ICRC

Improving Compliance with International Humanitarian Law
ICRC Expert Seminars

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Summary report

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Introduction

The International Committee of the Red Cross (ICRC), in co-operation with other institutions and organizations,[1] organized a series of regional expert seminars on the topic "Improving Compliance with International Humanitarian Law." The seminars were organized as part of the preparation for the 28th International Conference of the Red Cross and Red Crescent. Five seminars were held: in Cairo (23-24 April 2003), Pretoria (2-3 June 2003), Kuala Lumpur (9-10 June 2003), Mexico City (15-16 July 2003), and Bruges, Belgium (11-12 September 2003).

Each seminar followed the same agenda and participants included government experts, parliamentarians, academics, members of regional bodies, experts from non-governmental organizations, and representatives of National Societies of the Red Cross and Red Crescent, each acting in their individual capacities as experts in international humanitarian law (IHL). This report follows the outline of the agenda questions and includes a summary of both the expert presentations on each question and the ensuing discussions by all seminar participants.

The primary objective of the seminar series was to engage experts in international humanitarian law from all regions of the world in a creative and forward-thinking discussion of ways in which Article 1 common to the four Geneva Conventions ("common Article 1"), that is the States' obligation to "ensure respect" for international humanitarian law, might be operationalized. Particular attention was paid to measures for ensuring compliance that may be taken by States *during* armed conflict, rather than the more frequently debated subjects of pre-conflict implementation and dissemination initiatives or repressive measures, which are most frequently taken post-conflict. An emphasis was also placed on the specific problem of ensuring a better compliance with international humanitarian law by parties to non-international armed conflicts.

Debates throughout the seminars were animated and dynamic, revealing a great interest on the part of the expert participants in the subject matter. The experts expressed appreciation to the ICRC for taking the initiative to discuss these matters, underlining that such discussions are both appropriate and necessary in the current context.

I. Summary of Conclusions

[1] The regional expert seminars were organized by the ICRC in collaboration with the Egyptian National Commission for International Humanitarian Law (Cairo), the Ministry of Foreign Affairs of the Government of the Republic of South Africa (Pretoria), the Ministry of Foreign Affairs of Mexico (Mexico City), and the College of Europe (Bruges).

The discussions throughout the seminars reaffirmed the importance and relevance of international humanitarian law in the contemporary contexts of armed conflict and provided innovative ideas of how to improve compliance with international humanitarian law.

Regarding common Article 1, seminar participants confirmed that it entails an obligation, both on States party to an armed conflict and on third States not involved in an on-going armed conflict. In addition to a clear legal obligation on States to "respect and ensure respect" for international humanitarian law within their own domestic context, third States are bound by a negative legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations. Furthermore, third States have a positive obligation to take appropriate action – unilaterally or collectively – against parties to a conflict who are violating international humanitarian law. All participants affirmed that this positive action is at minimum a moral responsibility and that States have the right to take such measures, with the majority of participants agreeing that it constitutes a legal obligation under common Article 1.

When discussing existing IHL mechanisms, most participants agreed that, in principle, the existing mechanisms were not defective and indeed have great potential, but suffer from lack of use linked to lack of political will by States to seize them. Participants noted in particular the great potential of the International Fact Finding Commission (Art. 90, Additional Protocol I), advocating for its use and suggesting ways in which it might become more active.

The unique role and credibility of the ICRC in ensuring compliance with international humanitarian law was the frequent subject of discussion, and it was clearly evident that participants expect the ICRC to continue undertaking active measures in this regard. Participants at all seminars commended the ICRC for its initiatives, noting the institution's great reputation for independence and impartiality and the prestige that has followed its successful endeavours. Participants were careful to note that any ICRC activity in this field must not, however, impinge on its neutrality and impartiality or compromise its operational activities and the protection it offers on the ground for those vulnerable to the effects of armed conflict.

Participants engaged in lively and imaginative discussions of potential new mechanisms for the respect for international humanitarian law. The various proposals included frequent reference to an IHL Commission, reporting procedures, individual complaints mechanisms, or observation missions. Most participants counselled, however, that the current political climate is not conducive to the establishment of a permanent or automatic institution, with some suggesting in the alternative that any proposals should be undertaken gradually, perhaps beginning as an *ad hoc* mechanism, a body with one or two desired functions, or a regional mechanism, earning trust and support with proven success over time. Nonetheless, participants cautioned against the potential fragmentation of IHL interpretation that might result from this approach and called for a safeguarding of the universality of international humanitarian law.

