



**Australian Red Cross**  
THE POWER OF HUMANITY

# International Humanitarian Law and the Responsibility to Protect:

**A handbook**



**CRISIS CARE COMMITMENT**



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*Bosnian women comfort each other near the coffin of their relative during a memorial ceremony near Srebrenica in 2009. Photo: AP/Amel Emric*

*Cover: A Bosnian Muslim woman next to the coffin of her relative at the Potocari Memorial Center in Potocari, Bosnia and Herzegovina. Photo: AP/ Marko Drobnjakovic*

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# introduction

**Since the earliest times people and communities have set rules intended to minimize the suffering caused by war.**

Limitations on the way conflict is fought can be found in every culture and traditionally these rules were often agreed upon by the specific parties involved. The modern codification of laws of war was started by the founder of the International Red Cross and Red Crescent Movement, Henry Dunant, when he urged the international community to create binding treaties in the area, resulting in the first Geneva Convention of 1864. Today the four Geneva Conventions of 1949 are universally ratified and have been added to by many other treaties, protocols and developments in customary international law.

In contrast, the idea promoted by the international principle of a responsibility to protect (R2P) is relatively new. For centuries there has been an accepted international norm of non-interference in the domestic affairs of States. This principle is upheld in the Charter of the United Nations. However, the end of the cold war, and the paralysis of the international community in the face of the genocides in Rwanda and Srebrenica, combined with the unilateral action of NATO in Kosovo, lead to a recognition that non-interference in the face of atrocity crimes was no longer acceptable. From this highly moral standpoint the Responsibility to Protect principle emerged.

When comparing the relationship between international humanitarian law (IHL) and R2P it is important to note two things. First, R2P is not, itself, a legal concept. It derives its authority from previous bodies of international law such as the Convention for the Prevention and Punishment of Genocide, the Rome Statute of the International Criminal Court, and, of course, from IHL. Second, R2P only focuses on the protection of vulnerable populations from the four crimes of genocide, ethnic cleansing, war crimes and crimes against humanity. It is by nature, narrow in scope, and should not be seen to be a replacement for the vast array of protections offered by IHL and other bodies of international law.

There are areas of commonality and points of difference between IHL and R2P. Both have a role to play in the protection of vulnerable populations and by understanding their relationship to one another it may enhance our capacity to serve those at risk.

*Left: A Red Cross worker walks among columns of Hutu refugees fleeing Rwanda. Photo: AP/Laurent Rebour*



**questions and  
answers  
about IHL**

## What is IHL?

International humanitarian law is a set of rules that seek to limit the effects of armed conflict on people and objects. Also known as the law of war or law of armed conflict, IHL protects certain categories of people and restricts the methods and means of warfare.

**IHL protects people** who are not or no longer taking part in the fighting, such as civilians, the wounded, the sick, prisoners of war, detainees, shipwrecked, and medical and religious military personnel. These categories of people are entitled to respect for their lives, and parties to a conflict must provide them with assistance and treat them humanely at all times and without discrimination. For example, civilians must not be made the object of an attack; the wounded and sick must be collected and cared for; and prisoners and detainees must be treated humanely and benefit from judicial guarantees.

**IHL protects objects** such as hospitals, ambulances and significant pieces of cultural property including places of worship, works of art and historic monuments. Under IHL it is also prohibited to destroy infrastructure necessary for the survival of the civilian population (such as drinking water supplies) and work containing dangerous forces (such as nuclear power stations or dams).

**IHL limits the type of weapons** and military tactics that can be used during armed conflict. It is prohibited to use weapons or methods of warfare which do not distinguish between those taking part in the fighting (combatants) and those that are not (civilians as well as civilian property). IHL does not allow the use of weapons that cause superfluous injury or unnecessary suffering, and it prohibits tactics that cause severe or long-term damage to the environment.

## What are the key messages of IHL?

The key messages of IHL are twofold:

1. Do not attack people who do not or no longer take part in armed conflict.
2. Do not use weapons that make no distinction between civilians and combatants, or cause unnecessary suffering and damage.

