

INTERNATIONAL REVIEW of the Red Cross

... combattu l'un contre l'autre
à l'épée, et peu de temps après, se trouver
à l'autre à la table hospitalière
du roi de Prusse et causer en bonne amitié, qui
les avait empêchés d'examiner et de discuter une
question si digne de leur intérêt et de leur attention?
Lors des grandes manœuvres de Cologne, en 1861,
le roi Guillaume de Prusse fit inviter à dîner,
au château de Benrath, près Dusseldorf, les
officiers de diverses nations qui y étaient envoyés
par leurs gouvernements. Avant de se mettre
à table, le roi prit par la main le général Forey
et le général Paumgarten: "Maintenant
que vous êtes amis, leur dit-il en riant, asseyez-
vous là, l'un à côté de l'autre, et causez." Or,
Forey était le vainqueur de Montebello et Paumgarten
son adversaire.

Action by the International Committee
of the Red Cross in the event of violations
of international humanitarian law
or of other fundamental rules protecting
persons in situations of violence

Dans des occasions extraordinaires, comme
Châlons, ou ailleurs,
nationalités
souhaiter qu'ils
grès pour formuler
convention
sacre, lequel, une fois agréé et ratifié,
de base à des Sociétés de secours pour les blessés
dans les divers pays de l'Europe? Il est d'autant



ICRC

Aim and scope

The International Review of the Red Cross is a periodical published by the ICRC. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion about contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence

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Introduction

The International Committee of the Red Cross (ICRC) has a mandate to carry out the tasks incumbent upon it under the Geneva Conventions, in particular to promote the faithful application of international humanitarian law and to protect and assist civilian and military victims of armed conflict — whether international or non-international — or internal disturbances as well as their direct consequences.¹

In order to discharge its difficult mandate as effectively and consistently as possible, in 1981 the ICRC adopted guidelines concerning its action in the event of violations of international humanitarian law.² Since it is important that the ICRC's working procedures be well understood by the authorities and by its other

1 See Article 5(2)(c) and (d) of the Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference of the Red Cross and Red Crescent, Geneva, October 1986, *International Review of the Red Cross*, No. 256, January-February 1987, pp. 25 ff. See also numerous resolutions of the International Conferences of the Red Cross and Red Crescent, in particular: Berlin 1869 (Resolution IV/3); Karlsruhe 1887 (Resolution III); Washington 1912 (Resolution VI); Geneva 1921 (Resolution XIV); London 1938 (Resolution XIV).

2 Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law, *International Review of the Red Cross*, No. 221, March-April 1981, pp. 76–83. See also “Mémorandum sur l'activité du Comité international de la Croix-Rouge en ce qui a trait aux violations du droit international,” 12 September 1939, *Revue internationale de la Croix-Rouge*, No. 249, September 1939, pp. 766–769; “Mémorandum: le Comité international de la Croix-Rouge et les violations alléguées du droit des gens,” 23 November 1951, *Revue internationale de la Croix-Rouge*, No. 396, December 1951, pp. 932–936.

contacts and that its different types of action be — in so far as possible — predictable, the ICRC decided to publish these guidelines, accompanied by an explanation.

The guidelines have recently been reviewed and supplemented to take account of the ICRC's current operations and various developments that have unfolded since 1981 and that have affected the environment in which it works: the proliferation and increasing diversity of those involved in situations of violence, the establishment of the International Fact-Finding Commission (under Article 90 of the Additional Protocol I of 1977), *ad hoc* international tribunals and the International Criminal Court, changes in the world of communications, etc.

The present document, which is more complete, replaces the one of 1981.

It confirms that the ICRC's preferred mode of action in response to a violation of international humanitarian law committed by a specific party is and remains to carry out representations within the framework of a bilateral confidential dialogue with the authorities responsible for the violation. It outlines the subsidiary measures that the ICRC reserves the right to take wherever its bilateral confidential dialogue is unsuccessful and under what conditions it has recourse to such measures.

