INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

RECOMMITTING TO PROTECTION IN ARMED CONFLICT ON THE 70TH ANNIVERSARY OF THE GENEVA CONVENTIONS

REPORT

ICRC

TABLE OF CONTENTS

A. Dunser/ICRC

CHAPTER 5

TERRORISM, COUNTERTERRORISM MEASURES, AND IHL

In recent years, States have had to confront a threat emanating from individuals and non-State armed groups that resort to acts of terrorism. In response, States and international organizations have developed increasingly robust counterterrorism measures. There is no doubt that it is legitimate and necessary for States to act at the national, regional and international level to ensure their security and the security of their population. Acts of terrorism negate the basic principle of humanity and go against the principles underlying IHL. The ICRC condemns acts of terrorism regardless of their perpetrators, whether or not they are committed in the context of armed conflict.

At the same time, the ICRC is concerned about the humanitarian consequences of counterterrorism operations. In many contexts, especially in Africa, the Middle East and Asia, counterterrorism operations have been conducted in the context of armed conflict by State armed forces – alone, in coalitions, or under the auspices of an international organization. The ICRC is worried by the frequently held misperception that IHL does not apply or applies in a modified manner to groups or persons designated as terrorists, and to their families.

This chapter (1) seeks to clarify some aspects of the applicability of IHL to counterterrorism operations; (2) draws attention to the fact that counterterrorism measures can have real and adverse effects on the humanitarian work of impartial humanitarian organizations, including the ICRC; and (3) discusses the status and protection of foreign fighters and their families under IHL, focusing in particular on the needs of women and children.

1. THE APPLICABILITY OF IHL TO STATES FIGHTING "TERRORISM" AND NON-STATE ARMED GROUPS DESIGNATED AS "TERRORISTS"

The ICRC has, for many years now, been observing three key challenges to the applicability of IHL to counterterrorism operations.

First, some States deny that IHL applies to their counterterrorism operations – even in the face of plainly obvious situations of armed conflict – out of a concern that recognizing the existence of an armed conflict could somehow legitimize "terrorists". This concern is as prevalent today as ever – despite the fact that IHL norms (notably common Article 3) expressly recognize that the applicability of IHL does not confer any legal status on a non-State party to an armed conflict. Denying that non-State armed groups designated as "terrorists" can be party to a non-international armed conflict is problematic, as it greatly impedes application of the fundamental rules that IHL sets out for both State and non-State parties to conflict (for instance, the rules on the conduct of hostilities or the rules governing humanitarian access), and may jeopardize the effective application of the protection contained therein.

Second, there is a tendency among some States to consider any act of violence by a non-State armed group in an armed conflict as an act of terrorism, and therefore necessarily unlawful, even when the act in question is not in fact prohibited under IHL. This approach is likely to diminish any incentive to comply with IHL.

Third, some States have developed a discourse according to which the *exceptional* threat posed by non-State armed groups designated as "terrorist" requires an *exceptional* response. Some States are dehumanizing adversaries and employing rhetoric to indicate that actors designated as "terrorist" are undeserving of the protection of international law, including IHL: this is an alarming trend, and the ICRC has been following it closely.

Fortunately, these positions are not shared by all stakeholders involved in the fight against terrorism. Many States recognize that IHL applies to their counterterrorism operations when the conditions for its application are met. The determination as to whether an armed confrontation involving such groups amounts to an armed conflict, or is part of one, needs to be made objectively and exclusively on the basis of the facts on the ground and the recognized criteria for conflict classification under IHL.

