

Speech for ICRC Vice-President Beerli
XXXVIth ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL
HUMANITARIAN LAW,
“RESPECTING IHL: CHALLENGES AND RESPONSES”
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INTRODUCTION

Your Excellencies, Ladies and Gentlemen, good morning. It is a pleasure for me to be here to address you at this 36th San Remo Round Table on Current Issues of International Humanitarian Law.

The topic of this year's Round Table—'Respecting IHL: Challenges and Responses'—is one that lies at the centre of ICRC action. The ICRC's operational presence in the context of international and non-international armed conflicts is largely the result of needs created by lack of compliance with IHL. In Syria, for example, tens of thousands of civilians are living in extremely harsh conditions, and humanitarian organizations cannot reach them. Lack of access is one of the main reasons preventing us from having an independent understanding of what happened recently in relation to the alleged use of chemical weapons but we are appalled by the large numbers of civilian casualties reported. Any use of chemical weapons by any party is a barbarous act, and would constitute a serious violation of IHL. In the eastern Democratic Republic of the Congo, the violence and suffering inflicted on people has reached a level rarely seen in two decades. Amid almost total indifference, people are enduring violent treatment every day. Civilians are directly targeted in attacks that do not even spare children or elderly people; many medical facilities struggle to treat the wounded and sick, as their supplies are often looted; or because there are armed men on the premises; or because medical staff cannot safely reach their workplace. Further, there remains an alarming level of sexual violence against women, children and men. And in Colombia, where one of the world's longest-running armed

conflicts lingers, civilians continue to risk forced displacement and disappearance, sexual violence and summary execution. These are just three brief examples of situations where we continue to see lack of respect for IHL. The list, unfortunately, is very long ...

Over the next two and a half days, we will be discussing in depth various challenges regarding respect for IHL. We have a rich programme before us, and I commend the organisers for putting together what promises to be a stimulating few days of discussions.

In my speech, I will first speak about why there is a need to focus on strengthening compliance with IHL at this point in time, and some of the weaknesses in the existing IHL compliance mechanisms. For the second part of my speech I will, following the broad structure of the programme of the Round Table, provide some insight into some of the key activities that the ICRC is engaged in to build an environment conducive to respect for IHL at different stages: during peace-time, before an armed conflict occurs; while armed conflict is occurring; and after it has ended. In doing so I will highlight some of the key challenges the ICRC faces in undertaking these activities.

WHY THE FOCUS ON COMPLIANCE? PUTTING THE IHL COMPLIANCE ISSUE INTO A BROADER INTERNATIONAL LAW PERSPECTIVE

At the outset of our discussions, it is important to reflect on why the issue of compliance with IHL is particularly salient at this point in time; in other words, to put the current interest in compliance in the context of general historical trends in the development of international law.

The 19th and 20th centuries were periods of substantial normative development across different fields of international law. One marker of this

codification and progressive development of international law is the large number of treaties concluded during these periods. IHL is no exception. As you know, next year will mark the 150th anniversary of the First Geneva Convention, and as we look back, we see great achievements made in developing IHL since 1864 and adapting it to the evolving ways to wage war. What began with a short treaty to protect the wounded, sick and medical personnel, grew progressively into a detailed body of law, with the 1949 Geneva Conventions and their Additional protocols now comprising a corpus of more than 600 articles, aimed at protecting all victims of armed conflicts. In addition, important norms of customary IHL have crystallized. This is particularly important in relation to non-international armed conflict; even where treaty rules may be insufficient, customary IHL norms have emerged to regulate key aspects of the behaviour of parties to the conflict. All of these developments have contributed to positive changes in the practice of parties to conflicts, by allowing the injection of a much-needed measure of humanity into the conduct of military operations. Warfare has evolved, with certain behaviour used in previous conflicts, such as carpet bombing, now clearly regarded as unacceptable. There is no doubt that what is acceptable conduct has evolved due to IHL norms and the ever-increasing expectations of observance that they bring. In many contexts of armed conflict, IHL norms *have* been respected, which has made a significant practical difference for the protection of people on the ground, and has prevented or reduced human suffering.