*Left: The main prison in Monrovia, Liberia.  
Photo: ICRC/Boris Heger*

## What is the legal basis of IHL?

IHL is found in international treaties/conventions as well as in customary law (rules that develop over time due to consistent State practice accompanied by the belief that the practice is legally required). The major elements of IHL are contained in the four Geneva Conventions of 1949 as well as the 1977 Additional Protocols. However there are many other relevant treaties that deal with matters such as the regulation of specific weapons and the prosecution of war criminals.

## Who has what responsibility?

The duty to implement IHL lies first and foremost with States.

## When does IHL apply? And to who/what?

IHL applies only in times of armed conflict, both international (between two or more nations) and non-international (internal to the territory of one nation). Once a conflict has begun then IHL applies equally to all sides regardless of the reasons for the conflict or who started the fighting.

## What happens when IHL is violated?

States party to IHL treaties are legally bound to comply with the rules and must do everything in their power to respect and ensure respect for IHL. Serious violations of IHL constitute war crimes and individuals at all levels of society can be held individually criminally responsible.

The primary responsibility for the prosecution of those accused of war crimes rests with States, regardless of where they were committed. Certain specific acts found in the Geneva Conventions and Protocol I, such as willful killing, torture or inhuman treatment, rape and other acts which willfully cause great suffering or injury to body or health, must be punished.

IHL also requires States to search for people accused of grave breaches and bring them before their own courts or hand them over for trial in another State. It is concurrently important for States to require military commanders to prevent the commission of war crimes and to take measures against those under their control who commit grave breaches.

As well as domestic prosecutions, the international community has established a number of international tribunals that aim to supplement national courts. The United Nations has established two ad hoc tribunals that deal specifically with crimes committed in the former Yugoslavia and Rwanda respectively. In 2002 the International Criminal Court (ICC) entered into force. This is the first permanent body established to have jurisdiction over serious international crimes, including war crimes, regardless of whether they were committed in an international or non-international armed conflict.

The ICC will only operate when a State is genuinely unable or unwilling to prosecute those who are accused of crimes and are within their own jurisdiction. Increasingly, various countries are also creating mechanisms to prosecute those accused of war crimes that are part of the domestic jurisdiction but also incorporate international support.



## What is armed conflict?

Armed conflict is a legal term and there are two major types – international armed conflict (traditionally called ‘war’) and non-international armed conflict (often called ‘internal armed conflict’ or ‘civil war’).

- International armed conflict occurs when fighting breaks out between two or more countries.
- Non-international armed conflict is a situation within a country when acts of violence occur regularly between the military and other organized armed groups. For example a single riot or event of political disturbance would not amount to armed conflict.
- IHL has a different set of rules depending upon the type of armed conflict being fought. The regime regulating international armed conflict is more detailed than that dealing with non-international armed conflict. However increasingly there is an understanding of the need for people to be protected in all situations of conflict.

*Left: An Iraqi woman holds her child moments after soldiers raided her house. Photo: AFP/Roberto Schmidt*



**questions and  
answers  
about R2P**

## What is R2P?

The Responsibility to Protect (R2P) is a principle aimed at the protection of the world's most vulnerable populations from the most heinous international crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.

### What are the key messages of R2P?

The key messages of R2P are threefold:

1. States have a responsibility to protect populations under their jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity.
2. The international community has a responsibility to help states to fulfill their responsibility to protect.
3. When a state is 'manifestly failing' to protect its own populations then the international community has a responsibility to protect and may take collective action in a timely manner even to the point of using force as a last resort.

The origin of the R2P principle is in the report prepared by the International Commission on Intervention and State Sovereignty (ICISS) in 2001 entitled 'A Responsibility to Protect'. This report aimed to address difficult issues regarding gross violations of human rights on the one hand, and the principles of non-interference and sovereignty on the other. The Commission focused on the responsibility of States to protect their own populations, but recognised that when a State was failing, or unwilling to protect its own people, then the international community had a responsibility to do so.

