



# ICRC International Committee of the Red Cross

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## The relevance of IHL in the context of terrorism

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Events in recent years have increased interest in the issue of how international humanitarian law is applied in today's context of violent confrontation. In a new paper, the ICRC provides answers to some of the most frequently asked questions about international humanitarian law and terrorism.

### 1. Is there legal significance to the term "global war on terror?"

International humanitarian law (the law of armed conflict) recognizes two categories of armed conflict: international and non-international. International armed conflict involves the use of armed force by one State against another. Non-international armed conflict involves hostilities between government armed forces and organized armed groups or between such groups within a state. When and where the " global war on terror " manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law.

When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern.

Whether or not an international or non-international armed conflict is part of the " global war on terror " is not a legal, but a political question. The designation " global war on terror " does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict.

### 2. Who is a combatant?

International humanitarian law permits members of the armed forces of a State party to an international armed conflict and associated militias who fulfil the requisite criteria to directly engage in hostilities. They are generally considered lawful, or privileged, combatants who may not be prosecuted for the taking part in hostilities as long as they respect international humanitarian law. Upon capture they are entitled to prisoner of war status.

If civilians directly engage in hostilities, they are considered " unlawful " or " unprivileged " combatants or belligerents (the treaties of humanitarian law do not expressly contain these terms). They may be prosecuted under the domestic law of the detaining state for such action.

Both lawful and unlawful combatants may be interned in wartime, may be interrogated and may be prosecuted for war crimes. Both are entitled to humane treatment in the hands of the enemy.

### 3. Who is an "enemy combatant?"

In its generic sense, an " enemy combatant " is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict.

The term is currently used - by those who view the fight against terrorism as including a transnational armed conflict

against certain terrorist groups - to denote persons believed to belong to, or believed to be associated with terrorist groups, regardless of the circumstances of their capture.

As mentioned above, a member of the armed forces of a State engaged in an international armed conflict or of an associated militia that fulfils the requisite criteria is a combatant, and, as such, entitled to POW status upon capture by the enemy.

In non-international armed conflict, combatant and prisoner of war status are not provided for, because States are not willing to grant members of armed opposition groups immunity from prosecution under domestic law for taking up arms.

From an IHL perspective, the term "combatant" or "enemy combatant" has no legal meaning outside of armed conflict.

To the extent that persons designated "enemy combatants" have been captured in international or non-international armed conflict, the provisions and protections of international humanitarian law remain applicable regardless of how such persons are called. Similarly, when individuals are captured outside of armed conflict their actions and protection are governed by domestic law and human rights law, regardless of how they are called.

#### **4. Who is entitled to "prisoner of war" status? What is the consequence of failure to qualify for prisoner of war status?**

##### *a. In international armed conflict*

As previously mentioned, in international armed conflict, members of the armed forces of the States involved (and associated militias) are lawful combatants. It should be borne in mind that in this type of conflict, there are lawful combatants on two (or more) sides: the armed forces of one State fighting the armed forces of another State.

The four Geneva Conventions apply to situations of international armed conflict. It is the Third Geneva Convention which regulates the protection of lawful combatants upon capture by the enemy. Its procedures for determination of entitlement to prisoner of war status by a "competent tribunal" in case of doubt are mandatory.

Unlawful combatants do not qualify for prisoner of war status. Their situation upon capture by the enemy is covered by the Fourth (Civilian) Geneva Convention if they fulfil the nationality criteria and by the relevant provisions of the Additional Protocol I, if ratified by the detaining power.

This protection is not the same as that afforded to lawful combatants. To the contrary, persons protected by the Fourth Convention and the relevant provisions of Protocol I may be prosecuted under domestic law for directly participating in hostilities. They may be interned for as long as they pose a serious security threat, and, while in detention, may under specific conditions be denied certain privileges under the Fourth Geneva Convention. They may also be prosecuted for war crimes and other crimes and sentenced to terms exceeding the length of the conflict, including the range of penalties provided for under domestic law.

Persons not covered by either the Third or the Fourth Geneva Convention in international armed conflict are entitled to the fundamental guarantees provided for by customary international law (as reflected in Article 75 of Additional Protocol I), as well as by applicable domestic and human rights law. All these legal sources provide for rights of detainees in relation to treatment, conditions and due process of law.

Therefore, contrary to some assertions, the ICRC has never stated that all persons who have taken part in hostilities in an international armed conflict are entitled to prisoner of war status.

##### *b. In non-international armed conflict*

In non-international armed conflict combatant status does not exist. Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply. Members of organized armed groups are entitled to no special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal

law if they have taken part in hostilities. However, the international humanitarian law of non-international armed conflict - as reflected in Common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Conventions where applicable, and customary international humanitarian law - as well as applicable domestic and international human rights law all provide for rights of detainees in relation to treatment, conditions and due process of law.

#### **5. What are the ICRC's role and activities in relation to international humanitarian law?**

The international community has long recognized the ICRC's role in working for the understanding and dissemination of international humanitarian law. The institution also works towards its faithful application by, among other things, reminding parties to armed conflict of their legal obligations as reflected in treaties to which they are party, such as the Geneva Conventions, and under customary international law. Two further treaties relating to armed conflict are Protocol I Additional to the Geneva Conventions of 1949 and Protocol II Additional to the Geneva Conventions of 1949 that were negotiated by States from 1974-1977 at an International Diplomatic Conference.

Protocols I and II are international treaties to which the great majority of States are party (164 to Additional Protocol I and 160 to Additional Protocol II). The ICRC does not claim and has never claimed that any State that is not a party to these treaties is bound by them. However, significant portions of these Protocols are considered by States to reflect customary international law, which is binding on States regardless of whether or not it is contained in any treaty to which the State is party.

The ICRC itself cannot ensure the application of international humanitarian law, but rather urges States and parties to an armed conflict to respect and ensure respect for it.

#### **6. Does Protocol I Additional to the Geneva Conventions treat "terrorists" the same as it does soldiers?**

One of main achievements of Additional Protocol I concerns limitations on the methods and means of warfare introduced in order to better protect civilians. For example, it unequivocally prohibits acts of terrorism, such as attacks against civilians or civilian objects. The treaty also explicitly prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Needless to say, persons suspected of such acts are liable for criminal prosecution.

Additional Protocol I does not grant prisoner of war status to persons who unlawfully participate in hostilities. It reserves this status to members of the armed forces of a party to an international armed conflict in the sense of the Protocol. Such armed forces must be organized, be under a command responsible to that party and be subject to an internal disciplinary system that enforces compliance with humanitarian law. Moreover, members of armed forces must distinguish themselves from the civilian population in order to be entitled to prisoner of war status upon capture. While traditionally the wearing of a uniform or of a distinctive sign and the carrying of arms openly was required, States parties to the Protocol agreed that in very exceptional circumstances, such as wars of national liberation, this requirement could be less stringent. The carrying of arms openly would be sufficient as a means of distinction.

The Protocol thus provides recognition and protection only to organizations and individuals who act on behalf of a State or an entity that is a subject of international law. It excludes " private wars " , whether conducted by individuals or groups, in the same way that the 1949 Geneva Conventions and the 1907 Hague Regulations concerning the laws and customs of war on land had done. Therefore, " terrorist " groups acting on their own behalf and without the requisite link to a State or similar entity are excluded from prisoner of war protections.



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