Of course, although IHL progressively has become more detailed and specific, there remain areas that require further work, in particular to cater for new operational realities as they arise. One example is the need to strengthen IHL regarding detention in non-international armed conflict. In comparison to the detailed body of treaty rules regulating detention in international armed conflict, the law regarding detention in non-international

armed conflict is very limited. This is why the ICRC is currently leading a consultation process with States and other relevant actors, on how to strengthening the legal protections in this area. Strengthening legal protection could take a variety of different forms, including development of a non-binding standard-setting instrument.

However, what is clear is that, overall for IHL, the main problem is not the lack of rules, but the lack of respect for the existing law. Norms cannot, in and of themselves, eradicate abuses or be expected to do so. They need to be complied with. This is a common challenge across other areas of international law. As international law becomes ever more specialised and detailed in substance, it is a natural progression to focus more closely on mechanisms for monitoring and evaluating compliance with those norms. Since the end of the 20th century, we are in a period in which international law is increasingly focused on systems of compliance and accountability. This can also be regarded as a critical step in the process towards strengthening the rule of international law.

One illustration of this focus on compliance and accountability is the enormous growth of international law institutions in recent decades, including courts, tribunals and other bodies. We see this most strikingly in international criminal law, with the development of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. We also see this focus on compliance and accountability in international human rights law, with the development of the UN human rights treaty body system, the UN Human Rights Council and the Special Procedures, as well as increased resort to commissions of inquiry. We also see this in international trade law, with the development of the WTO's sophisticated international dispute settlement system.

However, against this backdrop, IHL stands out in significant contrast. All parties to the Geneva Conventions and Additional Protocol I are bound by the general obligation, in Common Article 1, to respect and ensure respect for the Conventions in all circumstances. However, unlike several other areas of international law, IHL lacks effective compliance mechanisms and procedures.

Three compliance mechanisms are envisaged in the Geneva Conventions and Additional Protocol I. First, the Protecting Powers system obliges each Party to the conflict to designate a neutral State, with the agreement of the other side, to safeguard its humanitarian interests, and therefore to monitor compliance with IHL. However, in practice the Protecting Powers system has been used on very few occasions since World War II, with the last reported instance having occurred three decades ago. Second, there is the formal Enquiry Procedure, which enables an enquiry to be made into an alleged violation of the Geneva Conventions, at the request of a party to the conflict. However, very few attempts to use the Enquiry Procedure have been made, and none have resulted in the actual launching of the procedure. And finally, there is the International Humanitarian Fact-Finding Commission. The Commission is competent to enquire into any facts alleged to be a grave breach or other serious violation, or to facilitate, through its good offices, the restoration of an attitude of respect for these instruments. However, the Commission has not been triggered so far, which in large part may be attributed to the fact it can only be used in relation to international armed conflict, where both parties have either made a formal declaration accepting its competence, or have given their consent. Overall, these three mechanisms have simply not served the purpose for which they were envisaged. They are of limited scope; they were crafted for international armed conflict only, and they have rarely, if ever, been used.

Some compliance-related mechanisms were developed in specific areas of IHL, such as some weapons treaty bodies, and the UN Security Council Monitoring and Reporting Mechanism on grave violations against children in armed conflict. However, there are no broader compliance mechanisms covering IHL in general. There is also no universal, dedicated forum where States can meet regularly to discuss IHL implementation and compliance, apart from the quadrennial International Conference of the Red Cross and Red Crescent Movement. At present, this remains the primary international forum in which States and components of the Movement come together to discuss matters of common humanitarian concern, including prevention of IHL violations.