In the years since the Commission's report, R2P has gained prominence and is widely accepted. At the UN World Summit in 2005, the largest gathering of Heads of State and Government in history, the General Assembly unanimously adopted the responsibility to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing. (See Annex Page 21)

Since 2005 R2P has continued to evolve and gain traction. In his 2009 Report to the General Assembly, Secretary General Ban Ki-moon noted that there were three important elements of R2P.

The first element is that R2P should be seen as 'an ally of sovereignty, not an adversary' and that by seeking to fulfill a responsibility to protect States should recognise that they are strengthening their own sovereignty.

*Left: A woman surveys the remains of victims of Rwanda's 1994 genocide, preserved where they were killed at Ntaram's Roman Catholic Church. Photo: AFP/Gianluigi Guercia*

The second element is that R2P should remain narrow and that the responsibility to protect principle is narrowly focused on the four crimes of genocide, war crimes, crimes against humanity and ethnic cleansing and should not be expanded to include less significant crimes or humanitarian disasters.

The third element is that while the scope of R2P should be narrow the response should be deep. In this the Secretary General refers to a wide range of support measures and responses that can be used to fulfill R2P.

In his paper the Secretary General defined R2P as having three equally important and parallel pillars.

The first is that a State has the primary responsibility to protect individuals under its jurisdiction from the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.

The second pillar addresses the responsibility held by all members of the international community to assist States to fulfill their responsibility to protect.

The third pillar, and the most contentious, is that if a State is 'manifestly failing to protect' its population from the R2P crimes of genocide, war crimes, ethnic cleansing and crimes against humanity, then the international community is 'prepared to take collective action in a timely and decisive manner'. This pillar allows for the possibility of the use of force for protection purposes under Chapter VII of the UN Charter.

This three pillar definition of R2P is now widely accepted over and above the ICISS Commissions broader 'prevent, react, and rebuild' approach of previous years.

*Right: A Bosnian woman prays at the memorial wall near Srebrenica. Photo: AFP/Elvis Barukcic*

## What is the legal basis of R2P?

While R2P is not itself, a legally binding framework, as a principle R2P is grounded in existing international law. States' responsibilities when faced with the crime of genocide are enumerated in the Genocide Convention which holds States responsible to prevent and punish the crime of genocide. States obligations to 'respect and ensure respect for' international humanitarian law, and their responsibilities under IHL are enumerated in the Geneva Conventions and Additional Protocols. These obligations are relevant to the war crimes responsibilities under R2P.

Crimes against humanity, although a well recognised international crime and defined at length in the Rome Statute of the International Criminal Court, does not have its own convention or treaty defining States responsibilities with regard to crimes against humanity although elements of the crime such as torture and slavery do have their own conventions.

**Ethnic cleansing, while listed as a separate crime under R2P does not have its own legal standing in international law. Ethnic cleansing can constitute both a war crime and a crime against humanity.**

# Who has what responsibility under R2P?

The primary duty bearers under R2P are States.

In the first instance States have a responsibility to protect populations under their jurisdiction and control.

States also have a responsibility to other States to assist them to fulfill their responsibility to protect their populations. The Secretary General notes that this may be done in four ways:

- a) encouraging States to meet their responsibilities under pillar one;
- b) helping them to exercise this responsibility;
- c) helping them to build their capacity to protect; and
- d) assisting States 'under stress before crises and conflicts break out'.

In addition, the "International Community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means... to help protect populations... (and they may) take collective action... through the Security Council."

In this context it may seem evident that the 'international community' is referring to States working together through the United Nations. However, there has been no agreed definition of what 'international community' is, and while it clearly applies to States, it is possible that it may also apply to the means States employ to implement their responsibilities including non-state actors, non-government organisations and civil society more generally. While these non-state actors are unlikely to have a 'legal' responsibility under international law, there is strong argument that a 'moral' responsibility exists.



## When does R2P apply?

The crimes of genocide and crimes against humanity do not require a threshold of armed conflict and so R2P applies at all times, both in situations of armed conflict (all R2P crimes) and in peace time (genocide, crimes against humanity and ethnic cleansing).