Finally, participants affirmed that both State actors and armed groups are bound by the provisions of international humanitarian law applicable in situations of non-international armed conflict, and called on all actors to work towards a better compliance with these provisions. Significant suggestions of how to practically improve compliance among armed groups included the conclusion of special agreements between State actors and armed groups (common Art. 3 (3) to the four Geneva Conventions), unilateral declarations by the armed groups, and State grants of some kind of immunity to members of armed groups for their participation in hostilities. A number of proposals were made of new IHL mechanisms

and, once again, the ICRC was commended as one of the most competent actors to effect improvement in compliance with international humanitarian law in non-international armed conflicts.

In conclusion, expert participants welcomed the opportunity to discuss these pressing and relevant issues of respect for international humanitarian law. Despite the difficulties of lack of political will crippling existing IHL mechanisms and a general atmosphere not conducive at the moment to the creation of new permanent mechanisms, participants remained optimistic that significant steps may be taken to improve compliance in today's international and non-international armed conflicts. They called upon the ICRC to continue this deliberation and consultation to further refine the proposals of the regional seminars, with a view to continued improvement in compliance with international humanitarian law obligations by all actors.

II. Discussion Theme I – Operationalizing Common Article

1) What are the scope and application of the obligation to "ensure respect" for international humanitarian law?

2) How to practically translate individual State duty to ensure respect into its policies and actions?

In order to set the foundation for subsequent questions concerning compliance mechanisms and procedures, each seminar began with an examination of Article 1 common to the four Geneva Conventions and Additional Protocol I, which states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." [2] Participants were asked to consider the scope of this obligation and also to identify what concrete measures a State might undertake to fulfil this duty.

Seminar participants recognized common Article 1 as conferring an obligation, both on States party to an armed conflict and on third States not involved in an on-going armed conflict. Participants noted that all states must perform this treaty obligation in good faith.[3] The common Article 1 obligation was generally agreed upon as conferring an obligation applicable both in international and non-international armed conflict situations.

In addition to the clear legal obligation for States to "respect and ensure respect" for international humanitarian law within their own domestic context,[4] at all seminars expert presentations and ensuing discussions emphasized the obligations placed by common Article 1 on third States. Third States are bound by a legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law[5] nor take action that would assist in such violations. Participants illustrated this negative obligation by referring to prohibited actions such as the transfer of arms or sale of weapons to a State who is known to use such arms or weapons to commit violations of international humanitarian law. In this regard, in addition to common Art. 1, reference was made to the International Law Commission Draft Articles on State Responsibility, Article 16, which attributes responsibility

[2] Article 1 common to the four Geneva Conventions (1949) and Protocol I Additional to the Geneva Conventions (1977).
[3] Vienna Convention on the Law of Treaties, Article 26, *Pacta sunt servanda*, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[4] Participants noted that this requires compliance with IHL by all branches of the government: executive, judiciary, legislatures, and armed forces.
[5] *See* the Nicaragua case, wherein the International Court of Justice noted that under common Art. 1, the United States was under "an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions […]". *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, ICJ Reports 1986, p. 14, para. 115.

to a State that knowingly aids or assists another State in the commission of an internationally wrongful act.[6]

Seminar participants also acknowledged a positive obligation on States not involved in an armed conflict to take action – unilaterally or collectively – against States who are violating international humanitarian law, in particular to intervene with States over which they might have some influence to stop the violations.[7] All participants affirmed that this entails at minimum a moral responsibility and that States have the right to take such action,[8] with the majority of participants agreeing that this constitutes a legal obligation under common Article 1. This is not to be construed as an obligation to reach a specific result, but rather an "obligation of means" on States to take all appropriate measures possible, in an attempt to end international humanitarian law violations. States expressed this positive obligation, for example, in the Final Declaration of the International Conference for the Protection of War Victims in 1993:

> We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war. We urge all States to make every effort to: [...] Ensure the effectiveness of international humanitarian law and take resolute action in accordance with the law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations.[9]

Considering violations of international humanitarian law to be matters of international concern, participants clarified that action taken pursuant to common Article 1 should not be understood as an illegal interference in the internal affairs of another State. Furthermore, it was clearly understood that common Article 1 is not an entitlement to the use of force, a matter governed solely by the UN Charter, and that action pursuant to common Article 1 must be in accordance with international law.