Given the lack of specific IHL compliance mechanisms, compliance functions in relation to IHL are in practice increasingly being performed by institutions and mechanisms established under other bodies of international law, such as international human rights law. While there are of course important benefits to this, there are also limitations. Indeed, the mechanisms of international human rights law are not necessarily well-adapted for the implementation of IHL. For example, human rights law binds only States, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-State armed groups. This is a significant constraint in an era when non-international armed conflict is the most common kind of conflict. In addition, aside from purely legal aspects, there are practical considerations that restrict the ability of non-State armed groups to apply human rights law. In most non-international armed conflicts, the non-State party lacks the capacity and an adequate apparatus for ensuring the fulfilment of human rights treaty-based and non-treaty standards. Further, sustainable strengthening of IHL cannot be achieved through case-by-case measures taken by international institutions that are not

specifically mandated to undertake IHL-focused work. Such efforts should instead be promoted from within an IHL-specific system.

It is clear therefore that regardless of which area of IHL one looks at, a common on-going challenge is implementation and ensuring compliance with IHL. That is, finding ways of encouraging all States and all parties to armed conflicts to observe the rules and implement their obligations under this body of law; to prevent violations from occurring, and to stop them when they are occurring.

This is the topic at the heart of our discussion over the coming days of the Round Table: how to improve compliance with IHL norms in practice. And, given that enormous human suffering caused by armed conflict continues, this is not just a legal challenge, but of course poses political challenges also, in terms of building the interest and commitment within the international community to tackle the issue. This weakness in IHL was acknowledged by the 31st International Conference of the Red Cross and Red Crescent in December 2011. Resolution 1 recognised 'the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL, with a view to strengthening legal protection for all victims of armed conflict'. As you know, Resolution 1 mandated the ICRC to pursue further research and consultation with States and other relevant actors, to put forward options and recommendations to enhance the effectiveness of IHL compliance mechanisms.

The ICRC/Swiss initiative on strengthening compliance

Pursuant to Resolution 1, the ICRC and the Swiss Government, have together been leading a series of consultations since 2011 to examine this issue. So far there have been two consultation meetings open to all States, as well as two preparatory meetings with a smaller, regionally-balanced group

of States. States participating in the consultation process have agreed that IHL lacks effective compliance mechanisms and that this is an area needing further work. There is general support for the creation of a platform for regular exchanges among States related to IHL compliance. States have identified three other priority areas for further discussion, namely a periodic reporting system on national compliance with IHL rules; thematic discussions on topical IHL issues; and fact-finding, including possible ways to make better use of the International Humanitarian Fact-Finding Commission.

Further detail about the joint ICRC-Swiss Government initiative will be provided in a specific session tomorrow. Ambassador Nicolas Lang, Ambassador-at-Large for IHL in the Swiss Federal Department of Foreign Affairs, will be providing you with an update on the consultation process so far, and the planned next steps. My colleague Philip Spoerri, Director for International Law and Cooperation in the ICRC, will then provide you with an overview of the main substantive themes and views that have emerged from the consultation process so far. In the course of these consultations, we are looking closely at the lessons for IHL compliance that can be learned from other systems of international law. I note that this is the focus of a specific session tomorrow, which is focusing in particular on lessons to be learned from international and regional human rights law and compliance mechanisms.

This consultation process on compliance is a very important initiative for the ICRC, and an area on which we can anticipate much more work over the years to come. For the remainder of my remarks however, I will move beyond that specific initiative, to take a broader focus, looking at the issue of respect for IHL at different stages in relation to armed conflict. Currently, the ICRC's constitute the only functioning IHL compliance mechanisms. Consistent with the Round Table's theme of 'Challenges and Responses', I will highlight some

of the current ICRC activities in responding to challenges at each of these stages.

