



# IHL AND ISLAMIC LAW IN CONTEMPORARY ARMED CONFLICTS

EXPERTS' WORKSHOP  
GENEVA, 29–30 OCTOBER 2018

Report prepared and edited by Ahmed Aldawoody  
Legal Adviser (Islamic Law and Jurisprudence), ICRC



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We would like to express our gratitude, first of all, to the experts and our colleagues at the ICRC who participated in the workshop. Special thanks go to Cristina Pellandini, the former head of the ICRC's Advisory Service on international humanitarian law, and Dominique Loye, Deputy Director for International Law and Policy: their support during the early stages of planning and organizing the workshop was crucial. Jacqueline Aeschimann, assistant and information manager, organized and oversaw all the logistical aspects of this meeting: many thanks to her as well. Silvia Scozia, former legal associate at the Advisory Service, and Kevin Karlen, the current legal associate, provided invaluable help in coordinating various aspects of the workshop: we are grateful to them. We would also like to thank all the legal associates who served as note-takers during the workshop, and Lucie Boitard, legal project manager, for all her help.

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International Committee of the Red Cross

# FOREWORD

## **Peter Maurer, President of the ICRC**

As the reference organization on international humanitarian law (IHL), the International Committee of the Red Cross (ICRC) works to ensure adherence to the rules, norms and conduct that limit the impact of armed conflict. Given the immense suffering caused by conflict, it is critical that we find common perspectives on preventing violations of IHL and protecting human dignity.

Individuals and communities affected by conflict, and influential local actors, play a crucial role in cultivating respect for the law. This is why we believe so strongly in building trustful relationships with cultural and religious actors, and why we engage in constructive dialogue on working together to uphold IHL, and thus prevent violations and protect communities.

Already in 1954, the ICRC was advocating the importance of engaging on humanitarian values with other cultures. Rodolfo Olgiate, a member of the Committee at the time, saw that all the great religions of the world contained the equivalent of the International Red Cross and Red Crescent Movement's ideals, and recognized the opportunity this presented for closer cooperation with faith actors.<sup>1</sup>

Since then, the many links between IHL and the world's various faiths have revealed themselves on numerous occasions, enabling us to reaffirm our common objective – to prevent and alleviate human suffering wherever it might be found, and to protect life and health, and ensure respect for the human being – and discover new possibilities for working together to realize this objective.

The ICRC has, for almost three decades now, engaged Muslim scholars and Islamic institutions in dialogue on IHL and humanitarian action, in order to find common perspectives on assisting and protecting people affected by armed conflict.

Furthering this engagement is vital for practical and operational reasons. Islamic law plays a major role in the lives of most of the 1.7 billion Muslims in the world. We know that the equivalent of the Movement's ideals exists in Islam: centuries before the development of IHL, Islamic law sought to humanize armed conflict.

IHL and the Islamic law of armed conflict have the same underlying objectives, and Islamic law has developed detailed rules to regulate the use of force during war. Since two-thirds of all conflicts are taking place in Muslim countries, we need to strengthen our grasp of Islamic law, and acquire some degree of expertise in it, to do our work more effectively.

The ICRC is committed to stepping up dialogue with Islamic circles as part of its broader aim to engage religious leaders on humanitarian issues. The experts' workshop on IHL and Islamic law in armed conflicts, which was held in Geneva in October 2018, was a valuable contribution to furthering discussion of the Islamic law of armed conflict. All the participants in the workshop expressed a wish to communicate the results of their deliberations to a wider audience.

The following report summarizes the proceedings of the workshop. It introduces the points of convergence and divergence between Islamic law and IHL in relation to five specific operational areas that are at the core of the ICRC's work. The discussions that took place at the workshop can serve as a stimulus to further research and as a basis for improved cooperation with the ICRC's contacts in the Muslim world.

We again thank all the experts who contributed to the workshop and to this publication, not only for their participation, but also for their commitment to continuing their engagement with us and for joining us in believing that together we can improve the lives of millions of people affected by armed conflict.

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<sup>1</sup> *Tribune de Genève*, "La Croix-Rouge doit comprendre les croyances étrangères à l'Occident", 28 October 1954.

# INTRODUCTION

## **Ahmed Aldawoody, Legal Adviser (Islamic Law and Jurisprudence), ICRC Advisory Service on IHL**

The ICRC's mission is to protect the lives and dignity of victims of armed conflict and other situations of violence, and to prevent suffering by promoting and strengthening international humanitarian law (IHL) and universal humanitarian principles. Ensuring respect for IHL during armed conflicts remains a challenging task. All too often, civilians – as a result of deliberate targeting, forced displacement, sexual violence or the destruction of civilian and cultural property – are the main victims of these conflicts.

At present, about two-thirds of the ICRC's operations are in Muslim countries where armed conflicts are in progress; the ICRC allocates a similar proportion of its budget to these operations. For almost three decades now, the ICRC has been involving or seeking to involve Islamic institutions and scholars in its efforts to protect and assist victims of armed conflict in these countries. Islamic law is one of the oldest legal systems in existence, and has developed detailed rules regulating warfare. Therefore, it is of paramount importance that the ICRC – its legal and operational expertise notwithstanding – engage with experts of various kinds in the Islamic world and draw on their knowledge in order to enhance respect for IHL and alleviate the suffering of victims of armed conflicts in Muslim countries.

This workshop brought together leading experts in Islamic law and IHL from 23 countries – in Africa, the Middle East, Asia, Europe, and North America – and enabled them to discuss a number of specific challenges relating to IHL in contemporary armed conflicts. Every corner of the Muslim world was represented; there were also experts in Islamic law from Europe, Australia and North America. The diversity of the participants' areas of expertise and professional backgrounds – some were academics and others were from various Islamic and international institutions and organizations – greatly enriched discussions at the workshop on the complex challenges that arise in contemporary armed conflicts.

The workshop covered five topics of contemporary interest and concern: conduct of hostilities, protection of health care, detention in armed conflict, special protection of children, and proper and dignified management of the dead.

The workshop paved the way for enhancing collaboration between scholars of Islamic law and the ICRC. Its overall objectives were to strengthen cooperation between experts in IHL and scholars of Islamic law, and to give experts in Islamic law an opportunity to discuss the operational and legal challenges confronting the ICRC in Muslim contexts. Its specific objectives were to:

1. enable IHL experts and experts in Islamic law to discuss IHL-related challenges arising in contemporary armed conflicts, particularly in the Muslim world, and the ICRC's activities in this regard
2. enrich the ICRC's regional strategies and policies with recommendations made by experts in Islamic law
3. stimulate interest in carrying out scholarly or expert research on the operational and legal issues to be discussed at the workshop
4. explore possibilities for cooperation between the ICRC and experts in Islamic law in their personal capacities and/or with their institutions
5. raise topics for discussion at future workshops for experts on Islamic law and IHL.

This report is divided into three parts: Part I consists of presentations introducing the ICRC's operations in Muslim contexts: Yves Daccord, the director-general of the ICRC, and Anne Quintin, the head of the ICRC's Advisory Service on IHL, made these presentations. Mr Daccord focused on the importance of the ICRC's dialogue with Islamic institutions and scholars; he also described the complexity of the ICRC's working environment and suggested ways to provide more effective protection and assistance for people affected by armed conflict. Dr Quintin described certain common trends in contemporary armed conflict that were also observable in Muslim contexts.

Part II consists of the texts of the presentations made by the speakers in six sessions and summaries of the discussions that followed each presentation. Two presentations were made during the first session. The first was a brief description of IHL – as a body of law that regulated armed conflict – and touched briefly on the challenges it faces currently; Lindsey Cameron, the head of the ICRC’s Unit of Thematic Legal Advisers, made this presentation. The second presentation was made by Ahmed Aldawoody, the ICRC’s legal adviser on Islamic law and jurisprudence: it introduced the various humanitarian principles enshrined in Islamic law that can help strengthen respect for IHL in contemporary armed conflicts in Muslim contexts and alleviate the suffering of people affected. The aim of these two presentations was to establish a context for discussing five specific challenges confronting the ICRC during armed conflicts. The other five sessions consisted of presentations addressing these five challenges from the perspectives of IHL, Islamic law, and operational expertise.

Part III contains the conclusions and recommendations of the workshop. The agenda of the workshop and the list of participants are provided in Annexes 1 and 2.

# PART I

## 1. WELCOME ADDRESS

### **Yves Daccord, Director-General of the ICRC**

The ICRC has developed a very rich and fruitful dialogue with Islamic institutions and scholars. This has been essential to the success of our work – not just for us as an organization, but also for the people affected by conflict. Having worked at the ICRC for over 20 years, I can confirm that this dialogue has greatly assisted our efforts to protect and assist people in need. This workshop is pivotal: it represents not just the continuation of our efforts, but is a milestone in the ICRC's efforts to reach a better understanding of Islamic law and its commonalities with international humanitarian law (IHL).

We are living at a time when there is little consensus at the multilateral level, and few solutions are being produced. This is likely to be the case for the foreseeable future. Conflict, as we all recognize, has become more and more complex and fragmented. States use non-State proxies and private organizations to fight on their behalf or in their interests. At the same time, a shift has taken place in the way hostilities are conducted. Ancient means of warfare are posing new challenges, such as besiegement and the cutting of water supplies. Civilians are, increasingly, bearing the brunt of conflict: between 2010 and 2016, the number of civilian deaths caused by armed conflict more than doubled. Almost 70% of ICRC's budget in the field is allocated to Muslim countries.

In this complex environment, our organization has had to make some choices. We are absolutely committed to our principles. It is not enough, however, to just say that we are neutral, independent and impartial. We must consistently turn these words into meaningful action. This is critical for us. We must do this if we want to continue to be at the front lines of armed conflict, to be close to the people suffering the effects of such conflict, and to do everything in our power to understand and respond to their needs. Such physical proximity is becoming rare in humanitarian action: many organizations now – and their numbers are growing – prefer to subcontract local partners to work on their behalf. The ICRC strongly believes that it is important to work *with* partners, but not *through* them, precisely to maintain our proximity to the people in need of protection and assistance.

We are equally convinced that it is critical to remain strongly engaged with *all* parties to armed conflict, regardless of the kind of party they are and regardless also of the labels attached to them. The dialogue we have with governments, non-State actors and other key contacts is essential for us: without it, we would find it very difficult to protect and assist people affected by conflict.

The ICRC doubled its operational budget between 2010 and 2018. We now have around 19,000 staff working for us around the world. But we recognize that institutional growth alone will not enable us to do more. We also need to collaborate more extensively and more effectively with others and build the right partnerships. Our dialogue with Islamic scholars and institutions is one of these essential partnerships. Together with civil law and common law, Islamic law is one of the three major legal systems in the world today – one that has developed rules that regulate, in exhaustive detail, the use of force in armed conflict. We have already learnt a lot through our dialogue with Islamic scholars. This workshop is another step towards building on this dialogue and to look at how, collectively, we can do more.

The workshop aims to achieve the following five objectives. **First**, we would like to exchange views and opinions on current legal challenges arising from contemporary armed conflicts, with, of course, a special focus on the Muslim world and the ICRC's operations in those contexts. **Second**, it is our objective to enrich our regional strategies and policies with the recommendations made by experts in Islamic law. Our **third** objective is to stimulate interest in carrying out scholarly or expert research into the operational and legal topics and challenges that will be discussed at the workshop. **Fourth**, we want to explore possibilities for more extensive and closer cooperation with experts in Islamic law, both in their personal capacity and with the institutions to which they are affiliated. And, finally, our **fifth** objective is to raise topics of interest for discussion in future workshops. If we think of ourselves as a network, we need to think ahead, about the next steps in our cooperation.

In conclusion, let me reiterate my appreciation to the organizing team for this excellent opportunity to meet with such distinguished experts, and in particular to my colleague Dr Ahmed Aldawoody for all the work he has done to make this happen. Let me also warmly thank all the participants, some of whom have travelled very long distances to be with us. I believe this is a very important moment. The outcome of this workshop will be immensely consequential not only for the ICRC, but also for the people we aim to serve.

Thank you.

## 2. INTRODUCTION TO THE ICRC'S WORK IN MUSLIM COUNTRIES

### Anne Quintin, Head of the ICRC Advisory Service on IHL

This is an important occasion: it is the first time that the ICRC has gathered together such a distinguished group of scholars and experts on Islamic law and jurisprudence from throughout the world. A total of 23 countries – African, Middle Eastern, European, North American, and Asian – are represented here. Such diversity will ensure rich and productive discussions.

We thank you once again for coming to Geneva for this event.

The ICRC is very much aware that religion is a key source of personal identity for millions of people around the world. For instance, religion plays a very important role in the social, political, economic and security dynamics of the Muslim world. Because so many armed conflicts today are taking place in Muslim contexts, two-thirds of the ICRC's operations are in countries where Islam is a pervasive influence: for instance, Syria, Yemen, Iraq, Somalia, and Nigeria.

The ICRC has observed the emergence of certain common trends in contemporary armed conflicts. These may also be seen in Muslim contexts, and include the following:

- **Fragmentation.** The nature of armed conflict has changed over the last decade, and fragmentation can be observed at different levels.
  - In many contexts, such as Afghanistan, Syria, Mali and South Sudan, the ICRC's operational environment is characterized by an increasingly fragmented battlefield and a proliferation of non-State armed groups. In addition, many of these armed groups do not have a central hierarchical structure through which to communicate and train members in the provisions of IHL.
  - The international order is itself becoming increasingly fragmented. Political polarization at global and regional levels is feeding conflict dynamics. As a result, there is no end in sight to conflicts that have been going on for decades, and newer conflicts are gradually morphing into protracted crises characterized by long-term societal challenges, high levels of violence, poverty and economic underdevelopment.
- **Urbanization of warfare.** Many armed conflicts are now taking place in urban areas, and this is a growing trend. By 2030 two-thirds of the world's population will be living in cities and it is becoming increasingly important to understand how demographics alter the environment in which humanitarian organizations operate. Fighting in densely populated areas also gives rise to crucial legal and operational questions. It is essential that the principles regulating the conduct of hostilities be respected, in particular the principles of proportionality and of precaution: parties to conflict need to take into account the presence of large numbers of civilians when conducting operations in urban areas.
- **Rise of extreme violence.** Acts of extreme violence against civilians have become commonplace, and massive civilian casualties are too often regarded as an inevitable consequence of war. It is important that, together, we fight this attitude: civilian casualties can and must be avoided to the greatest extent possible.
- **Increased difficulty in carrying out principled humanitarian action.** Together, these trends are making it increasingly difficult for the ICRC to maintain or broaden its safe access to populations affected and detainees. A number of serious security incidents in the recent past have highlighted the insecurity and volatility of our working environment: inevitably, in those contexts, it has become difficult for us to maintain our proximity to the people affected, and has limited our presence where it is needed the most. We fight against the erosion of respect for IHL, and for humanitarian action, every day: maintaining adequate medical services and ensuring respect and protection for the wounded and the sick, without any adverse distinction, is a central aspect of our work.

As we observed these trends, we realized how important it was for us to determine what we could do to continue to promote respect for the law – despite the difficulties and challenges posed by contemporary armed conflict. To that end, the ICRC conducted research – launched earlier this year – on how formal and informal norms influence conduct during war. This research studied the conduct not only of State military forces, but also that of the various types of armed group that the ICRC encounters in its work. One of the purposes of the research was to understand how ICRC staff might promote restraint within their ranks.

The research led to several recommendations:

- It is important to integrate the law into the doctrine, training and compliance mechanisms of armed forces and armed groups, when the latter are structured in a central and hierarchical manner. Integration of the law increases restraint on the battlefield: therefore, intensity of training and proper teaching of norms is important.
- It is necessary to focus on both the law and the values underpinning it; that is more effective than focusing only on the law. We have found that linking the law to norms and values respected by parties to armed conflict, including religious norms, gives the law greater traction.
- The ICRC is not alone in these efforts. External entities are able to influence the conduct of armed forces and armed groups. This is precisely one of the objectives of this meeting: the aim of our discussions on the points of convergence between IHL and Islam is to improve the situation in the ground and strengthen respect for the principles and values everyone in this room believes in.

As mentioned earlier, a large part of our work takes place in contexts where Islam has a strong influence and is widely respected. In order to work effectively in these contexts, we have to broaden our understanding of the nature of these societies. This also means advancing our understanding of Islamic law, and of the cultural references and values that are at its core.

We must exchange views with experts in Islamic law and jurisprudence – and listen to their recommendations – on how we can, together, enhance respect for IHL and ensure continued acceptance for the ICRC's neutral, independent and impartial work. This workshop is without precedent: never before have experts in IHL, experts in Islamic law, and ICRC field specialists gathered together to discuss issues of common interest.



# PART II INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW AND THE ISLAMIC LAW OF ARMED CONFLICT

## 1. CONTEMPORARY CHALLENGES FOR INTERNATIONAL HUMANITARIAN LAW

**Lindsey Cameron, Head of the Unit of Thematic Legal Advisers**

International humanitarian law (IHL) is one of the older bodies of international law. Its codification began in the late 19th century<sup>2</sup> and it has had to deal with various developments in the nature of warfare over the years. Today, technical advances and the changing nature of parties to conflicts, as well as other factors, have altered the landscape in which armed conflict takes place, presenting the existing IHL framework with new challenges. This contribution explores five of these contemporary challenges: the applicability of IHL to cyber operations occurring in armed conflict, the blurring of lines between IHL and the terrorism paradigm, the geographical scope of application of IHL, the applicability of IHL to peace operations, and the overarching question of how to ensure respect for IHL.

### A) THE APPLICABILITY OF IHL TO CYBER WARFARE

With the steady advance of technology, a new trend in the conduct of hostilities is becoming apparent, namely, the use of cyber operations in armed conflict. The term ‘cyber warfare’ describes operations against a computer or a computer system through a data stream, when used as means and methods of warfare in the context of an armed conflict. Cyber warfare has not yet had dramatic humanitarian consequences. Nevertheless, there are concerns about the potentially far-reaching effects of cyber attacks in the future: for example, if cyber attacks were to be directed against transportation systems, electricity networks, dams, and chemical or nuclear plants, they could cause civilian casualties and have long-term consequences for the daily lives of those affected. The reverberating effects of cyber attacks directed against military objectives can also have important consequences for the civilian population. For example, shutting down the electricity supply may obstruct the provision of medical services to civilians, potentially leaving many without essential medical care.

Against this backdrop, it is essential to determine when and how IHL applies to cyber warfare. IHL governs armed conflicts and distinguishes between international and non-international armed conflict (‘IAC’ and ‘NIAC’, respectively). IACs are conflicts between States and are regulated by the four Geneva Conventions of

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<sup>2</sup> See, for example, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (the original Geneva Convention), which was adopted in 1864, and the Hague Regulations concerning the Laws and Customs of War, dating from 1899.

1949 and by Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I), whereas NIACs are conflicts between a non-State armed group and a State, or between two or more non-State armed groups, and are governed by Article 3 common to the Geneva Conventions and by Protocol II of 8 June 1977 additional to the Geneva Conventions (Additional Protocol II). In addition to these treaties, there are customary IHL obligations that are binding on parties to conflict in both IACs and NIACs. Customary IHL is particularly pertinent to NIACs, as there are far fewer treaty rules applicable in NIACs than in IACs.

There is a difference in the threshold of violence for the existence of IACs and NIACs. Put simply, IHL requires a lower level in the intensity of violence for IACs than for NIACs. An IAC exists whenever there is a resort to armed force between two States.<sup>3</sup> The ICRC interprets this to mean that, for purposes of an international armed conflict – that is, an armed conflict between States – IHL applies from firing of the first shot, so to speak. Accordingly, a cyber operation that is carried out by one State against another, within a broader context of armed violence alongside traditional military operations, forms part of an armed conflict. In a case where a State solely engages in cyber activities unconnected with any other acts of armed violence, where the cyber attack creates kinetic effects, such as an explosion or the destruction of a building, this may be considered to amount to an IAC. What remains unresolved and contentious amongst States, however, is whether a cyber operation that leads to loss of functionality of equipment, for example, but has no physical effects, can be considered as a use of armed force amounting to an IAC.

NIACs require protracted armed violence between State armed forces and organized armed groups, or between such organized armed groups.<sup>4</sup> Accordingly, and in contrast to IACs, the existence of a NIAC presupposes a certain level of intensity of violence and a certain minimum degree of organization in the non-State armed group: for instance, that it has a command structure, disciplinary rules, and a headquarters.<sup>5</sup> The organizational criterion is met not only when a regular armed group engages in cyber activities, but also, in the view of the ICRC, when a group is organized solely online, depending on the level of organization amongst members of the group. However, the intensity requirement is not easily met where cyber operations do not cause kinetic effects.<sup>6</sup>

Further to this, according to Additional Protocol I, a number of rules – including, notably, the principles of distinction and proportionality in the conduct of hostilities – apply to “attacks” as defined in Article 49 of Additional Protocol I.<sup>7</sup> This gives rise to another question: under what circumstances can cyber-attacks be regarded as amounting to such attacks? In this regard, the ICRC is of the view that the employment of any kind of cyber capabilities in an armed conflict must comply with all the principles and rules of IHL, as is the case with any other weapon, means or method of warfare. In any event, the conduct of hostilities is governed by the rules and principles contained in customary IHL, including the principle of distinction, the prohibition against indiscriminate attacks, and the obligation to take precautions to spare the civilian population.<sup>8</sup>

## **B) NON-STATE ARMED GROUPS: BLURRING OF LINES BETWEEN TERRORISM AND IHL**

In response to the rise in some non-State armed groups’ use of terrorist tactics, States have tightened existing counter-terrorism measures and introduced new ones in recent years. There is no question that it is legitimate to take measures designed to ensure the security of the State. These counter-terrorism responses, coupled with robust counter-terrorism discourse in both domestic and international forums, have increasingly resulted in the blurring of lines between armed conflict and terrorism, with potentially adverse consequences for the application of IHL in NIACs. In the first place, there exists no universally accepted definition

<sup>3</sup> ICRC, *Commentary on the First Geneva Convention* (2016), paras 217–244. See also ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70.

<sup>4</sup> ICRC, *Commentary on the First Geneva Convention* (2016), paras 414–444.

<sup>5</sup> *Ibid.* See also, for example, ICTY, *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-5-T, Judgment, 3 April 2008, paras 37–62.

<sup>6</sup> ICRC, *Commentary on the First Geneva Convention* (2016), paras 253–256 and 436–437.

<sup>7</sup> As set out in Art. 49 of Additional Protocol I, “[a]ttacks’ means acts of violence against the adversary, whether in offence or in defence.”

<sup>8</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, 2005; see Rules 1, 7, 14, 15.

of “terrorism”, and IHL does not define the term. In addition, States have shown a growing tendency – based in their conflation of the conflict and terrorism paradigms – to consider any act of violence carried out by non-State armed groups in an armed conflict to be “terrorist” by definition. However, these two legal regimes are fundamentally distinct: IHL regards certain acts of violence as lawful and others as unlawful, while any act of violence designated as “terrorist” is always unlawful.

The rapid proliferation of armed groups further compounds the challenges associated with the application of IHL to such groups. Traditionally, non-State armed groups were organized in a manner similar to State armed forces: hierarchically, with a level of organization that was in plain view. However, particularly in recent conflicts, there has been a growing tendency for armed groups to splinter and thus multiply. The growing number of armed groups is making it more and more difficult to ascertain the degree to which they are organized and the manner in which they interact with one another. This, in turn, has exacerbated difficulties in determining whether a group has the requisite level of organization to qualify as a party to a NIAC.

### C) THE GEOGRAPHICAL SCOPE OF APPLICATION OF IHL

Armed conflicts involving non-State armed groups raise another issue: as some groups can move easily between several different territories, violence between them and the armed forces of a State can spill over into the territory of a third State that had previously been uninvolved in the conflict. There are at least three different options for thinking about the geographical applicability of IHL in such circumstances: first, the geographical scope of IHL could be considered to be limited to the State in which the conflict has its roots; second, it could be regarded as extending to the additional State or States in which the armed group controls territory; and, third, IHL could be thought to follow the members of the group.<sup>9</sup> The last option would seem to be too far-reaching, particularly when the members of the armed groups in question are far from the geographical centre of the hostilities. Even so, it is generally accepted that if an armed conflict occurs on the territory of a State, IHL applies to that State as a whole.<sup>10</sup> Though not all activities taking place within that State’s territory may be covered by it – such as those activities taking place within the ordinary law-enforcement paradigm – IHL applies fully in the territory of that State, and particularly to the conduct of hostilities against the non-State armed group.