The Secretary General noted that R2P is narrow but deep. In other words, that R2P only relates to situations where communities are either under threat of or suffering from the specified crimes. R2P does not apply to civil strife, conflict, or other violent situations that do not meet the threshold of these most serious of crimes.

## What happens when States fail in their responsibility to protect?

If States fail to prevent the commission of R2P crimes, and do not intervene to prevent the further commission of R2P crimes, then they have failed in their 'responsibility to protect.'

When such international crimes have been committed States then in most instances they have a responsibility to punish those responsible through their domestic legal system or, failing that, through international mechanisms that have been established such as the International Criminal Court.

R2P relies on existing international law for prosecution of R2P crimes. It does not outline a separate regime for the prosecution of perpetrators.

## R2P, humanitarian intervention and the use of force

R2P was a concept conceived by the humanitarian intervention debate, and born from a desire to resolve important contradictions of humanitarian need on the one hand, and state sovereignty and the principle of non-interference on the other. As such it is often seen as synonymous with the concept of humanitarian intervention, which is when a State, or group of States, intervene militarily – ostensibly for humanitarian reasons and the protection of vulnerable communities.

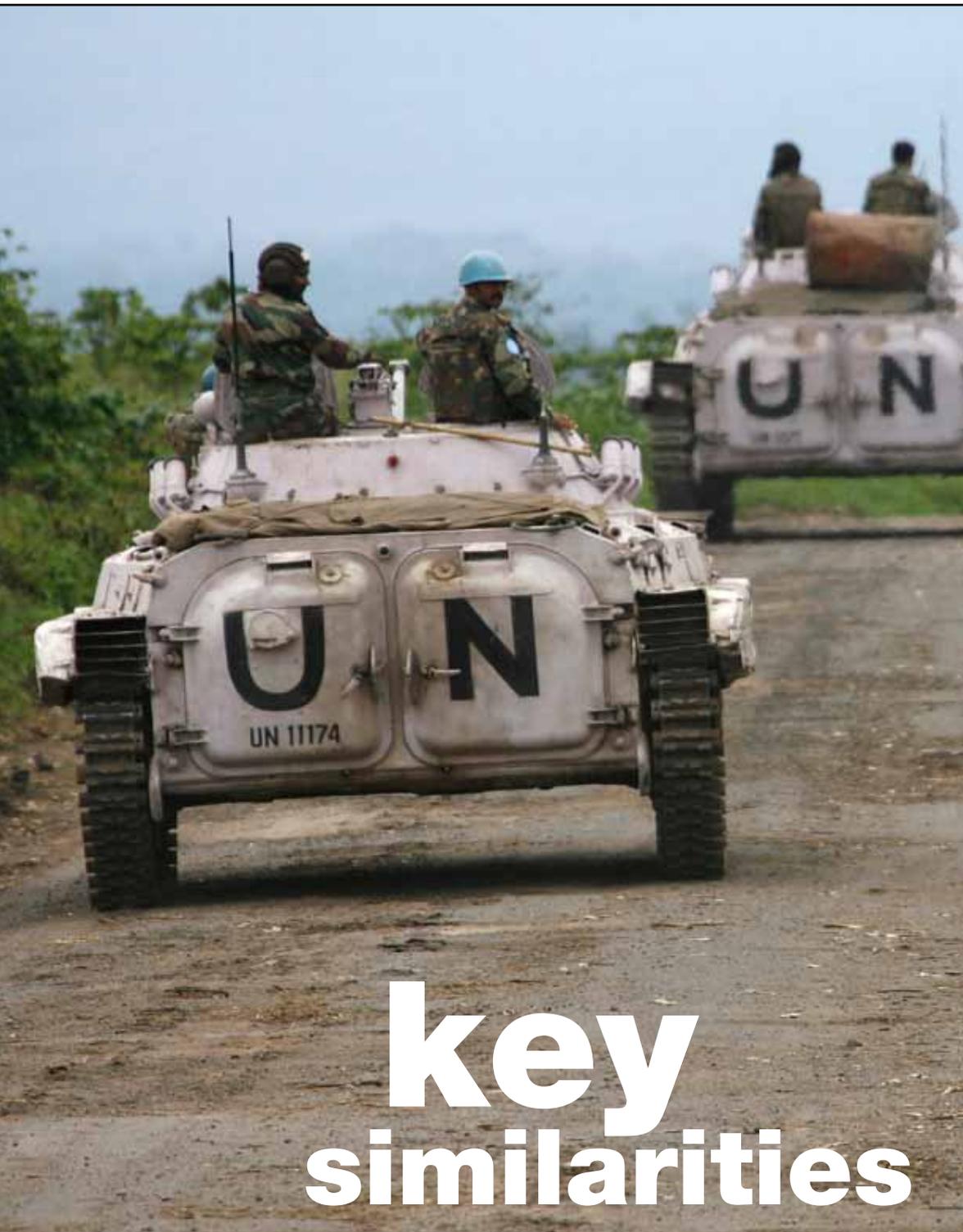
R2P, however, is quite different to humanitarian intervention. R2P only allows for the use of force as a last resort when a State is manifestly failing to protect its own population. R2P, unlike humanitarian intervention, only relates to the four crimes specified in the concept and does not relate to other humanitarian emergencies and disasters. Most importantly, R2P also focuses strongly on building state capacity to protect their own populations from these most heinous crimes; humanitarian intervention was silent on such matters.