Thus, if a non-State armed group that has been designated as "terrorist" is sufficiently organized for the purposes of IHL, and is involved in sufficiently intense armed confrontations with the State or other armed groups, the situation will amount to a non-international armed conflict, and will be governed by IHL. In contrast, situations of violence involving individuals or groups designated as "terrorist" but remaining below the threshold of armed conflict are not governed by IHL. In such situations, human rights law will govern counterterrorism operations.[78]

Claims of "exceptionalism" have also resulted in overly permissive interpretations of IHL rules. Examples include broad interpretations of who may be lawfully targeted, under which persons involved in financing organized armed groups designated as "terrorist", for instance, are targeted; a laxing in interpreting the principle of proportionality, permitting excessive incidental loss of civilian life, injury to civilians, and/or damage to civilian objects; and a selective approach to the rules governing deprivation of liberty of persons designated as "terrorists", justifying, for instance, prolonged solitary confinement, deprivation of family contact, or the impossibility of challenging the lawfulness of the detention.

Such permissive interpretations risk becoming new standards far below those that have been accepted for decades. They may lead to the dismantlement of the basic protection afforded by IHL to victims of armed conflict, including persons *hors de combat*, who remain protected even if they have been designated as "terrorists". States should reaffirm the fact that IHL is a balanced body of law and its rationale still valid. IHL permits neutralizing and overcoming the enemy while preserving standards of humanity in armed conflict. IHL includes rules allowing, for instance, lethal force to be directed against lawful targets based on the principle of military necessity, or the internment of enemies for imperative reasons of security. IHL does not hinder States from fighting terrorism effectively, while setting out a baseline of humanity that all States have agreed to respect, even in the most exceptional situations.

2. COUNTERTERRORISM MEASURES AND PRINCIPLED HUMANITARIAN ACTION

Efforts, undertaken within the framework of counterterrorism measures, to curb direct and indirect support to so-called "terrorist organizations" have led to increased monitoring of and restraints on all activities seen as providing support or assistance to non-State armed groups or individuals designated as "terrorists".

It is clear from various armed conflicts in the past decade that counterterrorism measures also adversely affect the ability of impartial humanitarian organizations – including the ICRC – to carry out their humanitarian activities and conduct principled humanitarian action in conflict settings. This is particularly true in areas where armed groups designated as "terrorists" are active and where principled humanitarian action is most needed. In some contexts, counterterrorism measures have prevented humanitarian relief and protection from reaching those most in need.

78 In addition to IHL and human rights law, international and regional instruments addressing terrorism may apply, such as the International Convention for the Suppression of Terrorist Bombings (1997), the International Convention for the Suppression of the Financing of Terrorism (1999), the Council of Europe Convention on the Prevention of Terrorism (2005), or the Shanghai Convention on Combating Terrorism (2001). In the ICRC's view, instruments aimed at combating terrorism should never define those acts as "terrorist" that are governed by IHL and not prohibited by it when committed during armed conflict, such as attacks against military objectives or military personnel.

Among the various counterterrorism measures developed by States and international organizations, some are of particular concern: penal laws criminalizing any form of support to individuals or groups designated as "terrorists"; sanctions regimes aimed at ensuring that no resources benefit such individuals and groups; and ever stricter and more cumbersome counterterrorism clauses in funding agreements between donors and humanitarian organizations. A growing body of research shows that these measures, inadvertently or deliberately, have impeded – or even prevented – impartial humanitarian action, to the detriment of those in need.[79] They can affect a variety of humanitarian activities, many of which are elements of the ICRC's mandate: visiting and providing humanitarian assistance to detainees (including family visits); delivery of aid to meet the basic needs of the civilian population in hard-to-reach areas; medical assistance to wounded and sick fighters; first-aid training; war surgery seminars; or IHL dissemination to weapon bearers.

In 2011, the ICRC raised this issue publicly and expressed its concern about the impact of counterterrorism measures on humanitarian action.[80] The ICRC has reiterated its position on various occasions, notably through statements before the UN General Assembly Sixth Committee and the UN Security Council.

Counterterrorism measures adopted by States and international organizations should not contradict the humanitarian principles that States have supported politically or endorsed through IHL treaties, and should not hinder impartial humanitarian organizations from carrying out their activities in a principled manner.

