

Opinion on ICRC Access to All Places of Detention Where Protected Persons Are Present

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Detention visits by the International Committee of the Red Cross (ICRC) constitute a key compliance mechanism built into the Third and Fourth Geneva Conventions of 1949 and recognised in customary international law.¹ Israel's refusal to grant ICRC access to Palestinians detained in the course of the ongoing hostilities in Gaza is a violation of international humanitarian law (IHL) that also amplifies concerns about other potential violations of IHL in relation to the detention and treatment of these individuals. ICRC visits and interviews with detainees without witnesses perform a critical protective function that contributes to safeguarding against enforced disappearances and ill-treatment of detained protected persons as well as to ensure proper conditions of detention. A blanket suspension of ICRC visits raises serious concern of inhumane treatment and conditions of detention, which may entail war crimes.

To remove any doubt about the mandate of the ICRC to carry out detention visits, this opinion describes the legal basis for ICRC access to all places where protected persons are present and demonstrates the complementarity of the ICRC's mandate and that of protecting powers or their substitutes.

The ICRC's legal mandate to access all places where protected persons are present

The special status of the ICRC in monitoring compliance with the IHL rules applicable to the detention of civilians in an international armed conflict is codified in Article 143 of the Fourth Geneva Convention (GC IV), reflecting customary IHL.² Located in the final part of GC IV, which is entitled 'Execution of the Convention', Article 143 bestows on the ICRC the same legal prerogatives as protecting powers to visit places where protected persons are detained.³ 'Protected persons' within the scope of GC IV are '[p]ersons ... who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.⁴ All Palestinians from the Palestinian territory who are detained by Israel – whether they were apprehended in the West Bank, including East Jerusalem, or Gaza – clearly fall within the definition of persons who find themselves in the hands of an occupying power of which they are not nationals.⁵

¹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) art 143; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 126; Study on Customary IHL by the ICRC 'Customary IHL Database' (ICRC, first published in 2005) (CIHL) r 124.

² CIHL r 124. In non-international armed conflicts, the ICRC may 'offer its services' to the parties to the conflict in accordance with common article 3 of the Geneva Conventions of 1949.

³ GC IV art 143(5).

⁴ GC IV art 4(1). For a commentary see, eg, Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2019) 69-73.

⁵ This is true of Palestinian detainees from Gaza irrespective of whether one agrees that Gaza is occupied territory, since other parts of the Palestinian territory, namely the West Bank including East Jerusalem, clearly are occupied.

Paragraphs 1 to 4 of Article 143 of GC IV define the prerogatives of protecting powers to visit all places where protected persons are present and to interview them without witnesses, without restrictions on the duration or frequency of visits. Paragraph 5 specifies that the delegates of the ICRC ‘shall also enjoy’ these prerogatives, thus confirming that (a) the legal mandate of the ICRC to access all places where protected persons are present is not subject to the consent of the detaining or occupying power and (b) it is complementary, not alternative, to the prerogatives of protecting powers to carry out such visits.⁶ Implicit in Article 143 and pursuant to Article 140 of GC IV is also the right of the ICRC to receive all relevant information pertaining to detained protected persons, so that it can properly execute its mandate.⁷

In addition to the ICRC’s prerogative to visit protected persons, all protected persons have the right to communicate with supervisory entities including the ICRC at any time, and must be granted ‘every facility’ to that end.⁸ Moreover, detained protected persons accused or convicted of an offence have a legal right vis-à-vis the detaining power to receive ICRC visits, as confirmed in Article 76(6) of GC IV.⁹ A detained protected person may not be deprived of this right, regardless of the reason or location of their detention. Refusal to grant ICRC access to places of detention may thus amount to a breach of both the legal prerogatives of the ICRC pursuant to Article 143 of GC IV and the right of detained protected persons under Article 76 of GC IV.

Other organisations whose aim is to assist protected persons do not have the same legal mandate as the ICRC but shall be granted all facilities to visit protected persons and distribute relief ‘as much as possible’, subject to ‘measures which the Detaining Power may consider essential to ensure their security or to meet any other reasonable need’.¹⁰

Permissible restrictions on ICRC access

Article 143(5) of GC IV makes the appointment of delegates by the protecting powers or the ICRC subject to the approval of the power controlling the territories where they will carry out their duties. Abuse of this prerogative to deny ICRC access to protected persons would run counter to, and constitute a violation of, Article 143. Paragraph 3 of said article confirms that only reasons of ‘imperative military necessity’ may exceptionally allow for the temporary postponement of a proposed visit. Any blanket refusal or indefinite postponement of ICRC visits not justified by imperative military necessity would constitute a breach of the detaining power’s obligations under Articles 143 and 76 of GC IV.

