

The Attribution Paradox: Protecting Civilians in International Humanitarian Law Beyond State Responsibility

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The charred wreckage near [Delhi's Red Fort on November 10](#) and the devastated courtyard of [Islamabad's District Judicial Complex on November 11](#) killed 25 civilians within 24 hours in two nuclear-armed states. Pakistan [immediately blamed Indian terrorist proxies](#) for the Islamabad attack without evidence. In contrast, India [declined to name any actor or state](#) despite invoking anti-terrorism laws.

This asymmetry reflects a critical challenge at the intersection of International Humanitarian Law (IHL), counterterrorism policy, and civilian protection. When terrorist violence occurs in contexts that may or may not amount to armed conflict, and when attribution to states remains contested, civilians fall into protection gaps. Civilians killed receive neither IHL's conduct of hostilities protections nor the accountability mechanisms available when state responsibility can be established. The question becomes: how can IHL protect civilians when the very existence and classification of armed conflict remain disputed, and how must IHL evolve to ensure civilians receive fundamental protections regardless of whether state sponsorship can be proven?

The Attribution Standard and Its Humanitarian Costs

Jamaat-ul-Ahrar, a faction of the Pakistani Taliban, [claimed responsibility for the Islamabad suicide bombing](#), a group with [documented grievances against Pakistan itself](#). Pakistan's allegation of Indian sponsorship requires proving that Indian operatives specifically directed this particular attack under the ICJ's [effective control standard established in Nicaragua](#).

The International Law Commission's Articles on State Responsibility provide in [Article 8](#) that conduct is attributable to a state only if actors are *in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*. This demanding threshold creates what has been termed the [attribution problem](#) in counterterrorism law, inevitably culminating in a *protection problem* in IHL.

The attribution problem generates three protection gaps. First, civilians receive inconsistent protection depending on whether the situation is classified as an armed conflict. If no armed conflict exists, only domestic criminal law and human rights law apply, which may be suspended during states of emergency. Second, when states respond with military force while denying armed conflict exists, they avoid IHL's constraints, including the [principles of distinction](#), [proportionality](#), and [precaution](#). Third, humanitarian access becomes contingent on political determinations about violence rather than humanitarian need.

IHL's Framework and the Classification Challenge

The applicability of IHL depends on the existence of an armed conflict. As [established in international jurisprudence](#), a non-international armed conflict (NIAC) exists when there is protracted armed violence between governmental authorities and organised armed groups. The [Tadic case](#) specifically distinguishes armed conflicts from *banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to the rules of international humanitarian law*.

Individual terrorist attacks typically do not meet the thresholds of [Common Article 3](#) of the Geneva Conventions. Yet when states respond with military force, as India did with [Operation Sindoor in May 2025, striking nine locations](#) inside Pakistan, the situation may cross into armed conflict territory. Following the Pahalgam attack that killed 26 civilians, India [suspended the Indus Waters Treaty, expelled Pakistani diplomats](#), and launched strikes for the first time since 1971. Pakistan responded with [artillery fire and drone strikes](#) before a [ceasefire on May 10](#). This [four-day period](#) almost certainly constituted an international armed conflict, yet neither state formally acknowledged it as such.

As the United Nations (UN) Counter-Terrorism Committee has emphasised, IHL [prohibits acts of terrorism committed in armed conflict](#), including acts whose primary purpose is to spread terror among civilians. [Additional Protocol I Article 51\(2\)](#) and [Additional Protocol II](#)

[Article 13\(2\)](#) explicitly prohibit such acts. [Common Article 3](#) provides minimum protections for *persons taking no active part in the hostilities*. Yet these protections apply only in the event of armed conflict. Without this classification, the incidents are treated as terrorism under domestic criminal law rather than as war crimes under IHL, and victims are left to rely on human rights frameworks that may be restricted during counterterrorism operations.

How Counterterrorism Frameworks Disable Attribution-Independent Protections

The protection gap arises not from two separate problems, but from a cumulative causal chain in which counterterrorism frameworks actively disable the attribution-independent protections IHL ostensibly provides. [Common Article 3](#) expressly states that its application *shall not affect the legal status of the parties*, meaning IHL protections apply irrespective of whether sponsorship can be proven. Yet this attribution-independent floor collapses when states use terrorist designations to deny that armed conflict exists at all.