### D) IHL AND PEACEKEEPING OPERATIONS

In recent decades, several peacekeeping operations have taken place within the context of armed conflicts. The increasing “robustness” of the peacekeeping mandates issued by the United Nations Security Council has raised the likelihood of the use of military force by peacekeepers – and that has given rise to questions about when and how IHL applies to these actions.

In the view of the ICRC, military force employed by peacekeeping forces is not automatically lawful on the basis of its being authorized, ostensibly, by a mandate of the Security Council. Rather, the lawfulness of peacekeeping forces’ actions depends on their compliance with IHL. This stems from the distinction between *ius ad bellum* and *ius in bello*, under which lawful recourse to the use of force (*ius ad bellum*) is distinguished from the lawfulness of the force that is actually used (*ius in bello*).

When peacekeepers use military force, they become involved in an armed conflict, even if they do not support either of the opposing parties to the conflict and are mandated solely to protect civilians. This makes it important to identify who among the participants in a multinational operation should be considered a party to conflict: the troop-contributing countries, the relevant international/regional organization under whose command the forces operate, or both. In the opinion of the ICRC, the decisive factor is which entity has control over the operation. For example, where contributing States retain a high degree of control over the conduct of their troops, those States can become party to armed conflict. By contrast, where an organization maintains control over the operation, it would be the organization that becomes a party to conflict.

<sup>9</sup> ICRC, *Commentary on the First Geneva Convention* (2016), paras 465–482.

<sup>10</sup> See ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70.

## **E) ENSURING RESPECT FOR IHL**

Like many branches of public international law, IHL lacks direct enforcement mechanisms to address or prevent violations of its rules by States. In recent years, international criminal law has contributed to addressing violations of IHL, but the processes under this body of law do not necessarily have an immediate impact on the ground, as they often take place only long after the fact.

The ICRC therefore engages States and parties to armed conflict in confidential bilateral dialogue to discuss the steps they can take to ensure application of and compliance with IHL during armed conflict. It also regularly encourages States to disseminate IHL through training sessions and courses, and other means, with a view to making certain that their obligations under IHL are known to all those concerned and violations prevented.

Episodes from recent armed conflicts notwithstanding, and despite the fact that international and domestic discourse has, in recent years, been centred on allegations of IHL violations, the ICRC has also been conducting research to acquire a fuller understanding of those instances where IHL has been respected. This not only helps us understand patterns of conduct, but behavioural science also suggests that an increased general awareness that the law is respected can, in fact, also strengthen confidence in this body of law.

Finally, the ICRC endeavours to work with States to foster dialogue on IHL: for example, it encourages them to share practices and experiences related to discharging their IHL obligations in the most testing circumstances.

## **F) CONCLUSION**

Many different challenges to the interpretation and application of IHL have arisen during the last half-century, and this contribution has introduced some of these. Indeed, every topic that will be discussed below comes with its own set of its challenges, and they will all be explored by others in greater detail. In this regard, I would like to emphasize that the ICRC places great importance on first gaining an in-depth understanding of the nature of the contemporary challenges to IHL, before determining responses to each of these. A significant portion of this process is related to the reports on contemporary challenges to IHL that the ICRC publishes every four years, on the occasion of the International Conference of the Red Cross and Red Crescent. The last report came out in 2015; the ICRC will publish its next report in the autumn of 2019, explaining its positions on various new challenges.

## 2. THE ISLAMIC LAW OF ARMED CONFLICT: AN INTRODUCTION TO THE MAIN PRINCIPLES

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### A) INTRODUCTION

Our need to humanize armed conflict remains intact – perhaps simply because it is human nature – despite all the atrocities that human beings have committed since the dawn of history. Major world religions, cultures, and legal traditions have attempted to restrain and humanize the use of force throughout history. IHL, an embryonic field of public international law, is the universally accepted legal regime for alleviating the suffering of victims of armed conflict. For almost three decades now, the ICRC has been involving or seeking to involve Islamic institutions and scholars in its efforts to protect and assist victims of armed conflict in Muslim contexts. IHL principles are not fundamentally in conflict with previous attempts by various legal, cultural and local traditions to regulate armed conflict. The universality of IHL can be reinforced by, first, explaining that its humanitarian principles are universally intuitive and, second, by stressing the fact that it is the most comprehensive/specialized and up-to-date legal regime for humanizing contemporary armed conflicts. This means that religious principles and customary practice can play a significant role in enhancing respect for IHL. Eight humanitarian principles enshrined in classical Islamic law that can enhance respect for IHL – and therefore alleviate the suffering of victims of armed conflicts – are discussed below.

### B) THE POINTS OF CONVERGENCE BETWEEN IHL AND ISLAMIC LAW

It is quite remarkable that Muslim jurists of the seventh, eighth and ninth centuries were already discussing, negotiating, and developing ways to regulate the way Muslims conducted hostilities during both international and non-international armed conflict – with the same objectives as IHL, of alleviating the suffering of victims and protecting certain persons and objects. Almost all the comprehensive legal manuals associated with the various schools of Islamic law contain chapters on the Islamic law of war and on issues related directly or indirectly to it. Classical Muslim jurists were impressively successful in providing a legal framework to humanize armed conflict. This framework is based on the eight principles listed below:

#### 1. Protection of civilians and non-combatants

Recognizing that during war atrocities are committed against the most sacred of God's creatures, *al-nafs al-bashariyah* ("human soul," i.e. "human life"), Islamic law makes it clear that fighting is permitted only against enemy combatants. Civilians and non-combatants may not be intentionally harmed during the course of hostilities; therefore, several categories of person were specifically protected against harm during the primitive warfare of the seventh century.

A number of the Prophet's Hadiths specifically prohibit the targeting of women, children, the elderly, monks or religious hermits, and *al-'usafā'*. The word *'usafā'* is the plural of *'asīf*, which means "hired man," or "employee"; in the context of war it refers to anyone who works for, or is paid by, the enemy to perform certain services in the battlefield, but who plainly does not take part in the actual fighting. The prohibition against attacking *'usafā'* on the battlefield implies, by extension, that attacking medical personnel (both civilian and military) accompanying enemy armies is also prohibited, as are attacks on military reporters or anyone else providing services to enemy armies – for as long as these individuals do not take part in military operations. On this basis, when it came to protecting non-combatants, the Companions of Prophet Muhammad followed his example. For instance, the first caliph, Abū Bakr (d. 634), gave the commander of his army these instructions: "Do not kill a child or a woman; or an aged person; do not cut down fruit-bearing trees or destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or drown palm trees; do not loot; and do not be cowardly."

The jurists also specified various other types of non-combatant who must not be targeted during war: the blind, the disabled and the insane, and craftsmen and traders. Such protection however is not absolute: all these groups forfeit the right to non-combatant immunity if they engage in combat. Scholars of Islamic law studied these issues in depth, specifying the circumstances in which the non-combatant parties mentioned above will lose the protection afforded to them by Islam against military attack.

## 2. Prohibition against indiscriminate weapons

To limit the effects of war and to minimize the danger to civilians and prevent the destruction of enemy property, classical Islamic law placed restrictions on the use of certain methods and means of warfare.

The weapons and military tactics used by Muslims in the early Islamic period – and therefore those addressed by Islamic law – were, seen from a contemporary perspective, extremely primitive: they were rudimentary and their capacity to inflict severe damage on enemy individuals and property was limited. Their rules on weapons reveal that Muslim jurists were dedicated to two objectives: not to endanger the lives of civilians and non-combatants, and to spare the property of the enemy unless dictated by military necessity. The rules developed by classical Muslim jurists show that war in their time took two forms. The first of these was direct or single combat, usually sword fighting; lances, bows, and spears were also used, but not as frequently as swords. When civilians and non-combatants are present, sword fighting does not endanger the lives of bystanders or risk incidental destruction of their property. Interestingly, the jurists, particularly those of the Mālikī school, discussed the permissibility of shooting poison-tipped arrows at the enemy. On this issue, as on many others, the jurists disagreed; some prohibited the use of poison-tipped arrows, while others merely disliked the idea of it, on the basis that the enemy could shoot them back at Muslims and also because there was no precedent for the use of poison-tipped arrows in the Prophet's time. However, the great Hanafī jurist al-Shaybānī (d. 805) permitted the use of poison-tipped arrows because of their effectiveness.

The second form of warfare involved grappling with an enemy who had retreated behind fortifications; single combat was not an option. The jurists discussed the use of mangonels (military devices for hurling large stones and other missiles), fire, flooding, and even besiegement as weapons to force the enemy to surrender. The jurists unanimously permitted the use of mangonels against an enemy fortress if required by military necessity, but they differed on the use of fire as a weapon: some prohibited it, some disapproved of it, and others permitted its use as a military necessity or a retaliatory measure.

Muslim jurists' deliberations over the use of these weapons show that indiscriminate attacks or use of military force beyond that required by military necessity were inconceivable to them, notwithstanding the depth and scope of their discussions about which weapons and tactics were permissible and which were not. Nonetheless, the differences of judicial opinion mentioned above are yet another instance of the challenges that arise when applying provisions of the Islamic law of war both historically and in modern times. In our own time, this happens when rules that permitted the use of primitive forms of indiscriminate attack and primitive weapons in a specific era – and within the context of the wars of that time – are cited to justify attacks against civilians and the use of chemical weapons and other weapons of mass destruction. This is a subject that is greatly neglected in Islamic scholarship; it will be discussed below in the section on the conduct of hostilities.

## 3. Prohibition against indiscriminate attacks

Classical Muslim jurists also discussed the permissibility of two methods of warfare that could result in indiscriminate killing of protected persons and cause damage to protected objects: *al-bayāt* (attacks at night) and *al-tatarrus* (shooting at human shields). This was because in these two methods of warfare – shooting at the enemy at night (during the seventh century) and shooting at a human shield – could cause incidental harm to civilian persons and objects. It is important to mention here that classical Muslim jurists developed contradictory rules regarding the permissibility of these primitive methods and means of warfare – largely because they struggled to balance the humanitarian principles of distinction, proportionality and precaution with the principle of military necessity. The subject of human shields has also not received sufficient attention in Islamic scholarship, and it, too, will be discussed below in the section on the conduct of hostilities.

#### 4. Protection of property

The Islamic view is that everything in this world is the Almighty's; thus, Islam prohibits all wanton destruction during the conduct of hostilities. The eighth-century jurist Al-Awzā'ī (d. 774) emphasized that "it is prohibited for Muslims to commit any sort of *takhrīb*, wanton destruction, [during the course of hostilities] in enemy territories." Such destruction was forbidden because it constituted – as the crime of terrorism does under Islamic law – the criminal act described metaphorically in the Qur'an as *fasād fī al-ard* (literally, "destruction in the land"). However, classical Muslim jurists did not develop specific punishments for those who wantonly destroyed enemy property during hostilities.

#### 5. Prohibition against mutilation

Islam prohibits mutilation and considers it a sin and a disgusting act because it is a violation of the human dignity bestowed by God on all humans, as stressed in the Qur'an: "We have honoured the children of Adam."<sup>11</sup> One of the many instructions of the Prophet Muhammad on this subject may be found in the following Hadith: "Do not loot, do not be treacherous and do not mutilate."

#### 6. Treatment of prisoners of war

Islamic law guarantees the humane treatment of prisoners of war and requires the provision of shelter, food, water, and clothes for them. Captured members of the same family should not be separated. Ill-treating or torturing prisoners of war to obtain military information is prohibited. But classical Muslim jurists disagreed about the correct Islamic view on the termination of captivity. One group advocated that they be set free graciously or exchanged for Muslim prisoners. Other jurists argued that the ruler of the country – or 'head of State' now – should decide what served the best interests of Muslims: setting prisoners of war free, executing some or all of them, enslaving them, or exchanging them for Muslim prisoners or for money.

#### 7. Quarter and safe conduct

The *amān* system (quarter and safe conduct) proves beyond doubt that under Islam, during hostilities fighting is restricted to enemy combatants. With regard to quarter, if enemy combatants ask for quarter during hostilities – verbally, in writing, or even through a gesture – then they have to be protected until they return to their home country. The rationale of the *amān* system is somewhat similar to the way the term *hors de combat* is understood in IHL: classical Muslim jurists used the expression *haqn al-dam* (prevention of the shedding of blood, protection of life). "Safe conduct" may be understood broadly to mean the permission granted to a non-Muslim national of an enemy State to temporarily live in or visit the Muslim State in question for business, tourism, education or other peaceful purposes. These non-Muslim nationals also are protected from any harm and enjoy certain rights such as the right to a fair trial, the right to work and property owning. They are exempted from paying taxes unless they decide to stay in the Muslim State for more than four months, according to the Shāfi'ī school of law, or for more than one year according to the other schools.

#### 8. Human dignity

Human dignity is a divinely bestowed right and must be protected regardless of whether someone is alive or dead. The Prophet Muhammad instructed Muslims not to deliberately target the faces of enemy combatants, out of respect for human dignity. Based on the tradition of the Prophet Muhammad, Muslims must return the dead bodies of members of an adverse party; if they do not take the bodies and/or bury them, then it becomes the Muslim army's obligation to do so. That is because if Muslims do not bury their dead adversaries, their bodies will decompose in the open or will be eaten by wild beasts – both of which are tantamount to mutilation, as the Andalusian jurist Ibn Hazm (d. 1064) affirmed.

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11 Qur'an 17:70.

### C) CONCLUSION

This brief discussion shows that IHL and the Islamic legal-humanitarian framework are compatible and complement each other. Understandably, classical Muslim jurists tried to ensure that humanitarian restraints on the use of force would not lead to the defeat of Muslims in war. This resulted in numerous contradictory rules – in many cases, because of differences of opinion between those jurists who gave priority to humanitarian imperatives and those who gave priority to military victories even if that meant endangering certain protected persons and objects. This latter group of jurists justified civilian casualties as collateral damage or as a consequence of military necessity.

Many people feel more bound to, and are more inclined to follow, their own religious and indigenous traditions, and Islamic law is a prime example. If a certain group of weapon bearers attempt to limit their use of force on the basis of traditional frameworks that do not violate IHL, they should not be discouraged from doing so. This – permitting groups to make use of alternative frameworks that they are willing to adhere to and respect – may be the most effective means of achieving the objectives of IHL. However, the challenges such permission might present must always be kept in mind, because frameworks are not all the same or in complete compliance with IHL. Therefore, coordination with the parties concerned is a necessity, to ensure that these alternate frameworks are not later found to have endorsed violations of IHL. However, despite the potential for divergence from IHL in some areas, the Islamic legal tradition will continue to be used, regardless of whether we choose to engage with it or disregard it. Therefore, it is imperative that we recognize the significance of this rich body of law and engage with it: we cannot afford to allow it to be abused. In conclusion, like President Barack Obama who viewed his faith “as an active, palpable agent in the world,” I believe that every religion, culture, ideology, set of beliefs or way of life should be part of the human endeavour to make the world a better place. This workshop is a small step towards making the world a better place by, at least, alleviating the suffering of victims of armed conflict.



### 3. EXPERTS' COMMENTS AND DISCUSSION

The discussion first tackled the issue of interpreting Islamic law. One of the participants emphasized the difficulty of ensuring acceptance for recent laws and jurisprudence. He said that it is inherently difficult to distinguish between *fiqh* (Islamic jurisprudence) and *sharia* (the set of laws given by God to all His messengers), and therefore between what is changeable and what is not. Ideally, another participant said, when dealing with an issue from the present, one should search for the fatwa (a non-binding legal opinion) that is most capable of providing a solution, and set aside or ignore past opinion. In this connection, another participant said that unfortunately, many Islamic scholars still made extensive reference to antique jurisprudence to deal with contemporary issues; this was particularly to be regretted, he said, because these scholars were sometimes no longer capable of interpreting the jurisprudence of the past. A possible solution was suggested: submit issues of contemporary concern to the board of Islamic jurists in the Organization of the Islamic Conference, ensuring thereby that the most prominent contemporary jurists dealt with them.

Another expert drew attention to the strong attachment to ancient teachings and the distrust that some Muslims have of contemporary fatwas. He linked this to a general failure to grasp the concepts of *usul al-fiqh* (legal theory/methodology), *al-qawaid al-fiqhiyah* (legal maxims), and *maqasid al-shariah* (objectives of the law), or of the tools of *ijtihad* (reasoning or judgement in making laws). He recognized that it was important to maintain the connection to past laws, but also highlighted the risk of resorting to simplistic *qiyas* (reasoning by analogy) to justify conduct that should not be tolerated today. He concluded by stressing how important it was to equip members of the general public with the right methodology and tools for understanding contemporary fatwas; this, he said, would also build acceptance for these fatwas.

In this connection, another scholar brought up the concept of *tajdid* (renewal): he said that Islamic scholars had changed their positions on certain topics over time, but that this did not mean that the past had to be abolished. The main question for scholars to grapple with was how the passage of time affected warfare and how it should affect the development of *fiqh*. He said that a middle ground must be found between using past understanding of crucial issues and taking into account new realities.

Another expert pointed out that one still had to keep in mind the difference between Islamic laws from the past that can be adapted to present realities and laws that are not part of Islamic law. The general objectives of Islamic law must always be kept in mind when contemplating the drafting of new laws. Having said this, the expert added, newly established Islamic laws of war must also fall within the framework of IHL: they must be based on the pertinent international treaties. When it comes to IHL, the fact that all Muslim States have ratified the Geneva Conventions, and that many of them have accepted other treaties related to IHL, demonstrates those States' agreement with the provisions of IHL and their commitment to respecting them. The expert then brought up the example of slavery: as all Islamic States had agreed to abolish slavery, and given the existing prohibition against it under international law, he said, it was time to recognize that the classical Islamic rules concerning slavery were obsolete.

# CONDUCT OF HOSTILITIES: LAWFUL WEAPONS AND METHODS OF COMBAT

## 1. THE PRINCIPLE OF DISTINCTION AND THE PROHIBITION AGAINST INDISCRIMINATE ATTACKS UNDER IHL

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### A) INTRODUCTION

This short contribution aims to delineate some of the key concepts of the rules governing the conduct of hostilities (CoH) under international humanitarian law (IHL). It is structured around four different notions that are fundamental to understanding the principle of distinction: combatants; civilians who participate directly in hostilities; military objectives; and the prohibition against indiscriminate attacks.

The right of belligerents to choose their means and methods of warfare is not unlimited. The object and purpose of the CoH rules is to protect civilians and civilian objects against the effects of hostilities by establishing an appropriate balance between military necessity and considerations of humanity.

CoH rules regulate only the use of force *in armed conflicts*, and only that force which amounts to *fighting between belligerents*. Other situations that may require the use of force, but which do not involve fighting between belligerents, are not regulated by CoH rules even if they occur during an armed conflict (e.g. riots in a prison or crowd violence during a demonstration). In such situation, force may be used only in accordance with the rules governing law-enforcement operations, which impose many more constraints than CoH rules.

The principle of distinction is the cardinal rule that runs through all the law governing the CoH, and, with the principles of proportionality and precautions, forms the cornerstone of the protection that IHL affords to civilians. There are many more rules restricting the use of means and methods of warfare, for example all the rules pertaining to weapons, as well as many additional protections afforded to specific categories of person and object (e.g. for medical personnel, cultural property, objects indispensable to the survival of the population).

The principle of distinction requires belligerents to distinguish between civilians and combatants, and between civilian objects and military objectives at all times; and accordingly, to direct their operations only against military objectives.<sup>12</sup> In particular, parties to conflict may direct their attacks only against military objectives (namely combatants, civilians directly participating in hostilities, and objects that are military objectives), and must not attack civilians or civilian objects.<sup>13</sup>

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<sup>12</sup> Art. 48, Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I).

<sup>13</sup> Additional Protocol I, Arts 51 and 52; Art. 13, Protocol II of 8 June 1977 additional to the Geneva Conventions (Additional Protocol II); ICRC Customary IHL Study, Rules 1-10.

## B) COMBATANTS

The notion of “combatant”<sup>14</sup> under IHL may seem readily understandable, but the realities of contemporary armed conflicts have complicated the issue, especially in non-international armed conflict (NIAC).

The armed forces of a party to conflict consist of all organized armed forces, groups and units that are under a command responsible to that party for the conduct of its subordinates;<sup>15</sup> and all members of such armed forces are combatants, except medical and religious personnel.<sup>16</sup> Members of police or paramilitary forces may also become combatants, but only the members of those units that are formally incorporated in the armed forces or otherwise tasked with the conduct of hostilities against an adversary on behalf of the State.<sup>17</sup>

In a NIAC, one of the opposing sides necessarily involves a non-State party to the conflict. In this regard, terminology must be used carefully: in particular, the non-State party to a conflict must be distinguished from its armed wing, in the same way that “State” and “State armed forces” are distinct notions. In the ICRC’s view, membership in irregular armed forces – such as the armed wing of a non-State party to conflict, militias or any militia, volunteer corps or resistance movements belonging to a State or non-State party to conflict – depends on whether a person assumes a continuous function for such forces that involves his or her direct participation in hostilities (“continuous combat function”).<sup>18</sup> Such persons must be distinguished from those carrying out other functions for the – State or non-State – party to conflict, such as political, administrative, or other support functions that do not involve combat; this latter group remain protected civilians. This determination is more easily made when the armed wing is clearly distinguished from the other parts of a non-State party to the conflict.

Under IHL, combatants, including members of irregular armed forces such as the armed wing of a non-State party to conflict, may be targeted at all times – even when not engaged in hostilities, unless they are *hors de combat*.

## C) CIVILIANS WHO PARTICIPATE DIRECTLY IN HOSTILITIES

Civilians are entitled to protection unless and for such time as they participate directly in hostilities.<sup>19</sup> The notion of direct participation in hostilities (DPH) is not defined in treaty IHL, and neither State practice nor international jurisprudence provides a clear and uniform interpretation of it. The evolution of armed conflicts in recent decades has made the practical application of this notion more challenging: increasingly, conflicts are taking place in urban areas, where civilians and combatants are often intermingled; civilians are taking on a variety of functions traditionally performed by military personnel; and persons participating directly in hostilities do not always adequately distinguish themselves from the civilian population.

In 2009, to help clarify this complex and challenging issue, and with a view to strengthening the implementation of the principle of distinction, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.

<sup>14</sup> In this presentation, “combatant” is used in the general meaning of “fighters”. It does not necessarily imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts.

<sup>15</sup> See Additional Protocol I, Art. 43(1); ICRC Customary IHL Study, Rule 4.

<sup>16</sup> Additional Protocol I, Art. 43(2); ICRC Customary IHL Study, Rule 3.

<sup>17</sup> ICRC Customary IHL Study, pp. 16–17.

<sup>18</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) (ICRC DPH Guidance) pp. 25, 32–35; available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>.

<sup>19</sup> Additional Protocol I, Art. 51(3); Additional Protocol II, Art. 13(3); ICRC Customary IHL Study, Rule 6.

The notion of DPH refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. The ICRC *Interpretive Guidance* sets out three cumulative requirements that a specific act must meet to qualify as DPH:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm).
2. There must be a direct causal link between the act and the harm likely to result either from it or from a coordinated military operation of which that act constitutes an integral part (direct causation).
3. The act must be specifically designed to directly cause the required threshold of harm in support of one party to conflict and to the detriment of another (belligerent nexus).<sup>20</sup>

In the ICRC's view, merely paying taxes, working in a weapons factory, or otherwise supporting a (State or non-State) party to conflict does not, *per se*, amount to DPH. If done in support of a non-State armed group, however, it might be a criminal offence under domestic law.

#### D) MILITARY OBJECTIVES

IHL provides that attacks must be strictly limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects that by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>21</sup>

The category of objects that, by their 'nature', make an effective contribution to military action covers all objects that are built for, and designed for use only by, the military (weapons, weapon systems and platforms, military fortifications, etc.).

Civilian objects may also make an effective contribution to military action by their location, purpose or use, and may become military objectives. This may be the case, for example, when a civilian house is used by the military as a command-and-control post; the destruction of this house would in the circumstances offer a definite military advantage.

