Individual responsibility for violations of IHL**

A state will be responsible for violations attributable to it. However, individuals – or groups of individuals – actually *commit* the violations of IHL. Three key mechanisms deal with the responsibility of individuals for violating IHL: military discipline systems and/or military law; prosecution before national courts based on national criminal law; and prosecution of war crimes before international criminal tribunals.

- ***Military Discipline Systems***

Discipline is essential to the proper function of the military, and all armed forces have internal systems to preserve discipline. These military discipline systems play an important role in preventing or punishing violations of IHL and enable states to meet their obligation to take measures necessary to repress violations of IHL. Violations of IHL by members of the military that do not rise to the level of war crimes are often resolved within this system. Militaries generally include IHL requirements in lawful commands, disciplinary rules and standing orders. Moreover, states are obliged to provide instruction to their military personnel in IHL to an extent commensurate with their position and level of command.

- ***Prosecution before national courts***

Not all violations of IHL are war crimes; only certain serious violations of IHL will give rise to criminal responsibility. The Geneva Conventions require states to criminalise certain serious violations of IHL, known as grave breaches. **AP I** adds further grave breaches that will give rise to criminal responsibility. Other treaties may also require states to establish criminal laws to enforce the treaty's provisions. These may be found, for example, in specific weapons treaties or treaties relating to the protection of cultural property (see **Annex B**).

For many years, it was not clear whether individual criminal responsibility also applied to serious violations of IHL in NIACs. **Common Article 3** to the **Geneva Conventions** lists basic guarantees of protection but does not mention the possibility of criminal prosecution for violations. **AP II**, which applies to NIACs, also does not mention criminal responsibility. However, it has now been generally accepted that individual criminal responsibility arises for certain serious violations of IHL, regardless of whether they are committed in IACs or NIACs.

There are materials available to states considering domestic legislation to give effect to their obligations under IHL. These include the ICRC Model Geneva Conventions Act for common law states. This model law enables states to introduce legislation that will permit them to meet their international legal obligations. This model law is found at: <https://www.icrc.org/en/doc/resources/documents/misc/5jykmc.htm>.



- **Prosecution before international criminal courts**

States bear the primary responsibility for investigating and prosecuting war crimes. However, there are situations where a state may be unable or unwilling to prosecute war crimes, for example, when the state's judicial system has collapsed due to conflict or when the crimes implicate the current government. In addition to the permanent International Criminal Court, the UN Security Council and states have established several *ad hoc* international criminal tribunals to strengthen the system of IHL enforcement.

After World War II, the Allied Powers established international criminal tribunals to prosecute those responsible for international crimes, including war crimes, committed in Europe (*the International Military Tribunal at Nuremberg*) and Asia (*the International Military Tribunal for the Far East or Tokyo Tribunal*).

In the mid-1990s, the **UN Security Council** established two tribunals to deal with specific situations, using its power to restore international peace and security under Chapter VII of the UN Charter: the **International Criminal Tribunal for the former Yugoslavia, 1993** and the **International Criminal Tribunal for Rwanda, 1994**. Each tribunal could prosecute war crimes, as well as other international crimes. Both tribunals have completed their mandates, and their functions have since been transferred to the **United Nations Residual Mechanism for International Criminal Tribunals**.

The UN was also responsible for setting up 'mixed' tribunals for specific situations. Mixed tribunals have some blending of international and national elements, usually by applying a mix of international and national law and by employing both international and national judges and other personnel. In Timor-Leste and Kosovo, UN officials established mixed panels as part of the UN's peacekeeping mandate. The **Special Court for Sierra Leone** was established pursuant to an agreement between the UN and Sierra Leone, while the **Extraordinary Chambers in the Courts of Cambodia** was established under Cambodian law, but operates under an agreement between the UN and Cambodia. The Special Tribunal for Lebanon is a mixed tribunal established by the Security Council, but it does not have jurisdiction for war crimes, only acts of terrorism under Lebanese law.

Other mixed tribunals have been set up by certain states, for example, the **Special Criminal Court in the Central African Republic** and the **Colombian Special Jurisdiction for Peace** (both of which include foreign judges sitting alongside national judges). States and human rights actors have suggested mixed tribunals as possibilities for addressing war crimes in other conflicts, including in Syria. Regional organisations can also be involved in establishing mechanisms to prosecute international crimes. The African Union established the **Extraordinary African Chambers** in Senegal, while the European Union established the **Kosovo Specialist Chambers**.

The African Union has also proposed the extension of the jurisdiction of the African Court on Justice and Human Rights to international and transnational crimes, including war crimes.



What can Parliamentarians do to support the enforcement of IHL?

As a Parliamentarian, you can:

- Avoid politicising matters relating to the enforcement of IHL and seek cross-party support for initiatives, wherever possible.
- If your state is a party to AP I, determine if it lodged a declaration at ratification or accession recognising the competence of the International Humanitarian Fact-Finding Commission. If not, encourage it to do so.
- As appropriate, create or support cross-party parliamentary ‘watch-dog’ bodies, with responsibility for monitoring situations where there may be a risk of IHL violations and reporting on and advocating for accountability.
- Where you have credible evidence of IHL violations, pass that evidence to the appropriate national authorities and/or international courts or investigative bodies.
- Call for parties to a conflict to abide by IHL, either through Parliament, the Executive and in organisations such as the UN, or via individual or collective efforts.
- Support the creation of fact-finding bodies and judicial bodies at the national, regional or international level.
- Encourage the Executive to use diplomatic and other means to influence foreign authorities to end violations, where they occur. This may include adoption of sanctions, removal of trade privileges or suspending aid to the state concerned.
- Where helpful, initiate or participate in a parliamentary or other fact-finding mission or enquiry, established nationally or by an international organisation.
- Ensure that national legislation incorporates criminal provisions on war crimes as well as other international crimes and that it accepts modes of liability such as command responsibility.
- Encourage your state to provide resources for the investigation and prosecution of war crimes, including the establishment of specialised units and support for international courts.
- Support efforts in other states to prosecute war crimes, including provision of capacity-building measures, practical assistance and mutual legal assistance.
- Ensure national authorities comply with the obligation to search for those accused of war crimes and to investigate and prosecute them or to extradite them to another state willing to do so.
- Ensure national authorities, including the military, investigate and if appropriate prosecute nationals accused of committing war crimes, including when on deployment.
- If not already in place, consider creating legislation that recognises universal jurisdiction as a basis for national prosecutions of serious violations of IHL.
- Monitor the use of political controls on prosecution of international crimes including war crimes (such as the need for the consent of the Attorney General) and request clarification where political actors block prosecutions.
- Educate the public about the importance of enforcement of IHL.



C.2 International Criminal Court

States created the ICC in 1998 by adopting a treaty, the **Rome Statute of the International Criminal Court (Rome Statute)**. As at February 2022, 123 states are party to the Rome Statute. The Rome Statute entered into force on 1 July 2002, following ratification by 60 states. For the text of the Rome Statute, please visit: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>. Additional resources on the ICC and its role are available at the following link: <https://www.icc-cpi.int/tell-others>.

The ICC is separate from the UN (the ICC is not a UN organ), but the UN Security Council may refer a situation to the ICC and plays a role in relation to jurisdiction for the crime of aggression. The UN Security Council may request the ICC to defer investigation or prosecution for a 12-month period.

• C.2.1 When and who can the ICC investigate?

The ICC may exercise jurisdiction where the crimes are alleged to have occurred on the territory or by the nationals of a state that is party to the Rome Statute. The ICC *does not* exercise universal jurisdiction. A state party can refer the situation to the ICC, or the ICC Prosecutor may decide to investigate of their own initiative.

The UN Security Council can refer a situation to the ICC even where the crimes have not occurred on the territory of a state party nor been committed by nationals of a state party. This is because the UN Security Council is referring the situation using its powers for international peace and security under the UN Charter, which does not require state consent.



© International Criminal Court, The Hague

The International Criminal Court at The Hague, The Netherlands.



A state that is not a party to the Rome Statute may choose to refer a situation to the ICC, without formally becoming party to the Rome Statute. It does so by filing a declaration accepting the Court's jurisdiction for a specific situation (*known as an Article 12(3) declaration*). By doing so, the state agrees to accept the Court's jurisdiction for that situation and to cooperate with the Court.

The ICC may only exercise jurisdiction over individuals, not legal persons such as states or corporations. The ICC may only consider crimes committed since the entry into force of the Rome Statute on 1 July 2002 or, for states becoming a party to the Rome Statute after that date, the date the Rome Statute entered into force for that state.

The ICC operates on the principle of **complementarity**, not primacy. This means that the ICC should operate only as a court of last resort where a state is not taking any action or is unable or unwilling genuinely to prosecute a case.

• C.2.2 What crimes may the ICC investigate?

The ICC may exercise jurisdiction in respect of four 'core crimes': **genocide**; **crimes against humanity**; **war crimes**; and **aggression**. Both genocide and crimes against humanity are perpetrated in either peacetime or in times of armed conflict.

- **Genocide** refers to the intentional destruction of a religious, national, ethnic or racial group with the intent to destroy that group in whole or in part, through the commission of at least one of five prohibited acts.
- **Crimes against humanity** concern the commission of violations (e.g. *rape, murder, persecution*) in the context of a widespread or systematic attack against a civilian population.
- **War crimes** are serious violations of IHL and therefore are committed only in armed conflict. War crimes may be committed alongside crimes against humanity and genocide, and many indictments may charge the same act as a war crime and a crime against humanity.

The ICC's jurisdiction for the crime of **aggression** is relatively recent and has not yet been accepted by many states parties to the Rome Statute. The crime concerns those in senior positions involved in manifest violations of the UN Charter. Therefore, while an act of aggression may trigger an armed conflict to which IHL will apply, the crime of aggression is matter of *jus ad bellum* and a wholly separate issue from IHL.

For those states that are party to the Rome Statute, **Article 8** details a list of war crimes based on the grave breaches of the Geneva Conventions and AP I, along with other serious violations of IHL. **Article 8** also sets out war crimes committed in NIACs, although more crimes are criminalised in IACs than for NIACs.

Article 8 is not an exhaustive list, and states can add new crimes by amending the Rome Statute. For example, in 2010 the states parties added three new war



crimes applicable in NIACs. The amendments criminalised the use of expanding bullets, the use of poison, and the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.

Examples of war crimes criminalised in both IAC and NIAC include murder, cruel or inhuman treatment, and directing attacks against medical personnel. An example of a war crime criminalised in IAC, but not in NIAC, is forcing prisoners of war to fight on behalf of the detaining power.

States also adopted the ICC Elements of Crime, which set out the requirements for each crime in the Rome Statute (<https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.)