RESPECTING IHL BEFORE, DURING AND AFTER ARMED CONFLICT

Respect for IHL is needed before, during and after armed conflict. These stages are of course not always clearly delineated, but this schema is one useful way of thinking about the different kinds of efforts needed to strengthen compliance. At one end of the spectrum is prevention, which encompasses all activities aimed at creating an environment conducive to respect for the life and dignity of people affected by armed conflict. However, it also includes activities to promote observance with IHL during armed conflict, and then at the other end of the spectrum, activities to promote IHL after armed conflict has ended. Let me focus first on prevention, which is an important area of the ICRC's work.

Prevention activity—in peace-time, before armed conflict

To build respect for IHL, one first has to understand the rules, and the rationale that underpins them, to create the conditions necessary for them to be applied and effective in practice, and to enable their enforcement where needed. This requires a variety of steps by States and other actors, including professional and educational bodies and National Societies, to reach different audiences in all corners of society.

States parties to IHL instruments have clear obligations to undertake action during peacetime, including all relevant measures of implementation, to ensure that IHL rules are known and respected. Prevention action may take many forms. It includes the adoption of domestic laws and regulations implementing IHL treaty obligations; the adequate training of armed forces and integration of IHL within military manuals and operations; the appointment of legal advisers to the armed forces; and teaching and dissemination of IHL to the population at large. Many States—currently over

100—have established specific bodies called national Committees for IHL, to facilitate this process and advise the relevant authorities on all IHL related questions.

The ICRC's Advisory Service stands ready to help governments fulfil their responsibility to promote and implement IHL. It supplements and supports governments' own resources, notably by providing specialist advice and technical assistance to States as they adhere to IHL instruments and adopt legal and administrative measures to give effect to their IHL obligations. It also collects and facilitates exchange of information between States on national IHL implementation laws and other measures.

IHL Dissemination, training and education

As you know, IHL dissemination and education will be the topic of a specific session later today. This is a core part of the work of the ICRC and National Societies. For example, the ICRC has education and outreach programmes that aim to build awareness of IHL among diverse audiences.

An important area of ICRC activity in promoting respect for IHL is dialogue with weapons bearers, including States' armed forces, organized armed groups and private military and security companies. For example, the ICRC maintains a working dialogue with States' armed forces around the world, to ensure that they know and are aware of IHL. This, however, is only the starting point, for experience has shown that knowledge alone is no guarantee that IHL will be respected in practice. Therefore, with weapon bearers the ICRC focuses on the concept of integrating the law, where the focus is on the four key areas of doctrine, education, training and equipment and sanctions. We call this the 'integration cycle', and thus see the path as a continuous, circular process that prevents violations far more effectively than through teaching or focusing on awareness alone. The ICRC also maintains

contacts with non-State armed opposition groups and private military and security companies.

Indeed, the question of how to strengthen respect for IHL by non-State armed groups remains a critical challenge now and for the years to come. Given that non-international armed conflicts are the most common kind of conflict today, it is crucial that increased emphasis is placed on prevention work with organized non-State armed groups. Here though, the ICRC faces some important practical challenges, such as getting access to such groups, and how to tailor our key IHL promotion and education messages to the appropriate level for our interlocutors. These are difficult issues, which require a lot of further work in the years ahead.

The ICRC has been continuously developing ways to reach all those with an interest in IHL and humanitarian action, and to ensure that our communications have an impact. This continues today with the ICRC's use of new technologies to convey its messages, including multimedia and virtual reality tools, such as web-based resource centres, online learning modules and training videos. This is a topic which my ICRC colleague, Vincent Bernard, Head of the ICRC's Forum for the Integration and Promotion of the Law, and Editor-in-Chief of the International Review of the Red Cross, will be speaking further about in his presentation later today, where he will be showing you some examples of these innovative tools.