The document states that the ICRC concerns itself with all violations of international humanitarian law, whether regarding protection and assistance for persons not or no longer taking part in hostilities or regarding the conduct of hostilities — the means and methods of warfare.

Moreover, the ICRC strives to provide protection and assistance in situations to which international humanitarian law does not formally apply (such as internal disturbances and other situations of internal violence). The same guidelines apply — *mutatis mutandis* — with regard to violations of other fundamental rules that protect persons in situations of violence and correspond to the areas in which the ICRC conducts its protection activities.

Action taken by the ICRC on its own initiative

1. General rule

The ICRC takes all appropriate steps to put an end to violations of international humanitarian law or of other fundamental rules protecting the persons in situations of violence, or to prevent the occurrence of such violations. These steps are taken at various levels and through various modes of action, according to the nature and the extent of the violations.

This guideline establishes the general rule whereby the ICRC takes action as soon as it is aware of a violation of international humanitarian law or of other fundamental rules protecting persons in situations of violence. It takes all appropriate steps, depending on the nature and gravity of the circumstances, with a view to ensuring that such a violation does not occur, persist or recur.

2. Principle mode of action: bilateral and confidential representations

Bilateral confidential representations to the parties to a conflict remain the ICRC's preferred mode of action.

This guideline refers to the ICRC's principle mode of action — in all circumstances, the ICRC will turn first to bilateral and confidential dialogue with all parties to an armed conflict or with all those directly involved in any other situation of violence. The ICRC thus confidentially approaches the representatives of the party (or parties) concerned, at the level directly responsible for the violation or, depending on the case or the type of violation, at various levels of the authority.

As confidentiality is a key factor in obtaining the best possible access to the victims of armed conflicts and other situations of violence, whether current or future, the aim of confidential representations is to convince the parties responsible for unlawful conduct to change their behaviour and uphold their obligations. The primary effect of such representations is often to reinforce awareness of the problems pointed out by the ICRC, to urge the parties to shoulder their responsibilities and to prompt the authorities to take account of the problems and to react accordingly. Years of experience have shown that confidentiality enables candid talks to take place with the authorities in an atmosphere of trust that is geared to finding solutions and avoids the risk of politicization associated with public debate.

Conversely, the ICRC seeks to ensure that the confidential nature of its representations, in particular its reports on visits to places of detention, will also be respected by the addressees of these representations. The ICRC thus stresses in each report that the contents are strictly confidential and are intended only for the authorities to whom the report is addressed. Neither the entire report nor any part of it may be divulged to a third party or to the public.

3. Subsidiary modes of action

The ICRC's confidentiality is not, however, unconditional. It is linked to a commitment made by the authorities to take account of the ICRC's recommendations aimed at putting an end to and/or preventing any recurrence of the violations it notes. The purpose and the justification of the ICRC's confidentiality thus rest on the quality of the dialogue that the ICRC maintains with the authorities and on the humanitarian impact that its bilateral confidential representations can have.

In the event that its representations do not have the desired impact, the ICRC reserves the right to have recourse to other modes of action, in keeping with the guidelines set out below. Those other modes of action are subsidiary to its preferred method and will only be used if the ICRC is unable to improve the situation in humanitarian terms and bring about greater respect for the law through bilateral confidential representations. In such cases, the ICRC will strive to resume its preferred mode of action as often and as soon as possible.

3.1 Humanitarian mobilization

The ICRC may also share its concerns about violations of international humanitarian law with governments of third countries, with international or regional organizations, or with persons that are in a position to support its representations to influence the behaviour of parties to a conflict. However, the ICRC only takes such steps when it has every reason to believe that the third parties approached will respect the confidential nature of its representations to them.

No matter how much effort the ICRC puts into its bilateral confidential representations, they do not always lead to greater respect for the law or an improvement in the situation of the affected persons. In such cases, the ICRC may decide to approach a third party discreetly, in the interest of the persons affected by the violation.