As the International Committee of the Red Cross (ICRC) observes in its study on [counterterrorism and over-classification risk](#), there is a growing tendency among States to consider any act of violence by a non-state armed group as terrorist by definition, with the result that such groups may not be recognised as parties to a NIAC. This pre-emptive classification denial operates as the first link. Once a non-state actor is designated a terrorist, the territorial state denies that protracted armed violence exists, regardless of factual thresholds. The ICRC [consistently emphasises](#) that conflict classification must be based on factual criteria rather than political declarations, yet no binding international mechanism enforces this principle.

The second link follows: suppressing NIAC classification extinguishes the protections under [Common Article 3](#). Where no NIAC is acknowledged, Common Article 3 does not apply, removing IHL's minimum guarantees, including humane treatment requirements and provisions facilitating humanitarian assistance. Inevitably, broad counterterrorism legislation can [criminalise impartial humanitarian assistance](#) as material support for terrorism.

While the UN Security Council [Resolution 2664](#) introduced a carve-out permitting humanitarian assistance notwithstanding United Nations sanctions and asset freezes, state-level implementation of corresponding exemptions in national counterterrorism laws remains [patchy](#). When armed groups are designated as terrorists and NIAC classification is denied, providing medical care, food, or humanitarian aid to civilians in areas under their control may be prosecuted as material support, directly conflicting with what would be IHL requirements to facilitate humanitarian relief if the situation were classified as armed conflict.

The third link emerges: once [Common Article 3](#) is denied through classification suppression, and humanitarian actors are criminalised, the question of state attribution becomes decisive, where it would otherwise be irrelevant. If the NIAC were acknowledged,

IHL would apply to all parties, regardless of whether any state sponsors them. But where states deny conflict classification, the only remaining basis for IHL application is inter-state armed conflict, which requires proving state sponsorship under the Nicaragua standard. The [2025 terrorist attack in Pahalgam](#) illustrates this trap: the attack killed 26 civilians; attribution to Pakistan remains [contested](#); and civilian victims fall into a protection gap that counterterrorism classification opened, not one that attribution failure merely exposed.

This cumulative chain means attribution-independent IHL protections cannot function attribution-independently while counterterrorism frameworks block conflict classification. The [counterterrorism era has transformed IHL](#), privileging military necessity over civilian protection. Where armed conflict is acknowledged, IHL provides attribution-independent protections. Distinction and proportionality would protect both the Red Fort and the District Judicial Complex as civilian objects. The Red Fort benefits from [customary IHL Rule 38](#), which protects cultural property, while the District Judicial Complex constitutes essential civilian infrastructure. Breaking this chain requires mechanisms that restore objective classification determinations regardless of terrorist designations.

Toward a Protection-Centred Framework: Confronting the Institutional Challenges

Three principles should guide reform. First, establish international mechanisms to make objective determinations of IHL applicability independent of state characterisations. A standing commission of security-cleared experts could assess whether situations meet the [Common Article 3](#) thresholds for protracted armed violence between governmental authorities and organised armed groups. The Harvard Program on International Law and Armed Conflict (PILAC) study documents how [states' avoidance of armed conflict classification](#) allows them to evade IHL's core constraints on targeting, detention, and use of force.

This proposal, however, faces three institutional challenges that any serious reform agenda must confront directly rather than paper over.

On **selection criteria**: the [International Humanitarian Fact-Finding Commission \(IHFFC\)](#), established under [Article 90, Additional Protocol I to the Geneva Conventions](#), comprises fifteen independent experts elected by accepting States Parties and has [never been formally activated](#) under its primary mandate in over three decades, in part because of disputes about expert independence, confidentiality obligations, and the absence of major power participation. A reformed body would require a merit-based nomination process insulated from diplomatic patronage, security clearances for handling sensitive intelligence, and guaranteed geographic representation to prevent selective application.

On **political sensitivities**: state consent requirements represent the deepest structural obstacle. The [ICRC-Swiss IHL Compliance Initiative](#), which engaged over [140 states across extensive consultation meetings](#), sought to establish even a minimal periodic

reporting forum, only for all proposals to be rejected at the [33rd International Conference in December 2019](#).