Serving as an important source of reference information on IHL

Another important role the ICRC plays in relation to education and outreach is through serving as a critical source of reliable reference information on IHL and its interpretation. To help people understand the existing rules, it is important to ensure their meaning is as clear as possible, and to keep updating our legal interpretation and guidance on these rules. For example, the ICRC Legal Division is engaged on a long-term project to update the

ICRC commentaries to the Geneva Conventions and 1977 Additional Protocols. The Commentaries have proven to be a valuable tool for all those who apply or study IHL—be they practitioners, lawyers, judges or scholars. They provide guidance on how the provisions of the Geneva Conventions and Additional Protocols are to be interpreted and applied. However, the current Commentaries on the Geneva Conventions date back to the 1950s and those on the Additional Protocols were developed in the 1980s; they are based primarily on the negotiating history of these treaties and on prior practice. We are now updating the commentaries to explain how these treaty rules apply today. Just think, for example, of the Conventions’ references to the humanitarian activities that the ICRC and ‘any other impartial humanitarian organization’ may—with the consent of the parties to the conflict—undertake. The context in which this occurs today, in terms of the diversity of actors as well as the challenges for humanitarian action, are very different from when the original Commentaries were written. Another example is Common Article 1, obliging parties ‘to respect and ensure respect’ for these Conventions ‘in all circumstances’. The international community’s understanding of the obligation to ‘ensure respect’ for humanitarian law has significantly expanded since the 1950s. The updated Commentaries seek to capture and present this understanding. Against this background, our update of the Commentaries is meant to ensure that they continue to be a valuable guidance tool. And they thereby contribute to the goal of strengthening compliance: if people understand the rules better, and the commentaries align better with contemporary practice, it is easier for parties to armed conflicts to apply the rules. Ultimately, this helps secure better protection for victims of armed conflict.

During armed conflict

Let me now mention some of the ICRC's main activities to promote compliance *during* armed conflict. This will be the topic of our next session,

where participants will be discussing issues regarding compliance with IHL during a number of recent or current conflicts. During armed conflict, the ICRC carries out a range of activities aimed at improving compliance with IHL and protecting all those adversely affected by armed conflict. This includes collection of information, to identify possible violations and enable us to engage in confidential legal operational dialogue with parties to armed conflict. This confidential dialogue aims to encourage parties to develop a better respect for IHL, and to sanction violations of IHL where established.

An ongoing challenge: collection of reliable information

We face several challenges in carrying out these activities, one of which relates to the collection of reliable information and the use of new technologies. We live in an era that has seen incredible advances in communications—with all sorts of new technologies enabling the rapid transmission of information, images and video footage during the course of armed conflict. Mobile phones and the internet are becoming more accessible to many people on the ground. As we can see from monitoring the daily news regarding armed conflicts occurring around the world—whether in Syria, Iraq, Afghanistan or Mali—a huge volume of information is reported not just by the parties themselves, but by individuals, international organizations, NGOs and the media.

The availability of these new technologies has many advantages, enabling a more detailed and nuanced picture of the experiences of people during armed conflict. However, it also poses significant practical challenges for the ICRC and others working in armed conflict—by making it more difficult to decipher the facts from this wealth of information. With so much information now in the public domain, coming from such a wide variety of sources, it can be very challenging to verify which sources are reliable, and to distil the truth from misinformation and disinformation. We need accurate, timely and objective information, to ascertain whether violations are about to be committed, or

have already been committed—and then to prepare appropriate diplomatic and legal responses. This is all part of the challenging work of trying to strengthen compliance and foster accountability in the thick of armed conflict: trying to encourage parties to stop committing IHL violations while they are actually occurring and trying to prevent imminent IHL violations from occurring. I understand that some of these challenges, in particular those of fact-finding, and of the contribution of NGOs to IHL compliance, will be examined in a specific session tomorrow, on 'The Challenge of IHL Compliance'.

After armed conflict has occurred

Another area of work in promoting compliance with IHL occurs after armed conflict has ended. Although IHL generally applies during armed conflict, some obligations remain relevant even after the end of conflict, and the ICRC works actively to promote implementation of these obligations.