Objects may be used simultaneously for civilian and military purposes. For example, a power plant may provide electricity for a hospital and for a military command post. When attacking a dual-use object of this kind, the potentially adverse consequences of the attack for civilian use of that object must be taken into account in the proportionality assessment, and the attacking party must take all feasible precautions to avoid, or at least minimize, them.

#### E) THE PROHIBITION AGAINST INDISCRIMINATE ATTACKS

Indiscriminate attacks are also prohibited. Indiscriminate attacks are those that are not directed at a specific military objective; that employ a method or means of warfare that cannot be directed at a specific military objective; or that employ a method or means of warfare, the effects of which cannot be limited as required by IHL.<sup>22</sup> An example of indiscriminate attacks that are explicitly prohibited is 'area bombardment', also known as 'carpet bombing', in which a number of clearly separated and distinct military objectives, located in a city, town, village or other area containing a similar concentration of civilians or civilian objects, are treated as a single military objective.<sup>23</sup> Equally prohibited are attacks that would violate the IHL principle of proportionality, namely an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>24</sup>

<sup>20</sup> ICRC DPH Guidance, Recommendation V, p. 46ff.

<sup>21</sup> Additional Protocol I, Art. 52(1) and (2); ICRC Customary IHL Study, Rules 7 and 8.

<sup>22</sup> Additional Protocol I, Art. 51(4); ICRC Customary IHL Study, Rules 11 and 12.

<sup>23</sup> Additional Protocol I, Art. 51(5)(a); ICRC Customary IHL Study, Rule 13.

<sup>24</sup> Additional Protocol I, Art. 51(5)(b); ICRC Customary IHL Study, Rule 14.

Some weapons, by their very nature, have an indiscriminate effect and are absolutely prohibited.<sup>25</sup> This is the case, for example, of chemical and biological weapons.

In most cases however, the indiscriminate character of an attack depends on the manner and the circumstances in which the weapons are used. For example, using means and methods of warfare that, in the circumstances, may be expected to escape the control of the user also amounts to an indiscriminate attack.

One circumstance that could make the use of a certain kind of weapon indiscriminate is its use in a densely populated area. Weapons with a large blast and fragmentation effect (e.g. large bombs and missiles), weapons with an inaccurate delivery system, and weapons delivering multiple munitions over a wide area (weapons with multiple warheads, such as cluster munitions, or multiple-barrel rocket launchers), were neither designed nor have been otherwise adapted for use in densely populated areas, as they produce effects that go well beyond their targets. Their employment is not prohibited by IHL as such. However, because of the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition against specific types of weapon, the ICRC considers that the use, in densely populated areas, of explosive weapons with a wide impact area should be avoided.<sup>26</sup>

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<sup>25</sup> ICRC Customary IHL Study, Rule 71.

<sup>26</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11 (2015), p. 47ff, available at: <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>.

## 2. HUMAN SHIELDS UNDER ISLAMIC LAW

**Professor Fassi Fihri Driss, Vice-President of Al Qarawiyyin University, Morocco**

After a quick glance at the Islamic principles of mercy, justice and charity, we can say that Islamic law contains all the general principles of IHL. Islamic law aims to protect human rights and human dignity. Everything that it prohibits during war, it also prohibits in all other circumstances. The presentation that follows will be about the Islamic rules concerning military operations: the issue of human shields – the subject of much confusion at present – will be discussed.

### A) PROTECTED PERSONS

In IHL, the terms “civilians” and “military” are used to differentiate between people who must be protected and people engaged in war. Allah formulated this fundamental concept by saying: “Fight in the way of God those who fight you but do not transgress. Indeed, God does not like transgressors.”<sup>27</sup> In Islam, civilians are divided into three categories: those who are defenceless, pacifists, and people “under treaty.”

Women, the elderly, and children are usually categorized as “defenceless.” Islamic law regards their inability to fight as implying a prohibition against fighting them. However, when one of these people is able to fight, they automatically drop out of this category. The second caliph, Omar Ibn Al Khattab, said: “Do not kill an elderly person, or a woman, or a child, and beware of killing them in moments of crisis and violence.”

Pacifists are people who refuse to engage in war. This may be for various reasons: ideological (for instance, religious figures like monks who dedicate their lives to acts of worship) or practical (for instance, because they follow occupations – like farming – at a great remove from fighting).

Persons “under treaty” are people who have been given a promise of peace by a Muslim. This treaty gives them the right to live amongst Muslims and the assurance of protection by that community. It is one of the most important and most emphasized of all divine commandments. The Prophet Muhammad said: “Whoever kills a person under treaty with Muslims, shall not be able to scent Paradise, though that scent be detectable from a distance of forty years.”

### B) PROHIBITED ACTS

Acts prohibited by the Islamic rules of armed conflict can be divided into two categories:

1. Acts prohibited both during war and in peacetime. Such prohibitions were established to counter practices dating from pre-Islamic times, of which these three are particularly noteworthy:
  - breaking an oath of peace
  - attacking messengers, meaning those who are carrying out diplomatic or humanitarian missions
  - theft of money or of property of material or moral value.
2. Acts generally prohibited because they amount to corruption or destruction. Allah has said, “And desire not corruption in the land. Indeed, God does not like corrupters.”<sup>28</sup> “Corruption” here includes any damage to the living environment, as well as the partial or total destruction of livelihoods and means of production or of the features of human civilization.

<sup>27</sup> Qur’an 2:190.

<sup>28</sup> Qur’an 28:77.

Not only do these acts lead to the escalation of violence, famine, and misery, but they can also lead to destruction of an adversary's property. Because it involves matters that are morally or ethically delicate, this issue has given rise to a great deal of debate. However, the scholarly texts in this connection refer to three specific cases: the destruction of fruit trees, the killing of livestock – for purposes other than consumption – and the demolition of private or public buildings. There appears to be general agreement among contemporary scholars that permitting such conduct would contradict the original texts.

### **C) HUMAN SHIELDS: BETWEEN PAST AND PRESENT**

Discussion of the issue of humans shield in classical Islamic legal literature is highly theoretical: jurists debated the proper Islamic position to take in the event of an attack on Muslims from behind a human shield. Nowadays, some people resort to these classical legal deliberations to justify indiscriminate attacks against civilians. We must separate early Islamic scholarship from that of the present if we wish to understand the origins of the conceptual shift that has led to the misunderstandings surrounding the issue of human shields. According to classical Muslim jurists, the ruler or other pertinent authority has the right to choose that position which serves the best interests of Muslims. But the decision – whether or not to shoot at a human shield – should be based on military necessity and guided by a desire to do the least possible harm.

In the 40-volume collection of his fatwas, Ibn Taymiya says on three different occasions that Muslim jurists unanimously agree on the permissibility of targeting human shields when Muslim lives are in danger. However, there are arguments to counter this. First, no original manuscript was found that would prove the authenticity of the book in which this fatwa is produced; second, Ibn Taymiya's claim contradicts what he himself has written elsewhere; and finally, the claim that there is a consensus on the permissibility of shooting at human shields is not true.

With regard to military necessity, it is important to differentiate between these two cases:

- If non-Muslims use Muslim prisoners or detainees as human shields, the necessity of targeting the enemy should be given more thought. In other words, if there is no pressing need for an attack, and if such an attack can be avoided, then shooting at the human shield is prohibited.
- However, if absolutely necessary to attack the enemy, and if such attack may cause harm to the human shields, then the following considerations take effect: shooting at the Muslim human shields is prohibited if it is certain to harm them; if the attack can be directed at the enemy combatants, then shooting at the human shields is permitted, provided that every effort is made to do the least possible harm to the human shields. In such circumstances, risking the loss of a few Muslim lives, for the greater good, is permissible.

## 3. WEAPONS OF MASS DESTRUCTION AND ISLAMIC LAW

**Professor Sohail H. Hashmi, Mount Holyoke College, USA**

Since the early 1960s, several Muslim States have figured prominently in international concern over the proliferation of weapons of mass destruction (WMD). The Comprehensive Test-Ban Treaty lists seven Muslim-majority States among the 44 “nuclear-capable” States whose ratification is necessary for the treaty to enter into force: Algeria, Bangladesh, Egypt, Indonesia, Iran, Pakistan, and Turkey. Pakistan became a confirmed nuclear power in May 1998. Not included in this list are three other States that are known to have sought nuclear capability: Iraq, Libya, and Syria. Most of these States have also developed or sought to develop chemical weapons, and the use of chemical weapons has been documented in at least three conflicts involving Muslim States: the Yemen war of the 1960s, the Iran–Iraq War, and the ongoing Syrian civil war. At least four Muslim States are believed to have or have had biological weapons programmes (Iran, Iraq, Libya and Syria).

Yet despite the development, stockpiling, threats to use, and even the actual use of WMD by Muslim States and non-State actors, the morality or legality of such weapons has not elicited significant discussion among Muslim lawyers and ethicists. In contrast to the classical Islamic literature on war – in which concerns over the proper conduct of war loomed large – modern Islamic discourse (over the past two centuries) focuses mainly on the legitimate grounds for war (*jus ad bellum*) and comparatively less on the legitimate means (*jus in bello*). Within the sparse discussion of legitimate means, Muslim scholars have yet to explore in a detailed and systematic fashion how nuclear, chemical, and biological weapons relate to the Islamic ethics of warfare.

Contemporary Muslim views on the ethics of WMD may be divided into three broad categories, mirroring those found in other religious traditions. The first group, the Muslim “WMD jihadists” argue for the acquisition and possible use – given the right circumstances – of weapons of mass destruction. Theorists of this group acknowledge that WMD push the moral limits of Islamic injunctions on fighting properly, but they argue that with the appropriate caveats, such weapons may be incorporated into the framework of traditional Islamic thinking on the proper conduct of jihad.

An even greater embrace of WMD occurs among the second group, who may be labelled the Muslim “WMD terrorists.” They not only argue that it is morally and pragmatically necessary for Muslims to acquire WMD, but also justify and, more importantly, seem prepared to employ WMD as a weapon of first resort. Moreover, they see little or no value in the mainstream jihad tradition’s distinctions between combatants and non-combatants, arguing that all non-Muslims — and even so-called nominal Muslims or Muslims who choose to live among non-Muslims — are legitimate targets.

The last group may be described as the Muslim “WMD pacifists.” These theorists renounce the acquisition and all possible uses of WMD as contrary to Islamic ethics. Muslim WMD pacifism should be distinguished from the total pacifism that renounces all recourse to violence to settle political disputes. A pure pacifist ethic is difficult to sustain within the Islamic tradition because of numerous Qur’anic injunctions to the contrary, including, most pointedly, verse 2:216: “Fighting is prescribed for you, though you dislike it. But it may be that you dislike something that is good for you, and like something that is bad for you. God knows, and you do not.” This is not to say that an ethic of non-violent resistance is alien to Islam; indeed, the Prophet Muhammad’s statecraft provides many important examples of non-violent resistance. But the Qur’an and Hadith provide so many justifications for the resort to force, when non-violent measures fail to provide for justice or security, that outright pacifism is virtually non-existent in Islamic intellectual history. Muslim WMD pacifists are not an exception. They accept that jihad may require the resort to violence under certain circumstances, but they cannot conceive of any circumstances that would warrant the use of nuclear, chemical, or biological weapons.



Most of the Muslim scholars who deal with this issue are WMD jihadists. Muslim WMD terrorists and Muslim WMD pacifists are very much in the minority, and one might even describe them as being on the fringe. None of these three positions is well articulated, so any attempt to delineate the salient points of difference among them is inherently an exercise in inference from scanty sources. And there is nothing, to my knowledge, that can be described as a sustained discussion or debate among the different groups, or even between two scholars, on the complex legal and moral issues raised by WMD.

My own research and reflection on Islamic law and ethics of war has led me to advocate WMD pacifism, and it is this position that I will develop here.

Let us consider first the use of nuclear, biological or chemical weapons.

As has been mentioned, most Muslim theorists who have expressed an opinion on the use of WMD fall within the category of WMD jihadists. They agree that Muslims should acquire WMD only for defensive purposes and that resort to such weapons is permissible only if the enemy has used them first. Under such circumstances, the principle of reciprocity that was often invoked by classical jurists permits, according to most modern scholars, the resort to such weapons. For such theorists, WMD do not seem to pose qualitatively new problems for the Islamic ethics of war.

Let us assume for the moment that the classical legal rules on permissible weapons are applicable to WMD. Perhaps a limited number of modern chemical weapons could then be judged according to the criteria developed by early Muslim jurists. It is possible (under a plausible set of conditions) to limit their use to the battlefield and thereby observe the strictures against wilfully targeting non-combatants or to design them in such a way that they incapacitate rather than maim or kill their victims. The problem with the analogy, of course, is that most chemical weapons are far more lethal than their crude medieval precursors, the ones classical Muslim scholars had in mind, and the types of injury they cause are much more severe and last longer, their effects extending to unborn generations. Modern chemical weapons, as a class of weapon, cannot be evaluated according to pre-modern strictures on the use of poisons or “noxious odours,” as some classical jurists described them. They, like nuclear and biological weapons, should be treated by Muslim lawyers and ethicists as new types of weapon posing new and qualitatively different challenges to Islamic ethics.

The use of any WMD should be rejected by Muslims, even as purely second-strike weapons. Retaliating with chemical, biological, and nuclear weapons against an unscrupulous enemy who initiates their use is not likely to deter that enemy from further use; instead, it may spur an escalation of WMD use. Such retaliatory use can be seen only as inhumane punishment of unprotected front-line troops, most likely those with little responsibility for the initial attacks. Chemical and biological weapons are most effective as weapons of terror, against civilian populations who are the least protected from their dangers. Tactical nuclear weapons remain as yet purely speculative. As in the Cold War, so, too, in any potential nuclear war in the Middle East or South Asia, it is difficult to imagine nuclear weapons being confined to the battlefield. Large civilian populations will be targeted and destroyed, particularly in a retaliatory second strike. No Islamic State and no Islamic military force can pursue jihad while intentionally targeting the civilian population, even if the enemy is doing so.

A second point requiring consideration in an Islamic framework is that any use of nuclear, biological, or even chemical weapons by a Muslim State in the Middle East or South Asia will assuredly result in the death of large numbers of Muslims living in the territory of the adversary or maybe in the Muslim State itself. Given the close geographical proximity of targets, how feasible is it to wage nuclear war (to focus on just this weapon for the moment) that will not backfire on the attacker when radioactive fallout is deposited in neighbouring countries?

Now, let us consider issues surrounding not the use but the threatened use of nuclear, biological, and chemical weapons.

Muslim proponents of deterrence invariably cite Qur'an 8:60 to support their claim that Islamic law and ethics not only permit but require Muslims to develop and stockpile WMD as a deterrent: "Make ready for an encounter against them all the forces and cavalry you can muster that you may overawe the enemies of Allah and your own enemies and others besides them of whom you are unaware, but of whom Allah is aware. Whatever you may spend in the cause of Allah shall be fully repaid to you, and you shall not be wronged" (al-Anfal 8:60).

Of course, the legitimization of nuclear weapons as a deterrent raises some very difficult moral issues. Does nuclear deterrence promote stability or instability in a hostile environment? Which deterrence strategy is the most effective: counter-force (aimed at military targets) or counter-value (aimed at population centres)? If counter-force targeting is adopted, can escalation be prevented? If counter-value targeting is adopted, is it morally acceptable to threaten the extinction of civilian populations?

Stable deterrence requires mutual trust, so to speak, among belligerents – trust that their adversaries are capable of surviving a first strike with enough weapons intact to launch a second strike. Thus a credible deterrence strategy inevitably fuels an arms race. Such costly ventures are financially disastrous and morally unjustifiable. The security returns are dubious at best while the opportunity costs of diverting resources are staggering.

The counterargument is sometimes made that in fact nuclear weapons reduce defence expenditures. In a July 1998 interview, Pakistan's foreign minister, Gawhar Ayyub Khan, stated: "The cost of the nuclear programme and the production of the missiles is much less than the cost of tanks and aircraft. The costs of the nuclear programme and missiles are the cheapest costs [*sic*] for a most effective system of weapons." This is a disingenuous claim: because nuclear weapons serve primarily political and not military purposes, their "un-usability" does not permit a concomitant decrease in spending on conventional weapons. When the journalist interviewing Gawhar Ayyub Khan pressed him on this issue by asking whether Pakistan would rely on nuclear weapons to provide the security heretofore provided by conventional weapons, the foreign minister responded predictably: "We can never dispense with the need for tanks and artillery, which are weapons with varied objectives."

Finally, let us consider the question of threatening evil in order to forestall evil, which lies at the heart of nuclear deterrence. According to one of the foundational prophetic Hadiths in Islamic ethics, "[a]ctions are judged by intentions." The intent (*niyya*) behind nuclear deterrence may, to some Muslims, be the praiseworthy goal of averting war, especially nuclear war, or of defending one's nation. But the strategy of nuclear deterrence, whether it is counter-force or counter-value, implies – with certainty – the killing of large numbers of innocents, the ravaging of the natural environment, and the injuring of generations yet unborn. These actions cannot be justified by any intention, not even that of averting some "supreme emergency" such as the potential death of large numbers of Muslims.

To this some may respond that nuclear deterrence can rely on the intent merely to deceive the enemy, to keep the enemy guessing whether such weapons will actually be used in war or not. After all, the Prophet is reported as saying, "War is deception." The problem with this line of reasoning is that nuclear deterrence, unlike conventional deterrence of the sort that the Prophet may have had in mind in the last Hadith or that the Qur'an discusses in verse 8:60, has catastrophe awaiting both the would-be "deterrent" and the deterred should deterrence fail. Nuclear deterrence works only when opponent is convinced that one intends to use nuclear weapons. The more money and energy one expends on convincing the other side of the sincerity of one's intentions, the more blurry the intentions become, and the more likely one is to cross the threshold.

Given all these concerns that I have outlined, I believe Muslims should reject the proliferation and hence the possibility of any use of WMD – for the following reasons:

First, nuclear, chemical, and biological weapons do not permit discrimination between combatants and non-combatants to the extent required by Islamic rules of war. The effects of WMD are felt not just by those who are their immediate victims, but also by those who rush to help these victims, and indeed by the children born to those first affected.

Second, even if WMD could be employed strictly against military targets, they kill or maim in such horrible ways that they violate Islamic teachings on fighting humanely.

Third, they cause lasting damage to the natural environment, a result that must be considered in Islamic moral evaluations because all life has worth as God's creation, quite apart from any utility to human beings: "There is not an animal on earth, nor a bird that flies on its wings, but they are communities like you."<sup>29</sup> Destroying or damaging the natural habitat of species unable to defend themselves against human attack is the height of what the Qur'an labels *fasad fi al-ard* (corruption in the land).

Fourth, because WMD cannot be used for any morally defensible purpose, any expenditure to develop and stockpile them – and any resources diverted from other, constructive purposes – amounts to what the Qur'an and Hadith condemn as *israf* (waste).

In arguing against the use of nuclear, biological, and chemical weapons, Muslim WMD pacifists do not and should not accept the use of other types of indiscriminate and highly destructive weapon traditionally regarded as "conventional" weapons, such as cluster bombs, anti-personnel landmines, or firebombs. These weapons are also open to objection on the grounds that they make discrimination between combatants and non-combatants difficult or that they kill and wound in particularly brutal ways. But nuclear, biological, and chemical weapons deserve particular attention because they are qualitatively different from conventional weapons and in a class by themselves. These are inherently weapons of massive, indiscriminate, and prolonged destruction.

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29 Qur'an 6:38.

## 4. PROTECTION OF CIVILIANS: AN ICRC PERSPECTIVE

### **Pilar Gimeno Sarciada, Head of the Protection of Civilians Unit at the ICRC**

Protection work within the ICRC has three branches: restoration of family links; detention-related activities, i.e. activities to benefit persons deprived of their liberty; and protection of the civilian population, i.e. activities to benefit civilians and others who are not or are no longer taking part in hostilities or acts of violence.

The ICRC's definition of "protection" is rights-based. For the ICRC, the aim of protection work – broadly speaking – is to ensure that authorities and other actors fulfil their obligations and respect the rights of individuals; the ultimate objective is to preserve the lives, security, physical and moral integrity, and dignity of those affected by armed conflicts or other situations of violence. Protection includes efforts to prevent or put a stop to actual or potential violations of IHL and other relevant bodies of law or norms that protect human beings. Protection aims to eradicate the direct causes of violations or the circumstances that lead to them, by addressing mainly people responsible for the violations and those who may have influence over these people. Protection also includes activities that seek to reinforce the security of individuals directly or indirectly, and minimize the threats or risks to their safety.

Protection activities address issues of two types:

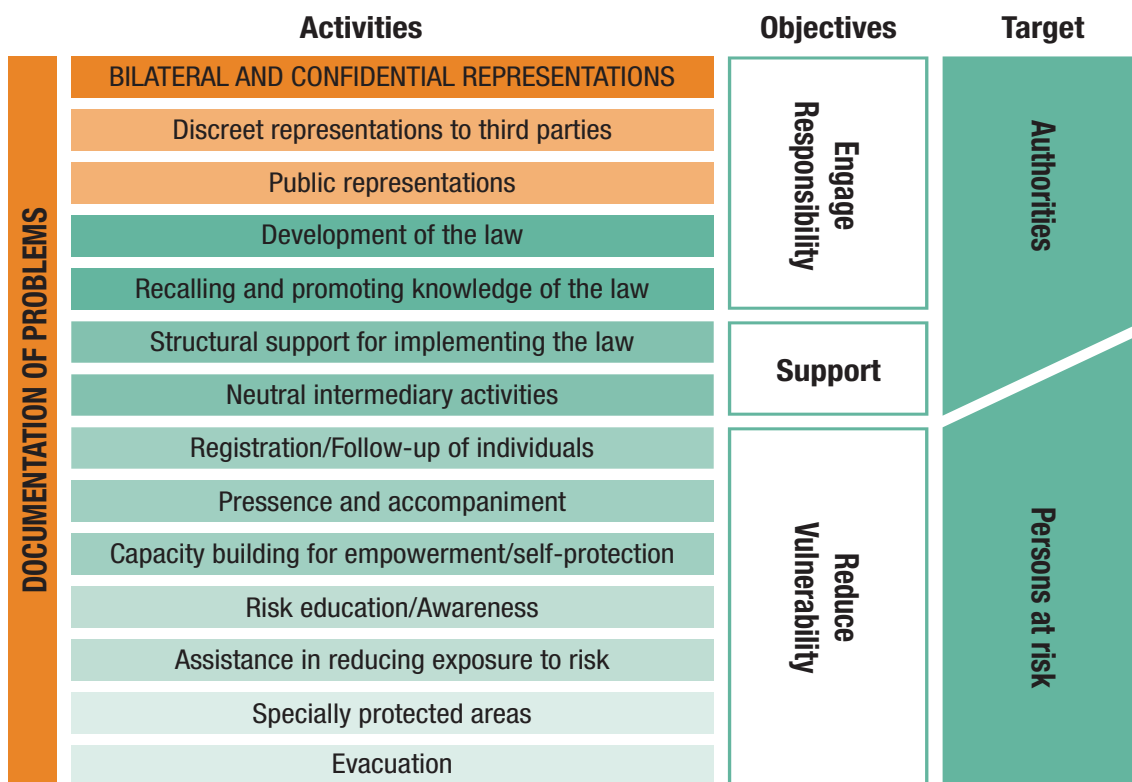
- the use of force in the conduct of hostilities and in law enforcement during armed conflicts and other violence
- the treatment of people by the authorities (State and non-State).

Protection activities are solidly based on documentation of single incidents or trends on the ground; analyses of policies and their humanitarian consequences for the population concerned; and dialogue with individuals, communities, authorities, armed actors and other stakeholders.

The ICRC's protection work consists of two main categories of action:

- activities that seek to engage the authorities
- activities that seek to limit communities and individuals' exposure to risks.