Therefore, R2P is not humanitarian intervention by another name, but does allow for the use of force under Chapter VII of the UN Charter for the protection of populations vulnerable to, or suffering from genocide, crimes against humanity, war crimes and ethnic cleansing.

*Right: Women gather together at a makeshift camp for internally displaced people in Darfur.  
Photo: AP/Ben Curtis*



**16** International Humanitarian Law and the Responsibility to Protect  
What are the key similarities between IHL and R2P?



**key  
similarities**

## What are the key similarities between IHL and R2P?

Many of the activities required for States to fulfill their obligation to ‘respect and ensure respect for’ IHL are the same activities required in order to prevent the commission of R2P crimes. For example, if IHL education and training is effective and States, and organs of the State such as the military, respect the rules of IHL, then the many protections offered by IHL may be guaranteed. Among them is the prevention of war crimes. This is one of the four tenets of R2P.

In the Secretary General’s report on Implementing R2P, presented to the General Assembly in 2009, measures to support States’ obligations to protect populations at risk of R2P crimes were outlined and included:

- Encouraging States to protect their own populations through:
  - Seeking technical assistance from the UN, neighbours, regional and international organisations, specialized NGOs or independent experts<sup>2</sup>

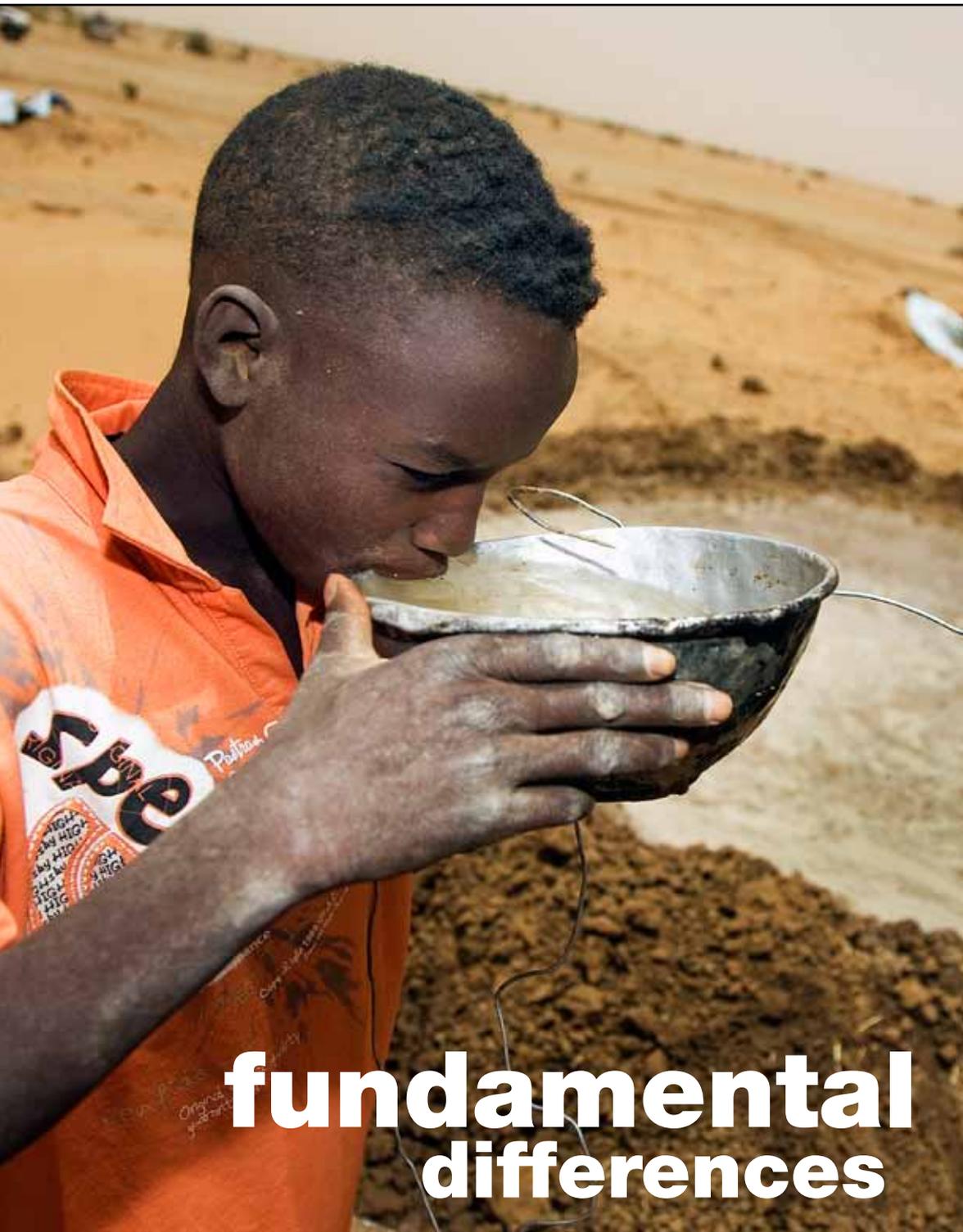
- Helping them to exercise this responsibility through:
  - Training, learning and education programmes<sup>3</sup> especially targeting critical actors in society such as the police, soldiers, the judiciary and legislators<sup>4</sup>
  - Confidential or public suasion<sup>5</sup>
  - Capacity building<sup>6</sup>
  - Working with regional and sub-regional bodies<sup>7</sup>

Many of these measures are similar to the activities required to ensure respect for IHL under common article 1 of the Geneva Conventions. In these instances, IHL and R2P activities are similar.

The difference, in respect of these matters, is first, that IHL is much broader in scope and encompasses many rules and guidelines for the conduct of armed conflict that do not directly relate to war crimes. In contrast, R2P also requires attention on the crimes of genocide, and crimes against humanity which are crimes that technically can be committed either in or outside of the context of armed conflict, and therefore either in or outside the purview of IHL.

IHL cannot be suspended at any time. While some human rights can be suspended in times of public emergency the prohibition on the commission of R2P crimes cannot be suspended.

IHL allows for collective action in cooperation with the United Nations and in conformity with the UN Charter when ‘serious violations of the Geneva Conventions or Additional Protocol I’ are taking place.<sup>8</sup> R2P allows for collective action under the UN Charter when there is a threat of, or commission of any R2P crime.