Certain model law guides exist to assist states in amending national law in line with the Rome Statute. This includes the **Commonwealth Model Law to implement the Rome Statute of the International Criminal Court**, available at: http://thecommonwealth.org/sites/default/files/key_reform_pdfs/PI5370_ROL_Model_Rome_Statute.pdf.

What can Parliamentarians do to support the ICC?

As a Parliamentarian, you can:

- Encourage your state to become a party to the Rome Statute if it is not already.
- Encourage your state to enter into an agreement on privileges and immunities with the ICC and/or a sentence enforcement agreement.
- Ensure that national laws incorporate ICC crimes and modes of liability (ways of linking crimes to senior perpetrators) and enable cooperation with ICC requests, including through effective arrangements for protection of ICC witnesses and victims.
- Understand which national authorities are responsible for cooperation with the ICC and monitor their performance by, for example, asking questions in Parliament.
- Encourage and, if necessary, take steps under national law to require your state to comply with its obligations to the ICC, including payment of dues.
- Work with national and international civil society actors to promote understanding of and support for the ICC in your state.
- Consider submitting an 'Article 15' communication to the Office of the Prosecutor if you have credible evidence that international crimes have been committed in your state (or another state). In submitting a communication, you should include this evidence and describe any national efforts to investigate or prosecute individuals for the crime. Seeking legal advice to draft the communication may also make it more useful to the OTP.
- Consider and support initiatives that develop national capacity to investigate and prosecute international crimes (both nationally and in other states), for example training of judges and prosecutors or the creation of specialised units.
- As appropriate to your national context, identify and seek to remove any obstacles in national law that may be inconsistent with obligations to prosecute war crimes, for example amnesties, immunities and statutes of limitation.

PART D: MODERN ARMED CONFLICTS: CURRENT CHALLENGES FOR INTERNATIONAL HUMANITARIAN LAW

Part B has set out the basic rules of IHL, while *Part C* detailed how IHL is implemented and enforced. This section identifies key challenges for IHL, many of which arise from the changing nature of modern armed conflicts.

Many of the IHL rules discussed previously apply only in IACs, which is not surprising given a number of these instruments were adopted several decades ago. However, since the end of World War II most armed conflicts have been NIACs, rather than IACs. This changing nature of armed conflict creates challenges for IHL, which this Part explores.

One consequence of the greater number of NIACs compared to IACs is that compliance with IHL may become increasingly **asymmetric**, with the normally well-equipped and clearly structured armed forces of a state fighting against non-state actors who may not be as structured, disciplined and equipped.

While a state's armed forces are required to comply with IHL, a non-state actor may have little incentive to respect IHL and to repress violations by its forces. Non-state actors may engage in tactics such as deliberately concealing themselves within the civilian population, attacking state forces from within urban centres and forcing civilians to participate in hostilities or to serve as human shields. In an asymmetric conflict, state forces are more likely to kill or injure civilians in their operations, for example, when returning fire at insurgents located in a civilian area.

D.1 IHL and modern armed conflicts

• D.1.1 Classifying modern conflicts

As discussed in *Part B.4*, IHL recognises only two types of armed conflict: IACs and NIACs. However, recent conflicts do not neatly fit this division. Situations are often both factually fluid and highly complex, with a range of non-state actors involved to varying degrees. This has led some to question whether and how existing categories of armed conflict apply to modern conflicts and whether the distinction between IACs and NIACs still serves a useful purpose.

One challenge has been to determine which rules apply to situations where states are fighting against OAGs, but where the fighting moves across borders. Some have called for recognition of a third category of armed conflict, namely a category of '**transnational armed conflict**', fought against non-state actors across the border of more than one state. This has been an issue in relation to Syria and Iraq, where states including the United States, the United Kingdom



and Australia began fighting against the Islamic State of Iraq and the Levant (**ISIL**) in Iraq (alongside the Iraqi forces). When ISIL began operating in Syria, the United States and the United Kingdom began launching airstrikes against ISIL targets in Syria and Russia intervened to assist Syria.

IHL does not currently recognise this suggested third category of transnational armed conflict; rather each of the overlapping conflicts in Syria and Iraq must be assessed individually as either IACs or NIACs, depending on the actors involved.

• **D.1.2 IHL and Terrorism**

In recent years, particularly after the attacks on the World Trade Center and the Pentagon in 2001, there has been considerable discussion regarding the overlap between the regimes governing terrorism and the rules of IHL. There has been a growing tendency of states to consider any acts of violence carried out by OAGs as an act of terrorism, without considering which legal frameworks apply, including whether IHL would permit a specific attack.

International Humanitarian Law does not define terrorism, nor does it consider the legitimacy or lawfulness or the reasons why a particular actor engages in a conflict or uses violence.

There is a separate and distinct legal framework for terrorism, comprising a number of multilateral treaties and UN Security Council resolutions, as well as national law.

IHL will only apply to acts of terrorism where those acts occur in the context of an armed conflict; that is when the threshold for establishing a conflict is satisfied (generally a NIAC in the context of terrorism). Terrorism can occur both in armed conflict (where IHL applies) and in times of peace, where national law and international human rights law (IHRL) apply, but not IHL.

IHL protects civilians from acts of violence by requiring parties to a conflict to observe the principle of distinction and not to target civilians deliberately (see **Part A on page 4**). In addition to these general protections, IHL specifically includes provisions prohibiting acts of terrorism against civilians in the hands of the adversary, as well as spreading terror among the civilian population. Such acts are war crimes.

One key difference between IHL and the legal regime governing terrorism is that IHL recognises that not all acts of violence are prohibited in armed conflict, in particular, attacks against military objectives and personnel. In contrast, the legal framework on terrorism prohibits all acts of terrorism and requires prosecution of those carrying out such acts. Therefore, in an armed conflict, to label all acts of violence as ‘terrorism’ conflates the legal regimes and risks criminalising acts that are lawful under IHL. This may also remove any incentive for the non-state actor to respect IHL.



The so-called ‘global war on terror’ that followed the attacks on the World Trade Center and the Pentagon in 2001 is not a single armed conflict with global reach, but is rather several conflicts against terrorist non-state actors. Each situation of violence must be considered individually to determine if it amounts to an IAC, a NIAC, or neither. The parties to the conflict would then be required to respect the applicable IHL rules, in particular, the rules on the conduct of hostilities, the treatment of the wounded, detainees and civilians.

In recent years, the application of domestic anti-terrorism legislation has posed some difficulties for the application of IHL in certain conflict areas. One particular difficulty concerns the impact on humanitarian relief of national laws directed to deter ‘*foreign fighters*’; that is, those nationals who travel to overseas conflicts to support OAGs. These laws tend to target nationals who travel to designated conflict zones, and mere presence in such a zone can lead to criminal prosecution or removal of nationality and other protections.

An unintended effect of using an overly broad definition of ‘*foreign fighter*’ is that humanitarian relief personnel operating in designated conflict zones could, in theory, be considered ‘*foreign fighters*’ and therefore subject to criminal prosecution. Many Parliaments have moved to amend anti-terrorism laws to ensure that nationals engaged in humanitarian assistance are excluded from the definition of ‘*foreign fighters*’, even if they are working in a designated conflict area.

Counter-terrorism legislation may also create additional provisions and offences concerning weapons that are also regulated by IHL, for example, biological or chemical weapons.

For more information, please visit: <https://www.icrc.org/en/document/challenges-ihl-terrorism>.

• D.1.3 Identifying who is a civilian

Determining who is a civilian (and must not be targeted) and who is engaging in hostilities (and can be targeted) is increasingly difficult in modern conflicts. While civilians are generally immune from targeting during armed conflict, they can lose the protection of IHL where and for such time as they take a **direct part in hostilities**.

IHL does not define what constitutes direct participation in hostilities. The ICRC considers that civilians will lose their protection in two circumstances:

- During periods when they directly participate in hostilities by committing specific hostile acts (those acts causing a sufficient level of harm to the enemy and connected to the armed conflict) but their protection returns as soon as they stop engaging in hostilities; and



- If they are members of an OAG and have a '*continuous combat function*'. Such members of an OAG may be targeted even at times where they are not actively participating in a hostile act.

The ICRC position is that where a civilian does not fall within either of these categories, they should be assumed to be civilians and protected from attack. For more detail on the ICRC guidance on direct participation in hostilities, please visit <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>.

While the ICRC position offers a useful way to conceptualise what direct participation in hostilities may be, it is not uniformly accepted, and many states disagree as to when forces may target a civilian. Some states argue that a civilian who has directly participated in hostilities recently or who is preparing to directly participate in hostilities can be targeted in the period leading up to their participation or for a period afterwards.

It is also difficult to apply the concept of direct participation in hostilities in practice, as shown by the following example. How can a soldier reliably know whether a civilian has a continuous combat function?

Illustrating the different types of direct participation¹

What about the driver of an ammunition truck?

The delivery by a civilian truck driver of ammunition to an active firing position at the frontline would almost certainly be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities. Both the truck (*a military objective*) and the driver (*a civilian taking direct part in hostilities*) could be targeted.

What about a driver transporting ammunition from a factory to a port for further shipping to a storehouse in a conflict zone? The ICRC position would view this action as too remote from the use of that ammunition in specific military operations. Although the ammunition truck remains a legitimate military objective, the driving of the truck would not amount to direct participation in hostilities and would not deprive a civilian driver of protection against direct attack. This does not mean the truck cannot be targeted; rather, when assessing the proportionality of a direct attack against the truck, one must take into account the probable death of the civilian driver.

¹ This example is drawn from the ICRC DPH Interpretive Guidance, available here: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>.



• **D.I.4 Detention in modern armed conflicts and the role of the ICRC**

As seen in the debate around the United States detention of suspected terrorists in Guantanamo Bay, modern armed conflicts also create challenges for states that detain members of OAGs and, on some occasions, civilians.

In IACs, a state may detain members of the opposing state's military. Provided the detained combatants meet certain conditions, they are entitled to 'combatant immunity' and prisoner of war status. This means they may not be subject to criminal prosecution for lawful acts of war.

States may only intern enemy civilians within their own territory, and within any territory they have occupied, where it is *absolutely necessary* for reasons of security.

IHL provides extensive and detailed regulation of the conditions for detention for both prisoners of war – in the **third Geneva Convention (GC III)** – and civilians – in the **fourth Geneva Convention (GC IV)**. These treaties include rules on issues such as accommodation, food, hygiene, and access to medical assistance and religious support. **AP I** provides further regulation for anyone deprived of liberty in the course of the conflict.

The rules concerning detention in NIACs are less detailed. IHL applicable to NIACs does not include combatant status and therefore does not include prisoner of war status or immunity from prosecution for fighters in OAGs. In virtually all circumstances, members of OAGs fighting either government troops or another OAG will be engaging in conduct that is criminal under the state's domestic law.