However, these failures do not demonstrate that independent mechanisms are impossible. They demonstrate that universal-consent treaty mechanisms are politically unviable, and that a different institutional pathway is required. The Organisation for the Prohibition of Chemical Weapons' (OPCW) [Investigation and Identification Team](#) (IIT) demonstrates that consent barriers can sometimes be circumvented through institutional design. After Russia vetoed renewal of the [OPCW-UN Joint Investigative Mechanism](#), states used the OPCW Conference of States Parties to establish the IIT by a [two-thirds majority vote in June 2018](#), placing the attribution mechanism within the OPCW's organisational structure. Despite active obstruction by Syria and its allies, the IIT continues to issue attribution findings, having released [five reports](#) identifying perpetrators of chemical weapon attacks, four of which attributed attacks to Syrian government forces.

On **funding**: voluntary contribution models are structurally vulnerable to politicisation. The [International, Impartial and Independent Mechanism for Syria](#) operated on voluntary contributions for three years after its 2016 establishment before securing regular UN budget funding in 2019, and yet [continues to face resource constraints](#). Likewise, the International Criminal Court's (ICC) [Trust Fund for Victims](#) raised only [€33.3 million from 2004-2018, against annual requirements of €10 million](#), with [voluntary funding characterised as unsustainable](#). Any standing commission should be funded through assessed rather than voluntary contributions from inception to insulate it from donor pressure.

This position is both feasible and normatively required. Sovereignty objections are inadequate because [IHL must not be seen as limiting state sovereignty](#) but as a manifestation of sovereignty. The classification of a situation as armed conflict is a factual matter; no sovereign has the prerogative to determine the legal category of its own conduct unilaterally. [Common Article 1](#) of the Geneva Conventions supplies the legal basis for third-state and institutional action. Where civilian lives are at stake under fundamental humanitarian guarantees with customary and jus cogens character, the burden shifts: sovereignty-objectors must explain why independent factual determination is impermissible.

Such a body's determinations would carry significant moral and political weight even if not formally binding, countering states' strategic incentive to characterise situations as *counterterrorism operations* rather than *armed conflict*. Second, these mechanisms should determine not only conflict classification but also whether specific incidents have violated IHL, even when state responsibility remains contested, creating accountability pressure independent of formal attribution. Third, humanitarian access must be decoupled from debates over conflict classification and attribution. [The ICRC argues](#) that humanitarian organisations' ability to assist populations should not depend on whether state sponsorship

can be proven. The [concept of fundamental standards of humanity](#) would ensure civilians receive basic protections regardless of legal classification disputes.

Legal Remedies Beyond Attribution

The ICJ's effective control standard deliberately sets a high bar, recognising that lowering it would invite abuse and enable pretextual uses of force.

International law provides state responsibility mechanisms short of force, requiring lower evidentiary thresholds. UN Security Council [Resolution 1373](#) mandates states to *deny haven to those who finance, plan, support, or commit terrorist acts*, a standard of harbouring distinct from operational control. Failure could be brought before the Security Council or form the basis for [lawful countermeasures under the law of state responsibility](#). The [U.S. State Department's state sponsor designation](#) offers a pattern-based approach that requires *repeated provision of support for acts of international terrorism*, rather than attributing individual attacks, and is adaptable to trigger enhanced humanitarian protection measures.

However, these mechanisms address state accountability, not civilian protection. The civilians killed needed protection before the attacks occurred, regardless of the attribution outcome.

Conclusion

The civilians killed in Delhi and Islamabad deserve both justice and recognition under international law. The attribution paradox means formal state responsibility may never be established to the evidentiary standard required for lawful use of force. However, IHL offers an alternative framework privileging civilian protection over proof of state responsibility. Until such frameworks are developed, incidents like these will generate accusations without answers.

The frustration inherent in a legal system that prizes evidence over expedience reflects state responsibility law working as intended. Yet the resulting protection gap reveals a different failure: ensuring IHL's humanitarian protections apply regardless of whether state sponsorship can be proven. The question is whether international law will evolve to deserve them.

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