⁶ However, in practice, the ICRC prefers to act on the basis of its right of humanitarian initiative in Article 10 of GC IV and obtain the consent of the parties to the conflict prior to engaging in humanitarian activities on their territories. ICRC, *Commentary on the Third Geneva Convention of 1949* (CUP 2020) para 1413.

⁷ See also Alain Aeschlimann, ‘Protection of Detainees: ICRC Action Behind Bars’ (2005) 87 *Int Rev Red Cross* 83, 87.

⁸ GC IV art 30(1). Only military or security requirements can justify temporary restrictions on this right. GC IV arts 30(2) and 63(1).

⁹ Eg Dinstein (n 4) 189-90; Rotem Giladi and Steven Ratner, ‘The Role of the International Committee of the Red Cross’ in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds) *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 534.

¹⁰ GC IV arts 30(3) and 142(1).

In accordance with Article 5 of GC IV, a protected person detained as a spy or saboteur or under definite suspicion of activity hostile to the security of the occupying power may exceptionally and temporarily forfeit their rights of communication with the outside world, but only 'if absolute military security so requires'.¹¹ Such person remains entitled to the fundamental guarantees of IHL, including the requirement of humane treatment.¹² Any blanket prohibition of communication with the ICRC not based on an individual assessment of whether the protected person in question has forfeited that right under Article 5 would amount to a violation of GC IV.¹³ Even if a protected person has forfeited some of their rights under Article 5 of GC IV, it can only be in extremely rare circumstances that absolute military security requires depriving such person of communication with the ICRC, given the high threshold of 'absolute military security' and the principle of confidentiality governing the ICRC's work.¹⁴

Complementarity of the ICRC and protecting powers

The system of protecting powers is drawn from diplomatic and consular practice, where in the event of a breakdown of diplomatic relations between States due to war, third neutral States would be appointed to defend the interests of the respective powers.¹⁵ Article 9(1) of GC IV thus stipulates that the Convention 'shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict'.¹⁶

In practice, protecting powers have only been appointed in five known instances since the adoption of the Geneva Conventions.¹⁷ This has meant that the ICRC, in practice, has often served as the primary or sole actor performing a monitoring function in places of detention. However, should a protecting power (or substitute) be appointed, the ICRC would retain its independent legal mandate to carry out detention visits.¹⁸ The effect of Article 143(5) of GC IV is not to substitute protecting powers for the

¹¹ GC IV art 5. See also Kunt Dörmann, 'Protection of Civilians' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 272 (noting in relation to GC IV art 5 that 'it can be assumed that this rule refers primarily to acts of espionage or sabotage'); *Prosecutor v Dario Kordić and Mario Čerkez* (Trial Judgment) IT-95-14/2-T (26 February 2001) [280] (observing that 'activities hostile to the security of the State', referenced in GC IV art 5, 'are above all espionage, sabotage and intelligence with the enemy Government or enemy nationals').

¹² GC IV art 5(3).

¹³ Eg GC IV arts 30, 76, and 106. It may also amount to collective punishment, contrary to art 33 GC IV. Jean Pictet (ed), *Commentary on the Fourth Geneva Convention* (ICRC 1958) 55. See also Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 *Harvard Intl L J* 367, 390.

¹⁴ 'Confidentiality: Q&A' (ICRC, 15 January 2018) <<https://www.icrc.org/en/document/confidentiality-q>> accessed 26 June 2024.

¹⁵ Eg Robert Kolb, 'Protecting Powers' in Clapham, Gaeta, and Sassòli (n 9) 550-52.

¹⁶ To serve as a protecting power, a third State must receive a mandate from the State that calls on its services, defining the scope of its tasks. The receiving State must also grant its approval of the appointment of the neutral State. Pictet (n 13) 81, 87.