Unlike in IACs, the IHL applicable to NIACs contains no express provision regulating the internment of civilians. Nevertheless, International Human Rights Law (IHRL) would apply to internment during NIACs and this means that the detention of civilians must be done in compliance with the state's human rights obligations.

The ICRC has long played a central role in ensuring that those deprived of their liberty in armed conflicts are being treated humanely and with dignity. In IAC, IHL gives the ICRC the right to access certain people, such as prisoners of war, with a view to ensuring the conditions of those detained are satisfactory and to restore contacts between prisoners and their families. While the ICRC's right of access does not expressly extend to those detained during NIACs, the organisation may offer its services.

The ICRC conducts its prison visits in accordance with the humanitarian principles discussed above (see **Part B.9** on page 23). Of particular importance are the Principles of Humanity and Neutrality. The overriding purpose of these visits is to ensure that states are treating those detained humanely and in accordance with international law. Where it finds that the conditions of detention are not acceptable, the ICRC will confidentially engage with the



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A replica of a bomb-damaged ambulance on display, promoting the *Health Care in Danger* project at the ICRC Headquarters in Geneva, Switzerland.

detaining state to improve the situation. The principle of Neutrality means that the ICRC will not take sides in political disputes by, for example, disclosing the content of these discussions.

D.2 IHL and technology

Rapid technological change has profoundly altered the nature of warfighting. IHL constantly needs to adapt to new developments in the conduct of hostilities. This section considers three contemporary challenges posed by developments in technology: **cyber attacks**; **the use of drones**; and **the prospect of autonomous weapons**.

• D.2.1 Cyber attacks and IHL

The proliferation of **information communications technology (ICT)** over the last 30 years has given rise to a new problem for IHL, the potential for attacks on ICT networks and systems within a state.

The first issue is whether an attack on ICT networks and systems alone is sufficient to trigger an armed conflict. As discussed in **Part B**, there is no minimum threshold of violence required for international armed conflict, provided there is some resort to force. This means that where the attack is carried out by a state against the ICT of another state, provided there is some physical damage or destruction, then the attack will give rise to an IAC.



The challenge is often one of attribution (*i.e. proving that the cyber-attack was perpetrated by or at least linked to state actors*).

Another difficult question is whether an attack on a state's ICT by another state that does not produce physical damage or destruction can constitute a resort to force giving rise to the existence of an armed conflict.

While there is some disagreement, the prevailing view is that, on its own, a cyber-attack that has no real world physical effects cannot constitute an armed conflict. This is based on analogies from conventional military operations and the assumption that computer data is non-physical.

There is also the prospect of attacks on ICT by non-state actors that are not attributable to a state. The threshold tests for a NIAC discussed in **Part B.4** on page 13 also apply to cyber-attacks. For IHL to apply, the attacks must have sufficient intensity and be sufficiently organised. As with IACs, it is not settled whether a cyber-attack with no physical impact would be able to meet these criteria. However, similar considerations apply to those for IACs and the prevailing view is that an attack that does not produce physical effects will not initiate a NIAC.

IHL treaties do not refer expressly to cyber warfare. However, once the threshold for an IAC or a NIAC is met, IHL applies to cyber warfare in the same way as it applies to other military operations.

In 2013, an international expert group published the **Tallinn Manual on the International Law Applicable to Cyber Warfare**. The manual was updated and amended in 2017. This manual is the most comprehensive analysis of how international law, including IHL, applies to attacks in cyberspace. More information is available at: <https://ccdcoe.org/research/tallinn-manual/>.

• D.2.2 Drones

IHL does not prohibit the use of drones (*remotely piloted aircraft*); rather, their use is regulated by the same IHL rules that apply to other weapons, in particular the rules on targeting discussed in **Part B.7**. Drones may also be unarmed and used for a number of non-combat functions, for example, surveillance.

What has been challenging is the use of drones in combat operations. Examples include the United States using drones in Afghanistan and Pakistan as part of counter-terrorism operations, and attacks by the United Kingdom against targets in Syria. The use of drones may – it is argued – make targeting more precise and lead to greater accuracy and fewer casualties. Opponents of the use of drones argue that drone attacks have killed or injured civilians in error.

Such attacks – also known as targeted killings - raise important questions as to

the relevant legal framework, in particular the application of IHRL and IHL and, if IHL applies, whether the conflict is characterised as IAC or NIAC.

For further discussion, please visit: <http://e-brief.icrc.org/wp-content/uploads/2016/09/15.-The-use-of-armed-drones-must-comply-with-laws.pdf>.

• D.2.3 Autonomous weapons

A further technological advance that may pose challenges for the application of IHL is the development of **lethal autonomous weapon systems, or LAWS**. States and other actors have begun to consider the implications of LAWS for IHL and other areas of international law.

It is important to be clear about what LAWS entail. Many systems in use today have a degree of autonomy in non-lethal functions such as movement or navigation. In principle, these do not pose any particular issues for the observance of IHL. The issue arises when autonomy is included in the critical functions of selecting and attacking targets.

The development of LAWS may improve IHL compliance. These systems may have a better capability to identify and select targets, and attack in a way that decreases the risk of harm to people and objects protected by IHL. Autonomous systems are less prone to making mistakes due to combat stress or fatigue. Similarly, emotional responses do not influence their reactions, making LAWS less likely to commit serious violations of IHL.

Notwithstanding these potential benefits, LAWS present a number of serious legal concerns. From the point of view of IHL, the removal of emotion from the battlefield may also result in removing the humanity from decisions relating to the use of lethal force. IHL requires that those who plan, decide upon and carry out attacks make certain judgments in applying the targeting rules discussed in **Part B**. Ethical considerations parallel these requirements – demanding that human agency and intention be retained in decisions to use force.

LAWS also present issues for accountability. If an autonomous system is deployed, and commits an act that would amount to a war crime if committed by a person, there are uncertainties surrounding the appropriate mechanisms for accountability. However, certain humans may bear responsibilities in the programming, development, activation and operational phases of autonomous weapon systems deployment. Moreover, the actions of LAWS may trigger state responsibility, if they were to commit violations of IHL.

For further information about LAWS, see the ICRC's report based on an expert meeting on the subject: <https://www.icrc.org/en/publication/4283-autonomous-weapons-systems>.

• D.2.4 Nuclear weapons

Since nuclear weapons were developed and first used in 1945, their regulation has been challenging. Historically, instead of prohibiting nuclear weapons (*as was the case with other weapons such as chemical or biological weapons*) attention was mainly focused on restricting the number of states that had access to nuclear weapons (*nuclear weapon states*) and the number and strength of the weapons that nuclear weapon states possessed.

The prevention of the spread of nuclear weapons to anyone except the nuclear weapon states was one of the aims of the ***Treaty on the Non-Proliferation of Nuclear Weapons, 1968***, as well as to promote negotiations for nuclear disarmament and cooperation for the purpose of the peaceful uses of nuclear energy.

Comparatively little attention was given to whether the use of nuclear weapons was regulated by IHL. However, several of the nuclear weapons states entered reservations to ***AP I***, reflecting their understanding that the rules set out in ***AP I*** apply to conventional weapons only and not to nuclear weapons. In a 1996 advisory opinion, the International Court of Justice recognised that customary IHL rules (such as proportionality and distinction) would apply to the use of nuclear weapons. However, the Court did not state that the use of nuclear weapons was prohibited or their use would be contrary to IHL in all circumstances.

In 2017, many states that do not possess nuclear weapons adopted a convention prohibiting nuclear weapons. The ***Treaty on the Prohibition of Nuclear Weapons (TPNW)*** regulates the development, testing, stockpiling and use (or threat of use) of nuclear weapons, as well as the transfer of such weapons and their stationing in the territory of a state.

The TPNW entered into force on 22 January 2021 and currently has 59 States Parties, of which 24 are member countries of the Commonwealth. The nuclear weapons states and their allies do not support the TPNW. For more information, please visit: <https://www.un.org/disarmament/wmd/nuclear/tpnw/>.

D.3 Specific protection issues

• D.3.1 Sexual violence in armed conflict

When committed in the context of an armed conflict, ***sexual violence is a war crime***, no matter against whom it is committed. While men do suffer sexual violence in conflict, in many conflict situations women and children are predominantly the victims of these crimes.

The prohibition of “*outrages upon personal dignity*” is recognised in ***Additional Protocols I and II*** as a fundamental guarantee for civilians and military personnel



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A member of the UN Task Force-Mali stands guard while other members set up a Forward Area refuelling point in February 2019.

who are no longer in the fight (e.g. *wounded personnel or prisoners of war*). The ICRC's Customary International Humanitarian Law Study considers “[r]ape and other forms of sexual violence [to be] prohibited” both in IACs and NIACs. Several human rights instruments also prohibit violence against women and children.

States have an obligation to prevent and punish rape and other inhuman and degrading sexual acts. The military manuals of numerous states regard rape, enforced prostitution and indecent assault to be prohibited and many of them specify that these acts are war crimes.

Rape and other acts of sexual violence are also included in the list of war crimes in the Rome Statute of the ICC, both in IACs and NIACs. Rape and other acts of sexual violence can also constitute crimes against humanity, including being an underlying act to establish the crime of persecution and they can constitute genocide.

A number of international initiatives aim to address the issue of sexual violence in armed conflict. These include:

- The series of resolutions adopted by the UN Security Council, following the adoption of Resolution 1325 in 2000 on Women, Peace and Security. This series of resolutions recognises the gendered dimension of conflicts and includes provisions addressing sexual violence in conflict. For further details please visit: <https://www.securitycouncilreport.org/un-documents/women-peace-and-security/>.



- The Preventing Sexual Violence in Conflict Initiative, launched by the United Kingdom in 2012. Please visit: <https://www.gov.uk/government/organisations/preventing-sexual-violence-initiative>; and
- The introduction of an International Protocol on Documentation and Investigation of Sexual Violence in Armed Conflict by the United Kingdom in 2014, as an attempt to increase prosecution of sexual violence crimes in armed conflicts. Please visit: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf, updated and amended in 2017.

- **D.3.2 Children and armed conflict**

The increase in NIACs has resulted in a corresponding growth in the exploitation of children by OAGs, including the forced abduction, recruitment and use of children to carry out or support military attacks and operations. Children are also at increased risk of sexual and other violence while under the control of an OAG.

IHL provides special protection to children in situations of armed conflicts. This protection is found in a range of specific rules. These include ensuring that children:

- can access education, food, and health care;
- are evacuated from areas where there is fighting; and
- are reunified with family if they are separated.

Additionally, schools and places of education are protected as civilian objects. Beyond this basic protection, the 2015 Safe Schools Declaration, a soft law instrument, provides states with a way to affirm their commitment to specifically protect educational facilities during armed conflict. For more details about the Safe Schools Declaration, please visit: http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf.