Criminal accountability is one important aspect of the work needed to implement IHL and address violations of IHL when they have occurred. This work of course occurs both during and after armed conflict. As I mentioned earlier, criminal accountability has been an area of important progress over the last two decades, with significant development of international criminal institutions, as well as domestic mechanisms for the determination of individual criminal responsibility. The ICRC contributes to the fight against impunity, for example by encouraging States to adopt domestic legislation to give effect to their IHL obligation to search for and prosecute persons suspected of having committed serious violations of IHL.

However, these domestic and international mechanisms are of course focused on individual criminal accountability, rather than compliance with IHL by States and non-State armed groups more broadly, and are therefore only

one part of the work necessary to comply with IHL after the end of armed conflict.

Returning prisoners and restoring family links

Other important aspects of post-conflict work are the release and return of persons detained in armed conflict, and the efforts to restore links of families who have been separated. Trying to locate people, and put them back into contact with their relatives, is a major challenge for the ICRC and national Red Cross and Red Crescent societies. This work includes exchanging family messages, reuniting families and seeking to clarify the fate of those who remain missing.

Reducing the humanitarian impact of weapon contamination

Diverse activities are needed to rebuild communities affected by armed conflict and other situations of violence. One significant ongoing challenge concerns reducing the humanitarian impact of weapon contamination. This can deprive entire populations of water, firewood, farmland, health care and education. It impedes relief work, depriving people of humanitarian aid and aggravating humanitarian problems. After the end of hostilities, ICRC teams are able to clear and make safe key buildings and infrastructure, to allow post-conflict rehabilitation to start and essential services to be restored. If clearance is not possible, or not an immediate priority, these teams can mark off dangerous areas and warn people not to enter them.

This has been just a rapid sketch of some important areas of post-conflict work on promoting respect for IHL. As you know, there is a specific session in the programme on 'Implementation of IHL After the End of An Armed Conflict', where some of these issues will be discussed in greater depth.

Conclusion

This morning I have given an overview of some of the main challenges for building respect for IHL before, during and after armed conflict, and highlighted some key ICRC activities in responding to each of these areas of challenge. It is clear that strengthening compliance with IHL and respect for IHL is a multi-dimensional task. It demands a variety of activities by diverse actors. This includes the ICRC and Red Cross and Red Crescent National Societies, however, the primary role and responsibility here is that of States and non-State armed groups. All these efforts must occur at the domestic level and at the international level. This is going to continue to be a critical challenge for IHL throughout the 21st century. Above all, strengthening compliance requires persistence and perseverance; creative thinking and collaborative action. We have to be realistic and practical: it is likely to take some time before the international community is ready to agree on the creation of stronger mechanisms of compliance. Until that time, we have to draw on existing resources, tools and mechanisms, to help encourage all parties to armed conflicts to respect IHL.

I hope that this Round Table provides an important opportunity for constructive and meaningful discussion of this challenge. Over the coming days, I encourage you all to consider—what are the legal, political and practical reasons that currently stand in the way? How can we, together, as a community of experts committed to safeguarding IHL, use our creative thinking and collaborative action, our persistence and perseverance, to help bring about progress in this area? And more broadly, how can the international community most effectively move ahead together, to envisage, and start creating, an era of stronger respect for IHL?

I began my remarks by situating this issue of compliance with IHL against the backdrop of the development of international law generally. It is to this point that I return, in conclusion. The time is clearly ripe for us all to concentrate

with greater determination on building a stronger system of compliance with IHL. Not only will this help us to achieve our common goal of striving for greater humanity in armed conflict, but it is important more generally for the development of the international rule of law. A strong system of international law requires both normative development and robust, effective mechanisms for ensuring compliance with those norms. It is my hope—and that of the ICRC—that through the current efforts to focus more sharply on this issue of compliance, IHL will, over time, join other fields of international law in helping to make the 21st century an era that we will look back upon as being marked by an ever stronger commitment to implementation, compliance and the rule of law.

I thank you for your attention and I wish you fruitful discussions ahead.

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