In legal terms, counterterrorism measures impeding principled humanitarian action are incompatible with the letter and spirit of IHL. For example, a number of counterterrorism measures criminalize one or more of the following acts: engagement with non-State armed groups designated as "terrorist"; presence in areas where these groups are active; or delivery of medical services to wounded or sick members of such groups. Such prohibitions are incompatible with three areas of IHL: the rules governing humanitarian activities, including the entitlement of impartial humanitarian organizations to offer their services and the obligation to allow and facilitate the relief activities undertaken by such organizations; the rules protecting the wounded and the sick as well as those providing medical assistance, notably the prohibition against punishing a person for performing medical duties in line with medical ethics; and the rules protecting humanitarian personnel.

Recent experience has shown that corrective or mitigating measures can carve out a humanitarian space in the counterterrorism realm. In particular, a number of "humanitarian exemptions" have been adopted in recent instruments. The objective of such exemptions is to exclude from the scope of application of counterterrorism measures exclusively humanitarian activities undertaken by impartial humanitarian organizations such as the ICRC. They have proven to be an effective way to preserve humanitarian activities, in line with the letter and spirit of IHL. They also demonstrate that fighting terrorism and preserving IHL and humanitarian activities are perfectly compatible.

Despite some useful and interesting avenues such as humanitarian exemption clauses, effective policy and legal mitigation measures preserving principled humanitarian action are still all too rare. Counterterrorism concerns are prominent in the current political environment, and humanitarian space is shrinking steadily.

Many stakeholders have released statements or adopted resolutions underscoring the need for counterterrorism measures to comply with IHL (see, for instance, UN Security Council Resolution 2462 of March 2019 on combating the financing of terrorism) and not impede principled humanitarian action (see, for instance, UN

79 See Norwegian Refugee Council, *Principles under Pressure: The Impact of Counter-Terrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018: available at https://www.nrc.no/resources/reports/principles-under-pressure/; Jessica S. Burniske and Naz Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, 2017: available at https://pilac.law.harvard.edu/pilot-empirical-survey-study-and-comment; Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, commissioned by the United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013: available at https://www.unocha.org/sites/unocha/files/CounterTerrorism_Study_Full_Report.pdf.

80 See ICRC, *IHL Challenges Report 2011*, pp. 48–53.

General Assembly Resolution A/RES/72/284 of June 2018 on the UN Global Counter-Terrorism Strategy). It is now necessary to close the gap between these commitments and the practical measures needed to implement them. Having adopted these resolutions, States and international organizations must now find ways to effectively resolve the tension between counterterrorism measures and principled humanitarian action. The ability of impartial humanitarian organizations to carry out their exclusively humanitarian activities, and to provide relief to those who need it most, is at stake.

3. STATUS AND PROTECTION OF FOREIGN FIGHTERS AND THEIR FAMILIES

The phenomenon of "foreign fighters and their families" – nationals of one State who travel abroad to fight alongside a non-State armed group in the territory of another State, and the families of these persons – has grown in recent years.[81] A great deal of media attention within the context of the conflicts in Iraq and Syria has been directed towards the activities and fate of foreign fighters and their families. But it is imperative to recall that the wider population – beyond the media's spotlight – also continues to suffer the devastating effects of armed conflict: people have been separated from their families; they have been displaced internally and across borders; they have been injured and killed; and their livelihoods have been destroyed. The scale of humanitarian needs arising from these conflicts is enormous, and the ICRC is working to address this suffering in a number of ways.[82] During this work, and alongside the pressing needs of the local population, the ICRC has identified specific concerns with regard to the treatment of foreign fighters and their families.