Children under the age of 15 must not participate in hostilities and may not be recruited into the armed forces. In the case of children between the age of 15 and 18, priority should be given to recruiting older children. Recruiting or using child soldiers is a war crime.

IHL prohibits imposing the death penalty on children under the age of 18. When children are interned, they must be interned with the parents if possible, except in temporary cases, or for medical or employment reasons. They must not be accommodated with adults (*except their parents*).

The **Convention on the Rights of the Child, 1989** and particularly the **2000 Optional Protocol on the Involvement of Children in Armed Conflict**, supplement these IHL rules and require that states take “*all feasible measures to ensure protection and care of children who are affected by armed conflict.*”



The UN Security Council has also adopted a series of resolutions addressing the challenge of protecting children in armed conflict. The UN General Assembly has created the role of the Special Representative for Children and Armed Conflict to strengthen the protection of children affected by armed conflict, raise awareness, promote the collection of information about the plight of children affected by war and foster international cooperation to improve their protection. For more details, please visit: <https://childrenandarmedconflict.un.org/about-us/>.

• D.3.3 Journalists, media professionals and armed conflict

Civilian **journalists** play an important role in armed conflict. However, they have increasingly become the target of deliberate attacks, kidnapping and detention, particularly by non-state actors. The ordinary work of media professionals – gathering information and reporting to the public from armed conflict – is civilian in nature and must be respected as such. As a result, provided they are not participating in hostilities, IHL requires that journalists are respected and protected as civilians.

This means that journalists enjoy the same protections and guarantees as civilians. Parties to a conflict are prohibited from directly and deliberately attacking journalists. Journalists should be detained only for imperative reasons of security or criminal grounds and should be released as soon as the reason for their detention no longer exists. If accused of a crime, journalists must receive a fair trial. Journalists are also entitled to humane treatment and the provision of medical care and basic sanitation while detained, and must not be subject to torture and sexual violence.

Journalists are required to respect the law and have particular responsibilities related to their professional and operational activities. Journalists are different from **war correspondents**. War correspondents are journalists who are authorised by a state to accompany that state's armed forces but without being members of the military. **Embedded journalists** is a non-legal term used to refer to media professionals accompanying armed forces. Embedded journalists are only considered war correspondents if they have official accreditation from the armed forces in which they are embedded. This distinction matters: war correspondents are entitled to prisoner of war status if detained in IAC. There is no category of war correspondents and no prisoner of war status in NIAC.

For further information, please visit:

- <https://www.icrc.org/en/doc/resources/documents/interview/protection-journalists-interview-270710.htm>
- <https://www.icrc.org/en/document/ihl-resources-media-professionals>

The 2017 Field Guide entitled **Media Professionals and Armed Conflict: Protection and Responsibilities under International Humanitarian Law** also offers useful guidance and is available at the following link: <https://www.redcross.org.uk/-/media/documents/about-us/international/ihl-field-guide-media-professionals.pdf>.



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Combined Air Operations Center (CAOC) at Al Udeid Air Base, Qatar, provides command and control of air power throughout Iraq, Syria, Afghanistan and other nations in the US Air Force Central Command region.

• D.3.4 Health care during armed conflict

Modern armed conflicts have seen an increase in attacks on medical personnel and facilities, whether as a result of a deliberate or indiscriminate attack.

The protection of those aiding the sick, wounded or shipwrecked is the most longstanding protection in IHL. Officially authorised units that provide medical assistance may use the distinctive emblems of the Geneva Conventions to indicate their protected status (see **Part B.8** on page 20). It is a war crime to attack a person or object using these emblems in accordance with international law – as is misusing the emblems during armed conflict.

Military and non-military medical personnel, units, hospitals and transports assigned to medical duties by a party to the conflict must not be targeted unless they act outside their humanitarian function and commit acts harmful to the enemy. Temporarily assigned medical personnel are entitled to the same protection for the duration of their assignment.

The parties to the conflict must permit all medical personnel to undertake their humanitarian function without impediment, except on a temporary basis for reasons of security. Moreover, parties to the conflict must take precautions to avoid exposing medical personnel to the dangers of combat. This includes not situating military objectives near medical facilities.



Medical personnel may not be punished for performing their duties, nor be compelled to act contrary to medical ethics. This includes prioritising treatment solely upon the basis of need and maintaining the confidentiality of patients.

Where a medical unit is committing acts harmful to the enemy, they may only be attacked after a warning has been given requesting that those acts be ceased and a reasonable time given to allow them to comply, unless circumstances do not permit. Military medical personnel may carry light weapons for personal defence without causing those medical personnel to lose their protection.

For further information please visit:

- <https://www.icrc.org/en/document/respecting-and-protecting-health-care-armed-conflicts-and-situations-not-covered>
- <https://www.icrc.org/en/international-review/violence-against-health-care-0>
- <https://guide-humanitarian-law.org/content/article/3/medical-personnel/>

• **D.3.5 Protecting cultural property during armed conflict**

In addition to increasing attacks on civilians and civilian objects, modern conflicts have given rise to deliberate attacks on cultural property, for example, the destruction of important monuments in the ancient city of Palmyra by ISIL.

IHL protects cultural property on the basis that damage to the cultural property of any people is an attack on the cultural heritage of all.

IHL protects cultural property in two ways:

- as a civilian object, meaning that the normal IHL protections for civilian objects apply; and
- specific protection, as reflected in several IHL treaties, in particular AP I and the ***Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, 1954*** and its Protocols (see ***Annex B***).

Attacks directed against cultural property are also considered a war crime under the Rome Statute. A state must safeguard its own cultural property against attack, for example, by moving such property away from areas of potential or actual military operations, or in the case of historical sites, by avoiding placing military objectives near to them. This requires states to take action during peacetime.

Parties to an armed conflict must not use cultural property for military purposes, must not direct hostilities against cultural property, and must avoid or minimise incidental damage to such property.

An attack on cultural property may be lawful where cultural property has been turned into a military objective and an attack would be required by “*imperative military necessity*.” Occupying powers must protect cultural property (particularly movable cultural property) under their control from theft, pillage or misappropriation.



Alongside the ICRC, the UN Educational, Scientific and Cultural Organisation (UNESCO) has a particular role in relation to the protection of cultural property during armed conflicts, including in restoring sites that have been damaged or destroyed during armed conflicts. For more information, please visit:

- <https://www.icrc.org/en/document/protection-cultural-property-armed-conflict>
- <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage>

Additionally, some countries have a **Blue Shield National Committee** which helps to protect cultural heritage – tangible and intangible – from the effects of conflict and natural disaster. The Blue Shield also promotes the ratification of, respect for, and implementation of, the **1954 Hague Convention** and its two Protocols. For more information, please visit: <https://theblueshield.org/>.

• **D.3.6 IHL and the natural environment**

Attacks on targets such as commercial oil fields in places such as Iraq, Syria and Kuwait demonstrate the possible impact of armed conflict on the natural environment and on civilian populations that depend on the environment.

International Humanitarian Law protects the natural environment both as a civilian object in its own right and because the effects of hostilities on the natural environment may adversely affect the survival of the civilian population.

IHL recognises that armies are not unrestrained in the means and methods they use to wage war. Article 35 of **AP I** provides that a state must not ‘*employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment*’.

Article 55 of **AP I** also requires states to take care ‘*to protect the natural environment against widespread, long-term and severe damage*’. This includes a prohibition on the use of methods or means of warfare that are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. A number of states are not yet party to **AP I**, while some states parties have expressed reservations which limit the application of these provisions.

The threshold for a violation of IHL is high, although some incidents have been considered as attacks on the natural environment, for example the deliberate bombing or setting alight of oil fields during the Iraqi invasion of Kuwait.

Moreover, inflicting ‘*widespread, long-term and severe*’ damage to the environment is a war crime under the Rome Statute in IACs.

For further information, please visit: <https://www.icrc.org/en/doc/war-and-law/conduct-hostilities/environment-warfare/overview-environment-and-warfare.htm>.



• D.3.7 Humanitarian access and assistance

Recent armed conflicts such as those in Syria and Yemen highlight the impact of conflict on the civilian population and the challenge of protecting the civilian population from starvation. Parties to the conflict, including states and non-state actors, have refused to allow access to affected populations, as well as attacked humanitarian actors and aid convoys, seized aid, and kidnapped or detained humanitarian personnel.

IHL requires parties to a conflict to allow impartial humanitarian assistance to civilians in need, subject to their right of control. States are primarily responsible for meeting the basic needs of civilians under their authority. However, where a state is unable or unwilling to do so, IHL contains provisions allowing and facilitating the rapid and unimpeded passage of relief consignments, personnel and equipment by other actors. The ICRC in particular has a mandate to provide humanitarian assistance in armed conflict.

Humanitarian relief organisations, including the ICRC, operate based on the consent of the relevant state, but a state should not arbitrarily withhold its consent to the provision of humanitarian assistance. The state can also include conditions on its consent, provided those conditions are required for valid reasons. Humanitarian relief personnel and their equipment should not be the object of attack; deliberate targeting of humanitarian personnel is a war crime. For more information, please visit: <https://blogs.icrc.org/ilot/2017/08/14/what-does-ihl-provide-for-in-terms-of-humanitarian-access-and-assistance/>.

Sometimes the armed forces of a state are the only actors able to provide relief to the civilian population. However, the use of military personnel to provide humanitarian assistance or to protect relief personnel may complicate the provision of humanitarian assistance. While IHL protects relief personnel from attack, IHL does not protect military personnel from attack, thus the 'militarisation' of humanitarian assistance may make operations more dangerous for relief personnel.

A possible resource for Parliamentarians interested in the use of military assets for humanitarian relief during conflict is the UN's *The Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*: please visit https://www.unocha.org/sites/unocha/files/01.%20MCDA%20Guidelines%20March%2003%20Rev1%20Jan06_0.pdf.

What can Parliamentarians do to support humanitarian access and assistance?

Parliamentarians can support the provision of humanitarian assistance by relief organisations, including the ICRC and encourage the executive to:

- call for parties to the conflict to allow rapid and unimpeded delivery of humanitarian assistance to civilians in need, subject to their legitimate control;
- support humanitarian assistance efforts including through international organisations such as the ICRC, United Nations or regional organisations; and
- condemn attacks on humanitarian relief personnel.

• D.3.8 IHL and the availability of small arms

It has long been realised that the availability of weapons in conflict zones, particularly **small arms and light weapons (SALW)**, increases the risk of civilians being targeted. **The Arms Trade Treaty, 2013 (ATT)** entered into force in 2014 and it regulates the trade in conventional weapons, including SALW, and it also requires states parties to ensure that such weapons are not:

- being used for illegal purposes (such as terrorism or human rights violations);
- traded in violation of arms embargoes;
- sent to certain actors (for example, OAGs that do not comply with IHL); or
- used in certain situations (that is, specific conflict zones).