The ICRC chooses such third parties carefully, bearing in mind their ability to exercise a positive humanitarian influence, particularly when they are close to the authorities concerned or they are paid heed by them.

This humanitarian mobilization is directed primarily at States, which can play a key role in improving respect for the rules of international humanitarian law.³ That particular role is recognized by Article 1 common to the four Geneva Conventions and by Article 1 of Additional Protocol I, through which States undertake to “respect and to ensure respect” for the Conventions and the Protocol in all circumstances.

States are thus obliged by law to refrain from encouraging a party to the conflict to commit a violation of international humanitarian law and from providing concrete assistance, enabling or facilitating such violation.⁴ Moreover, it is generally recognized that common Article 1 requires States that are not party to an armed conflict to strive to *ensure respect* for the law by taking every possible measure to put an end to violations of the law by a party to a conflict, in particular by using their influence on that party.⁵

When the ICRC seeks the support of third States on the basis of common Article 1, it does not give an opinion on the measures that those States may take.⁶

3 Where international humanitarian law does not formally apply, the ICRC acts on the basis of Guideline 3.1 above in responding to violations of other fundamental rules protecting persons in situations of violence.

4 See International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986*, para. 220. See also *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the International Committee of the Red Cross, 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, pp. 22 and 48 ff.

5 The ICRC has repeatedly drawn public attention to the scope of Article 1 common to the Geneva Conventions and has regularly reminded States of their obligations under this provision. See, for example, F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC/Macmillan, Oxford/Geneva, 2003, pp. 924–925.

6 Common Article 1 does not provide the legal basis necessary to justify recourse to armed force. Whatever its motivation, such recourse is governed by the Charter of the United Nations (see Article 89 of Additional Protocol I).

Other than third States, whose mobilization rests on formal legal foundations, the ICRC may also mobilize international or regional organizations, non-State entities or even individuals if it considers that they are in a position to improve the fate of the affected persons.

In order to ensure such mobilization, the ICRC may decide — if necessary and only to the extent strictly necessary — to share confidential information with those third parties.

3.2 Public declaration on the quality of the bilateral confidential dialogue

The ICRC may publicly express its concern about the quality of its bilateral confidential dialogue with a party to a conflict, or about the quality of the response given to its recommendations regarding a specific humanitarian problem.

Once again, this mode of action — a public one this time — is aimed at strengthening the impact of the ICRC's bilateral and confidential dialogue with a party to a conflict when that dialogue is not having the desired results on the issues raised in the ICRC's representations.

The ICRC resorts to issuing a public declaration when it hopes that this will prompt a party to a conflict to improve the substance of its dialogue with the ICRC and take account of its recommendations. It also does so in order to ensure that its silence is not wrongly interpreted as a sign that the situation is satisfactory in humanitarian terms or as tacit approval, which would be detrimental to the ICRC's credibility and its preferred mode of action, namely bilateral confidential representations.

This type of public declaration only concerns problems regarding working procedures and the quality of the bilateral dialogue. Although the problem may be mentioned in general terms, the ICRC will refrain from defining it from a legal point of view or describing in detail the difficulties or their humanitarian consequences. It will also refrain from giving details about the content of its recommendations, those being elements that remain confidential.

3.3 Public denunciation

The ICRC reserves the right to issue a public denunciation of specific violations of international humanitarian law providing the following conditions are met:

- (1) the violations are major and repeated or likely to be repeated;*
- (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources;*
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations;*
- (4) such publicity is in the interest of the persons or populations affected or threatened.*

Public denunciation means a public statement by the ICRC to the effect that acts which can be attributed to a party to a conflict — whether or not they are known to the public — constitute a violation of international humanitarian law.⁷

The ICRC only takes recourse to this measure when it has exhausted every other reasonable means, including, where appropriate, through third parties, of influencing the party responsible for a violation, at the most relevant levels, and where these means have not produced the desired result or where it is clear that the violation is part of a deliberate policy adopted by the party concerned. It is also the case when the authorities concerned are inaccessible and when the ICRC is convinced that public pressure is the only means of improving the situation in humanitarian terms.