The phenomenon is characterized by the diversity of individual cases and the corresponding difficulty of discussing the applicable legal framework in general rather than in case-specific terms. The nature of an individual's association with a non-State armed group, the individual's nationality, and which State has jurisdiction over the individual: these are a few of the many factors that differ from case to case. Thus, generalizations about foreign fighters and their families risk omitting facts from which important legal consequences flow: for example, children may accompany family members or they may have travelled to fight alongside the non-State armed group themselves (in which case they themselves are "foreign fighters"); they may have suffered the crime of unlawful recruitment and have committed crimes themselves. Similarly, caution must be exercised to avoid oversimplification with regard to women in this context. Women may have travelled voluntarily to areas where such armed groups are active, or may be victims of trafficking; they may be both perpetrators and victims of war crimes (including though not limited to sexual violence); and may have fulfilled a wide range of roles as members or civilian affiliates of a non-State armed group.

States have taken a variety of measures to quell the perceived or potential threat posed by foreign fighters and their families, including the use of force, detention, travel bans and revocation of nationality. While most security measures taken are of a law enforcement nature and therefore governed by human rights law, IHL – where applicable – must also be considered and respected.

The applicability of IHL to foreign fighters and their families

"Foreign fighter" is not a term of art in IHL.[83] There is no *specific* regime – and there are no rules – under IHL dealing explicitly with foreign fighters and their families. IHL deals with these individuals as it does with any other person involved in or affected by armed conflict. It governs the actions of foreign fighters and their families, as well as any measures taken by States in relation to them, when these actions and measures are taken in the context of an ongoing armed conflict. Therefore, the applicability of IHL to a situation of violence

81 The present section builds on the discussion of "foreign fighters" in ICRC, *IHL Challenges Report 2015*, pp. 19–20.

82 See the ICRC president's statement of 22 March 2019; available at www.icrc.org/en/document/statement-icrc-president-upon-ending-5-day-visit-syria.

83 The term "foreign fighter and their families" is used here for convenience, in awareness of the fact that the term may carry a risk of stigmatization. The ICRC observes that stigmatization affects persons associated with armed groups designated as "terrorist" – and indeed can affect a wide range of individuals who have had any contact with such groups – regardless of whether they are third-country nationals.

in which foreign fighters and their families are present depends on whether the criteria for the existence of an armed conflict, in particular those set out in Articles 2 and 3 common to the 1949 Geneva Conventions, are met.

When foreign fighters are engaged in military operations, relevant IHL rules on the conduct of hostilities govern their conduct. They are thus subject to the same IHL principles and rules that bind any other belligerent in the conduct of their military operations.

When foreign fighters and their families are in the power of a belligerent, notably when deprived of their liberty, they must benefit from the same protection provided by IHL rules as any other person in such a situation. Accordingly, in non-international armed conflicts, common Article 3 and customary IHL – as well as Additional Protocol II as applicable – will govern their treatment. Importantly, these rules require, *inter alia*, that grounds and procedures are provided by the detaining party when foreign fighters and their families are interned for imperative reasons of security, that judicial guarantees are respected where individuals face criminal charges, and that no one is transferred to an authority if there are substantial reasons to believe that the person would be in danger of being subjected to certain fundamental rights violations if transferred. In addition, differential treatment is required on bases such as a person's state of health, age, and sex. Pursuant to customary IHL, children are entitled to special respect and protection – including if they are detained for reasons related to an armed conflict – and family life must be respected as far as possible.

The designation of foreign fighters and their families as "terrorists", as well as any perception that they pose an exceptional security threat, have no bearing on the applicability and application of the relevant IHL rules, including those containing the protection to which these individuals are entitled. At the same time, IHL in no way prevents States from prosecuting foreign fighters for violations of law that they may have committed in relation to an armed conflict.[84]

The fact that IHL applies to foreign fighters and their families during armed conflict does not mean that IHL applies to all security measures taken by States against these persons. Only States that are parties to the armed conflict in which foreign fighters and their families are involved are bound by IHL. IHL rules in relation to foreign fighters and their families apply first of all in the territory in which armed conflict is taking place. In addition, it is submitted that IHL also applies throughout the territories of all the States involved in a non-international armed conflict extraterritorially, even if hostilities related to that conflict are not taking place in their territory.[85] In the ICRC's view, foreign fighters and their families who are in the territory of these intervening States (notably through transfer or repatriation) benefit from the protection afforded by the applicable IHL rules – including those governing detention, family contact, and the special protection of children – in addition to applicable domestic and human rights law.