The UN Security Council may also adopt resolutions establishing restrictions on the provision of weapons to certain states or actors, known as arms embargoes. All member states of the UN are required to give effect to these arms embargoes. Other actors, for example the European Union, and individual states, such as the United States, also impose embargoes restricting the sale of weapons to particular conflict zones or to certain actors.

Parliamentarians can support the restriction of SALW by ensuring that their state has ratified the ATT, has the necessary legislation in place (both for the ATT and for arms embargoes) and that national authorities implement and enforce the legislation. Parliamentarians can also assist their constituents, particularly those constituents that are involved in the arms trade, to understand the purpose behind the ATT and arms embargoes and to comply with regulatory requirements.

For more information, please visit:

<https://www.icrc.org/en/war-and-law/weapons/arms-availability>.

D.4 Relationship between IHL and IHRL

International Humanitarian Law (IHL) and International Human Rights Law (IHRL) are complementary bodies of law that at times may also appear to be in conflict. **The relationship between IHL and IHRL is complex and evolving.**

Until comparatively recently there was a commonly held assumption that IHRL would not apply in situations of armed conflict, which is when IHL applies. However, it is now accepted that IHRL continues to apply even when there is an armed conflict.

There are differences in when and to whom the regimes apply. IHL applies to all parties to a conflict, but only where there is an armed conflict. IHRL applies to states both in times of peace and in armed conflict, unless the state has derogated from the relevant human right (and that derogation is lawful).



IHL applies throughout the territories of the parties to the conflict, and so always applies to troops wherever they are fighting. A state's obligations under IHL, on the other hand, only apply within the territory of that state or when people are subject to the state's jurisdiction. Extraterritorial application of IHL arises in two circumstances:

- When an individual is under the authority and control of the agents of the state in question, for example where a state's armed forces detain people outside that state's territory.
- Where the state has effective control of an area outside its borders, for example, during a military occupation.

As a result, even when a state is involved in an armed conflict overseas, it will have obligations under both IHL and IHRL.

In most situations, the substantive rules of each body of law impose similar obligations. However, IHRL requires that states fulfil certain additional planning and procedural requirements. These requirements include taking steps to prevent human rights violations – either by the state's own troops or by armed groups acting within the state's jurisdiction. States must also undertake effective and independent investigations where there are credible allegations of violations of rights. Moreover, where a violation is found, the state is obliged to ensure an adequate remedy is provided, as well as making any necessary systemic changes to avoid the violation recurring.

The right to life is an example of where the two sets of rules differ. In armed conflict, parties to the conflict may use lethal force against enemy combatants and civilians who are directly participating in hostilities.

Civilian deaths may also be lawful if incidental to an attack that is otherwise not excessive in relation to the anticipated military advantage (see **Part B**). However, human rights treaties prohibit the arbitrary deprivation of life. The International Court of Justice, in its 1996 advisory opinion on the legality of nuclear weapons (see **Part D.2.4 on page 46**), has proposed that this apparent conflict is resolved by using the IHL rules of targeting to assess whether a death is 'arbitrary.' In other words, provided feasible precautions are taken to ensure that the rules of distinction and proportionality are followed, a death will not be considered a violation of the right to life under IHRL.

The IHRL system has a range of mechanisms and tribunals that allow for the resolution of claims of rights violations. This is an important point of distinction with IHL, which – except for war crimes tribunals – does not have the same institutions (see enforcement in **Part C**). This means that many incidents which occur during armed conflict are currently being considered by IHRL bodies such as the European Court of Human Rights.

For more information, please visit:

<https://www.icrc.org/en/document/ihl-human-rights-law>.



© ICRC/Photographer: Varney Bawn.

An ICRC family reunification programme at the Loguato border between Ivory Coast and Liberia.

D.5 Relationship between IHL and International Refugee Law

Wars cause displacement: people flee from violence. Modern conflicts have triggered large flows of refugees and several countries face significant numbers of refugees and **internally displaced persons (IDPs)** within their territory. However, war is not the only cause of displacement. Therefore, while IHL applies only in armed conflict, the protections for refugees and IDPs also apply in other contexts.

Refugees are those people who flee across an international boundary. Refugees are protected by international law, mainly the **Convention Relating to the Status of Refugees, 1951**, the **Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969**, and IHL. They fall under the mandate of the Office of the United Nations High Commissioner for Refugees.

IDPs are those people who flee violence, human rights violations or disasters, but remain within the territory of their own state. Not all people who flee from violence will be considered refugees. Refugee status is linked to persecution: only those who flee due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion will be considered a refugee. People who leave for other reasons, including economic reasons, will not be considered refugees but migrants. Although they may remain vulnerable to violence and exploitation, including through human trafficking, there is no international instrument that systematically protects migrants.

There is not a separate international convention protecting IDPs, although the **UN Guiding Principles on Internal Displacement, 1998** provides a



non-binding framework. There is also a recently adopted regional instrument on IDPs: the *Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009 (Kampala Convention)*, which entered into force in December 2012. National laws and IHL also protect IDPs.

IHL protects refugees, IDPs and migrants as civilians but only where they are present in a state in which an armed conflict or an occupation exists (and provided they do not take direct part in hostilities).

IHL offers protection to refugees and IDPs in two ways. First, various provisions of IHL aim to prevent displacement occurring in the first place. Such provisions include those prohibiting direct attacks on civilians or compelling civilians to leave their places of residence (subject to reasons of security or military imperative) and provisions facilitating humanitarian assistance to those in need. Second, in addition to general protections extended to all civilians, IHL gives specific protections to refugees arriving in a state where there is an IAC. For example, Article 73 of *AP I* provides that refugees must be regarded as protected persons in all circumstances and without any adverse distinction. Moreover, refugee law precludes those accused of international crimes, including serious violations of IHL, from receiving refugee status.

For further information, please visit: <https://www.icrc.org/en/document/how-does-humanitarian-law-protect-refugees-and-internally-displaced-persons-0>.

D.6 Multinational peace operations

As the nature of conflict has changed, the number of operations carried out by multinational forces has increased and the range of functions expanded. There are also increasing instances of peace operations and their personnel being targeted by parties to the conflict.

Peace operations may be conducted by or under the auspices of organisations such as the United Nations, the North Atlantic Treaty Organisation, the African Union and the European Union. Individual states can also conduct peace operations, either acting individually or collectively. Many Commonwealth member states contribute personnel, both military and civilian, to these missions and must determine which legal rules apply to their forces and activities.

Multinational operations will have different powers and legal bases, depending on their mandates. Traditional peacekeeping missions are based on state consent and the neutrality of peacekeeping forces and do not authorise the mission to use force. Other missions are based on state consent and neutrality, but are authorised to use force in self-defence or to protect civilians. Some missions may operate without the consent of the state concerned, for example, having been authorised by the UN Security Council, and are authorised to use force offensively, that is to bring about an end to hostilities. It is generally accepted that IHL may apply to a peace operation; what is unclear is when it will do so.



To determine if IHL applies to a particular operation, it is important to assess the operational context. Certain factors are pertinent, including:

- the relevant UN Security Council resolutions for the operation;
- the specific operational mandates, the role and practices actually adopted by the peace operation during the particular conflict;
- their rules of engagement and operational orders;
- the nature of the arms and equipment used by the operation; and
- the interaction between the operation and the parties involved in the conflict.

In essence, one must determine the extent to which the forces serving as part of the peace operation could be considered to have become a party to the conflict.

At one end of the spectrum, a peace operation that performs a humanitarian assistance mission or observes a ceasefire and does not use force or enter into any military engagement with the parties to the conflict cannot be considered a party to the conflict and is therefore not subject to IHL. A mission that uses force sporadically and only in self-defence is also unlikely to be considered to be a party to the conflict and subject to IHL. In contrast, where an operation is authorised to use force offensively and regularly conducts military operations against one or more parties to the conflict, it is considered a party to the conflict and is regulated by IHL.

This is an important distinction: where a peace operation has not become a party to the conflict, its personnel and material are protected by international law. For example, the ***UN Convention on the Safety of United Nations and Associated Personnel, 1994*** requires states parties to take measures to protect the safety of UN personnel, including establishing provisions allowing criminal prosecution of those attacking UN personnel. When the UN is not a party to the conflict, deliberate targeting of UN and international personnel and equipment is a violation of IHL and a war crime, including under the Rome Statute.

Where a peace operation force is participating in hostilities and is a party to the conflict, its personnel and equipment can be lawfully targeted in accordance with IHL. The mission itself should comply with IHL in its own actions, including its military actions, within territory it may occupy and in relation to detention.

Missions that do not appear to be linked to an armed conflict can involve potential application of IHL. For example, a naval vessel patrolling an area of contested waters may be subject to challenge by a vessel of another state and may have to determine whether to use force and, if so, whether IHL would apply.

For more information, please visit: <https://www.icrc.org/en/document/multinational-forces-operations>.

D.7 Private military and security companies

Another feature of modern armed conflict is the increased privatisation of war. While the use of private actors to perform functions usually performed by the



military is not new, reliance on **private military and security companies (PMSCs)** to perform combat, or combat-related, functions has grown, both in terms of the number of conflicts in which they are used, and the range of tasks they are asked to perform. Activities may include protecting military personnel and assets, training and advising armed forces, maintaining weapons systems, interrogating detainees and, on occasions, participating in hostilities.

Are such actors covered by IHL? And, if so, what are their obligations and the obligations of the state that hires them? The answers to these questions are not simple. IHL would consider a non-state actor to be bound by IHL only where it is a party to a conflict or conducts conflict-related activities. Similarly, IHL would consider an employee of a PMSC to be a civilian unless that person takes a direct part in hostilities. Therefore, whether a PMSC and its employees are subject to, and protected by, IHL will depend on their role, functions and activities.

States that employ PMSCs are required to make sure they respect IHL and that their employees are familiar with IHL rules. States that exercise jurisdiction in respect of a PMSC (*for example, as the state of incorporation*) may also have obligations to ensure that such companies and their employees respect IHL. This may include adopting legislation.

In response to the growing prevalence of PMSCs in conflicts, Switzerland and the ICRC launched an initiative that led, in September 2008, to the adoption of the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. The Montreux Document details the legal obligations of States with regard to PMSCs and their activities during armed conflict, as well as providing suggestions for best practice in how to implement those obligations.

For further details, please visit: <https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/privatization-war>.