**fundamental  
differences**

## What are some of the fundamental differences between IHL and R2P?

IHL is a set of legally binding treaties, conventions and customary law. The R2P principle is not legally binding. However, there are legal obligations on States concerning the R2P crimes in other treaties and conventions such as the Genocide Convention.

**IHL applies only when a threshold of armed conflict has been reached. R2P applies at all times due to the nature of the R2P crimes and the fact that they can be committed outside the arena of armed conflict.**

The differences between IHL and R2P are numerous and significant - from their creation to the aims and subject matters they cover.

IHL protects people who are not, or no longer taking part in the fighting as well as limits the use of weapons upon all those involved in the conflict. R2P protects anyone from four serious international crimes.

IHL does not concern itself with the reasons for conflict commencing, however it establishes rules for how armed conflict should be conducted. R2P makes no suggestion as to the rules of engagement in the arena of armed conflict but serves to establish that the international community has a responsibility to protect populations from the most heinous international crimes. In its third pillar, R2P sets out conditions for the use of force against a State.

IHL deals with a wide range of protections necessary for the conduct of hostilities such as issues relating to targeting decisions and precautions in attack. R2P only deals with the prevention and protection from R2P crimes. There is no real guidance of how this should be done although the Secretary General in his 2009 Report to the General Assembly moved towards an implementation plan for R2P in his three pillars analysis.

IHL protects civilian objects such as hospitals, ambulances, those things necessary for survival such as water installations and significant pieces of cultural property. R2P does not protect objects other than those whose destruction would constitute a war crime under IHL.

Left: A boy drinks a bowl of water delivered by the United Nations contingent in Darfur.  
Photo: UN/Albert Gonzalez Farran

IHL limits the types of weapons and military tactics that can be used. R2P is silent on tactics, although supports obligations under IHL that prevent the commission of war crimes.

IHL requires States to search for and try those accused of war crimes wherever the crimes were committed and wherever the perpetrators might be. R2P has no legal framework of its own, is silent on what to do with perpetrators and relies on existing international law such as IHL, the Genocide Convention, and the Rome Statute of the International Criminal Court as its legal basis for action to prevent and punish the commission of R2P crimes.

**IHL provides a wide set of responsibilities and guidelines on how States and non-state actors should conduct themselves in the context of armed conflict. R2P does not prescribe how States or the international community should fulfill their responsibility to protect populations other than within the context of the UN Charter, Chapters VI, VIII and, as a last resort Chapter VII.**

*Right: Civilian buildings damaged by shelling in Gaza.  
Photo: ICRC*







# conclusion & annex

## Conclusion

In the face of the civilian populations increasingly becoming victims during times of armed conflict and turbulence, the need for the international community to continue to search for solutions to eradicate violations of international law is pressing.

New developments, such as R2P, which provide clarity and extra focus upon existing obligations of States to ensure the protection of their civilian populations, are necessary. Such developments need to re-enforce existing legal frameworks, such as IHL, and a better understanding of the elements of both IHL and R2P, how they work together and where they differ in their approach, is an important first step to all attempts to protect civilians.

*Previous page: Portuguese soldiers patrolling East Timor are joined by local children.  
Photo: UN/Eskinder Debebe*

## Annex

**World Summit Outcome Document paragraphs 138-140 relevant to R2P.**

**Responsibility to Protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.**

**138.** Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

**139.** The International Community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly

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failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

**140.** We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

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<sup>1</sup> World Summit Outcome: Resolution Adopted by the General Assembly, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/Res/60/1 (2005) para 139.

<sup>2</sup> Implementing the Responsibility to Protect Report of the Secretary General UN Doc A/63/677 (2009) para 22

<sup>3</sup> *Ibid* para 24

<sup>4</sup> *Ibid* para 25

<sup>5</sup> *Ibid* para 30

<sup>6</sup> *Ibid* para 35

<sup>7</sup> *Ibid* para 37

<sup>8</sup> Article 89, AP 1





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*A French United Nations soldier helps evacuate a Bosnian family from Srebrenica.  
Photo: AP/Michel Euler*

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