¹⁷ Protecting powers are only known to have been appointed in five conflicts since the adoption of the Geneva Conventions in 1949: the Suez conflict (1956) between Egypt on one side and Israel, France, and the UK on the other; the conflict between France and Tunisia over Bizerte in July 1961; the Goa crisis between India and Portugal in 1961; the conflict between India and Pakistan in December 1971; and the Falkland/Malvinas Islands conflict between Argentina and the UK in 1982. Kolb (n 15) 556.

¹⁸ GC IV art 143(5).

ICRC (a scenario that is, on the other hand, envisaged in Article 11 of GC IV) but rather to sanction ‘the presence and activities of [the ICRC’s] delegates *side by side* with those of the Protecting Power’.¹⁹

In granting the ICRC the same prerogatives as those bestowed on protecting powers, Article 143(5) recognises the complementary relationship between a protecting power and the ICRC as an independent, neutral, and impartial humanitarian organisation.²⁰ Although the legal mandates of protecting powers and the ICRC overlap, they are distinct. Whereas a protecting power is limited to defending the interests of the party to the conflict that has appointed it, the ICRC’s mandate extends to all protected persons, whatever their nationality, in line with the humanitarian nature of the organisation.

Duplication of supervisory functions to be performed by protecting powers and the ICRC was built into the Third and Fourth Geneva Conventions to strengthen the protection of persons detained in an international armed conflict, given the situation of extreme vulnerability in which they often find themselves. The United Nations (UN) Human Rights Committee has echoed that ‘access by the International Committee of the Red Cross to all places of detention becomes an essential additional safeguard for the rights to liberty and security of person’ in situations of conflict.²¹

Substitutes for protecting powers

Article 11 of GC IV foresees the appointment of a substitute for protecting powers in the event that protected persons cease to benefit from their services.²² Article 11 sets out three possible substitution scenarios:

- (1) An organisation ‘which offers all guarantees of impartiality and efficacy’ may be entrusted by the high contracting parties to exercise the duties incumbent on the protecting powers. This scenario is based on a suggestion made by the French delegation during the drafting process to create an organisation that would serve as a general substitute for protecting powers.²³ No such organisation was created.
- (2) When protected persons cease to benefit from the activities of a protecting power or the organisation referred to in (1), the detaining power ‘shall request’ a neutral State or an organisation which offers all guarantees of impartiality and efficacy to undertake the functions performed by protecting powers.
- (3) If protection cannot be arranged according to scenarios (1) or (2), the detaining power ‘shall request or shall accept’ the offer of services of a humanitarian organisation, such as the ICRC, to assume the humanitarian functions performed by protecting powers.

¹⁹ Pictet (n 13) 568-69. Emphasis added.

²⁰ Eg Godofredo Torreblanca, ‘The International Committee of the Red Cross and Human Rights Law’ in Robert Kolb and Gloria Gaggioli (eds) *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 542-43.

²¹ Human Rights Committee, ‘General Comment No. 35: Article 9 (Liberty and Security of Person)’ (16 December 2014) UN Doc CCPR/C/GC/35 para 64.

²² GC IV art 11.

²³ *Commentary on the Third Geneva Convention* (n 6) para 1396.

The fact that the ICRC is mentioned as a possible substitute for protecting powers in Article 11(3) of GC IV in no way detracts from the ICRC's independent legal basis to access places of detention pursuant to Article 143 of GC IV, or from its right of humanitarian initiative pursuant to Article 10 of GC IV. Rather, Article 11(3) offers an additional legal basis for the ICRC to perform its humanitarian functions, triggered upon failure to appoint protecting powers or substitutes in accordance with paragraphs 1 and 2 of Article 11 and an offer of services by the ICRC.

To ensure that neutral States or organisations invited to serve as a substitute for protecting powers exercise their functions impartially and diligently, Article 11(4) imposes twofold obligations on such States or organisations to (a) 'act with a sense of responsibility to the Party to the conflict' on which protected persons depend, and (b) 'to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially'. This is meant to safeguard against abuse related to the unilateral designation of a neutral State or organisation by the detaining power. Article 11(5) further specifies that no derogation may be made by special agreements from the requirements to qualify as a substitute.²⁴

Consequences for third States

Third States are under an obligation, pursuant to Article 1 common to the Geneva Conventions and customary international law, to 'ensure respect' for IHL by the parties to a conflict.²⁵ This includes respect for the legal prerogatives of the ICRC to visit all places where protected persons are present and to interview them without witnesses, both because this is an IHL obligation in its own right and because ICRC access contributes to ensuring respect for other IHL rules regulating conditions and treatment in detention, including the prohibition of all forms of ill-treatment.