The following figure shows the ICRC activities that aim at the protection of civilians:



We carried out a number of activities in parts of the Muslim world in 2017, and here are some statistics related to the human cost of war that year:

- AFGHANISTAN: 10,000 civilian casualties
- IRAQ: 13,000 civilians killed
- SOMALIA: 2,078 civilians killed; 2,507 wounded
- SYRIA: 10,507 civilians killed; an average of 6,550 people were displaced every day
- YEMEN: 5,200 civilians killed since 2015
- NIGERIA: Between 2011 and 2017, 10,157 were wounded or killed in explosive violence; 86% (8,721) were civilians.

Some of the operational challenges that the ICRC faces on the ground include:

- the means and methods of warfare used on the ground, which often pose serious operational challenges for the ICRC. For example, the use of explosive weapons in populated areas or suicide bombings indiscriminately affect both legitimate military targets and civilians and civilian objects.
- difficulty in identifying perpetrators (multiplicity of actors and limited presence of humanitarian actors):
  - partner warfare: warfare becoming more and more a matter of partnership
  - rapid rise in armed groups that are horizontally rather than vertically organized, which makes it very difficult to identify contacts with actual influence.
- difficulties in engaging with different parties, because of limited access and their unwillingness to engage with humanitarian actors (often based on erroneous perceptions).
- sensitivity of certain subjects: differences in the way crucial concepts and issues are defined and understood (for instance, in the way the term “civilians” is understood by parties to conflict and humanitarian organizations).
- understanding the context, and the prevailing attitudes and value systems, and finding the right approach to connecting with people.

- finding the right contacts (military, political, religious and traditional leaders), because it is becoming increasingly difficult to know who would best serve our purposes or meet our needs.
- identifying influential circles, including religious and community leaders and scholars.

Finally, here are some examples of good practices from contexts where we have worked:

- Instructions to respect the lives of civilians (definition of “civilian”)
- Advance warning before attacks and other military operations, advising civilians to evacuate and/or take shelter
- Cooperating with local elders in creating safe passage for civilians, either by clearing areas of improvised explosive devices (IEDs) or by identifying roads or routes to avoid.
- Providing warnings that IEDs have been or will be laid, and advising against moving at night and/or taking certain roads (Helmand).
- Public declarations that health facilities are not to be targeted.

## 5. EXPERTS' COMMENTS AND DISCUSSION

### A) INTERPRETING ISLAMIC LAW IN LIGHT OF CONTEMPORARY REALITIES

In light of the discussion about taking contemporary challenges into account, one scholar drew attention to certain issues related to the principle of distinction. All the participants agreed that “distinction” was a core principle of IHL and that it also existed in Islamic law. However, he stressed that this matter must be discussed more thoroughly and that certain contemporary questions had to be dealt with. For instance, classical Islamic sources give protection to certain categories of person and regulate the employment of certain means and methods of warfare in use during the early centuries of Islamic history. But modern warfare poses many new and difficult questions: What about civilians who participate in hostilities but only temporarily? What about members of the police? The police wear uniforms, but police personnel who regulate road traffic have to be distinguished from those working in counterterrorism units that directly participate in hostilities. How does *fiqh* address this? A similar question in this respect is the use of modern means and methods of warfare. There is already a debate among Islamic jurists as to whether Islamic law permits the use of bombs, let alone weapons of mass destruction. IHL offers more precise guidance, through the principles of distinction, proportionality and precaution. That degree of regulation is not found in the books of *fiqh*. Therefore, the recommendation was made by some of the experts that modern scholars address these questions in a more detailed manner.

### B) USE OF WEAPONS OF MASS DESTRUCTION

Weapons of mass destruction (WMD), such as biological, chemical and nuclear weapons, were then discussed in some detail. One participant noted that while classical Islamic jurisprudence predates the development of such weapons – and was therefore in no position to tackle the issue directly – the Islamic law does restrict the use of certain means and methods of warfare. The participant added that contemporary scholarship has discussed the question in depth, and that most scholars agree that the use of such weapons, particularly nuclear weapons, is prohibited under the Islamic law of war.

One participant then linked the discussion to ancient means of warfare such as mangonels. He stressed that while classical Muslim jurists disagreed about the permissibility of the use of mangonels – and though the authenticity of the Hadith attributed to the Prophet Muhammad regarding the use of mangonels was still a subject of debate – one can safely say, based on the fundamental tenets of Islam, that WMD, which are much more lethal than ancient weapons such as mangonels or poison-tipped arrows, are categorically prohibited by Islam. Therefore, the participant called for adherence to the treaty prohibiting nuclear weapons; and everyone, not just some States, should reject WMD, so that no one is subject to the threat posed by them. Respecting treaties is an obligation for all Muslims, as reflected in the exemplary conduct of the Prophet Muhammad.

### C) CONSCIENTIOUS OBJECTIONS TO MILITARY SERVICE

Participants also discussed where Islamic law stood on the issue of conscientious objectors. One participant explained that every sovereign Muslim State is free to punish conscientious objectors as it sees fit; the only condition laid down in Islamic law is that to be legally binding, such decisions must be in line with the objectives of Islamic law. Another participant was of the opinion that States could compel their citizens to perform military service, but added that they still had to give due consideration to any reason that someone might legitimately have for refusing to serve.

# PROTECTION OF HEALTH CARE

## 1. PROTECTION OF HEALTH CARE UNDER IHL

**Alexander Breitegger, Legal Adviser, ICRC Legal Division**

This presentation will focus on how IHL protects the delivery of health care. Indeed, this is a foundational issue for the ICRC: it is bound up with both the creation of the International Red Cross and Red Crescent Movement and the very origins of IHL. We heard about the protection of civilians when the conduct of hostilities was discussed. Now, we will enlarge the scope of our discussion and talk about protecting the wounded and sick and maintaining adequate care for them in armed conflict. Under IHL now, “the wounded and sick” may mean both civilians and military personnel; it was not always so: originally, protection under IHL was limited to wounded and sick enemy combatants.

The definition of the term “wounded and sick” under IHL is both narrower and broader than its meaning in common parlance. It is narrower because – as, on the whole, IHL seeks to balance military necessity and humanitarian considerations – it provides legal protection only legally for those persons who, apart from requiring medical care, also refrain from any hostile acts. A wounded enemy combatant who continues to shoot his or her AK-47, launch rocket-propelled grenades, or emplace improvised explosive devices does not benefit from the IHL protection for the wounded and sick. The IHL definition of “the wounded and sick” is broader than its meaning in common parlance because it also encompasses persons who would not ordinarily be called “wounded and sick,” for instance, expectant mothers or newborn babies. So, this should be borne in mind when we look at the various obligations that parties to armed conflict have towards the wounded and sick.

Here we can briefly mention the following aspects:

- **Humane treatment:** Generally speaking, once a person is wounded or sick, regardless of whether he or she is a civilian, an enemy fighter, or a friendly fighter, that person has to be treated humanely. In fact, once a person is wounded or sick, the distinction between civilian and combatant ceases to be relevant. Humane treatment means more than not killing or ill-treating someone: it also means that if a person is under your control, you do everything in your power to ensure their survival.
- **Respect:** This means refraining from performing certain acts, especially not killing and not ill-treating or harming someone. It can be challenging in the heat of battle to fight the urge to kill a prominent enemy commander in front of you, especially if that person was responsible for the death of many of your fellow-soldiers or for killing civilians; but once this person is wounded or sick, you may do him no harm.
- **Protect:** This means having to do something: coming to the aid of third persons (e.g. from the local population, during looting, for instance) who, if wounded and sick, may be easy prey. It also means assisting the delivery of health care to these persons in every way possible.
  - **Collect and Care:** This has to be done – it cannot be emphasized enough – without any adverse distinction. All feasible measures must be taken to search for, collect, evacuate, and care for wounded and sick without adverse distinction based on whether they are civilians or combatants, or on other criteria such as religion or sex. The various obligations under IHL have been formulated with the security challenges during armed conflict in mind: for instance, the obligation to collect and evacuate is intended to ensure that the wounded and sick are taken to a protected location where they can be cared for and kept out of harm’s way; but this is tied to security considerations, and the obligation requires collection and evacuation when the security situation permits and particularly after an engagement has taken place. The provision regarding medical care is subject to the medical capabilities of the various parties to conflict; it permits others to care for the wounded and sick – including civilians (who may spontaneously collect and care for the wounded and sick), other medical personnel (e.g. associated with an adversary), and impartial humanitarian organizations.



Those are the fundamental obligations with regard to the wounded and sick. Since the function of medical personnel, facilities, and transports is to ensure care for the wounded and sick, we can derive the IHL protection for health-care personnel, facilities, and transports from these obligations

You might also have civilians spontaneously collecting wounded and sick, and you also have different layers of protection for health-care professionals. The first is for health-care professionals at large: the activity of providing medical care in line with medical ethics is protected, but the persons providing the medical care are not themselves afforded more specific protection on account of their profession. Another layer of protection is added for medical personnel, facilities, and transports, as these are categories already fixed before a conflict and assigned by a competent authority of a party to conflict to tend to the wounded and sick. They have certain specific privileges over and above health-care professionals at large, to which we'll turn in a second.

1. Health care professionals at large, not falling within the category of specifically protected medical personnel who may be entitled to use the red cross, red crescent or red crystal emblem. Those health-care professionals would normally be protected as civilians and they are protected from threats, harassment or punishment, when performing their medical activities in line with medical ethics.
  - Medical ethics include these basic injunctions: do no harm to a patient; provide medical care to the best of your ability; and respect patients' autonomy and preferences, and medical confidentiality. You must not be punished for the mere fact of having acted within medical ethics, i.e. if you have helped a wounded enemy or terrorist. This is a significant challenge today.
  - Also, health-care professionals shall not be compelled to act against medical ethics: for instance, they may not be compelled – at gunpoint, as is sometimes the case – to treat a wounded or sick fighter before others who need medical care more urgently.
  - Respect for medical confidentiality is also a major challenge, especially because the protection in that case is not absolute and subject to domestic law. Far-reaching exceptions to medical confidentiality in domestic law, where they exist, create challenges in practice.
  - Besides these particular protections, health-care professionals – if they are civilians – will be protected as civilians unless and for such time as they directly participate in hostilities.
2. Specifically protected medical personnel, facilities, and transports:
  - In this connection, I have already mentioned the need for specific assignments made out by a competent authority before an armed conflict; this authority determines that these personnel may provide medical care during the conflict in question. Their activities must, however, be related solely to medical purposes.
  - They can be civilian or military: public or private civilian health-care providers, or members of the military medical services of armed forces; some non-State armed groups may also have military medical services.
  - Assigning personnel specifically to carry out medical duties always implies some degree of control: for instance, with regard to who will provide medical care in an armed conflict; this is also linked to the issue of deciding who may bear one of the protected emblems. But, a caveat here, the specific protection does not depend on whether you use such a protective emblem. The emblems just make such protection visible.
  - Compared to civilians and civilian objects, they have to go a long way to lose their protection. I will describe the circumstances in which that can happen, but I would like, first, to describe very briefly the major components of this protection:
    - Respect: this refers to a duty of abstention, i.e. not to attack them or impede them unduly in the fulfilment of their medical functions.
    - Protection: this means that they must be protected from harm by third persons and their work facilitated as far as possible.

- Medical personnel, facilities, and transports lose their specific protection only in certain circumstances:
  - They lose their protection if they commit acts harmful to the enemy, and beyond their humanitarian functions, such as using medical facilities or medical transports:
    - to fire at the enemy for reasons that go beyond self-defence
    - to shelter healthy combatants
    - to store arms or ammunition
    - as military observation posts
    - as shields for military action
    - to transport healthy troops, arms or munitions
    - to collect or communicate military information that facilitates military operations.
  - Loss of specific protection is not automatic. Prior to the loss of protection taking effect, a warning must be issued and at the same time, if possible, a time limit specified. The protection is forfeited only if this warning is not heeded.
  - Exceptions to such loss of protection include:
    - carrying light weapons for self-defence or for the defence of patients (primarily relevant for military personnel)
    - the presence of escorts and guards around hospitals
    - storage of small arms – that have been taken away from the wounded and sick – until they are handed over to a competent authority (this happens frequently).

Finally, someone providing medical care to a wounded enemy may not be deprived of protection – as that is never, in and of itself, a hostile act or an act harmful to the enemy.

## 2. PROTECTION OF HEALTH CARE UNDER ISLAMIC LAW

**Muhammad Mushtaq Ahmad, Associate Professor and Director-General of the Shariah Academy at the International Islamic University, Islamabad, Pakistan**

Health-care provision is endangered now in a number of ways. One is the growing threat to sick and wounded combatants.<sup>30</sup> A second concern is the number of attacks on hospitals, medical personnel, ambulances and other medical services. In some contexts, such attacks are doubled: for instance, when humanitarian workers are dispatched to the scene of a bombing, a second bomb specifically targeting them is detonated. Other examples concern the inhuman treatment of doctors and other medical personnel during captivity. Finally, the protected status of hospitals and ambulances is abused sometimes and exploited for unlawful purposes. The rest of this presentation will focus on the protection of medical personnel under Islamic law, with these operational challenges in mind.

One of the grounds for protecting medical personnel is that they do not participate in hostilities. It is a fundamental principle of both IHL and Islamic law that persons not participating in hostilities should not be targeted. Another ground for their protection is that they work for humanity: they provide much-needed care for the wounded, the sick, and others in need of medical attention.

But a question arises here: what if they do participate in hostilities? A question is also raised sometimes about the protection these doctors provide to wounded and sick combatants: do combatants have the right to life? The argument takes this form: they are enemies; they are combatants; and if medical help is provided to them, they will be able to attack us again; hence, those providing them medical care are legitimate targets. These are not hypothetical points; they are actually discussed in various circles.

Muslim scholars, classic and contemporary, generally agree that Islamic law provides protection to non-combatants and others who do not participate in hostilities. But what “non-combatants,” or *ghayr muqatilin*, means in the Islamic context remains a contested issue. “Combatant,” like “civilian,” has become a technical term. Classical Muslim jurists used the terms *muqatil* (combatant) and *ghayr muqatil* (non-combatant), and they generally cite women and children – and some other people to whom protection was given by the Prophet or his successors – as examples of non-combatants. But the concepts (combatant/*muqatil* and civilian/*ghayr muqatil*) may sometimes overlap, and there may be some grey areas. Hence, defining “combatants” and “direct participation in hostilities” is a contentious issue, in Islamic law as in IHL. A sub-question arises in this respect, on whether Islamic law distinguishes between direct and indirect participation in hostilities.

For the purpose of clarity, the next section will focus on the example of a doctor who is loyal to his or her profession, provides medical care to all without adverse distinction, and prioritizes patients only on the basis of need. To ascertain if and when this person can be considered to be participating (directly or indirectly) in hostilities, and when he or she might lose the protection accorded by Islamic law, three legal questions should be discussed:

1. Under Islamic law, can such a doctor ever be regarded as a *muqatil* (combatant) in a technical sense? The definition of *muqatil* includes all those who participate in hostilities physically or by contributing money or their opinions. The definition is hence a broad one, and begs the question of whether, under Islamic law, medical personnel would be included.
2. By providing medical assistance to enemy combatants, does this doctor participate in hostilities? In other words, does assistance to the enemy count as participation?
3. If yes, is it direct or indirect participation, and does Islamic law recognize this distinction?

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30 In this presentation, “combatant” is used as a generic term to mean “fighter.” Hence, it goes beyond the IHL category of “combatant,” which exists only in international armed conflict.

The various schools of Islamic law differ on a number of issues. These schools of law represent internally coherent systems of interpretation; mixing up the opinions of scholars from different schools often leads to analytical inconsistencies. To avoid that, the following analysis focuses on the views of one particular school of law, the Hanafi school. This is not to deny the significance of any other school, but only in order to apply an internally coherent legal theory and ensure analytical consistency.

Now, what should be the starting point for legal reasoning? Should we start with the presumption of permissibility, that is, by presuming that everything is permissible unless proven otherwise? Or should we start with the presumption of prohibition? This is important, as it will change the way we look at our question. On the one hand, it would mean that it is permitted to target medical personnel unless there is a specific prohibition against it, while on the other, that there is a general prohibition against attacking medical personnel unless there is a specific exception permitting it.

The famous Shāfi‘ī jurist Imam al-Suyuti is reputed to have stated that the Hanafis began with the presumption of prohibition. Without examining the authenticity of this claim of al-Suyuti, it should be said that the original presumption of permissibility is applicable primarily to things and not to acts. It is not a principle over which there is unanimous agreement. Even if such agreement were to exist, and even if it were to apply to both acts and things, there are many exceptions to it. For instance, and this is important for our question, a well-established exception concerns human life: it is generally agreed that the original rule prohibits the taking of a human life. In fact, it is prohibited to kill, target, or cause harm to anyone, unless the law permits it. Hence, regardless of whether one starts with a presumption of permission or of prohibition, the result is the same: the life of a doctor remains protected unless proven otherwise, and the burden of proof is on the side that claims otherwise.

A second issue is that of direct participation in hostilities. We will explain the relevant principles of Islamic law by analysing the different ways in which women have participated in wars during the era of the Prophet. Seven types of participation can be identified: 1) as servants; 2) as companions; 3) as singers, to boost soldiers' morale; 4) by providing medical assistance; 5) by participating in the planning for war; 6) by contributing money helping to finance wars; and 7) by committing a hostile act such as killing, wounding or capturing the enemy. How should these seven categories be classified as direct or indirect participation in hostilities?

In this respect, Imam Muhammad Ibn al-Hasan al-Shaybani asserts that women may participate in battles in many different ways, “but I do not like them to directly participate in *qital* (actual combat).” Hence, he draws a distinction between actual combat and other forms of participation. Another rule from which this distinction is derived relates to the sharing of war booty. According to jurists, women are non-combatants and are therefore not entitled to any share of the booty from war. However, that ceases to be the case if they prepare food for combatants or provide them medical care – because that amounts to their having participated indirectly in the fighting.

A third aspect to consider is the distinction under Islamic law between the acts of the *mubashir* (the one who actually or physically commits an act) and the *mutasabbib* (the one who causes – orders or instigates – the commission of that act). As a general rule, the act is attributed to the *mubashir*. It is only where the *mubashir* is deemed to have been a tool in the hands of the *mutasabbib* that the act is attributed to the *mutasabbib*. In such cases, a causal link must exist between the act of the *mubashir* and the *mutasabbib*. Moreover, the act is always attributed to the nearest cause.

Finally, let us consider some other principles of Islamic law. For instance, one of them provides that “an act becomes obligatory because another obligatory act cannot be performed without it.” Thus, because protecting civilians and other non-combatants is a necessity, sufficient protection must be provided to medical personnel; otherwise it is not possible to adequately protect civilians. Another principle states that “a lawful act becomes unlawful if it is committed for achieving an unlawful purpose.” In other words, even if an act is lawful, it becomes prohibited when the ultimate consequence is unlawful. This principle comes under the larger doctrine of *maslahah* (public interest), which, according to the famous jurist-cum-philosopher Imam Ghazali, means “protecting the purpose of the law.” Some contemporary scholars interpret *maslahah* as

a utilitarian principle by focusing on its literal meaning, which is “acquiring benefit and repelling harm.” On this basis, they assert that an act will be prohibited if it is more harmful than beneficial, but not if it is more beneficial than harmful. According to most scholars, an act would be prohibited if it results in an equal amount of benefit and harm, because Islamic law prefers repelling harm to acquiring gains of any kind. Hence, even this utilitarian interpretation of the principle of *maslahah* necessitates protection for medical personnel.

To summarize, it is a fundamental principle of Islamic law that every human life is protected unless proven otherwise. Hence, the burden of proving the legitimacy of targeting medical personnel is on those who perpetrate these acts. Islamic law distinguishes between direct and indirect participation in hostilities; it does not consider the act of providing medical assistance to enemy combatants to be direct participation. Therefore, medical personnel, like all those who do not directly participate in hostilities, remain under the protection of Islamic law. Moreover, Islamic law attributes acts to the nearest cause; therefore, under Islamic law, hostile acts are attributed to the combatants who actually commit them, not to the doctors who provide medical care for these combatants. This protection is further strengthened by the fact that one of the purposes of Islamic law is to minimize suffering during war, which purpose cannot be realized if medical personnel are deemed legitimate targets.

### 3. INTRODUCTION TO OPERATIONAL CHALLENGES

**Maria S. Guevara, Senior Coordinator, Attacks on Health Care, Médecins Sans Frontières**

Attacks against medical services are growing in number, and at an alarming rate. The World Health Organization reported a yearly average of 293 attacks and 365 deaths for the period between 2015 and 2017. Between January and October 2018 alone, 230 attacks and 271 deaths were recorded.

As a field worker, I am a witness to the disturbing rise in the number of attacks on medical personnel, facilities, and vehicles. As a medical doctor, I am appalled at the loss of sanctity and the criminalization of medical activities. And as a citizen of the world, I am ashamed of the breakdown in humanity within our societies. We are not only facing a humanitarian crisis but a crisis of humanity. I am here to take part in finding out why these things are happening and to help to find ways to put an end to them.

Médecins Sans Frontières (MSF) is an independent, international, non-profit, medical humanitarian organization. It provides medical humanitarian assistance to people affected by conflict, epidemics, disasters or exclusion from health care. Its actions are guided by the humanitarian principles of independence, impartiality and neutrality, and by medical ethics.

MSF's mandate differs from the ICRC's, which includes being the legal guardians of IHL. We practise humanitarian medicine. That is why humanitarian principles and medical ethics are at the core of what we do. Our president, who received the Noble Peace Prize in 1999 on behalf of the organization, has said, "MSF is not a formal institution, and with any luck at all we will never be. It is a civil society organization, and we have a new global role, a new informal legitimacy that is rooted in its action, and in its support from public opinion."

MSF has witnessed attacks against medical services almost since its creation in 1971. The worst attack took place in Kunduz, Afghanistan, in October 2015: in the early morning hours of 3 October, the MSF Kunduz trauma hospital suffered sustained bombing, lasting over an hour, by a United States Air Force AC-130U gunship. A total of 42 lives – 28 patients and 14 staff – were lost: some were burnt to death in their beds and others were shot while fleeing. Bombardments were also experienced in Syria, Yemen and many other places that same year.

From 2013 to 2016, MSF carried out a project – Medical Care Under Fire – to study and understand the typology of the incidents that the organization had been experiencing. Five main types were identified:

- requests for preferential treatment (this concerns cases where medical personnel are attacked for doing their work impartially: what it amounts to is that medical personnel are sometimes asked to carry out their medical duties – triaging, diagnosing and providing life-saving treatment – in a preferential manner, and are attacked if they refuse to comply)
- violence linked to dissatisfaction with care
- looting for economic gain or political reasons
- attacks against health facilities on the grounds that are part of the battlefield
- persecution of patients or civilians seeking sanctuary in health centres because they are sick.

The study also showed that the perpetrators were mainly 'groups', such as international forces, State security forces and armed non-State actors; their reasons were various, and linked, for instance, to counter-terrorism policies or military and/or political strategy.

We should also recognize that the principle of humanity – which is one of MSF's guiding principles – and the idea of "bringing humanity to war" may not have the same meaning everywhere. Cultural and social norms vary across regions and may not define humanity, neutrality or impartiality in identical ways. This can cause misunderstandings and give rise to tensions.

Health care, too, does not mean the same thing everywhere, and we must acknowledge the importance of the ethical and social constructs around health care. With regard to ethics, we can say this: medical practice is based on a professional code of conduct that is accepted by all medical practitioners and that has historically been the basis of the respect afforded to medical activities. Medical ethics, which are based on universal rights, are embodied in these four principles by which medical workers abide:

- respect for autonomy, that is, giving the patient the right to refuse or to choose his or her treatment
- beneficence, that is, acting in the best interests of the patient
- non-maleficence, that is, doing no harm
- justice, that is, proper distribution of scarce health resources.

Health care is not always seen as a common good, because it is regarded as a luxury affordable only by a privileged few and inaccessible to the impoverished. It is sometimes a commodity that can be used, misused or manipulated for gain. In some settings, unfortunately, health care has become a weapon of war. We must put an end to this and strive to reach a common understanding on the value of health care.

In 2015, MSF's hospital in the Democratic Republic of the Congo (DRC) was caught in the crossfire between various warring armed groups. The organization convened a round-table meeting of the representatives of the various armed groups, the clergy, and community leaders, in order to understand their views on health care and reach a common understanding of the necessity of protecting it individually as well as collectively. The participants drafted a social contract involving all those present. As a result, there were no attacks against medical services for some time afterwards.