In any other situation, measures against foreign fighters and their families taken by States that are not party to an armed conflict are governed by other bodies of law, notably human rights law. All States must ensure that their counterterrorism activities and security measures against persons designated as foreign fighters and their next of kin – including prosecution and deprivation of liberty – comply with the relevant international laws and standards.

International law rules protecting children associated with foreign fighters

The need to affirm that international law must govern the treatment of foreign fighters and their families arises from a persistent legislative trend that treats these individuals as exceptional cases to whom existing law does not apply. Three issues related to the treatment of children in the foreign-fighter context are emblematic of this trend.

84 More specifically, in the absence of a combatant privilege and immunity under the law governing non-international armed conflict, States retain under domestic law the possibility of criminalizing acts by foreign fighters – regardless of whether or not they are lawful under IHL.

85 See ICRC, *IHL Challenges Report 2015*, p. 14.

First, States are reticent to apply the law and standards governing the treatment of children associated with armed groups (commonly referred to as "child soldiers") to children in the foreign-fighter context who have been trained and/or used in hostilities. However, children termed "foreign fighters" remain entitled to these legal protections. Notably, States party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict are obliged, when necessary, to accord to unlawfully recruited children all appropriate assistance for their physical and psychological recovery and their social reintegration; and to cooperate for the rehabilitation and social reintegration of such children, including through technical and financial assistance.[86]

The second issue relates to the principle of the best interests of the child. It is a core obligation under Article 3 of the Convention on the Rights of the Child that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Decisions regarding, for example, how to repatriate and reintegrate children in the foreign-fighter context are actions to which this obligation applies, regardless of the age of the child and the nature of their involvement with a non-State armed group.

The third, related issue is the right of all children not to be separated from their parents against the parents' will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. This right is set out in Article 9(1) of the Convention on the Right of the Child and must be respected by States Parties in the various situations of detention and repatriation that arise for foreign-fighter families.

Specific humanitarian concerns with regard to female foreign fighters and female family members

The ICRC has specific humanitarian concerns regarding the current treatment and future situation of foreign fighters and their families. The stigma and level of threat ascribed to these fighters may place them at particular risk of violations of their fundamental rights. The treatment and fate of the many women in these circumstances is at times overlooked, and requires case-by-case consideration. For example, thousands of foreign women are located in camps, many of them accompanied by children. Regardless of their potential culpability under domestic or international law, these women have a distinct set of needs and face specific physical and psychological risks. Their distinct needs include basic female hygiene items, and medical care for pregnant women, nursing mothers, and those who have experienced sexual violence (though importantly, sexual violence affects women, men, boys and girls in such contexts). The specific risks they face include retributive violence or collective punishment for their perceived role as foreign fighters' "brides"; statelessness of their children arising from nationality laws or policies that limit women's ability to confer citizenship; and prosecutions that fail to take account of the broad range of roles and experiences of women in the foreign-fighter context.

The ICRC emphasizes that authorities who hold foreign fighters and/or their family members must treat them humanely and in accordance with international law. It recognizes that humanely and lawfully resolving the situation of foreign nationals during or after an armed conflict is inevitably complex and takes time. What happens to foreigners is often dependent on varried legal frameworks and political decisions. Measures other than local resettlement, such as repatriation or third-State resettlement, require the cooperation of multiple States. Consequently, steps to identify and secure the best solution for each foreigner should be taken as soon as possible.

86 Arts. 6(2) and 7 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).