



INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS

BUILDING A CULTURE OF COMPLIANCE FOR IHL TO PROTECT HUMANITY
IN TODAY'S AND FUTURE CONFLICTS

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II. CLARIFYING THE LEGAL FRAMEWORK: 'GREY ZONES', 'COMPETITION', 'HYBRID WARFARE' OR 'PROXY WARFARE'

The geopolitical environment today is characterized by tensions among states, instability within countries, projection of power through a range of covert and coercive measures, and an increasing number of armed conflicts. In political and military discourse, this complex reality is at times described as 'competition' among states, hostile measures depicted as 'hybrid warfare', and the political, financial, or material support by a state to a party to an armed conflict labelled 'proxy warfare'.

The term 'competition' is often used to describe rivalry between states at the political, economic, and military levels.

'Hybrid threats' or 'hybrid warfare' are terms commonly used to describe the employment of a combination of different technologies or other means by a state or non-state actor to project power to destabilize adversaries. Acts described as 'hybrid' include military to non-military as well as operations that are covert or overt, kinetic or non-kinetic (for example disinformation or cyber operations), lethal or non-lethal. The term may refer to operations affecting a state's government, or its civilian population or infrastructure, and is used to describe operations conducted by a combination of state and non-state actors.

'Proxy warfare' is a term used to refer to armed hostilities involving entities (both states and non-state actors) that other states or non-state actors may support directly or indirectly – politically, materially, financially, militarily or otherwise – in line with their own strategic interests against another state or non-state actor.

The term 'grey zone' suggests that the line between war and peace is blurring, or that the law is unclear or non-existent in certain situations. However, while some of these patterns are old and others are new, international law applies to all situations, and for the application or not of IHL, it is a matter of determining whether a specific situation amounts to armed conflict.

The definition of what is an armed conflict to which IHL applies has not changed. States and other actors must assess each situation of armed violence from a legal perspective to determine whether their operations constitute or form part of an armed conflict.

For the purpose of its operations and its humanitarian dialogue with parties to conflict, the ICRC systematically assesses which situations amount to armed conflicts.⁶ Relying on widely established legal criteria, the ICRC has assessed that in 2024 there are more than 120 armed conflicts around the world, involving more than 60 different states and 120 non-state armed groups as parties to those conflicts.

Under IHL, armed conflicts are either international or non-international in nature. International armed conflicts are those armed conflicts in which two or more states are opposed. Article 2 common to the four Geneva Conventions of 1949 (common Article 2) states that the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".⁷ Accordingly, any difference arising between two or more states leading to a resort to armed force is an armed conflict within the meaning of common Article 2. Therefore, when a situation objectively shows that, for example, a state is involved in military operations or any other hostile actions against another state (by attacking or capturing enemy military personnel or assets, hampering its military operations, or using or controlling its territory without its consent), the situation is an international armed conflict. It makes no difference how long the conflict lasts, how much slaughter takes

6 In 2024, the ICRC published its second opinion paper on the notion of armed conflict. See ICRC, *How is the term 'armed conflict' defined in international humanitarian law?*, ICRC, Geneva, 2024: <https://www.icrc.org/en/document/icrc-opinion-paper-how-term-armed-conflict-defined-international-humanitarian-law>.

7 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (GC I), Art. 2 (cited here in GC I, but common to all four Geneva Conventions).

place or how numerous the participating forces are.⁸ This means that there is no specific level of intensity of hostilities required for international armed conflicts, in contrast to non-international armed conflicts.⁹

Non-international armed conflicts are armed conflicts between a state and a non-state armed group, or between such groups. They require two conditions to be met for IHL to apply: the non-state party or parties must be organized; and the violence between the parties must be sufficiently intense.

In the classification of armed conflicts, any assessment must be made objectively and exclusively on the basis of the facts on the ground, according to the criteria established under IHL. In that sense, new factual scenarios or narratives do not necessitate devising novel, *ad hoc*, or specific legal criteria to establish whether such situations amount – or not – to armed conflict. Thus, under IHL, notions such as ‘competition’, ‘hybrid threats’ or ‘hybrid warfare’, or ‘proxy warfare’, must be assessed based on the existing criteria. For instance, a relationship between states that is described as ‘competition’ may or may not amount to an armed conflict, depending on whether it escalates into a resort to armed force between these states.

Similarly, an act described as a ‘hybrid threat’ will be governed by IHL only if it either triggers an armed conflict or occurs in the context of (and is associated with) an existing armed conflict. The latter is true even for those acts that would not, on their own, have triggered the applicability of IHL. For example, while cyber operations that are conducted in the context of an armed conflict must comply with IHL and thus, for instance, not be directed against medical facilities, not all cyber operations against a medical facility in times of peace will be the starting point of an armed conflict. Likewise, the prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population applies to information operations if carried out in the context of an armed conflict, even if these information operations in and of themselves would not trigger the applicability of IHL if conducted in times of peace. In situations in which acts described as ‘hybrid threats’ neither trigger an armed conflict nor occur in the context of an armed conflict, these acts are regulated by peacetime rules only and not by IHL.

Uses of proxies by states can and must also be analysed on the basis of existing legal criteria. For example, the classification of an armed conflict between a state A that controls a proxy and a state B fighting against that proxy will depend on the degree of control that state A has over its proxy. In order for the conflict to qualify as an international armed conflict between states A and B, the proxy’s acts must be legally attributable to state A. With regard to non-state armed groups acting as proxies, when one state exercises ‘overall control’ over an armed group fighting against another state, the situation is classified as an international armed conflict between the two states.¹⁰ Regardless of the political characterization of a situation as a ‘proxy war’, in this case the ‘overall control’ test (which, strictly speaking, is used to determine whether a non-state armed group is a *de facto* organ of a state) is the legal test to determine whether an international armed conflict exists.

If IHL applies to a given situation, the scope of the applicable IHL rules depends solely on the classification of the situation as an armed conflict and the applicable treaty and customary rules. IHL obligations do not change based on the scale or intensity of hostilities.

8 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, commentary on Art. 2.

9 This view has been endorsed by international tribunals. See, e.g., International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Delalić*, Judgment (Trial Chamber), IT-96-21-T, 16 November 1998, para. 184 (see also para. 208); ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), IT-94-1, 10 August 1995, para. 70; International Criminal Court (ICC), *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 207; Special Court for Sierra Leone (SCSL), *Prosecutor v. Taylor*, Judgment (Trial Chamber II), 18 May 2012, paras 563–566.

10 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., ICRC, Geneva, 2020 (hereafter ICRC, *Commentary on the Third Geneva Convention*, 2020), paras 298–306.

The political narratives surrounding 'competition', 'hybrid warfare', 'proxy warfare' or other 'grey zone' terminology must not obfuscate the legal classification of armed conflicts and the application of IHL. The legal classification of such situations requires disentangling the facts on the ground and applying the law to these facts. While this might sometimes be difficult because of the difficulty of obtaining clear information, that is a factual difficulty, not a legal one. Importantly, activities such as imposition of economic measures, information operations, and espionage, by themselves, do not trigger the application of IHL.