Unfortunately, it is hard to discern the impact of those efforts today. For instance, in the current Ebola crisis in the DRC, which is taking place in the same area where the MSF hospital is situated, the security concerns have so many different dimensions that mounting a response is even more challenging than usual. Physical insecurity due to violence is compounded by general health insecurity and bio-security risks linked to the disease itself. Manipulation of the situation and general ignorance concerning the disease have built up mistrust in the community, which has led to numerous attacks on health-care providers. Safe-burial teams made up of Red Cross volunteers have been targeted in this current epidemic: for instance, on one occasion, when the burial team carried the corpse of a dead relative to the family concerned, they were attacked because of suspicions among the family and the community that the body in the body bag was not what it was claimed to be. Reassuring the family and the community that their suspicions were misplaced was impossible, because it would have meant opening the body bag, which is prohibited because of the high risk of transmitting the disease.

A final point: the disturbing narratives around anti-terrorism, de-humanization and "othering" have become part of the social psyche. It is becoming far too common, alarmingly common, for people to regard other people as something other than human – that is, devoid of human essence – or as less than human and therefore candidates for murder or extermination. This dehumanization of the Other is an impediment to providing impartial care to those who are most vulnerable. Counter-terrorism laws have also served to obstruct the work of humanitarian actors, by limiting humanitarian organizations' ability to negotiate. These organizations are thus forced to rely – for access and for their safety – on their acceptance by the communities they seek to help, which they can gain only by engaging the members of these communities. Therefore, criminalizing such actions endangers their ability to reach those most in need.

What can be done then? Connection is key. Acceptance requires making connections. It also requires awareness, sharing knowledge, observing and collecting the necessary data, and training. Forming alliances is crucial.

In the end, it comes down to finding areas of common interest or concern, developing trust, and building bridges; it is also important to remember that the norms must be brought down to the field, and made protective and pragmatic and usable for and by people.

## 4. EXPERTS' COMMENTS AND DISCUSSION

### A) ISLAMIC GROUNDS FOR THE PROTECTION OF HEALTH CARE

The discussion began with participants reflecting on the concept of *amān* (protection) in Islamic law. One participant suggested that medical personnel should be encouraged or even obliged to seek *amān* (protection) from the parties to conflict. They could inform the parties of their intended activities, and the parties would then decide whether or not to afford them protection. Another expert, however, quickly interjected that this would be superfluous: Islamic law is extremely clear about the existence of an obligation to provide medical care, which itself falls under one of the Five Necessities of Islamic law, i.e. protection of life.<sup>31</sup> Other experts agreed; one added that the simple fact of being a doctor is sufficient for protection, and that – according to Islamic law – medical personnel therefore did not have to petition for protection.

This position was reinforced by another expert by recourse to medical ethics, which are a global code of conduct that every doctor understands. Since the creation of the Hippocratic oath, everyone knows what it means to be a doctor and how to provide care. Requiring medical personnel to seek additional protection through the granting of *amān*, which requires the consent of parties to conflict, would undermine that code.

### B) ENVISAGING DIFFERENT CASES

This exchange led an expert to conclude that the complexity lay in the details. According to him, there seems to be a consensus that medical personnel are protected under both IHL and the Islamic law of armed conflict. However, the application might differ. For instance, under IHL, only those persons who have been assigned to medical duties by a party to conflict may be defined as “medical personnel.” The expert contended that this definition was too restrictive and that everyone who provides medical care should be protected in the same way.

Participants then envisaged three different cases, in order to see whether IHL, the Islamic law of armed conflict, and medical ethics would all yield different responses:

- a deliberate attack on a medical unit and its personnel because they are caring for the wounded and sick
- an attack that affects the medical unit and its personnel – but the reason for this attack is that the unit is also being used for military purposes or at least is thought to be doing so
- an attack on a medical unit and its personnel that resulted from the attackers' failure to take sufficient precautions – but the medical unit was not the target of the attack.

By way of introduction one expert drew attention to the necessity of analysing the different reasons for a lack of respect for medical services, and to the fact that each reason should lead to a different means of addressing it. One key question to consider in this regard is whether the lack of respect for the law is the result of lack of awareness, reluctance to apply existing law, or even total scepticism about the validity of an applicable rule.

In the first case, the experts agreed that preventing violations of this kind requires an in-depth analysis of all that can influence the parties positively and motivate them to respect the law.

In the second case, one expert noted that the issue could be linked to perceptions concerning misuse. The expert emphasized the necessity of having unambiguous rules on the loss of protection for medical units and the necessity also of ensuring that these rules were known to all pertinent personnel. The rules could then be compared with Islamic law and its definitions of “combatants” and “non-combatants.” In addition, the expert explained, while previous discussions had drawn attention to the existence of points of convergence between IHL and Islamic law, now, on a topic such as this one, participants and other scholars had to go beyond the identification of generic principles and points of convergence.

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<sup>31</sup> Note: The Five Necessities or the Five Higher Objectives of Islamic law are: protection of religion, protection of life, protection of the mind, protection of the lineage, and protection of wealth.



Finally, with regard to the third case, the challenge is mainly one of implementing the applicable law, and could be addressed in practical terms, particularly when the parties were already willing to respect the law. In this connection, it is worth noting that the ICRC's Health Care in Danger initiative explores avenues such as revision of military doctrine and practice. The ICRC works through certain scenarios directly with armed forces and armed groups – that is, through situations that they might be confronted with during hostilities – in order to ensure that they are better prepared, for instance, to take precautionary measures.

### **C) THE DOUBLE-FUNCTION DILEMMA**

The discussion then moved on to the specific case of medical personnel who had dual functions. The rules of IHL were first recalled. The experts then drew a clear distinction between a medical worker using a weapon to participate directly in hostilities, and that same person using a weapon strictly in self-defence or to defend the wounded and sick in his or her care.

The experts then drew attention to the importance of military discipline and regulations on the one hand and professional ethics on the other. They agreed about the usefulness of leaving it up to professional bodies of health-care workers to punish unethical conduct. In addition to ensuring respect for the law and for medical ethics, these professional bodies also have a duty to preserve trust in medical activities. If the boundaries between military conduct and medical conduct become blurred, that trust is easily undermined, and the mistrust that results might affect other medical professionals who might be active in certain areas or contexts.

In this connection, one expert mentioned the ICRC's work on ethical standards with civilian and military international health-care associations – such as the World Medical Association and the International Committee of Military Medicine. The ICRC brought all of them together – for the first time – to agree on a common set of ethical principles, which were formalized in a document. The document is also intended to provide help in tackling this issue: although ethical principles are the same in all situations, applying them during armed conflict might create certain dilemmas. All the professional health associations involved committed themselves to disseminating and helping to implement these principles.

# DETENTION IN ARMED CONFLICT

## 1. DETENTION IN ARMED CONFLICT UNDER IHL

**Tilman Rodenhäuser, Legal Adviser, ICRC Legal Division**

This workshop is an opportunity for experts in two important areas of law – IHL and Islamic law – to discuss similarities and differences between the rules on deprivation of liberty in armed conflict found in these two bodies of law. My presentation will focus on the IHL rules protecting persons deprived of their liberty. IHL has numerous important rules on deprivation of liberty because in armed conflicts, persons deprived of their liberty are particularly vulnerable: their treatment, the conditions in which they are held, and their future depend on the detaining power, which is normally the party to the conflict against which they were fighting.

This brief presentation first recalls that in IHL there are two different legal regimes that protect detainees in armed conflict: the rules protecting prisoners of war and civilian internees in international armed conflict (IAC) and those protecting detainees in non-international armed conflict (NIAC). As most conflicts today are non-international in nature, this intervention will concern itself mainly with the norms protecting detainees in NIAC – in particular, IHL rules on the treatment of detainees, on conditions of detention, and on procedural safeguards and judicial guarantees.

### A) DEPRIVATION OF LIBERTY IN INTERNATIONAL ARMED CONFLICTS

The best-known protection regime for persons deprived of their liberty in armed conflict consists of the rules protecting prisoners of war (POWs) in IACs. IHL rules protecting POWs are set out in the Third Geneva Convention of 12 August 1949 (GC III). A POW is a member of a party to an armed conflict who has fallen into the hands of the enemy (see Article 4, GC III). POWs may not be prosecuted merely for having participated in hostilities. The deprivation of their liberty, which is called “internment” (Article 21, GC III), is non-punitive in nature. The rationale is to keep POWs out of the hostilities. POWs may be interned for the duration of an armed conflict. They have to be released and repatriated without delay after the cessation of active hostilities (Article 118, GC III).

IHL defines in considerable detail how POWs are to be treated during their internment. It requires that they be interned in dedicated camps, and not in prisons or, more generally, close confinement. GC III defines in great detail all aspects of the internment of POWs, including their registration, notification of their capture to the armed forces to which they belong, and contact with the world outside.

The existence of GC III is testimony to the fact that States have created a rather complete and encompassing legal regime for the protection of POWs.

During IACs, under the Fourth Geneva Convention of 12 August 1949 (GC IV), internment is the severest “measure of control” that a State may take with regard to civilians (Articles 41 and 78, GC IV). Internment is permissible only “for imperative reasons of security”.<sup>32</sup> GC III sets out detailed rules for the treatment of POWs; and GC IV does the same for interned civilians and their living conditions in internment. GC IV also defines basic procedural safeguards for civilian internees that the interning power has to respect (Articles 42 and 78, GC IV).

## B) DEPRIVATION OF LIBERTY IN NON-INTERNATIONAL ARMED CONFLICTS

One of the great legal challenges in protecting detainees during NIACs is that the protection regime defined in GC III for POWs in IAC does not apply, because these conflicts are non-international in nature (meaning that at least one party to the conflict is a non-State armed group). IHL rules protecting detainees in NIACs are significantly less elaborate than those protecting persons deprived of their liberty in IACs. Therefore, in NIACs we need to draw on various sources of international law – not only IHL treaty and customary rules, but also human rights law – to ensure the protection for persons deprived of their liberty in relation to this type of armed conflict.

### IHL norms relating to the treatment of detainees in NIACs

#### Sources

- Article 3 common to the four Geneva Conventions (common Article 3)
- Article 4 of Protocol II of 8 June 1977 additional to the Geneva Conventions of 12 August 1949 (AP II), if applicable
- Customary IHL<sup>33</sup>

One of the elementary rules that IHL provides for the protection of detainees is the obligation of humane treatment: all detainees have to be treated as human beings and their dignity respected. This basic rule is of great relevance in contemporary armed conflicts, as the ICRC has frequently heard arguments in this connection that certain detainees do not deserve certain rights because they are “terrorists”. However, IHL demands that all human beings be treated humanely.

Another overarching IHL rule is the prohibition against adverse distinction: IHL prohibits discrimination against detainees based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. This is extremely important because it means that the treatment of a detainee cannot be based on his or her religious affiliation.

In addition, IHL sets out a number of rules prohibiting violence against life and person (including, for example, the prohibitions against murder, mutilation, torture, and cruel treatment). IHL also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. An outrage on personal dignity does not need to cause severe pain: the term “outrages upon personal dignity” encompasses a broad range of acts that seriously humiliate or degrade persons.

Moreover, IHL also prohibits sexual violence. The relevant prohibitions are set out explicitly in IHL treaty norms (such as Article 4, AP II) and customary law (Rule 93 of the ICRC’s study on customary IHL); they are also implicitly forbidden by other IHL norms, such as the prohibition against cruel treatment and outrages upon personal dignity.

<sup>32</sup> GC IV foresees seemingly different grounds for the internment of civilians depending on whether the civilian is within a State’s own territory (internment permissible “if the security of the Detaining Power makes it absolutely necessary”, Art. 41, GC IV) or whether the civilian is interned in occupied territory (internment permissible for “imperative reasons of security”, Art. 78, GC IV); but in the ICRC’s view, there is no significant difference between these two standards.

<sup>33</sup> Customary IHL Study, Rules 87–98.

## IHL norms relating to the conditions of detention for persons held in relation to NIACs

### Sources

- The obligation of humane treatment in common Article 3<sup>34</sup>
- Article 5, AP II, if applicable
- Customary IHL<sup>35</sup>

In addition, human rights soft law instruments, such as the Mandela Rules, set out legally non-binding minimum rules for the treatment of prisoners, which – depending on the context – provide additional guidance.<sup>36</sup>

IHL requires that all persons deprived of their liberty be provided with humane conditions of detention. Depending on the applicable sources of law, this may include, *inter alia*, that:

- detainees be provided with food, water, clothing, and hygiene items and adequate sanitation.
- the detaining power provide detainees with medical care when required.
- places of detention be located away from battlefields; that men, women, and children be held separately in places of detention, except when male and female members of a family are confined together; and that detainees be under the supervision of guards from the same sex.
- the detaining power respect the religious convictions of the detainee and facilitate his or her religious practices. For instance, AP II requires that, if requested by detainees, persons performing religious functions – such as priests or imams – be allowed to provide spiritual assistance to detainees.

The detaining power also has an obligation to allow family contact: detainees must be allowed to stay in touch with their families, that is, at least to write and receive messages to and from them. In recent conflicts, detainees in certain contexts have also been permitted to benefit from phone calls, video conferences, and family visits. The ICRC has a long history of restoring family ties during armed conflict, including between detainees and their relatives.

### Procedural safeguards and judicial guarantees

IHL foresees two types of deprivation of liberty in NIACs.

On the one hand, a person may be deprived of his or her liberty in accordance with the penal laws of a party to conflict. In other words, a person may be prosecuted for allegedly committing a crime.

On the other hand, in armed conflict a person may also be subjected to internment, which can be defined broadly as “non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority”.<sup>37</sup> Traditionally, internment has been a form of deprivation of liberty that is particularly prevalent in IACs. As set out above, the detention of POWs is not a form of punishment; they are deprived of their liberty to ensure that they do not continue their participation in hostilities. Broadly speaking, this logic also applies to internment in NIACs.

<sup>34</sup> See ICRC, updated Commentary on the First Geneva Convention, 2016, para. 558.

<sup>35</sup> Customary IHL Study, Rules 118–127.

<sup>36</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015, as adopted by the UN General Assembly in Resolution A/RES/70/175.

<sup>37</sup> ICRC, “Internment in armed conflict: Basic rules and challenges”, 2014, p. 3.

These two forms of deprivation of liberty are very different, not least in terms of the procedures that have to be respected.

A person charged with an offence under criminal law has to be provided with a fair trial. Fair-trial guarantees during IACs and NIACs are defined in considerable detail by both IHL and human rights law.<sup>38</sup>

However, IHL applicable in NIACs does not define the grounds and procedures for internment. This does not mean that no procedural safeguards exist; what it means is that they have to be determined on a case-by-case basis, taking into account IHL, domestic law and human rights law. In 2005, the ICRC drew on various sources of law and on its own operational experience to develop a set of legal and policy guidelines that it uses in its dialogue with various parties to armed conflict.<sup>39</sup>

With regard to the grounds for internment in NIACs – that is, the reasons for which individuals may be interned – the ICRC is of the view that a person may be interned only for imperative reasons of security. This means that someone may be interned only if he or she poses an imperative security risk.

As for procedural safeguards for internees in NIACs, the ICRC's guidelines include the following requirements:

- The person must be informed promptly, in a language he or she understands, of the reasons for internment.
- The internee must have the right to challenge, with the least possible delay, the lawfulness of his or her detention. The lawfulness of the internment should be reviewed by an independent and impartial body, in the presence of the internee. If a person is kept in internment, that decision should be reviewed periodically (every six months).
- An internee who wishes to mount an effective challenge to the internment decision should be provided with the following: an explanation of the internment-review process; access to evidence supporting the internment decision; and help in seeking and obtaining additional evidence.
- Whenever feasible, the internee should also be given access to legal counsel, or at least to some form of expert legal assistance.

### C) CONCLUSION

Protecting persons deprived of their liberty is a major challenge in contemporary armed conflicts and of great concern to the ICRC. IHL provides fundamental norms on the treatment of persons deprived of their liberty in relation to both IACs and NIACs. IHL also sets out the minimum living conditions that detainees have to be provided with. The ICRC seeks to strengthen the implementation of these rules by all parties to armed conflicts. It is therefore interested in engaging with scholars of different legal traditions, including Islamic law, to clarify the points on which Islamic law and IHL converge and diverge.

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<sup>38</sup> For fair-trial obligations under IHL applicable in NIACs, see common Art. 3; Additional Protocol II, Art. 6; and Rule 100 of the ICRC's study on customary IHL. See also ICRC, updated Commentary on the First Geneva Convention, 2016, paras 674-695.

<sup>39</sup> Jelena Pejic, "Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375-391.

## 2. DETENTION IN ARMED CONFLICT UNDER ISLAMIC LAW

**Ahmed Aldawoody, Legal Adviser (Islamic Law and Jurisprudence), ICRC Advisory Service on IHL**

This presentation will focus on the treatment of prisoners of war (POWs), during international armed conflicts, under Islamic law. According to the classical caliphate paradigm in which all Muslims were united under the rule of one government – which is the context dealt with by classical Muslim jurists – ‘international armed conflict’ means conflict with a non-Muslim-majority country. The Islamic approach to the issue of POWs reflects many typical features of the Islamic legal system; it has also become clear that it is urgently necessary to reinterpret certain Islamic legal provisions to be able respond adequately to the requirements of the present. Most of the rules under Islamic law that concern POWs are based on the treatment of enemy combatants captured during the battle of Badr in the second year of the Islamic calendar (AD 624). At this battle, the Muslims managed to capture 70 enemy combatants. This posed a challenge for the nascent Islamic state, which had yet to enact laws concerning the legal status of POWs. The Prophet Muhammad therefore consulted his Companions on the issue. To tackle the additional challenge of providing shelter for the prisoners – since no specific arrangements had been made for this purpose – some of the 70 prisoners were held in a mosque and the rest were to be housed with the various Companions of the Prophet. The Prophet made it clear that the prisoners were to be treated well, saying: “Observe good treatment towards the prisoners.”<sup>40</sup>

This presentation will focus on the treatment of POWs during detention. It will not address the discussions that took place among medieval Muslim jurists on the issue of the termination of captivity, which was touched upon in Part II. In brief, with regard to POWs, Islamic regulations and IHL have the same underlying principles: POWs are interned not as punishment, but to prevent them from further participating in hostilities. Islamic law guarantees the humane treatment of prisoners. This is clearly illustrated by the fact that enemy combatants taken prisoner during the Battle of Badr were held in the homes of the Companions of the Prophet, who were instructed to treat the prisoners well. As camps or other places of detention had not yet been built to shelter prisoners, it would have been an option, for example, to tie up the prisoners and leave them outside, which could have exposed them to harm. The biography (*sirah*) of the Prophet provides evidence of the humane treatment of prisoners at the Battle of Badr, which forms – as has already been mentioned – the general basis for Islamic rules concerning POWs. These rules are also in line with some of the provisions of the Third Geneva Convention, which require that prisoners be provided with food, shelter and clothes and enabled to maintain contact with their families, and which forbid torture of any kind.

The fact that POWs from the Battle of Badr were housed in a mosque and at the homes of the Companions also indicates recognition of the necessity of protecting them from harm. With regard to food, some of these POWs recounted how the Muslims had provided them with the best food available: the Muslims had done all this in obedience to the Prophet’s instructions to treat the prisoners well. Abū ‘Azīz ibn ‘Umayr – in A. Guillaume’s translation – says: “I was with a number of the Ansār when they [Muslim captors] brought me from Badr, and when they ate their morning and evening meals they gave me the bread and ate the dates themselves in accordance with the orders that the apostle had given about us. If anyone had a morsel of bread he gave it to me. I felt ashamed and returned it to one of them but he returned it to me untouched.”<sup>41</sup> This altruistic treatment of POWs – feeding them well despite the captors’ own hunger – is described in the Qur’an like this: “And they feed the needy, the orphans and the captives [with their own] food, despite their love for it [which can also be interpreted as “because of their love for God]”.<sup>42</sup> According to various historical accounts, when

<sup>40</sup> Muhammad ibn Jarīr al-Tabarī, *Tārīkh al-Tabarī: Tārīkh al-Umam wa al-Mulūk*, Vol. 2, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2001, p. 39.

<sup>41</sup> *The Life of Muhammad: A Translation of Ishāq’s Sirat Rasūl Allāh*, trans. A. Guillaume, Oxford University Press, Oxford, 1955, p. 309. See also ‘Abd al-Mālik ibn Hishām ibn Ayyūb al-Himyarī, *Al-Sirah al-Nabawīyyah*, Vol. 2, ed. ‘Umar ‘Abd al-Salām Tadmurī, Dār al-Kutub al-‘Arabī, Beirut, 1990, p.287.

<sup>42</sup> Qur’an 76:8.

Salāh al-Dīn al-Ayyūbī (1193) was unable to feed the large number of prisoners who had fallen under his control after he reclaimed Al-Aqsā Mosque, he had no choice but to release them.<sup>43</sup> With regard to clothing, Jābir ibn ‘Abdullah quotes the following passage from *Sahīh al-Bukhārī*: “When it was the day [of the battle] of Badr, prisoners of war were brought, including Al-‘Abbās, who was undressed. The Prophet looked for a shirt for him. It was found that the shirt of ‘Abdullah ibn Ubaī would do, so the Prophet let him wear it.”<sup>44</sup>

It should also be noted that Islam prohibits the torture of prisoners to obtain military intelligence about the enemy. Imām Mālik, the eponymous founder of the Mālikī school of law (d. 795), was asked: “Is it possible to torture a prisoner of war in order to obtain military intelligence about the enemy?” His answer was: “I have not heard of that.”<sup>45</sup> His succinct response clearly indicates the peculiarity of this question to him: it shows that the very idea of discussing the permissibility of torturing prisoners, even to obtain military intelligence, had not occurred to Muslims.

On the issue of separating families in detention, Islam prohibits the separation of members of the same family; in Islam, that means parents, grandparents and children.<sup>46</sup> According to a Hadith reported by Abū Ayyūb al-Ansārī (d. 674), the Prophet said: “Whoever separates a mother and her children, God will separate them and their loved ones on the Day of Judgement.”<sup>47</sup> Therefore, all classical Muslim jurists took the view that, during captivity, members of the same family must not be separated: they prohibited the separation of children from their parents, grandparents or siblings; some jurists also prohibited their separation from other members of the extended family.<sup>48</sup>

This brief presentation shows that with regard to POWs, Islamic regulations and IHL share the same underlying principle: POWs are to be treated humanely at all times. Further research is needed, however, to explore how this underlying principle finds expression in concrete rules on the treatment of detainees and the conditions of detention. Moreover, strengthening compliance with these regulations – both the rules under Islamic law and the pertinent IHL provisions – remains a challenge. Lawyers and scholars must make these regulations known to all those concerned and instruct them in these matters. This is essential for enhancing respect for these principles and regulations among parties to contemporary armed conflicts in Muslim contexts.

43 Dalīlah Mubārīkī, “Dawābit al-‘Alāqāt al-Dawliyyah fī al-Islām Zaman al-Harb”, *Majallat Kulliyat al-‘Ulūm*, 4th year, 9th ed., July 2004. p. 206.

44 Muhammad ibn Ismā‘īl al-Bukhārī, *Mukhtasar Sahīh al-Imām al-Bukhārī*, Vol.2, ed. Muhammad Nāsr al-Albānī, Maktabah al-Ma‘arif, 2002, p.318.

45 Wahbah al-Zuhaylī, *Āthār al-Harb fī al-Islām: Dīrāsah Muqāranah*, Dār al-Fikr, Damascus, 1998, p. 415.

46 See ‘Abd al-Ghanī Mahmūd, *Himāyat Dahāyā al-Nizā‘āt al-Musallahah fī al-Qānūn al-Dawli al-Insānī wa al-Sharī‘ah al-Islāmiyyah*, International Committee of the Red Cross, Cairo, 2000, p. 39; Zayd ibn ‘Abd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawli al-Insānī fī al-Islām* (International Committee of the Red Cross, 2004), pp. 39, 77.

47 Hadīth no. 1566 in Muhammad ibn ‘Isā Al-Tirmidhi, *Sunan Al-Tirmidhi, wa huwa Al-Jāmi‘ al-Sahih*, Vol. 4, Matba‘ah al-Halabī, Cairo, 1962, p. 134.