D.8 Strengthening enforcement of IHL

Unfortunately, despite its clear legal framework, violations of IHL continue to occur, with parties to a conflict often disregarding IHL rules. As outlined in **Part C**, there are limited mechanisms for enforcing IHL.

From 2012-2015, the ICRC and Switzerland led a consultation process with states to explore prospects for enhanced or additional mechanisms to strengthen compliance with IHL. This led to an inclusive, state-driven intergovernmental process, facilitated by the ICRC and Switzerland, which aims to find ways to strengthen respect for IHL. The outcome of this process was presented at the 33rd International Conference of the Red Cross and Red Crescent in December 2019.

Efforts will continue to be made by states, both individually and collectively, to enhance implementation of IHL, at domestic, regional and international levels.

ANNEX A: GLOSSARY OF TERMS AND ABBREVIATIONS

- **AP I** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- **AP II** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
- **AP III** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem
- **ASP** Assembly of State Parties to the Rome Statute
- **ATT** Arms Trade Treaty
- **CA3** Article three common to the Geneva Conventions of 1949
- **GC III** Geneva Convention (III) relative to the Treatment of Prisoners of War
- **GC IV** Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
- **IAC** International Armed Conflict
- **ICC** International Criminal Court
- **ICRC** International Committee of the Red Cross
- **ICT** Information Communications Technology
- **IDP** Internally Displaced Person
- **IFRC** International Federation of Red Cross and Red Crescent Societies
- **IHL** International Humanitarian Law
- **IHRL** International Human Rights Law
- **ISIL** Islamic State of Iraq and the Levant
- **LAWS** Lethal Autonomous Weapon Systems
- **NIAC** Non-international Armed Conflict
- **OAG** Organised Armed Group
- **PMSC** Private military and security companies
- **Rome Statute** Rome Statute for the International Criminal Court
- **SALW** Small Arms and Light Weapons
- **TPNW** Treaty on the Prohibition of Nuclear Weapons
- **UN** United Nations
- **UN Charter** Charter of the United Nations



ANNEX B: TABLES OF SELECTED IHL AND RELATED TREATIES²

TREATIES ON THE PROTECTION OF VICTIMS OF WAR

Treaty	Summary
Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (First Geneva Convention, GC I) 1949	Protects wounded and sick combatants, the personnel attending them, the buildings in which they are sheltered and the equipment used for their benefit. Also regulates the use of the Red Cross and Red Crescent emblems.
Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (Second Geneva Convention, GC II) 1949	Extends protection to shipwrecked combatants and regulates the conditions under which they can be assisted.
Convention relative to the treatment of prisoners of war (Third Geneva Convention, GC III) 1949	Protects members of the armed forces who have been taken prisoner. Sets forth the rules governing their treatment and establishes the rights and obligations of the detaining power.
Geneva Convention on the protection of civilian persons in time of war (Fourth Geneva Convention, GC IV) 1949	Establishes the rules governing the protection of the civilian population, in particular the treatment of civilians in occupied territory, the treatment of those deprived of their liberty, and occupation in general.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (AP I), 1977	Broadens the protection extended to civilians and limits the means and methods of warfare.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the victims of non-international armed conflicts (AP II), 1977	Contains the fundamental guarantees for persons not taking part in hostilities during a non-international armed conflict, and sets forth rules relating to the protection of civilians and objects and installations essential for their survival.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (AP III), 2008	Establishes a new emblem, commonly referred to as the Red Crystal, alongside the Red Cross and the Red Crescent as a protective emblem.
Optional Protocol to the Convention on the Rights of the Child in the involvement of children in armed conflict, 2000	Requires states parties to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
Convention for the Protection of All Persons from Enforced Disappearance, 2006	Defines and prohibits enforced disappearances. It seeks to combat impunity, prevent disappearances and creates rights for victims and recognises members of the family of the disappeared person as victims.
Convention on the Rights of Persons with Disabilities, 2006	Creates protections to ensure that persons with disabilities enjoy the same standards of equality, rights and dignity as everyone else, including, in accordance with IHL, taking all necessary measures to provide for the protection and safety of persons with disabilities during situations of armed conflict.

² This annex is partially reproduced with permission from the Australian Red Cross publication, Promoting respect for international law: a handbook for Parliamentarians, published 2016, available here: https://www.redcross.org.au/getmedia/4e3605ee-99b6-4412-9cc2-31aba8876830/Australian-Handbook_2.pdf.aspx.



TREATIES RESTRICTING THE USE OF, OR PROHIBITING, CERTAIN WEAPONS

Treaty	Summary
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, 1972	Prohibits states from developing, producing, stockpiling or otherwise acquiring or retaining: <ul style="list-style-type: none"> ▪ Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; ▪ Weapons, equipment or means of delivery designed to use such agents or toxins for hostile
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, 1980 and amended in 2001	Establishes the framework for the protocols prohibiting the use of certain weapons. There are currently five protocols under this Convention.
Protocol I: Protocol on non-detectable fragments, 1980	Prohibits the use of weapons that injure by fragments that cannot be detected by X-rays.
Protocol II: Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices, 1980 and amended in 1996	Prohibits the use of mines, booby-traps and other devices against the civilian population and restricts their use against military targets. The amended Protocol further extends the prohibition of those devices and extends its scope to NIACs.
Protocol III: Protocol on prohibitions or restrictions on the use of incendiary weapons, 1980	Prohibits the use of incendiary weapons (weapons designed to use fire and heat, such as napalm, thermite, magnesium powder, chlorine trifluoride, or white phosphorus) against civilians and civilian objects and restricts their use against military targets.
Protocol IV: Protocol on blinding laser weapons, 1995	Prohibits the use of laser weapons that are designed specifically to cause permanent blindness.
Protocol V: Protocol on explosive remnants of war, 2003	Allocates responsibility for explosive remnants of war and facilitates the marking and clearance, removal or destruction of explosive remnants of war such as unexploded artillery shells, mortar shells, hand grenades, cluster munitions, bombs and similar weapons that are often found at the end of active hostilities.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, 1993	Prohibits chemical weapons.
Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and their destruction (Ottawa Convention), 1997	Prohibits anti-personnel mines (landmines).
Convention on Cluster Munitions (Oslo Convention), 2008	Prohibits the use, production, stockpiling and development of cluster munitions that cause severe structural damage, injury, loss and death to civilian populations during armed conflict.
Arms Trade Treaty, 2013	Creates common international standards for the transfer of conventional arms and includes prohibitions on transfers when there is a defined risk that serious violations of IHL or of IHRL will occur.
Treaty on the Prohibition of Nuclear Weapons, 2017	Regulates the development, testing, stockpiling and use (or threat of use) of nuclear weapons, as well as the transfer of such weapons and their stationing in the territory of a state.



TREATIES ON THE PROTECTION OF CERTAIN OBJECTS AND THE NATURAL ENVIRONMENT

Treaty	Summary
Convention for the protection of cultural property in the event of armed conflict, 1954	Protects movable and immovable property such as monuments of architecture, art or history, works of art, manuscripts, archaeological sites, collections of books, archives, scientific material and other objects of artistic, historical or archaeological interest and the buildings intended to preserve or exhibit these. Requires that states safeguard cultural property within their own territory during peacetime, including by prohibiting and preventing theft, misappropriation and vandalism. During armed conflict states must respect cultural property within their own territory as well as within the territory of other states and must refrain from directing acts of hostility against cultural property.
First Protocol for the protection of cultural property in the event of armed conflict, 1954	Provides for the prevention of the export of cultural property from occupied territory, and for the safeguarding and return of such property.
Second Protocol for the protection of cultural property in the event of armed conflict, 1999	Creates a new category of 'enhanced protection' and strengthens the repression of violations.
Convention on the prohibition of military or any other hostile use of environmental modification techniques, 1976 (ENMOD Convention)	Prohibits the military or any other hostile use, as a weapon of war, of environmental or geophysical modification techniques having widespread, lasting or severe effects.

TREATY ENFORCEMENT MECHANISMS

Treaty	Summary
Statute of the International Criminal Court (Rome Statute), 1998	Establishes a permanent international criminal court with jurisdiction for the crime of genocide, war crimes, crimes against humanity and the crime of aggression.



ANNEX C: PARTICIPATION OF COMMONWEALTH COUNTRIES IN TREATIES

Country	GC I-IV 1949	AP I 1977	AP I declaration (Art 90)	AP II 1977	AP III 2005	Convention on the Rights of the Child, 1989	Optional Protocol to CRC on children in armed conflict, 2000	Rome Statute (ICC) 1998	Hague Convention – cultural property, 1954	Hague Protocol 1954	Hague Protocol II 1999
Antigua and Barbuda	Yes	Yes		Yes		Yes		Yes			
Australia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		
Bahamas	Yes	Yes		Yes		Yes	Yes	Sign			
Bangladesh	Yes	Yes		Yes		Yes	Yes	Yes	Yes	Yes	
Barbados	Yes	Yes		Yes		Yes		Yes	Yes	Yes	Yes
Belize	Yes	Yes		Yes	Yes	Yes	Yes	Yes			
Botswana	Yes	Yes		Yes		Yes	Yes	Yes	Yes	Yes	
Brunei Darussalam	Yes	Yes		Yes		Yes	Yes				
Cameroon	Yes	Yes		Yes		Yes	Yes	Sign	Yes	Yes	
Canada	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Cyprus	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Dominica	Yes	Yes		Yes		Yes	Yes	Yes			
Eswatini	Yes	Yes		Yes		Yes	Yes				
Fiji	Yes	Yes		Yes	Yes	Yes	Sign	Yes			
The Gambia	Yes	Yes		Yes		Yes	Sign	Yes			
Ghana	Yes	Yes		Yes	Sign	Yes	Yes	Yes	Yes	Yes	Sign
Grenada	Yes	Yes		Yes		Yes	Yes	Yes			
Guyana	Yes	Yes		Yes	Yes	Yes	Yes	Yes			
India	Yes					Yes	Yes		Yes	Yes	
Jamaica	Yes	Yes		Yes	Sign	Yes	Yes	Sign			
Kenya	Yes	Yes		Yes	Yes	Yes	Yes	Yes			
Kiribati	Yes					Yes	Yes	Yes			
Lesotho	Yes	Yes	Yes	Yes		Yes	Yes	Yes			
Malawi	Yes	Yes	Yes	Yes		Yes	Yes	Yes			
Malaysia	Yes					Yes	Yes	Yes	Yes	Yes	
The Maldives	Yes	Yes		Yes		Yes	Yes	Yes			
Malta	Yes	Yes	Yes	Yes	Sign	Yes	Yes	Yes			
Mauritius	Yes	Yes		Yes		Yes	Yes	Yes	Yes		
Mozambique	Yes	Yes		Yes		Yes	Yes	Sign			
Namibia	Yes	Yes	Yes	Yes		Yes	Yes	Yes			
Nauru	Yes	Yes		Yes	Yes	Yes	Sign	Yes			
New Zealand	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Nigeria	Yes	Yes		Yes		Yes	Yes	Yes	Yes	Yes	Yes
Pakistan	Yes	Sign		Sign		Yes	Yes		Yes	Yes	Sign
Papua New Guinea	Yes					Yes					
Rwanda	Yes	Yes	Yes	Yes		Yes	Yes		Yes		
St Kitts and Nevis	Yes	Yes	Yes	Yes		Yes		Yes			
St Lucia	Yes	Yes		Yes		Yes	Yes	Yes			
St Vincent and the Grenadines	Yes	Yes	Yes	Yes		Yes	Yes	Yes			
Samoa	Yes	Yes		Yes		Yes	Yes	Yes			
Seychelles	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes		
Sierra Leone	Yes	Yes		Yes	Sign	Yes	Yes	Yes			
Singapore	Yes				Yes	Yes	Yes				
Solomon Islands	Yes	Yes		Yes		Yes	Sign	Sign			
South Africa	Yes	Yes		Yes		Yes	Yes	Yes	Yes		Yes
Sri Lanka	Yes					Yes	Yes		Yes		
Tanzania	Yes	Yes		Yes	Sign	Yes	Yes	Yes	Yes		
Tonga	Yes	Yes	Yes	Yes		Yes					
Trinidad and Tobago	Yes	Yes	Yes	Yes		Yes		Yes			
Tuvalu	Yes					Yes					
Uganda	Yes	Yes		Yes	Yes	Yes	Yes	Yes			
United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Vanuatu	Yes	Yes		Yes		Yes	Yes	Yes			
Zambia	Yes	Yes		Yes		Yes	Sign	Yes			