The obligation to ensure respect comprises both negative and positive duties. Firstly, third States must not encourage, aid, or assist in the commission of an IHL violation. Encouraging or supporting measures adopted by Israel aimed at circumventing its obligation to grant ICRC access to all places where protected persons are detained would, for example, constitute a breach by the third State of its duty to ensure respect for IHL. It could also amount to 'aiding or assisting' in the commission of an internationally wrongful act, for which the third State may incur international responsibility under the general rules of State responsibility.²⁶

Secondly, third States are required, pursuant to the obligation to ensure respect for IHL, to do everything reasonably in their power to prevent and put an end to IHL violations. This is a duty of due diligence and its contents depend on, inter alia, the gravity of the breach, the means reasonably available to the third State, and the level of influence the third State exercises over the party responsible for the violation.²⁷ Examples of measures that third States could take to urge Israel to grant

²⁴ This also follows from GC IV art 7.

²⁵ GCs I-IV art 1; CIHL r 144. Lawrence Hill-Cawthorne, 'Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation' (2023) 72 Intl Comp Law Q 869; Robin Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Clapham, Gaeta, and Sassòli (n 9) 123.

²⁶ These rules, which are considered customary, are set out in International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 2 Yearbook Intl L Com part 2 (ARSIWA). See ARSIWA art 16.

²⁷ *Commentary on the Third Geneva Convention* (n 6) para 198.

ICRC access include raising Israel's obligations under IHL as outlined above in diplomatic dialogue, exerting diplomatic pressure to allow ICRC access, and cooperating with national and international efforts aimed at upholding the rights of detainees to contact with the outside world, including with the ICRC, and to hold those responsible for violations to account.

Conclusion

ICRC visits to places of detention and interviews with detainees without witnesses are a critical safeguard against torture, enforced disappearance, and other ill-treatment of detainees and inhumane conditions of detention. Accordingly, IHL imposes an obligation on detaining powers to grant access to the ICRC to all places where protected persons are detained. Israel's failure to grant such access constitutes a clear violation of this obligation as set out in Articles 143 and 76 of GC IV. Moreover, by preventing the ICRC from accessing Palestinian detainees and discharging its protective function, the Israeli authorities have given rise to grave concerns that Israel is subjecting detainees to ill-treatment, thereby committing serious violations of IHL and implicating those responsible in the commission of war crimes.²⁸

Israel's obligations with respect to ICRC access to detainees and places of detention cannot be circumvented by establishing an alternative monitoring mechanism. To be sure, the Geneva Conventions of 1949 envisaged that the system of protecting powers would perform a key role in ensuring compliance with IHL. The fact that protecting powers have not been appointed in most international armed conflicts since the Geneva Conventions came into force has heightened the importance of the monitoring function carried out by the ICRC. However, even on the assumption that the system of protecting powers functioned properly, the drafters recognised the vital complementary function of the ICRC and gave it an independent legal mandate to carry out detention visits, on a par with protecting powers. Accordingly, if protecting powers or substitutes were to be appointed to serve the interests of detained Palestinians, the ICRC would retain its independent legal prerogatives to carry out detention visits side by side with the protecting powers or substitutes, exactly as it was foreseen by the drafters of the Geneva Conventions. Denying the ICRC access to detainees would remain a breach of IHL.

²⁸ Eg 'Israel: UN Expert Calls for Probe of Allegations of Torture and Mistreatment Against Palestinian Detainees' (*Office of the United Nations High Commissioner for Human Rights (OHCHR)*, 23 May 2024) <<https://www.ohchr.org/en/press-releases/2024/05/israel-un-expert-calls-probe-allegations-torture-and-mistreatment-against>> accessed 2 July 2024. 'End-of-Mission Statement of the UN Special Committee to Investigate Israeli Practices' *UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territory* (Amman, 25 June 2024) 2 <<https://www.ohchr.org/sites/default/files/documents/countries/palestine/statements/2024-06-25-EOM-Statement-SP-Committee.pdf>> accessed 2 July 2024.