48 See, for example, Muhammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Jāmi‘ al-Fiqh*, Vol. 4, ed. Yusri al-Sayyid Muhammad, Dār al-Wafā’, Al-Mansūrah, 2000, p. 70; Zayd ibn ‘Abd al-Karīm Al-Zayd, *Muqaddimah fī al-Qānūn al-Dawli al-Insānī fī al-Islām*, International Committee of the Red Cross, Cairo, 2004, p. 39, 77 ff. ; Troy S. Thomas, “Prisoners of war in Islam: A legal inquiry”, *The Muslim World*, Vol. LXXXVII, No. 1, January, 1997, p. 50; Saleem Marsoof, “Islam and international humanitarian law”, *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 26; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Basingstoke, 1988, p. 135.

### 3. INTRODUCTION TO OPERATIONAL CHALLENGES

#### **Daniel Mac Sweeney, Deputy Head of Protection Division, ICRC**

Operational challenges present themselves when respect for the law meets the operational reality of armed conflict. This presentation will focus on the role of the ICRC in conflict, the detention visits that we carry out, and the dialogue we have with detaining authorities. This dialogue concerns the problems we see in detention and the causes of those problems. I will also discuss some specific issues currently seen in armed conflict and more generally in detention. I hope I will be able to show you that ICRC detention visits have a positive impact in a number of ways.

The ICRC is present in more than 80 countries and has been helping detainees since 1870. Detention, so to speak, is at the core of our mandate to protect and assist victims of armed conflict. Protecting and assisting people requires proximity to them: for our detention-related activities that means visiting places of detention and spending time with detainees.

The methodology we use for our detention visits is important. Our working procedures are the same wherever we go: we try to have a dialogue based, on the one hand, on confidentiality and trust, and on the other, on our experience and expertise in detention-related work. In 2017, we made 4,411 visits to approximately 1,600 places of detention, where we visited 940,326 detainees. Given the scale of our work in detention, and the understanding we have acquired of the level of respect, or the lack of respect, for applicable international standards, I think I can safely say that we have a good picture of what is happening in detention in armed conflict. However, getting access to all of the detainees in all of the countries of interest and concern to us, and having a dialogue with the detaining authorities, remain difficult. So, these are some of the first challenges that we face.

There are various national and international standards of pertinence to the detention issues that the ICRC focuses on: conditions of detention, treatment of detainees, family contact, procedural safeguards, and judicial guarantees.

IHL has a number of strong provisions concerning the treatment of detainees, in both international and non-international armed conflicts. During our detention visits, we sometimes ask ourselves why these provisions are not being respected. If we think about all the different standards for conditions of detention, treatment of detainees, family contact, procedural safeguards and judicial guarantees, we will soon see that there are many reasons for this lack of respect: a deliberate decision by the detaining authority not to respect the rules; some degree of negligence; lack of resources; or even total incapacity.

For instance, why is there no water at this prison that we are visiting? Is it because there is no water source, such as a well? Or is it because the authorities have not paid their water bill? Or have the authorities decided that the detainees in this prison are enemy soldiers and therefore do not deserve water? How the ICRC responds will be determined by the cause of this lack of water.

We have seen that in some legal systems, finding the accused guilty in court can depend on the authorities producing a confession. In some situations, when other methods or tools are unavailable, the authorities might therefore resort to ill-treatment to extract a confession. As in the previous example – the lack of water at a prison – this decision might be driven by a mix of intentionality, lack of capacity, and/or lack of resources. How should such a situation be dealt with? Let me describe what the ICRC does in such cases. First, we listen to the detainee and try to help him or her. Then, if he or she agrees, we bring to the attention of the authorities the violation represented by the use of ill-treatment and lobby for an investigation. And finally, we might also seek to address some of the causes by, for example, advocating amendments to the law on confessions. We might also try to find a third party to train the authorities in methods of investigation or interrogation.



Another serious problem that we see in detention today is overcrowding. This can result in detention conditions so bad as to amount to ill-treatment. Why does overcrowding occur? There are many possible reasons: the court system does not work; there are long pre-trial delays; respect for judicial guarantees is lacking; the detention facilities are too small and the detainees, too many; and domestic law imposes prison sentences for too many trivial infractions. It is important to try to understand why problems occur before trying to address them.

Now, let us look at some of the issues specific to detention in armed conflict. What is detention in armed conflict? Detention in armed conflict is a way to take the enemy off the battlefield without killing him. This often leads to each party capturing and detaining members of its adversary's forces. The ICRC can play an important role in these situations – as an independent monitor that conducts detention visits, meets detainees, talks to authorities, and tries to ensure that the provisions of IHL are respected. It can also facilitate family contact. The ICRC, which is a neutral and impartial actor, can also try to persuade the authorities to respect the rules governing the treatment of the detainees they are holding. All of this occurs within the confidential bilateral dialogue that the ICRC has with each party about the people they are detaining.

Detention in armed conflict can also be a way for a party to conflict to project power and legitimacy. This must be kept in mind when talking about detention in armed conflict today. Detention can also be used to exercise control over a population: for instance, detaining authorities can use detention to influence the behaviour of detainees' families. Issues of power, control and legitimacy are important. Are there limits? Yes, the limits are set out in IHL.

Some parties to a conflict do not take detainees; we see this from time to time. That is because these parties show no mercy or offer no quarter. Again, IHL regulates such conduct by prohibiting certain acts.

The logic of IHL exceptionalism, so to speak, creates a further set of challenges in detention. This is what I mean by "the logic of IHL exceptionalism": "My enemy is outside the bounds of humanity; therefore the limits of the law do not apply to him." This has been a difficult challenge for the ICRC to address in its role as detention monitor during armed conflict. At the same time, ICRC visits to detainees challenge the logic of IHL exceptionalism. The ICRC's dialogue with the detaining authorities can help us push back against this logic of retribution and punishment and can also advocate respect for the rules governing the treatment of detainees.

Missing people: this is another important issue in connection with armed conflict and detention today. People go missing during armed conflict. When armed conflicts end, there are thousands of families who do not know what happened to their loved ones. They do not know if their loved ones are dead or where their bodies are, which gives rise to a whole set of administrative, humanitarian and legal problems. Compliance with IHL provisions concerning detention – on family contact, treatment, respect for human dignity – can ensure that fewer people go missing. Access for the ICRC to detainees – to register them and put them in contact with their families – is extremely important for preventing cases of disappearance (people going missing) in detention.

Finally, humanitarian actors also discuss detention beyond the bounds of armed conflict. The increased use of detention to manage migration, drug use, social problems, and other issues means that the number of people being detained is growing all the time. We see a security agenda driving detention rather than an agenda focused on rehabilitation and humanity. This can mean a reduced investment in detention, leading us to ask about the purpose of detention. These questions, however, lie outside the scope of our workshop.

## 4. EXPERTS' COMMENTS AND DISCUSSION

### A) ACCESS TO DETENTION FACILITIES

Participants asked about the ICRC's access to places of detention. The ICRC experts in the room explained that within the context of international armed conflict (IAC), the ICRC has a legal right to visit prisoners of war (based on the Third Geneva Convention) and protected civilians (on the basis of the Fourth Geneva Convention). In situations of non-international armed conflict (NIAC), the ICRC enjoys a right of initiative, i.e. a right to offer its services to the parties to the conflict (on the basis of common Article 3).

### B) SPECIFIC RULES ON DETENTION UNDER THE ISLAMIC LAW OF ARMED CONFLICT

Participants pointed out that medieval Islamic rules on the treatment of prisoners are the product of the *ijtihad* (reasoning or judgement in making laws) of that time and context. One participant observed that it was generally agreed that the guiding principle underlying the rules regulating the treatment of prisoners of war was *maslaha* – that which is in the best interests of the public. He therefore suggested a pragmatic approach and asked if *maslaha* would not be sufficient to reach a codification of Islamic rules in this regard, and whether it was necessary to go down the complicated path of deducing the findings of classical scholars and applying them to present-day situations (by analogy). The participant agreed that the arguments of classical scholars were useful for substantiating the credibility (legitimacy, orthodoxy) of a rule, but warned all those present about the complexity of reaching agreement on such rules.

Participants then looked into the substantive provisions regulating the treatment of detainees under Islamic law and identified a number of rights that detainees had in connection with arrest and investigation:

- While detention may be allowed, the detainee must be informed of the reason for his detention.
- The detainee has a right to basic necessities, which include food, water, proper accommodation, and clothing.
- The psychological health of the detainee must be protected.
- Torture is prohibited during interrogation. When Imam Malik was asked whether it was permissible to torture a captured soldier, he said that he had not heard of any precedents and that he disliked such acts.

### C) LEGAL GAPS WHERE IHL AND THE ISLAMIC LAW OF ARMED CONFLICT DO NOT CONVERGE

Participants pointed out the common objectives of the rules – under IHL and the Islamic law of armed conflict – that govern detention in armed conflict. However, they were quite clear that the issues that existed in this regard had to do with implementation rather than with any divergences in theory. Given the absence of standards that allow theory to be operationalized, and of a specific authority applying these principles, one participant emphasized the importance of developing relations with Islamic institutions in order to strengthen the application of these norms.

Experts also remarked on the ways in which the interrelationship of IHL and the Islamic law of armed conflict was similar to that of IHL and international human rights law. In both situations, different theoretical starting points lead to the same result in most cases. In these cases, the main problem remains how to obtain respect. Here, one participant felt, the role of Islamic law could be more pertinent than others may be, because people were responsible before God.

Participants also agreed – and this is significant – that where the rules were different, they could and must be reconciled. With regard to the relationship between IHL and human rights law, it was explained that the ICRC regarded IHL as providing a legal basis for detaining people, including in NIACs. One expert suggested that this conclusion did not necessarily imply that the requirements of human rights law concerning the prohibition against arbitrary deprivation of liberty had been fulfilled; hence, despite the existence of an inherent basis for detention under IHL, additional legislation regulating the grounds for detention, and its duration, would still be needed. This led to someone asking whether Islamic law in its current state provides sufficient legal grounds for detaining individuals or if there is a need for additional legal bases. The expert asking the question also wondered whether it was possible under Islamic law to detain members of a non-State armed

group without a trial, for which the IHL term is “administrative detention.” The Islamic law of armed conflict identifies a number of different categories of NIAC; therefore the answer to this question is that if a group of weapon bearers qualify as “armed rebels,” then a set of rules of engagement different from those pertinent to other categories of NIAC and IAC apply. Most Muslim jurists hold that detained armed rebels must be released after the cessation of hostilities. This means that they cannot be held in detention after the cessation of hostilities or that they can be tried for resorting to armed rebellion provided again that they meet all the conditions for qualifying as armed rebels. The situation is different in the case of another category of NIAC: *hirābah* (the Islamic law of terrorism); members of an armed group involved in such activities must stand trial. Hence, there are no grounds in Islamic law for detaining members of a non-State armed group without a fair trial.

#### **D) MANUAL FOR FAITH ACTORS: AN AVENUE FOR IMPLEMENTATION**

An expert from an international human rights organization described an interesting example of faith actors assisting to enhance respect for human rights. His organization helped a group of faith actors of various kinds to formulate 18 commitments in relation to their responsibility to empower and implement human rights. He said that he wanted to take this a step further by drafting a manual for faith actors, a document that would fit many different contexts.

# SPECIAL PROTECTION FOR CHILDREN

## 1. IHL PROVISIONS PROVIDING SPECIAL PROTECTION FOR CHILDREN IN CONTEMPORARY ARMED CONFLICTS

**Vanessa Murphy, Legal Adviser, ICRC Legal Division**

IHL contains a range of important rules setting out specific protections for children caught up in armed conflicts today. Given this framework and the pressing protection concerns all too visible on the ground, the ICRC's child protection strategy focuses on four key areas: unlawful recruitment and use of children in hostilities; access to education; treatment of children deprived of their liberty; and restoration of family links. These four areas form the subject of the present discussion.

It is a rule of customary IHL that all children affected by armed conflict are entitled to special respect and protection.<sup>49</sup> This customary rule is underpinned by the many provisions in the Geneva Conventions and their Additional Protocols that articulate more detailed measures that must be taken to provide children with this special respect and protection. The rationale driving these rules is evident from their drafting history: during the negotiation of the Additional Protocols in the 1970s for example, it was emphasized that children were particularly vulnerable to the effects of armed conflict. The ICRC can attest to the traumatic effects of war on children – which are so deep and lasting that these children require privileged treatment in comparison to the rest of the civilian population; the ICRC can also confirm that children do not have the same capacity as adults to understand the risks inherent in certain situations, which means that they must proactively be prevented from being recruited or engaging in hostilities. In short, the law affirms the need to recognize the vulnerability of children and the obligation of parties to conflict to respect and protect them accordingly.

### **A) UNLAWFUL RECRUITMENT AND USE OF CHILDREN IN HOSTILITIES**

Recruitment and use of children in hostilities is prohibited by a number of IHL and human rights instruments, and by customary law. The ICRC's study on customary IHL – an analysis of State practice and *opinio juris* – sets out that children must not be recruited into armed forces or armed groups, or allowed to take part in hostilities; this is applicable to both international and non-international armed conflicts.<sup>50</sup> These rules of customary law are underpinned by a number of related treaty law provisions. Article 77(2) of Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I) requires parties to international armed conflict to take all feasible measures to ensure that children under the age of fifteen do not take a direct part in hostilities and, in particular, to refrain from recruiting these children into their armed forces. With regard to non-international armed conflict, Article 4(3)(c) of Protocol II of 8 June 1977 additional to the Geneva Conventions (Additional Protocol II) specifies that children under the age of fifteen must neither be recruited into armed forces or groups nor allowed to take part in hostilities.

<sup>49</sup> Customary IHL Study, Rule 135 (“Children affected by armed conflict are entitled to special respect and protection.”)

<sup>50</sup> Customary IHL Study, Rules 136 and 137.

Human rights instruments also address recruitment: Article 38 of the Convention on the Rights of the Child (CRC) provides that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities,” and that “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.” Finally, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) requires States Parties to take all feasible measures to ensure that members of their armed forces under the age of 18 do not take a direct part in hostilities (Article 1); prohibits the *compulsory* recruitment of persons under 18 (Article 2); and requires States Parties to raise the minimum age for *voluntary* recruitment from 15 (Article 3). OPAC also provides that non-State armed groups should not, under any circumstances, recruit or use in hostilities persons under the age of 18 (Article 4). Regional human rights instruments – such as the African Charter on the Rights and Welfare of Children and the Covenant on the Rights of the Child in Islam – also address the issue of the recruitment and use of children in hostilities.<sup>51</sup>

There are two clear differences between the provisions in these treaties. The first and most obvious is the age limit. Under the Additional Protocols and the CRC, the minimum age for the recruitment and use of children is 15 years. OPAC raises the minimum age to 18 for armed groups, and requires States Parties to raise the age above 15 for voluntary recruitment to their armed forces. The second difference concerns the way children may be used in hostilities. Additional Protocol I prohibits the “direct” participation of children in hostilities (meaning participating as fighters); Additional Protocol II, however, prohibits even the indirect use of children in hostilities – that is, their use as cooks, messengers, or spies. The standards relevant to a particular party to an armed conflict will depend on the instruments that that State or non-State armed group is bound by.

## B) ACCESS TO EDUCATION

The IHL provisions governing the conduct of hostilities are crucial to the protection of schools and students. Under IHL, students and educational personnel are usually civilians and as such, protected from attack, unless and for such time as they participate directly in hostilities. Similarly, schools and other educational facilities are usually civilian objects and thus protected against attack. As for all other civilian objects, educational institutions may cease to be protected when they are used for military purposes. Even in these cases, all feasible precautions must be taken when attacking such military objectives to avoid or at least minimize incidental harm to civilian students, personnel and facilities. Attacks on military objectives expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited.

But beyond the rules governing the conduct of hostilities, there are also specific provisions of IHL that require States and armed groups to facilitate access to education for children. In IACs, the Geneva Conventions and Additional Protocol I specifically protect education in the following cases: for all children under 15 orphaned or separated as a result of war (Articles 13 and 24 of the Fourth Geneva Convention (GC IV)); for civilian internees, notably children (Articles 94, 108 and 142, GC IV); in situations of occupation (Article 50, GC IV); in circumstances involving evacuation of children (Article 78 Additional Protocol I); and for prisoners of war (Articles 38, 72 and 125 of the Third Geneva Convention).

In non-international armed conflicts, Additional Protocol II requires parties to provide children with the care and aid they require, and in particular to ensure that children receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.

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<sup>51</sup> Article 22(2) of the African Charter on the Rights and Welfare of Children provides that “State [*sic*] Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, [*sic*] from recruiting any child.” Article 17(5) of the Covenant on the Rights of the Child in Islam states that States Parties shall take the measures necessary “[t]o protect children by not involving them in armed conflicts or wars.”

### C) PROTECTION OF CHILDREN DEPRIVED OF THEIR LIBERTY

In armed conflicts today, children are deprived of their liberty for various reasons. They are detained because of their own conduct (e.g. taking part in fighting as members of an armed group) or that of their relatives (e.g. their parents were members of an armed group and took part in fighting). In addition to the key protections that IHL provides to any person deprived of their liberty, there are also specific rules to protect children who are particularly vulnerable when detained.

First, whether detained during IACs or NIACs, children must be housed separately from adult detainees, except when an entire family is being held as one unit.<sup>52</sup> Second, they are entitled to age-appropriate treatment when detained: in situations of international armed conflict or occupation, GC IV provides as a general rule that “[p]roper regard shall be paid to the special treatment due to minors” (Article 76); and more specifically, that interned children must continue to have access to education, as well as to special playgrounds for sport and outdoor games (Article 94); and that internees under the age of 15 are entitled to “additional food, in proportion to their physiological needs” (Article 89(5)). In situations of NIAC, the requirement of humane treatment established in common Article 3 calls for a context-specific assessment of the concrete circumstances of the internee, which includes their age;<sup>53</sup> and Article 4(3)(d) of Additional Protocol II confirms that children under the age of fifteen who have fought in armed groups continue to benefit from special care and aid when captured. Finally, rules of IHL applicable in both IACs and NIACs also provide that the death penalty may not be carried out, or pronounced, on persons who were under the age of 18 at the time of their offence (GC IV, Article 68(4); Additional Protocol I, Article 77(5); Additional Protocol II, Article 6(4)).

### D) RESTORATION OF FAMILY LINKS

Children are sometimes separated from their families during armed conflict. IHL contains rules that seek both to ensure that a separated child’s needs are met, and to re-establish contact between members of dispersed families and reunite them when possible. For example, parties to international armed conflict must ensure that children under the age of 15 are not left to their own resources and that their maintenance, the exercise of their religion, and their education are facilitated in all circumstances (GC IV, Article 24(1)). This requires parties to take measures related, *inter alia*, to the child’s food, clothing, accommodation, and medical needs. Additional Protocol II specifies that parties to non-international armed conflict must take all appropriate steps to facilitate the reunion of families temporarily separated (Article 4(3)(c)).

More generally, it is a rule of customary IHL that family life must be respected as far as possible;<sup>54</sup> State practice demonstrates that this requires, to the degree possible, maintaining family unity, facilitating contact between members of separated families, and providing information on the whereabouts of missing family members.

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<sup>52</sup> Customary IHL Study, Rule 120. See also GC IV, Art. 82(2) and Additional Protocol I, Art. 77(4)–(5).

<sup>53</sup> ICRC, *Commentary on the First Geneva Convention*, ICRC/Cambridge University Press, 2016; see the section on common Article 3, para. 553.

<sup>54</sup> Customary IHL Study, Rule 105.

## 2. CHALLENGES FACED BY CHILDREN IN CONTEMPORARY ARMED CONFLICTS

**Monique Nanchen, Global Adviser on Children, Protection of Civilians Unit at the ICRC**

The specific attention given to children in the law is unfortunately not matched by what we are seeing in the field. In fact, children are disproportionately affected by armed conflict both directly and indirectly (namely, their access to health care, food and basic services, on which they are even more dependent than adults).

The number of children wounded or killed in armed conflict has increased by up to 300% since the beginning of the last decade (according to a report prepared by Save the Children). With regard to the indirect consequences of armed conflict, I should also mention that children living in contexts of conflict or fragility are twice as likely to die before the age of five. Armed conflict exacts a very heavy toll on children. I will focus on three areas:

- Impact of conflict on access to education for children
- Family separation
- Child recruitment

### A) IMPACT OF ARMED CONFLICT ON CHILDREN'S ACCESS TO EDUCATION

According to UNICEF, nearly 27 million children – in 24 countries affected by armed conflict – are currently out of school and thousands of schools have been destroyed. In Syria, one in four schools has either been damaged or used for military purposes during armed conflict and over two million children are out of school. In South Sudan, two million children – 72% of all the children in the country – are also out of school. A 'lost generation': that is UNICEF's term for all those children who have been out of school for at least seven years. When so many children are or have been out of school for so long, the consequences will be long-lasting, not only for the future of those societies but also for peace-building.

How is education affected by armed conflict? Schools can be targeted deliberately or might simply get caught in crossfire. They can be used for military purposes, and this puts children at risk in a number of ways, for instance, the long-term threat posed by unexploded military ordnance. Schools could be used as shelters for displaced people, which soon makes them unfit for educational purposes. And they can also be used as places of detention or propaganda sites, or as recruitment centres for children.

Education is also affected when both teachers and students are at risk. Teachers come under threat, particularly during NIACs, when they are regarded as agents of the State by the non-State armed groups controlling the area: when this happens, they might stop going to their schools. Children on their way to school are at risk of being detained, recruited, or sexually abused.

Conflict affects both the availability and the quality of education. In this connection, the impact on 'availability' means this: destruction of classrooms; teachers leaving out of fear or because they do not have the economic means to keep going to schools; and damaged or looted classrooms as a result of their being used for military purposes. Armed conflict, even when schools continue to function, often affects the quality of education: there are too many children in each classroom; fewer teachers; and scarcities of educational materials.

### B) FAMILY SEPARATION

Family separation is a significant risk during armed conflict. It happens when families are fleeing chaotically for safety. It can also be a consequence of measures taken by the authorities to manage the flux of civilians fleeing violence. One important way to prevent family separation is birth registration. In conflict-affected countries, State services are often dysfunctional and unable to register new births. In addition, in some contexts, children born in territories controlled by non-State armed groups are issued documents whose validity the State will not recognize.

A child on his or her own is more vulnerable and at greater risk of abuse, trafficking, recruitment; it is also likely to be without access to schools or hospitals. Unaccompanied children are also likely to be unaware of all the risks to their safety, and to make decisions that will cause them harm; they are also likely to struggle to gain access to basic services. Family separation can also force children to resort to self-damaging methods of survival: they might have to start working at an early age, beg on the streets, get married when they are too young, take up prostitution, or commit petty crimes such as stealing food.

One of the most important aspects of the ICRC's work is restoring family links; it has been doing this for over a hundred years. The ICRC, in partnership with the National Red Cross and Red Crescent Societies, tries to prevent family separation and when that is not possible, to restore family links and reunite families. The ICRC has created a website – familylinks.org – where people register their missing relatives and browse through posted pictures of missing people (<https://familylinks.icrc.org/en/Pages/home.aspx>).

### **C) CHILD RECRUITMENT**

We have seen that an “associated child” is any person under the age of 18 being recruited or used by an armed force or an armed group in any capacity. We use the definition spelt out in the Paris Principles, because it is broader than the term “child soldiers” and corresponds more closely to the facts on the ground. Children might be recruited forcibly or might join an armed group voluntarily – though one can wonder how much of a choice they really have, given their financial circumstances or the need to support themselves or their families, or when they are encouraged to join an armed group to defend their community. Child recruitment is not confined to boys. A significant number of girls are also used by armed actors, for various purposes, including for sexual services. They are often invisible, but they are there.

The consequences of child recruitment for the child are manifold: family separation, injury, and abuse of various kinds. There is also the psychological dimension: the traumatizing effects of the violence they witness and the violence they might be forced to commit.