TABLE OF RATIFICATION, ACCESSION AND SIGNATURE IN COMMONWEALTH COUNTRIES

	ENMOD Conv 1976	Geneva Gas Protocol, 1925	BWC 1972	CCW 1980	CCW Prot I 1980	CCW Prot II 1980	CCW Prot III 1980	CCW Prot IV 1995	CCW Prot II amdt 1996	CCW amdt 2001	CCW Prot V 2003	CWC 1993	Anti-personnel Mine Band Treaty, 1997	Cluster Munitions Convention, 2008	ATT, 2013	TPNW, 2017	Country
	Yes	Yes	Yes	Yes	Yes		Yes	Yes				Yes	Yes	Yes	Yes	Yes	▪ Antigua and Barbuda
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		▪ Australia
			Yes									Yes	Yes		Yes		▪ Bahamas
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Sign	Yes	▪ Bangladesh
		Yes	Yes									Yes	Yes		Yes		▪ Barbados
			Yes									Yes	Yes	Yes	Yes	Yes	▪ Belize
			Yes									Yes	Yes	Yes	Yes	Yes	▪ Botswana
			Yes									Yes	Yes			Sign	▪ Brunei Darussalam
	Yes	Yes	Yes	Yes				Yes	Yes		Yes	Yes	Yes	Yes	Yes		▪ Cameroon
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		▪ Canada
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Sign	Yes		▪ Cyprus
	Yes											Yes	Yes		Yes	Yes	▪ Dominica
		Yes	Yes									Yes	Yes	Yes	Sign		▪ Eswatini
		Yes	Yes									Yes	Yes	Yes		Yes	▪ Fiji
		Yes	Yes									Yes	Yes	Yes		Yes	▪ The Gambia
	Yes	Yes	Yes									Yes	Yes	Yes	Yes	Sign	▪ Ghana
		Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		▪ Grenada
			Yes									Yes	Yes	Yes	Yes	Yes	▪ Guyana
	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes					▪ India
		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Sign	Yes	Yes	▪ Jamaica
		Yes	Yes									Yes	Yes	Sign			▪ Kenya
												Yes	Yes		Sign	Yes	▪ Kiribati
		Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	▪ Lesotho
	Yes	Yes	Yes									Yes	Yes	Yes	Sign	Sign	▪ Malawi
		Yes	Yes									Yes	Yes		Sign	Yes	▪ Malaysia
		Yes	Yes	Yes	Yes		Yes	Yes	Yes			Yes	Yes	Yes	Yes	Yes	▪ The Maldives
		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	▪ Malta
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes		▪ Mauritius
			Yes									Yes	Yes	Yes	Yes		▪ Mozambique
												Yes	Yes	Yes	Yes	Yes	▪ Namibia
			Yes	Yes	Yes	Yes	Yes	Yes	Yes			Yes	Yes	Yes	Sign	Yes	▪ Nauru
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	▪ New Zealand
		Yes	Yes	Sign								Yes	Yes	Sign	Yes	Yes	▪ Nigeria
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes					▪ Pakistan
	Yes	Yes	Yes									Yes	Yes				▪ Papua New Guinea
		Yes	Yes									Yes	Yes	Yes	Sign		▪ Rwanda
		Yes	Yes									Yes	Yes	Yes	Yes	Yes	▪ St Kitts and Nevis
	Yes	Yes	Yes									Yes	Yes	Yes	Yes	Yes	▪ St Lucia
	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	▪ St Vincent and the Grenadines
			Yes									Yes	Yes	Yes	Yes	Yes	▪ Samoa
			Yes	Yes	Yes	Yes	Yes	Yes	Yes			Yes	Yes	Yes	Yes	Yes	▪ Seychelles
	Sign	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		▪ Sierra Leone
			Yes									Yes			Sign		▪ Singapore
	Yes	Yes	Yes									Yes	Yes				▪ Solomon Islands
		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	▪ South Africa
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes			▪ Sri Lanka
		Yes	Yes									Yes	Yes	Sign	Sign		▪ Tanzania
		Yes	Yes									Yes					▪ Tonga
		Yes	Yes									Yes	Yes	Yes	Yes	Yes	▪ Trinidad and Tobago
												Yes	Yes		Yes	Yes	▪ Tuvalu
	Sign	Yes	Yes	Yes	Yes	Yes	Yes					Yes	Yes	Sign			▪ Uganda
	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes		▪ United Kingdom
			Yes									Yes	Yes		Sign	Yes	▪ Vanuatu
			Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes		▪ Zambia

This table is accurate as at December 2021, based on the ICRC treaty ratification database. For updated information refer to the treaty database, which can be searched by topic (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/fw.TreatiesByTopic.xsp>) or by country (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/fw.TreatiesByCountry.xsp>).

ANNEX D: BECOMING A PARTY TO A TREATY

This annex provides additional information as to how a state can become a party to a treaty. A state can become a party to a treaty in three ways: **ratification**, **accession** and **succession**.

As shown in **Figure 3** opposite, ratification occurs when a state joins a treaty regime that it has signed. When a multilateral treaty (i.e. more than two states concerned) is created, states first negotiate and agree the text of the treaty, which is then adopted. States may then sign the treaty, which signals acceptance of the text and the intention to be bound by the treaty once it is in force.

For some states, after signature the Executive can ratify a treaty by filing an instrument of ratification, which signals that the state considers itself to be bound by the treaty's provisions.

Other states may be required to submit the draft treaty to some form of review before ratification, which may include parliamentary involvement. This is particularly the case where the treaty will require national legislation to make sure the state can comply with the treaty obligations. Once that review process is completed, in some states the Executive may then proceed to deposit an instrument of ratification. In other states, the decision to ratify a treaty may be taken by Parliament.

In dualist states, the decision to ratify a treaty is distinct from adopting legislation to give effect to a treaty (implementing legislation). Several states (mainly common law states), for example the United Kingdom, will normally be required to enact implementing legislation before depositing the instrument of ratification to make sure that national law is compliant before accepting the treaty obligations.

Accession to a treaty occurs when a state joins a treaty regime to which it is not a signatory. Accession generally follows a similar process to ratification.

Succession occurs where one state replaces another in the responsibility for the international relations of territory, for example, the dissolution of Czechoslovakia into two separate states. The succeeding state may accept to be bound by the treaty obligations of the former state.

The effect of a treaty as a matter of national law varies. Not all of the IHL treaties require implementation in international law, but many do. Similarly, not all provisions of a treaty require domestic implementation.

For some states (monist systems), all international treaties take effect in national law as soon as they become binding for that state without any Executive or Legislative action required. For other states (dualist systems, mainly common law countries), a treaty does not have any effect in national law without implementing legislation. Other states are somewhere in between, with some types of treaties, but not others, having direct effect in national law. However, even in states where a treaty has direct effect in national law, the nature of some of the IHL obligations may still require implementation, for example the creation of criminal offences in national law to incorporate the grave breaches provisions of the Geneva Conventions.

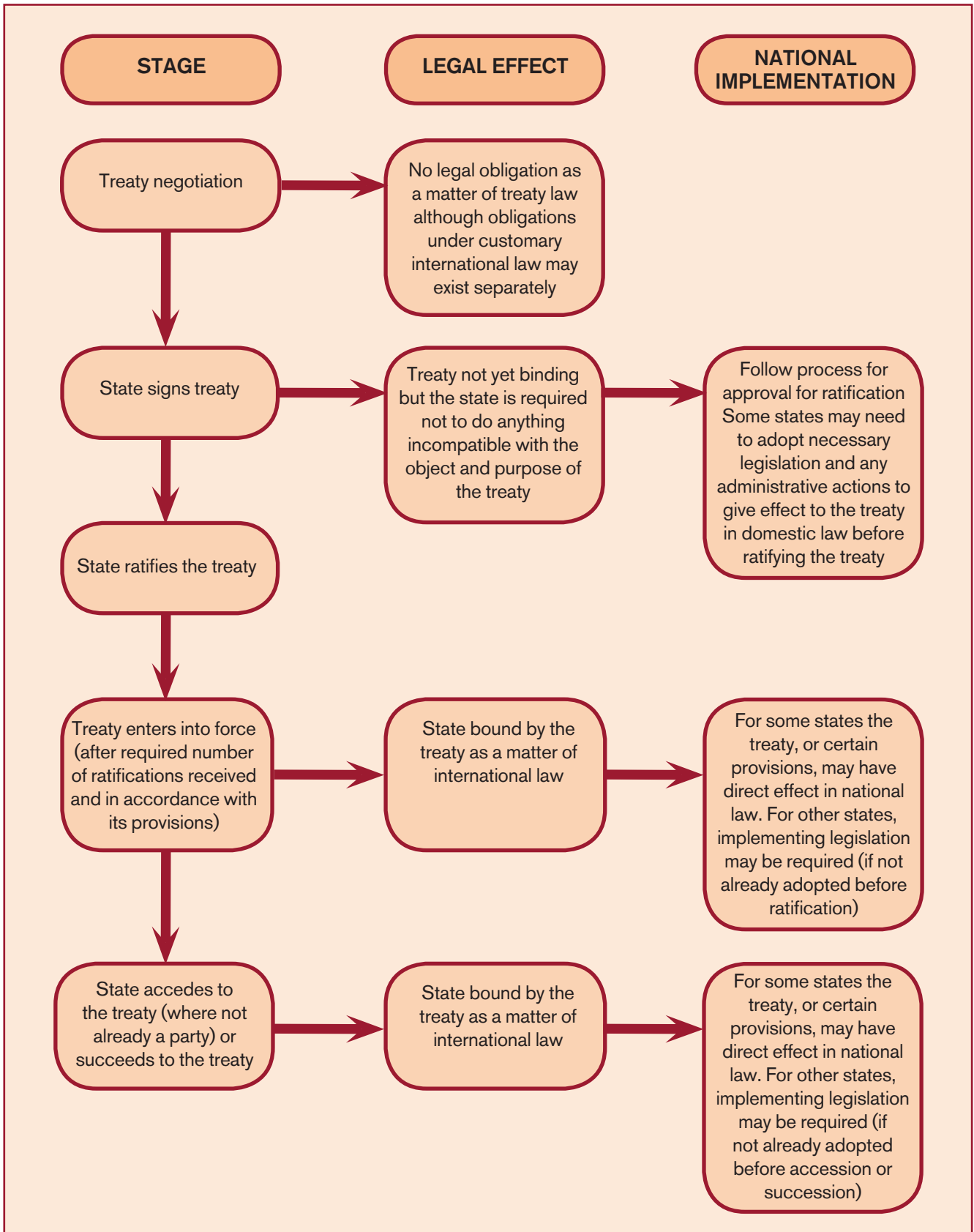
As a matter of international law, the provisions of the treaty formally bind a state only when the treaty enters into force, generally after a specified number of states have ratified the treaty. Until the treaty enters into force, state parties are required not to act in a manner inconsistent with the object and purpose of the treaty. Importantly, treaties bind only those states that are party to that treaty; the provisions of a treaty do not bind non-party states and non-state entities.