Such a measure is nevertheless exceptional and may be issued only if all of the four above-mentioned conditions have been met.

In considering “the interest of the persons or populations affected or threatened,” the ICRC must take account not only of their short-term interests but also of their long-term interests and of the fact that its responsibility is greater when it witnesses particularly serious events of which the public is unaware.

ICRC attitude to third-party initiatives

1. Relations with judicial, quasi-judicial or investigating authorities

The ICRC does not provide testimony or confidential documents in connection with investigations or legal proceedings relating to specific violations.

This guideline does not prevent contacts with judicial, quasi-judicial⁸ or investigating authorities on general issues relating to the application or interpretation of international humanitarian law.

2. Requests for inquiries

The ICRC will not act as a commission of inquiry and, as a general rule, it will not take part in an inquiry procedure. However, if solicited by one or more parties to a conflict, the ICRC may encourage them to appeal to the International Fact-Finding Commission or, at the request of all the parties to the conflict, it may offer its good offices to help set up a commission of inquiry, limiting itself to proposing non-ICRC persons who are qualified to be part of such a commission.

7 Where international humanitarian law does not formally apply, the ICRC acts on the basis of Guideline 3.3 above in responding to violations of other fundamental rules protecting persons in situations of violence.

8 The term “quasi-judicial authority” refers to mechanisms which, although not of a judicial nature as such, have similar objectives, such as truth commissions.

However, the ICRC will only offer its limited services providing this will not in any way undermine its traditional activities or its reputation for impartiality and neutrality. It will also endeavour to ensure that the inquiry procedure provides every guarantee of impartiality and gives all parties the means to put their point of view across.

3. Reception and transmission of complaints

In conformity with Article 5(2)(c) of the Statutes of the International Red Cross and Red Crescent Movement, the ICRC is entitled to “take cognizance of any complaints based on alleged breaches of [international humanitarian law].”

3.1 Complaints from a party to a conflict or from the National Society of a party to a conflict

The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them. In such a situation, the ICRC shall transmit complaints received from a government to the government of the adverse party and complaints received from a National Society to the National Society of the adverse party.

3.2 Complaints from third parties

Complaints from third parties (governments, National Societies, governmental or non-governmental organizations, individual persons) shall not be transmitted. If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided that the violation has been recorded by its delegates or has been established on the basis of reliable or verifiable sources, and insofar as it is advisable in the interest of the victims. The authors of such complaints may be invited to submit it directly to the parties in conflict.

3.3 Publicity given to complaints received

As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

4. Requests to record the consequences of a violation

If the ICRC is asked, particularly by the authorities, to record the consequences of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them or if it is necessary in order to record the effects of an attack so as to have information enabling the ICRC to take action with full knowledge of the facts. Moreover, the ICRC shall only send a delegation to the scene of violations if it has received assurances that its presence will not be used to political ends.

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The International Review of the Red Cross invites submissions of manuscripts on subjects relating to international humanitarian law, policy and action. Most issues focus on particular topics, decided by the Editorial Board, which can be consulted under the heading Future Themes on the website of the Review. Submissions related to these themes are particularly welcome.

Articles may be submitted in Arabic, Chinese, English, French, Russian and Spanish. Selected articles are translated into English if necessary.

Submissions must not have been published, submitted or accepted elsewhere. Articles are subjected to a peer-review process; the final decision on publication is taken by the Editor-in-Chief. The Review reserves the right to edit articles. Notification of acceptance, rejection or the need for revision will be given within four weeks of receipt of the manuscript. Manuscripts will not be returned to the authors.

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