Reintegration of demobilized children is a real challenge, and re-recruitment is a risk not to be underestimated. Reintegration is a long and complicated process. Preventing a child from joining an armed group again is no easy task, if the root causes that led the child to do so originally are still there. Also, families can be apprehensive about receiving a child who has spent time with an armed group. To conclude, children do not choose to be associated with wars fought by adults, and they should not have to bear the consequences of this association.



## 3. PROTECTION OF CHILDREN UNDER ISLAMIC LAW

**Samah bin Farah, Lecturer at Zeytouna University, Tunisia**

Under Islamic law and based on its primary sources, Islamic jurists have developed rules providing protection for children. These rules are guided by the following principles:

1. Special protection for children from any harm
2. Distinction between laws for children and laws for adults
3. Equality of all children, regardless of sex, religion, race, colour, etc.
4. Coverage of children's basic needs
5. Legislation that is mindful of the best interests of children

Islamic law also contains conflict-prevention measures that aim at maintaining peace and security. "Jihad," for instance, is a just, defensive war: Muslims have an obligation to defend themselves, their territories, and their religious freedom against an enemy's aggression.<sup>55</sup> Therefore, fighting should target only enemy combatants, not civilians. And it goes without saying that treaties must be respected.<sup>56</sup>

Regarding special protection for children during armed conflict, the Prophet Muhammad gave army leaders instructions not to target children, and these instructions were followed; there is complete agreement among Muslim jurists on this prohibition.

Special mention should be made of the question of child recruitment. This, too, is forbidden in Islam.<sup>57</sup> Regarding the minimum age for child recruitment, some jurists place it at 15: they do so on the basis of the Hadith attributed to Ibn Umar, according to which the Prophet Muhammad rejected Ibn Umar's request – made when he was 14 – to join the army at the battle of Uhud in March 625 CE; according to the Hadith, the Prophet permitted Ibn Umar to join the army at the battle of the Trench in 627 CE, when Ibn Umar was said to be 15. These dates do not add up: the battle of the Trench took place two years after the battle of Uhud, which means that Ibn Umar was 16 when he joined the army, not 15.

In this regard, some jurists argue that children cannot join the army until they reach the age of puberty – which raises another issue: when does puberty begin? The Hanafi and Maliki schools hold that children come of age at 18, because that is when they attain maturity. Therefore, one needs to rely on educational, psychological, and sociological studies to identify the age of recruitment.

The indirect participation of children in armed conflict is another issue of concern. "Indirect participation" refers to activities undertaken by children in service of fighters, e.g. preparing food or carrying food, baggage or weapons. All such involvement is prohibited under Islamic law because anything that might endanger the life of a child is prohibited. In short, children should not be given responsibility beyond their years.

In addition, Islam also strictly prohibits intimidation and torture of children. The Prophet Muhammad ordered that children be treated mercifully and compassionately. Under Islamic law, taking children prisoner is prohibited and people who do so must be punished. Degrading treatment and humiliation of children are also prohibited, as they violate human dignity, the protection of which is one of the ultimate objectives of Islamic law. Furthermore, degrading treatment might cause long-lasting psychological damage and compromise a child's future; its prohibition is therefore a necessity for that reason as well.

<sup>55</sup> Qur'an 8:61, 9:13 and 22:39-40.

<sup>56</sup> See e.g. Qur'an 9:7.

<sup>57</sup> Qur'an 4:98.

Islamic law also criminalizes the sexual abuse of children – and the separation of children from their families – during armed conflict.

I would like to conclude with these observations:

1. Disseminating information about children's rights in times of peace is essential, because that will help tackle the child-related issues that arise during armed conflict.
2. It is also important to study the root causes of armed conflicts.
3. The work done towards engaging Islamic jurists in tackling such issues should be continued, particularly because of their influence in Muslim societies.
4. Muslim jurists should develop Islamic rules that are relevant to contemporary contexts; they should also review the Islamic legal heritage.

## 4. PROTECTION OF CHILDREN UNDER ISLAMIC LAW

### **M. Amin Al-Midani, President of the Arab Centre for International Humanitarian Law and Human Rights Education, France**

This presentation will address the protection of children in armed conflict in accordance with Islamic law, and a number of human rights issues based on Islamic instruments adopted by some Islamic organizations. First of all, further research on the practical implications of these issues is needed in order to avoid perpetuating the same problems and same opinions. The question for those interested in international human rights law and IHL has to do with their implementation: how does one ensure compliance with IHL and human rights law? The States that have ratified international instruments must honour their commitment and must abide by them. In the Arab and Muslim world, many constitutions give precedence to international conventions over domestic law; hence, incorporating the provisions of IHL and human rights law more fully in domestic legislations should be a priority for these States.

This presentation looks at the matter from the perspective of human rights law.

A child is an individual under international law. Hence, he or she has to be protected. Protection of human rights is one of the main concerns of the United Nations, whose ultimate objective is the realization of peace and security in accordance with paragraph two of the UN Charter's preamble. The first milestone document adopted by the UN in this respect was the Universal Declaration of Human Rights (UDHR), which celebrated its 70th anniversary this year.

The UN Charter and the UDHR were nevertheless not sufficient to protect children in armed conflict. The Fourth Geneva Convention contains rules on the protection of children, including against their involvement in armed conflict.

The third important stage – after the UN Charter and the UDHR – was the adoption of a number of instruments that sought specifically to protect children. In 1959 there was the Universal Declaration on the Rights of the Child and in 1989, the Convention on the Rights of the Child (CRC). The CRC has been ratified by all the Member States of the United Nations, except one: the United States of America. Subsequently, the first Optional Protocol (OP) to the CRC was adopted: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. This OP has since been ratified by the United States. The first OP was followed by a second one: the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. A third OP – the Optional Protocol to the Convention on the Rights of the Child on a communications procedure – allows for an inquiry procedure concerning the violation of children's rights.

### **A) DEFINITION OF CHILDREN**

The second OP mentioned above defines a child as a human being below the age of 18. Regarding the protection of children under Islamic law, a majority of Islamic jurists have determined that a human being is a child until he or she reaches puberty. If a child shows no signs of puberty, he or she remains a child until the age of 15.

## **B) PROHIBITION AGAINST KILLING CHILDREN/SPECIAL PROTECTIONS**

Islamic law prohibits targeting children during armed conflict or separating them from their families. The question is whether such prohibitions also exist in international Islamic conventions by which Muslim-majority States abide or whether they are merely emanations from the realms of theory and heritage. The only examples I found have all been adopted through the Organization of Islamic Cooperation (OIC): the Dhaka Declaration of Human Rights in Islam (1983); the Cairo Declaration on Human Rights in Islam (1990); the Declaration on the Rights and Care of the Child in Islam (1994); and the Covenant on the Rights of the Child in Islam (2005).

Article 3 of the Cairo Declaration on Human Rights in Islam speaks about IHL, protection of prisoners and protection of children. However, this Declaration is not binding on States: it is just a recommendation. In parallel, Article 8, paragraph 2, of the Declaration on the Rights and Care of the Child in Islam prohibits involuntary separation of children from their families. Guardianship will not be dropped unless it is very important and for the benefit of the child in accordance with Islamic law. The only deficiency of this Declaration is that it refers only to the Muslim child and not to all children. This is a recurring gap in the instruments adopted by the OIC: many other OIC instruments protect the Muslim family and its values, but say nothing about protection for non-Muslim families living in Muslim countries? And what about the rights of non-Muslim children in Muslim States?

## 5. EXPERTS' COMMENTS AND DISCUSSION

The subsequent discussion focussed on the criteria for determining the age at which it is permissible to join armed forces or armed groups: that is, on the definition of a child for the purposes of armed conflict. One participant pointed out that from the criteria under Islamic law seemed to vary with the issue under consideration. Generally, for matters related to fixing moral responsibility, the age of majority would be the age of puberty. However, the minimum age at which a child or orphan may be given their property is the age at which they are deemed to have acquired the faculty of discernment. A participant submitted that this confirmed the essential role of society in determining the age of majority on the basis of the rights or obligations conferred on the child.

The same participant also presented examples in which setting a minimum age for certain activities, in the absence of concrete guidance from (medieval) scholars, was fairly straightforward. This participant concluded that to determine the minimum age for recruitment into armed forces or armed groups, Muslim jurists should look at the current reality: a child wielding a modern weapon is being entrusted with much greater responsibility than, for instance, an orphan to whom his or her property is being returned. Hence, using public interest is one of the important methods for the development of the law: we need to look at what we are dealing with and not cling to prescriptions from the past.

The ICRC held that the main challenge in relation to children and armed conflict was the lack of implementation, not the inadequacy, of existing law. The existing framework – IHL, international human rights law, regional instruments (such as the African Charter on the Rights and Welfare of the Child), and customary international law – was quite robust, and the ICRC felt that there was no need for a new treaty dedicated to the protection of children in armed conflict. For example, while there are differences among existing treaties – about the minimum age for the lawful recruitment of children – there was no “normative gap,” as States could accede to the higher standard within the Optional Protocol to the Convention on the Rights of the Child (and indeed within the African Charter, where applicable).

Experts agreed that there was space for the clarification of specific issues within existing law. For example, consideration could be given to clarifying the extent to which the obligation to provide children with special respect and protection encompasses the need to prioritize cases of interned children, as this can improve protection standards on the ground.

Finally, participants agreed about the necessity of securing wider accession to the treaties comprising the legal framework for protecting children during armed conflict – including Protocols I and II of 8 June 1977 additional to the Geneva Conventions and the Optional Protocols to the Convention on the Rights of the Child.

# PROPER AND DIGNIFIED MANAGEMENT OF THE DEAD

## 1. MANAGING THE DEAD IN CONFLICTS AND DISASTERS: KEY CONSIDERATIONS

**Oran Finegan, Head of the ICRC Forensic Unit**

Forensic operations linked to humanitarian issues have grown over the past 15 years. Today, the ICRC has over 70 professionals working in a number of different contexts. Its growing global engagement has strengthened the ICRC's understanding of the need for greater consideration of cultural and religious practices in handling and managing the dead. Increasingly, ICRC forensic staff are being confronted with questions from professionals in this field, from a broad range of contexts. This resulted in the compilation of a series of questions – especially on the subject of Islam – from various contexts around the world. In July 2018, during the annual meeting of the ICRC Forensic Advisory Board, a decision was reached to hold a workshop on Islamic law, IHL, and the management of the dead.

The forensic process is often thought to be like this: a death happens, and then the body is recovered, examined and, possibly, identified before being disposed of (buried). In practice, however, it is not that simple. A body may be found following a certain disaster (tsunami or other natural disaster, plane crash, shipping accident), or from a (mass) grave, within the context of migration, active conflict or other situations of violence, post-conflict, or a man-made or natural disaster. The range of potential scenarios for forensic recovery is quite wide. It can be surface or sub-surface recovery. Sub-surface recovery might entail working on a grave containing a single individual or a mass grave with many bodies; these bodies may have been placed there in secret, to hide a massacre, or deposited safely for the time being so that they can be recovered safely at a later date. Recovering the remains of several individuals in various states of preservation is a complex process.

Bodies are recovered from various other places besides graves: for example, bodies of water or large wells. They might also simply be left or abandoned on the surface – the ground – indefinitely. Sometimes the process is carried out properly, but often – owing to haste or lack of expertise – it isn't: the remains themselves receive little consideration. For example, using large mechanical diggers shows a lack of respect for the remains; it is also immensely traumatizing for the families concerned. But I should point out that most of the time, any disregard shown or pain caused is unintentional, and the result of not knowing the proper procedure.

We turn now to the examination of remains. An autopsy is one way of doing this, but, often, more extensive examination is needed. Bodies are best described as being on a spectrum, from “fleshed” to “skeletonized” (that is, when they are in the form of bones), with various stages of decomposition in between. As a result, age and gender are not always obvious. It requires extensive scientific examination to determine these important characteristics. Forensic professionals often have to deal with partial remains, which adds more layers of complexity – not only to the process of analysis, but also to the task of returning the remains to the family. Remains can be commingled – that is, the remains of many individuals could be mixed together, and it is not always clear how many individuals are represented. This means more complexities and further analysis. Forensic professionals also encounter cases where the remains have been cremated. Determining the number of individuals represented in such cases is even more difficult. Besides the scientific or forensic complexities, there are other pressing issues involved as well: for instance, ensuring that the dignity of these dead individuals is respected; and showing due regard for religious and cultural considerations; but these are

less straightforward or easily managed than might seem the case. Also, when analysing remains associated with a large number of individuals, we need to mark the bones to avoid mixing them up. What might people think of this? Is it acceptable to them or will they regard it as a sign of disregard? And what should we do to learn how to deal with such issues?

Artefacts and clothing are often found with human remains. Artefacts can be of great assistance in identifying human remains. We also often have to collect biological samples (DNA) to identify the individual, either from the remains themselves or from relatives (or from both). We have to do this to find or establish a biological or genetic link between the remains and living relatives. How do we store these samples, and how do we dispose of them? Let me give you an example, A finger bone and a ring were found together and carefully recovered. A name was engraved on the inner surface of the ring, and this name was helpful to the process of identification. If finger bone and ring had not been carefully recovered, and separated, identification would probably have been impossible. The examination of remains can be a very long process, and can take years in some cases.

The disposal of bodies can take many different forms, from individual burial to large-scale disposal, often without the necessary respect (this is not an uncommon occurrence after disasters). But sometimes, swift burials after disasters may be necessary. We want to ensure that remains are properly handled, in order to respect the dead as well as the living.

My objective in this presentation was to give you some sense of the context we work in and of the different kinds of case we deal with. The question that has to be answered next is how to ensure that human remains are recovered with due respect and then examined and disposed of with the same respect.

## 2. THE MANAGEMENT OF THE DEAD UNDER ISLAMIC LAW

**Sheikh Ahmad Abadi Abed Al-Sadah Mohammad Al-Shaibani,  
Instructor at the Al-Hawza Al-Ilmiyya, Baghdad**

The management of the dead is a purely humanitarian matter and Islamic rules are based on humanitarian values. Therefore, there is no contradiction between Islam and IHL principles. The main problem lies in the diversity of opinion among Muslim jurists. In Islamic law, as in other legal systems after a law is enacted, there are different interpretations of the same law. Thus, there are different interpretations of the objectives of the Islamic rules enshrined in the Qur'an and the Sunnah. These disagreements exist not only amongst the different schools of Islamic law, but even within the same school. Throughout Islamic history, there are noteworthy examples – occasions for Muslim pride – of respect for human beings, vegetation, and animals.

An issue that is reflective of Islamic humanitarian concerns is the burial of the dead, both in times of war and of peace. The dead must be buried with due respect, regardless of whether the bodies belong to the Muslims' army or the enemy's. Dead bodies are dealt with differently only when it is necessary to accommodate religious prescriptions for burial.

Under Islam, Muslims are buried under the ground. A dead body cannot be left unburied: that is tantamount to mutilation, which is strictly prohibited under Islamic law. According to a Hadith attributed to the Prophet Muhammad, "mutilation is prohibited even if it was the body of a rabid dog."<sup>58</sup> Any form of burning, beating or amputating the dead falls under this prohibited desecration.

In his book *al-Muhalla*, Ibn Hazm says that it is obligatory on Muslims to bury the dead bodies of "belligerent unbelievers" and anyone else. I quote the term "belligerent unbelievers," as it was used by classical Muslim jurists to refer to non-Muslim enemy belligerents. Classical Muslim jurists stated that the corpse of enemy "belligerent unbelievers" must be respected and buried under the ground, despite their enmity and their efforts to kill Muslims. Scholars are very strict on this matter. Also, Muslim jurists of all schools of law agree that Muslims must bury the corpses of their non-Muslim enemies deep enough so that no beast can dig them out or floods expose them. Hence, in Islamic law, Muslims and non-Muslims must be buried alike.

The practice of the Prophet Muhammad shows that the injunction to bury the dead bodies of the enemy was observed. During the battle of Badr, the bodies of 24 leaders of the enemy army were buried in the well of Badr. Muslims also buried the bodies of dead members of the tribe of Beni Quraiza. Furthermore, Abu Yalla ibn Murrah said that he travelled with the Prophet Muhammad several times and that whenever the Prophet saw a dead body, he ordered its burial.

Finally, there are Islamic rules for exhuming human remains. In cases of criminal suspicion or for DNA analysis for identification purposes, or for transferring the remains elsewhere, certain rules have to be observed: for example, the tomb must be covered and the remains must be exhumed respectfully.

In addition, there are specific rules for burial at sea. Whoever dies at sea must be placed in a coffin or a bag that covers the body, which must then be lowered into the water with a heavy object attached to it. Respectful treatment of this kind must be given to both Muslims and non-Muslims, and to friends and foes.

Based on everything that I have said, it follows that the dead bodies of Muslim and non-Muslim enemies in armed conflict must be buried in a dignified way.

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<sup>58</sup> See Muhammad ibn Ahmad ibn Abi Sahl al-Sarakhsi, *Kitāb al-Mabsūt*, Beirut, Dār al-Ma'rifah, Vol. 9, pp. 135, 196; Vol. 10, pp. 129, 131; Vol. 16, p. 145; Vol. 26, p. 175.



## 3. EXPERTS' COMMENTS AND DISCUSSION

### A) CREMATION AND ISLAMIC LAW

The discussions confirmed the obligation under Islamic law to search for the dead without any distinction, to protect their dignity, to identify them when possible, and bury them ceremoniously if and where possible. It was also emphasized that while cremation is not allowed under Islamic law, the principle of necessity may be applied when justified by medical requirements. The Islamic law of armed conflict does not differ from IHL, which also requires that the dead not be cremated unless justified by necessity or required by the religious beliefs of the families concerned.

One additional question was raised regarding the Islamic position on the cremation of Ebola victims, because forensic specialists recommend that these corpses be cremated.

Some experts explained that if ritual washing of the corpses was likely to spread the disease, and forensic specialists confirm that cremation was the only solution, then the bodies can be cremated and buried in graves as usual. But if the corpses can be disinfected and buried, then cremation is not permitted.

### B) IDENTIFICATION OF DEAD BODIES

Experts recalled that Islamic burial regulations prefer dead bodies to be buried as soon as possible. But dead bodies have to be identified first; hence, when the identity of the deceased is not known, identification may require DNA analysis or the taking of fingerprints before the body is cremated or buried.

One expert also mentioned that in Islamic tradition, respect for the dead requires concealing the corpse and not exposing it. As a consequence, the expert said, it was important not to publicize photos of dead bodies.

This led a forensic specialist to ask a couple of questions related to the fact that identification can often take a long time: many months or even years. In such cases, the specialist said, human remains often remain in storage for extended periods. How should these bodies be stored? Can those remains be buried in the interim, especially when there are many sets of remains and the facilities to store them are lacking?

In response to this question, an expert in Islamic law cited the massacres at Srebrenica in Bosnia and Herzegovina, in which nearly 9,000 non-combatants were killed; the corpses were then deformed by bulldozers before being buried in more than twenty mass graves. Islamic religious authorities allowed the storage of these remains after they were discovered, in order to identify them through DNA analysis. In fact, the expert explained, there is no need to make haste to bury the dead in such contexts, because identification may prevent the commission of genocides in the future. Therefore, a fatwa was issued for identifying these dead bodies and postponing their burial until the collection of DNA.

### C) DIALOGUE WITH RELIGIOUS AUTHORITIES AND SHARING BEST PRACTICES

This example and many others showed the importance of discussing all pertinent issues with local religious authorities before carrying out forensic work. An ICRC representative explained that the ICRC was already doing this: it tries to consult with the local religious authorities about the pertinence of carrying out the forensic activity that it is considering. For example, in 2011, a mountain community in Libya asked the ICRC for help in recovering the remains of 35 members of their community who had been killed and buried in a mass grave during the civil war. The ICRC could have followed IHL obligations in carrying out the work as requested by the community. But it first consulted the muftis. It asked them to recommend how best to proceed. As a token of their appreciation for such deference to their views, the muftis helped the ICRC with the recovery and management of the dead. This is just one example of the importance of consulting the authorities before doing anything.

The discussion concluded by confirming the similarities between the Islamic and IHL perspectives on managing the dead, and by stressing the need to disseminate information on this important subject.

# PART III

# CONCLUSIONS

# AND RECOMMENDATIONS

## 1. CONCLUDING REMARKS

**Eva Svoboda, Deputy Director of International Law and Policy, ICRC**

I am honoured to deliver these concluding remarks of the ICRC's Experts' Workshop on IHL and Islamic Law in Contemporary Armed Conflicts. I know – having participated in some of the sessions, and from conversations with participants and colleagues – how enriching and fruitful the discussions have been. I am pleased that the ICRC was able to organize this important event, a forum to discuss a number of specific challenges relating to IHL and Islamic law in contemporary armed conflicts.

The overall objectives of the workshop were to strengthen cooperation between experts in IHL and scholars of Islamic law, and to enable experts in Islamic law to discuss the operational and legal challenges that the ICRC is facing in Muslim contexts. You can see why this is a matter of some urgency for the ICRC: about two-thirds of our operations are in Muslim countries where armed conflicts are in progress; and we allocate a similar proportion of our budget to these operations.

Let me first say that how honoured we are that you accepted our invitation and how much we appreciate your valuable contributions over these two days. Of course, we cannot expect one meeting to produce all the answers to our questions; and many people have suggested a follow-up meeting. But your discussions have, in fact, yielded numerous answers, and raised more questions, which we hope to ponder together with you in your personal capacities and/or with your respective institutions.

Now, let us move on to the task at hand. This workshop gave us an opportunity to address various questions and issues of pressing concern.

One of our key objectives was to discuss with experts in Islamic law current challenges to IHL during armed conflicts, particularly in the Muslim world.

We focused on this objective during all five sessions. We drew attention to certain key points of convergence between IHL and Islam, which several of you brought up during the various sessions:

- First, on the protection of civilians and non-combatants: IHL and Islamic law agree on the overall protection due to civilians and non-combatants, including protection from direct targeting and protection during detention: women, children, and the elderly are among those entitled to such protection.
- Second, on implementation: Both Islamic law and IHL have a rich theoretical basis, but the challenge for both today is not developing new rules, but implementing those already in existence.
  - In this regard: it is important not to focus only on bad practices; we must also celebrate the instances of good practice, while never losing sight of the fact that there is room for improvement (i.e. IHL in Action).

We also looked at the points of correspondence between IHL and Islamic law in certain specific areas:

### **A) CONDUCT OF HOSTILITIES: LAWFUL WEAPONS AND METHODS OF COMBAT**

Islamic law makes it abundantly clear that all fighting on the battlefield must be directed solely against enemy combatants. Civilians and other non-combatants must not be deliberately harmed during the course of hostilities.

### **B) PROTECTION OF HEALTH CARE**

Of course, this protection granted to non-combatants also applies to medical personnel. The discussions emphasized the fact that Islamic law, IHL, and medical ethics all insisted on the impartiality of medical personnel. The discussions also allowed us to discern links between medical and Islamic ethics.

### **C) DETENTION IN ARMED CONFLICT**

Islamic law has the same underlying principles as IHL with regard to detention. Both IHL and Islamic law require humane treatment for detainees. This means access to food, water, adequate accommodation, and clothing. Another key point is the strong statement prohibiting torture at all times, including for the extraction of confessions and military information. Islamic law and IHL also agree about the critical importance of procedural safeguards and judicial guarantees, including a person's right to know why he or she was being arrested.

### **D) SPECIAL PROTECTION FOR CHILDREN**

Protection of children has an extremely important place in Islamic law, as does protection of the right to education. The prohibition against the separation of families is crucial. Islamic law clearly states preventive obligations regarding the protection of children.

Clearly, IHL and Islamic law converge on a number of issues. The problem, however, is the disjunction of the law and practice. One of the main concerns identified during the discussions was the gap between the law and its implementation. One key way to address this is through training and by disseminating the applicable rules.

Recruitment of children is prohibited under Islamic law. Even when it may appear to be necessary, children should not be involved in combat. There is also the issue of determining the minimum age for recruitment. The participants touched upon some ways of finding an age limit that everyone can agree about.

### **E) PROPER AND DIGNIFIED MANAGEMENT OF THE DEAD**

Protecting the dignity of the dead is the overarching concern in Islamic law. The coordination and cooperation between experts in Islamic law and forensic specialists is exemplary: it shows how Islamic law and IHL can work together to alleviate the suffering of victims of armed conflict.