Depending on the terms of the treaty, states may file a reservation when ratifying or acceding to the treaty. Reservations intend to limit or modify the application of one or more obligations in the treaty to that state. States may also make interpretive declarations, which indicate the understanding of the state of a particular provision in a treaty.

Reservations apply on a reciprocal basis; that is, where a state makes a reservation, other states are able to rely on the same reservation against that state. This means that reservations (and interpretative declarations) can have the effect of either clarifying or reducing the scope of protections offered by a treaty by modifying the obligations of states parties to the treaty. For this reason, some IHL treaties preclude reservations completely, or limit a state's ability to make reservations to particular issues.



FIGURE 3: PROCESS OF BECOMING PARTY TO A TREATY





ANNEX E: COMMONWEALTH COUNTRIES WITH NATIONAL IHL COMMITTEES (OR SIMILAR IHL BODIES)

This list is current as at *25 January 2021* and was drawn from the ICRC document: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>. The ICRC list also provides details of legal basis, membership, mandate and contacts.

- Australia
- Bangladesh
- Botswana
- Canada
- Cook Islands
- Cyprus
- Eswatini
- Gambia
- Kenya
- Kiribati
- Lesotho
- Malawi
- Malaysia
- Mauritius
- Namibia
- New Zealand
- Nigeria
- Papua New Guinea
- Samoa
- Seychelles
- Sierra Leone
- South Africa
- Sri Lanka
- Trinidad and Tobago
- Uganda
- United Kingdom
- Vanuatu
- Zambia

ANNEX F: USEFUL RESOURCES ON INTERNATIONAL HUMANITARIAN LAW FOR PARLIAMENTARIANS

INSTITUTIONS AND PORTALS

Institution	Description	Website link
ICRC – war and law	ICRC’s website section that discusses IHL and humanitarian policy	▪ https://www.icrc.org/en/war-and-law
ICRC – e-briefing series	This e-briefing series provides a range of reference material, conference proceedings and blogs that give an overview to key IHL topics.	▪ http://e-brief.icrc.org
International Criminal Court	Permanent court for violations of IHL and other international crimes	▪ https://www.icc-cpi.int
International Humanitarian Fact Finding Commission	Website for the Commission, with details of mandate, states parties and activities.	▪ https://www.ihffc.org

TREATIES AND CUSTOMARY IHL

Institution	Description	Website link
ICRC IHL treaty database	Current information on the main IHL treaties and related instruments, including the text of the treaty, details as to states parties, entry into force, reservations and links to expert commentaries on several treaties. Searchable by treaty and by country, this is where you can determine if your state is party to a particular IHL treaty.	▪ https://ihl-databases.icrc.org/ihl
Treaty ratification kits	The ICRC provides ratification kits for some major IHL treaties, including model instruments of ratification and accession, as well as fact sheets and other guidance.	▪ https://www.icrc.org/en/war-and-law/ihl-domestic-law/documentation ▪ https://www.icrc.org/en/document/national-implementation-ihl-ratification-kits
ICRC Customary IHL Study	The ICRC study on customary IHL rules, including discussion of the rules and details of supporting national practice. Updated regularly.	▪ https://ihl-databases.icrc.org/customary-ihl/eng/docs/home



HANDBOOKS AND GUIDES FOR PARLIAMENTARIANS

Institution	Description	Website link
The Commonwealth Secretariat: International Humanitarian Law and International Criminal Justice: An Introductory Handbook	Handbook providing an overview of IHL and international criminal justice, in particular the ICC.	▪ http://thecommonwealth.org/sites/default/files/inline/Law%2BIntroductory%2BHandbook%2BEB.pdf
Inter-Parliamentary Union and ICRC, International Humanitarian Law Handbook for Parliamentarians	This detailed handbook is designed to familiarize Parliamentarians with international humanitarian law and to heighten their awareness of the key role they, as political leaders, can play in promoting its implementation, especially by adopting appropriate national legislation.	▪ https://www.icrc.org/en/publication/1090-respect-international-humanitarian-law
ICRC Fact sheet: the role of parliamentarians in implementing IHL	A brief fact sheet on the key roles Parliamentarians can play in implementing IHL.	▪ https://www.icrc.org/en/document/role-parliamentarians-implementing-international-humanitarian-law
UK, House of Commons, Library	Briefing paper providing a basic introduction to IHL	▪ https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7429#fullreport
Australian Red Cross	Handbook providing an introduction of IHL to Parliamentarians.	▪ https://www.redcross.org.au/getmedia/4e3605ee-99b6-4412-9cc2-31aba8876830/Australian-Handbook_2.pdf.aspx
Australian Red Cross Pacific Handbooks	A series of guides and handbooks for Parliamentarians in specific Pacific Island nations, with details of relevance of IHL for that country as well as details of domestic implementation.	▪ https://www.redcross.org.au/about/how-we-help/ihl-resources/pacific-handbooks
Kiribati Guide to the Red Cross Movement		▪ https://www.redcross.org.au/getmedia/65d8aa3b-483a-41dd-a5a9-9972dff3edc3/Kiribati-Guide.PDF.aspx
Tuvalu Guide to the Red Cross Movement		▪ https://www.redcross.org.au/getmedia/bbd16c9f-dfa2-4f54-a99f-282369be13e3/Tuvalu-Guide-to-the-Movement.pdf.aspx
Samoa Handbook on IHL		▪ https://www.redcross.org.au/getmedia/40c09c76-7f93-423b-9e3f-1b772bbbe1d5/20120628-Samoa-IHL-HBook.pdf.aspx
Solomon Islands Handbook on IHL		▪ https://www.redcross.org.au/getmedia/345ec7d3-0a63-4ca1-a91b-52133c3c2de1/20110328Solomon-Islands-IHL-HBook.pdf.aspx
Papua New Guinea Handbook on IHL		▪ https://www.redcross.org.au/getmedia/8515168f-cc11-4a32-a4cd-416f6e3fb1e1/PNG-IHL-Handbook-Web.pdf.aspx
Vanuatu Handbook on IHL		▪ https://www.redcross.org.au/getmedia/c6d54aa4-1eca-4676-ba3d-0f7f61c868df/Vanuatu-Handbook-web.pdf.aspx
Tonga Handbook on IHL		▪ https://www.redcross.org.au/getmedia/76c18a7f-4bf1-4e31-afe1-975bde789a74/Tonga-Handbook-web.pdf.aspx
Namibia Red Cross Handbook	Handbook for Parliamentarians in Namibia, with details of national implementation.	▪ http://redcross.org.na/files/downloads/Parliamentary%20handbook.pdf



DOMESTIC IMPLEMENTATION

Institution	Description	Website link
ICRC – IHL and domestic law	Main ICRC webpage for information on IHL and domestic law	▪ https://www.icrc.org/en/war-and-law/ihl-domestic-law
ICRC national implementation database	Database of national implementation of IHL, based on information collected by the ICRC’s legal advisory service and provided to it by states. Searchable by treaty and by country, this database is where you will find details of national implementing legislation and decisions of national courts and tribunals.	▪ https://ihl-databases.icrc.org/ihl-nat
ICRC Manual on the Domestic Implementation of IHL	A practical tool to assist policy-makers, legislators and other stakeholders worldwide in adhering to IHL instruments and implementing them domestically.	▪ https://www.icrc.org/en/publication/dvd40-domestic-implementation-international-humanitarian-law-cd-version-including-links
ICRC Advisory Service on IHL	The Advisory Service assists states to implement IHL at the national level by providing guidance, legal advice and technical support to national authorities on specific domestic implementation measures needed to meet their IHL obligations.	▪ https://www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law
Model laws	The ICRC provides a range of model laws for major IHL treaties to enable the adoption of domestic legislation.	▪ https://www.icrc.org/en/document/national-implementation-ihl-model-laws
Commonwealth model law on implementing the Rome Statute of the ICC	Model law drafted by a group of experts for the Commonwealth Secretariat.	▪ http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_ROL_Model_Rome_Statute.pdf
National Societies	Directory of National Societies maintained by the IFRC. Many National Societies will have further information about that country’s membership of IHL treaties and domestic implementation.	▪ https://media.ifrc.org/ifrc/who-we-are/national-societies/national-societies-directory/
National IHL Committees	Table of states that have established a National IHL Committee or similar body, with contact details.	▪ https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law
National IHL Committees	The ICRC website also provides guiding principles for how to establish and organise a National IHL Committee.	▪ https://www.icrc.org/en/war-and-law/ihl-domestic-law/national-committees ▪ https://www.icrc.org/en/doc/resources/documents/misc/guiding_principles_national_committees.htm

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- Small Branches Strategic Plan 2021 - 2023**
- Recommended Benchmarks for Democratic Legislatures**
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