### **F) OTHER OBJECTIVES**

The workshop had other objectives as well. One was to enrich the ICRC's regional strategies and policies with the recommendations of experts in Islamic law. The richness of our discussions over the past two days confirmed the ICRC's view that engagement with religious circles is critical to our successful provision of protection and assistance.

The next objective was to stimulate interest in scholarly or expert research on the operational and legal issues discussed at the workshop. Some of you have already addressed the gaps that need to be filled. Several participants stressed their commitment to establishing courses on IHL and the Islamic law of armed conflict at their universities or to doing research.

The third objective was to explore possibilities for cooperation with experts in Islamic law in their personal capacities and/or with their institutions. I am convinced that the discussions suggested many avenues for future cooperation in the places where you live and work; our delegations in those countries or regions will certainly be delighted to talk with you about possibilities for working together.

The fourth objective was to bring up matters for discussion at future experts' workshops on Islamic law and IHL. Our last discussion – on the way forward – brought up a number of good ideas; we look forward to exploring them with you. I agree that to get a fuller view of things we must have greater diversity of participants.

The ICRC's commitment to discharging its mandate from States, to generate and strengthen respect for IHL – and to working for the faithful application of this body of law – has never wavered. We therefore welcome and are grateful for all the discussions that took place at this workshop, and for all the ideas that have emerged from it. They will give us a lot to think about, and help us to carry out our humanitarian mission to protect and assist victims of armed conflict and other situations of violence.

To be successful, a workshop like this one needs the active participation of all those in attendance. I would therefore like to thank you all for your many valuable contributions to the discussions and to the workshop as a whole. The depth of knowledge, experience and expertise on display, the many different points of view that were represented, the respectful tone of all the discussions: because of all this, I think we can all safely say that we have participated in an event of some significance.

The ICRC will study the content of our discussions, and looks forward to cooperating with you. We will also prepare a summary report of the workshop, which will be circulated to all participants in due course.

I would like to express my thanks to the moderators, panellists, interpreters and note-takers, as well as to all of you – for making this workshop such a success.

Finally, I would like to thank the Advisory Service on IHL for coordinating this event and our colleagues from other services at ICRC headquarters, and in the field, who provided support for this event.

It was a great pleasure to meet you all. I hope to see you again soon. Thank you very much.

## 2. RECOMMENDATIONS AND THE WAY FORWARD

### **Ahmed Aldawoody, Legal Adviser (Islamic Law and Jurisprudence), ICRC Advisory Service on IHL**

The extent of the suffering caused by armed conflicts today, and the complex and changing environment in which the ICRC works, necessitate dialogue and cooperation with all relevant stakeholders. The discussions during this workshop reflected a rich and indispensable dialogue between two legal frameworks, IHL and Islamic law, on one hand, and between the law and the ICRC's operations, on the other. These different frameworks and traditions, and the experts who study them, have a common objective: alleviating the suffering of victims of armed conflict. However, they will struggle – with no end in sight – to find ways to realize this objective, simply because of the unceasingly changing nature of armed conflict.

The discussions at the workshop have also shown that the workshop was an exercise in mutual learning. Experts in Islamic law learnt about a number of operational challenges that the ICRC is facing in contemporary armed conflict. As can be seen from the recommendations listed below, the experts in Islamic law said that similar experts' workshops, training and research were all needed. In fact, some of the experts are currently conducting further research on matters discussed during the workshop. A number of ICRC staff were introduced to the Islamic legal tradition through discussions and exchange of views with experts in Islamic law; these ICRC personnel will now have to reflect on ways to communicate their messages more effectively in relevant Muslim contexts. Identifying areas of convergence and divergence between IHL and Islamic law is a first step towards enhancing compliance with IHL in certain Muslim contexts and addressing the challenges that the ICRC is facing in these contexts. Reaching out to and cooperating with all relevant stakeholders, to find ways to address these challenges, is a necessity for the ICRC: it has to do this if it is to fulfil its mission as the guardian of IHL. The ICRC does not – and can never have – have all the resources needed to tackle these challenges in every armed conflict; therefore, pertinent local knowledge and expertise must be sought to ensure the security of ICRC personnel and to enhance the ICRC's ability to protect and assist victims of armed conflict.

Discussions on various issues with and among the experts in Islamic law revealed – to those encountering it for the first time – the highly specialized and sometimes complex nature of Islamic law; this is partly because Islamic law has its own legal-cultural mindset, so to speak, that is strongly linked to certain sources, methodologies and historical contexts. The accessibility of Islamic law is complicated by the fact that not all its significant texts have been translated; and the translations, from Arabic into English, that do exist are, in some instances, riddled with inaccuracies. This example alone should make clear how much dialogue, education, training and dissemination are needed to bring the two legal mindsets closer. Dialogue, for instance, will enable key messages to be communicated in a language understood by all parties. Miscommunication exacts a high price: it hobbles our ability to alleviate the suffering of victims of armed conflict; and sometimes, tragically, it kills people – humanitarian aid workers and others as well.

Therefore, the ICRC has to take a multidisciplinary approach to its engagement with IHL and Islamic law. The complex conflicts in progress may require innovative approaches that bring lawyers, anthropologists, engineers, forensic specialists, medical professionals, and others together to respond more effectively to humanitarian crises. These approaches must be closely linked to and focused on field realities and changing challenges.

During the concluding session, the experts in Islamic law made a number of observations and recommendations regarding the ICRC's engagement with IHL and Islamic law, with a view to strengthening respect for IHL in Muslim contexts:

- Organize similar workshops for experts, and if there is a follow-up session next year, consider holding it in an Islamic country.
- Include more schools of thought.
- Further research, coordination among scholars of Islamic law, and codification of the Islamic law of armed conflict are needed.

- Teaching the principles of the Islamic law of armed conflicts in certain Muslim contexts is important, because it will reveal IHL's compatibility with Islamic law and broaden acceptance for IHL.
- Share the contact details of the other participants.
- Pay more attention to comparatively neglected subjects such as detention and the management of the dead.
- Create a peer-reviewed scholarly journal online that focuses on issues pertinent to the ICRC's work.
- Communicate clear and concise messages via social media.
- Increase cooperation and coordination with influential religious scholars/leaders during armed conflict.
- The ICRC and other international organizations should work together to train Islamic scholars, jurists and judges in IHL and the Islamic law of armed conflict.
- Establish a research centre for studying IHL and the Islamic law of armed conflict.
- Develop diploma courses, and master's and PhD programmes, in IHL and the Islamic law of armed conflict.
- Prepare an exhaustive annotated bibliography on the subject of IHL and the Islamic law of armed conflict.
- Including front-line negotiators and influential religious leaders in future events of this kind.
- Use all the forums academics and religious leaders have to communicate pertinent messages to the general public.
- Provide training for officials at detention centres in the detainees' rights that were discussed at the workshop.
- Publish the proceedings of this workshop and if that is not feasible, publish the main questions, concepts and issues discussed during this workshop in FAQ form.

These observations and recommendations show how much interest there is in close cooperation between the ICRC and various sections of the Muslim world: academia; research institutions; independent scholars; students; local, regional and international organizations/institutions; religious leaders; and front-line Muslim negotiators. There is immense potential for cooperation – and this is only one example – with the Organization of Islamic Cooperation,<sup>59</sup> and particularly with its specialized organs such as the Islamic Committee of the International Crescent, the Islamic Educational, Scientific and Cultural Organization, and the International Islamic Fiqh Academy. Cooperation with such entities in humanitarian assistance, publishing, education, training, and dissemination of IHL and Islamic law will popularize IHL in large parts of the Muslim world. Also cooperation with Dar al-Ifta in Muslim States could draw the attention of Muslim jurists to issues and challenges confronting the ICRC in Muslim contexts, such as those related to forensics and health care. Many of the observations and recommendations listed above invite cooperation with experts in their academic capacity. And many of these observations and recommendations are related to initiatives that may be undertaken by Islamic experts and institutions, such as establishing a research centre for studying IHL and the Islamic law of armed conflict and developing courses in this area. The pertinent ICRC units and departments can provide support in the form of IHL expertise, publications, and training. Some ICRC delegations are already giving such support: they organize certificate courses and/or training for Islamic scholars in IHL and Islamic law.

Given the complexity of the ICRC's working environment, any degree of cooperation will necessitate close coordination between the field and headquarters in Geneva, and involve various units and departments as well as require expertise of various kinds. The ICRC confronts human suffering, and the various obstacles to alleviating it, every day. Cooperation and coordination between the ICRC and all relevant stakeholders and, no less importantly, within the ICRC is essential for mounting an effective response to the daunting tasks that the ICRC must undertake.

59 <https://www.oic-oci.org/home/?lan=en>

# ANNEX 1: AGENDA

## MONDAY, 29 OCTOBER 2018

**8:45–9:00**      **Registration**

**9:00–9:15**      **Introduction to the ICRC's operations in Muslim countries**

[Overview of the agenda and organization of the work](#)

Anne Quintin

*Head of the ICRC Advisory Service on IHL*

**9:15–10:15**      **Introduction to IHL and the Islamic law of armed conflict**

Contemporary challenges of international humanitarian law

Lindsey Cameron,

*Head of the Unit of Thematic Legal Advisers*

[The Islamic law of armed conflict: An introduction to the main principles](#)

Ahmed Aldawoody

*Legal Adviser on Islamic Law and Jurisprudence, ICRC Advisory Service on IHL*

### **Discussion**

Moderator: Anne Quintin

*Head of the ICRC Advisory Service on IHL*

**10:15–10:45**      **Welcome address**

Yves Daccord, Director-General of the ICRC

**10:45–11:00**       **Group photo &**  **coffee break**

**11:00–13:00**      **Conduct of hostilities: Lawful weapons and methods of combat**

*Throughout the history of warfare, the conduct of hostilities has inflicted unspeakable suffering on millions of families and individuals. This remains the case today. Civilians and combatants alike are killed, wounded and maimed for life and often lose loved ones or their property and belongings. It has long been a central objective of IHL, therefore, to regulate the conduct of hostilities so as to ensure the protection of the civilian population and civilian objects from the effects of war. This is pursued, inter alia, through the principle of distinction, requiring parties to an armed conflict to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and, accordingly, to direct their operations against military objectives only.*

*This session will focus on discussion of the position of Islamic law on the distinction, in armed conflicts, between civilians and civilian objects, which are protected against attack, and lawful targets (namely combatants, military objectives and civilians directly participating in hostilities) and on the prohibition of indiscriminate attacks. Studying the interplay between Islamic law and IHL is important in relation to the conduct of hostilities in certain contexts where Islamic law is invoked.*

### The principle of distinction and the prohibition against indiscriminate attacks under IHL

Laurent Gisel

Senior Legal Adviser, ICRC Legal Division

### The conduct of hostilities under Islamic law

Fassi Fihri Driss

Vice-President of Al-Qarawiyin University, Morocco

and

Sohail H. Hashmi

Professor of International Relations, Mount Holyoke College

### Introduction to operational challenges

Pilar Gimeno Sarciada

Head of the ICRC Unit for Protection of the Civilian Population

### Discussion

Moderator: Jean-Marie Henckaerts

Head of Commentaries Unit, Legal Division

Distinction between civilians and combatants, and between civilian objects and military objectives  
Indiscriminate attacks

13:00–14:30



Lunch

14:30–16:30

### The protection of health care

*Maintaining adequate medical services and ensuring respect and protection for the wounded and sick without any adverse distinction, i.e. irrespective of whether they are combatants or civilians or considered friend or foe, and for health-care personnel and facilities and medical transports is at the very origin of IHL and the foundation of the International Red Cross and Red Crescent Movement. Generating respect for these rules of IHL remains of timely relevance in today's armed conflicts.*

*Given the influential role that Islamic law experts and religious leaders can play in Muslim contexts in increasing awareness and acceptance of relevant rules of IHL, it is indispensable to take a detailed look – beyond the basic precepts – at possible convergences between IHL and Islamic law, including the impartiality of medical care and links between medical and Islamic ethics, particularly with regard to ensuring medical care for wounded adversaries; the scope of specific protections for medical care providers and circumstances leading to the loss of such protection; and the scope of relevant prohibitions, such as killing health-care professionals, taking them hostage or pillaging medical equipment.*

### The protection of health care under IHL

Alexander Breitegger

Legal Adviser, ICRC Legal Division

### The protection of health care under Islamic law

Muhammad Mushtaq Ahmad

Associate Professor and Chairman of the Department of Law in the International Islamic University, Islamabad



### Introduction to operational challenges

Maria S. Guevara

*Senior Coordinator, Attacks on HealthCare, Doctors Without Borders*

### Discussion

Moderator: Kelisiana Thynne

*Legal Adviser, ICRC Advisory Service on IHL*

The protection and care for the wounded and sick associated with the adversary

The protection of medical personnel and medical transport

The protection of medical facilities

19:00



**Dinner (Azar & Co)**

## TUESDAY, 30 OCTOBER 2018

09:00–11:00

### Detention in armed conflict

*Detention is a regular occurrence in both international and non-international armed conflicts. Given the inherently vulnerable position of persons deprived of their liberty by the opposing side, IHL devotes a significant number of provisions to regulating various aspects of detention in order to protect the life, health and dignity of detainees. Safeguards relate to, inter alia, the treatment of detainees and the conditions of their detention, procedural and fair trial rights and the prohibition on transferring detainees to other authorities in some cases. Bearing in mind the centrality of detention rules in IHL and in Islamic law, an exchange of views on this topic could provide a better mutual understanding of the key tenets of the two normative regimes as they relate to detention and allow commonalities to be identified, with a view to facilitating dialogue and strengthening legal protection for detainees in the various contexts of armed conflicts taking place around the world, including in Islamic countries.*

#### Detention in armed conflict under IHL

Tilman Rodenhäuser

Legal Adviser, ICRC Legal Division

#### Detention under Islamic law

Ali Jum'ah Al-Rwahneh

Dean of Sharia Faculty at Al al-Bayt University

#### Introduction to operational challenges

Daniel Mac Sweeney

Deputy Head of Protection

### Discussion

Moderator: Eva Svoboda

Deputy Director of International Law and Policy

Reasons for detention

The protection of detainees, including vulnerable groups

End of captivity

11:00–11:30



**Coffee break**

11:30–13:00

### Special protection for children

*Children continue to be disproportionately affected by violence and suffering in contemporary armed conflicts – in 2017 alone, the UN noted at least 21,000 incidents in which harm was done to children by a party to an armed conflict. The ICRC works accordingly to strengthen implementation of the special respect and protection afforded to children under international humanitarian law with a focus on four key areas regulated by it. The session dedicated to the special protection of children under IHL and Islamic law will consequently address the following issues:*

- *On the issue of child recruitment, experts will address the question of whether and within what parameters Islamic law regulates the recruitment of children for use in hostilities and, in particular, whether there is a minimum age beneath which the recruitment of children is prohibited.*
- *On the issue of access to education, experts will discuss how provisions within Islamic law protect or facilitate access to education for children in situations of armed conflict and whether educational facilities, such as schools, benefit from any special protection from attack or from use by parties to a conflict.*

- On the issue of the detention of children, experts will focus on the nature of any special protections (such as specific facilities, food, recreation, access to education, and family contact) children are entitled to when they are detained. Experts will also consider rules governing the prosecution of children for actions committed in association with an armed force or armed group and whether there is a minimum age of criminal responsibility in this respect.
- On the issue of restoring family links for separated and unaccompanied children, experts will look at whether there are provisions of Islamic law that regulate or prevent the separation of children from their families and ways in which family contact and reunification feature in Islamic law applicable in armed conflict.

### IHL provisions providing special protection for children, and the challenges faced by children in contemporary armed conflicts

Vanessa Murphy

Legal Adviser, ICRC Legal Division

and

Monique Nanchen

Child Protection Adviser, ICRC Unit for Protection of the Civilian Population

### The protection of children under Islamic law

Samah bin Farah

lecturer at Zeytouna University

and

M. Amin Al-Midani

President of the Arab Centre for International Humanitarian Law and Human Rights Education

### Discussion

Moderator: Ahmed Aldawoody

Legal Adviser on Islamic Law and Jurisprudence, ICRC Advisory Service on IHL

The recruitment of children

Access to education

The treatment of children in detention

Restoring Family Links

**13:00–14:30**



**Lunch**

**14:30–16:00**

### Proper and dignified management of the dead

The ICRC's growing engagement in the area of the management of the dead has prompted the need for a more in-depth understanding of the cultural and religious requirements of those concerned. There is a real need for both first responders and forensic professionals to better understand how to handle the dead and ensure that proper guidance and advice can be provided on taking, using and storing biological samples from both the dead and the living in different cultures. Greater guidance is needed on the burial and exhumation of human remains, taking into consideration both Islamic law and IHL. The risk of ill-informed forensic practitioners unintentionally causing even greater trauma to those concerned is real, and a comprehensive review and study are required so that sound guidance can be provided on this important matter.

### Managing the dead in conflict and disasters: Key considerations

Oran Finegan

Head of the ICRC Forensic Unit

### The management of the dead under Islamic law

Sheikh Ahmad Abadi Abed Al-Sadah Mohammad Al-Shaibani  
*instructor at Baghdad's Al-Hawza Al-Ilmiyya*

#### **Discussion**

Moderator: Morris Tidball-Binz  
*Forensic Manager, Project on Missing Persons*  
Collective graves  
The burial and exhumation of human remains  
Autopsies

**16:00–16:30**



#### **Coffee break**

**16:30–17:15**

#### **The way forward**

Moderators:  
Anne Quintin  
*Head of the ICRC Advisory Service on IHL*  
and  
Ahmed Aldawoody  
*Legal Adviser on Islamic Law and Jurisprudence, ICRC Advisory Service on IHL*

### Concluding remarks

Eva Svoboda  
*Deputy Director of International Law and Policy*

# ANNEX 2: LIST OF PARTICIPANTS




NAME	TITLE	POSITION	ORGANISATION/ INSTITUTION	COUNTRY
AHMAD Ahmad Atif	Mr	Professor of Religious studies	University of California, Santa Barbara	USA
AHMAD Muhammad Mushtaq	Mr	Associate professor	International Islamic University Islamabad	Pakistan
AL-ALWANY Ismael Khaleel Ibrahim	Mr	Professor of Islamic Law	Al-Imam Al-Adham College	Iraq
AL-KILANI Jamal Ahmad Abdulkareem Zaid	Mr	Dean of Islamic Law Faculty	An-Najah National University	Palestine
AL-MIDANI M. Amin	Mr	Professor	President of the Arab Centre for International Humanitarian Law and Human Rights Education	France
AL-RWAHNEH Ali Jum'ah Ali	Mr	Dean of the Faculty Shariah	Al al-Bayt University	Jordan
Al-SHAIBANI Sheikh Ahmad Abadi Abed Al-Sadah Mohammad	Mr	Islamic scholar	Director of Imam Al-Baqer College and Imam of Ahl Al-Bayt Mosque in Baghdad	Iraq
BARKINDO Ibrahim	Mr	Lecturer	Centre for Islamic legal studies, institute of administration, Ahmadu Bello university	Nigeria
DRISS Fassi Fihri	Mr	Professor and Vice-President of Al Qarawiyyin University	Al Qarawiyyin University	Morocco
FARAH Sameh Ben	Ms	Professor	Tunis Higher Institution of Islamic Civilization, Zeytouna University	Tunisia
FARRAR Salim	Mr	Associate Professor Muslim Chaplain	Sydney Law School - University of Sydney	Australia
GUEVARA Maria	Ms	Senior Coordinator, Attacks on Healthcare	MSF, Geneva	Switzerland
HASHMI Sohail	Mr	Professor of International relations	Mount Holyoke College	USA
ISLAM Mohammad Azharul	Mr	Assistant professor	Central Law College, National University	Bangladesh
KAMAL Mohd Hisham Mohd	Mr	Associate Professor	Ahmad Ibrahim Kulliyah of Laws	Malaysia
KANE Aissata	Ms	Ambassador	OIC Permanent Observer Delegation to the UN in Geneva	Switzerland
KANE Mariata	Ms	Program Analyst, National human rights officer	United Nations High Commissioner on Human Rights (OHCHR)	Mauritania
LEMU Muhammad Nuruddeen	Mr	Director of Research and Training	The Da'wah Institute of Nigeria	Nigeria
MAHNA Mohamed Abdelsamed Mohamed	Mr	Professor of International law and Adviser to the Grand Imam of Al-Azhar	Al-Azhar University	Egypt
MORADOS Macrina Adjero	Ms	Dean of the Institute of Islamic Studies	University of the Philippines, Diliman	Philippines
MUHAMMADIN Fajri Matahati	Mr	Lecturer	Universitas Gadjah Mada	Indonesia

MUSIC Kenan	Mr	Professor and Head of International Relations Department	Faculty of Islamic Studies	Bosnia & Herzegovina
SAHITI Vedat	Mr	Adviser to the Grand Mufti of Kosovo	Adviser to the Head of the Islamic Community of Kosovo	Kosovo
SAID Bourhani	Mr	Lecturer in Islamic law and IHL	President of the University of Comoros	Comoros
SALAMA Ibrahim	Mr	Chief, Human Rights Treaties Branch	Office of the High Commissioner for Human Rights, OHCHR	Switzerland
SASSÒLI Marco	Mr	Director of the Geneva Academy of IHL and HR and professor of international law at the Faculty of Law of the University of GVA	Geneva Academy of International Humanitarian Law and Human Rights	Switzerland
SULAIMON Davlatzoda	Mr	Chairman of the Committee for Religious Affairs	Religious Committee, Observing national traditions and rituals under the Government of the Republic of Tajikistan	Tajikistan
WALUSIMBI Abdul Hafiz	Mr	Dean, Lecturer and Head of Department of Shari'ah	Faculty of Islamic Studies and Arabic Language, Islamic University in Uganda (IUU)	Uganda
<b>ICRC HQ STAFF</b>				
Peter MAUREER	Mr	President	International Committee of the Red Cross	ICRC GVA
Yves DACCORD	Mr	Director-general	International Committee of the Red Cross	ICRC GVA
Eva SVOBODA	Ms	Deputy Director	International Law and Policy Department	ICRC GVA
Jean-Marie HENCKAERTS	Mr	Head of Unit	Commentaries Unit, Legal Division	ICRC GVA
Lindsey CAMERON	Ms	Head of Unit	Thematic Lawyers Unit, Legal Division	ICRC GVA
Anne QUINTIN	Ms	Head of Unit	Advisory Service on IHL, Legal Division	ICRC GVA
Pilar Gimeno Sarciada	Ms	Head of Unit	Protection of Civilians Unit	ICRC GVA
Kelisiana THYNNE	Ms	Legal Adviser	Advisory Service on IHL, Legal Division	ICRC GVA
Alexandra ORTIZ	Ms	Legal Adviser	Advisory Service on IHL, Legal Division	ICRC GVA
Benjamin CHARLIER	Mr	Legal Adviser	Advisory Service on IHL, Legal Division	ICRC GVA
Ahmed ALDAWOODY	Mr	Legal Adviser	Advisory Service on IHL, Legal Division	ICRC GVA
Laurent GISEL	Mr	Senior Legal Adviser	Thematic Lawyers Unit, Legal Division	ICRC GVA
Tilman RODENHAUSER	Mr	Legal Adviser	Thematic Lawyers Unit, Legal Division	ICRC GVA
Jacqueline AESCHIMANN	Ms	Unit Assistant	Advisory Service on IHL, Legal Division	ICRC GVA
Kevin KARLEN	Mr	Legal Associate	Advisory Service on IHL, Legal Division	ICRC GVA
Alexander BREITEGGER	Mr	Legal Adviser	Thematic Lawyers Unit, Legal Division	ICRC GVA
Daniel MAC SWEENEY	Mr	Deputy Head of Division	Protection Division	ICRC GVA
Vanessa MURPHY	Ms	Legal Adviser	Thematic Lawyers Unit, Legal Division	ICRC GVA
Monique NANCHEN	Ms	Child Protection Adviser	Unit for Protection of the Civilian Population	ICRC GVA
Oran FINEGAN	Mr	Head of Unit	Forensic Unit	ICRC GVA
Morris TIDHBALL-BINZ	Mr	Forensic Manager	Project on Missing Persons	ICRC GVA
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## MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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