Building on this foundational understanding of the scope and implications of common Article 1, seminar participants were then asked to consider how to practically translate this obligation into State practice and policies. A key question in this regard involved **how to create the political will of States**, both to ensure their own domestic respect for provisions of international humanitarian law, as well as to ensure its respect by other actors involved in an armed conflict. A positive attitude of influential states was seen as an essential prerequisite in this regard.

Beyond the question of political will of States, participants at all seminars also strongly advocated for the fostering of a **greater culture of respect for international humanitarian law** among all sectors of society, at national and international levels.[10] All actors – parties to conflict, third states, and civil society – must be made aware that a greater

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[6] Draft Articles on Responsibility of States for internationally wrongful acts (International Law Commission, 53rd Session, 2001), Article 16: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.

[7] Carrying the chain of obligation one step further, one expert recommended that States should put pressure on a State they know to have influence over a violating State, urging the third State to fulfil its positive obligation under common Article 1 to attempt to ensure respect by the violating State.

[8] Participants at one seminar discussed whether there are different levels of responsibility between enemy States, neutral States, and allies, considering that there may be a higher level of obligation for States to intervene when their allies or partners in a coalition are violating international humanitarian law.

[9] International Review of the Red Cross, September-October 1993, ICRC, Geneva.

[10] At the Pretoria conference, a parallel was drawn between the stigmatisation of slavery and the need for a similar future stigmatisation of violations of IHL.

respect for international humanitarian law is essential to limit the human suffering and destruction caused by armed conflict.

In order to achieve this "culture of respect", **civil society** must be sensitised to issues of international humanitarian law in the same way they are currently well-versed in issues of human rights law. Traditional non-governmental organizations and other actors in civil society must be given the necessary expertise to deal with IHL. Efforts to influence decision makers should include other actors such as churches or religious communities, trade unions, and other community organizations, many of whom might not be aware that they share the same ideas and ideals as those underlying international humanitarian law. Components of the Red Cross and Red Crescent Movement may be useful in sensitising and in capacity building. Finally, public opinion must be strengthened, both against the effects of war as well as concerning the role of international humanitarian law in protecting those affected by armed conflict.

Within a strong culture of respect for international humanitarian law, many actors may work to hold States responsible for their obligations under IHL and, more specifically, under common Article 1. Regarding what concrete actions States might take – either individually or collectively – to fulfil their common Article 1 obligations, seminar participants urged the following:[11]

- **Dissemination and education** are essential actions that must be vigorously pursued in peacetime, targeting various sectors including: politicians, opinion makers, academics, military personnel, youth, civil society, media, and the general public. In this regard, participants pointed to successful campaigns by civil society, resulting in States ceasing to give aid to violating States or other effective measures to ensure compliance with international humanitarian law. The efforts of non-government organizations were endorsed by participants as highly effective, in their work of fact-finding and documentation, reporting, and denunciation regarding issues of international humanitarian law. The important role of national commissions for IHL was mentioned and speakers encouraged their creation by States. National Societies of the Red Cross and Red Crescent were also endorsed as valuable partners in spreading knowledge, although it was thought that their staff members and volunteers might need appropriate training in order to undertake this task. Some participants indicated that dissemination and education programs should be culturally adjusted to make them understandable.

- States must be encouraged to enact **national penal legislation** in order to be in a position to punish violations of international humanitarian law, during and after an armed conflict. Prosecution of war criminals should be highly visible in order to create a deterrent effect during armed conflicts.[12]

- Participants welcomed increased application of *universal jurisdiction* and other **international developments in repression for violations of international humanitarian law**, such as the creation of the International Criminal Court (ICC) and *ad hoc* tribunals. States were called upon to cooperate with the ICC, or at least not to thwart its efforts, as part of their obligation under common Article 1.

- Utilize the **existing mechanisms of IHL**, for example by referring situations of conflict to the International Fact Finding Commission or by offering to serve as a Protecting Power (discussed below, pp. 9-11).

[11] One participant called for the drafting of a list of minimum obligations required by common Article 1.
[12] It was noted, however, that an emphasis on national legislation assumes that the domestic legal systems are capable and effective, although many perhaps are weak systems where norms might be ignored in practice.

- **Scrutinize all intended sales of armaments** to ensure that their export is not contrary to the provisions of any of the international humanitarian law/disarmament instruments, and that they are not used in violation of the provisions of any of the Conventions. In this regard, States should adopt legislation that would limit their capacity to aid others in violations of international humanitarian law, for example legislation that forbids the transfer of arms to violating States. In particular the trade of small arms to non-state actors needs to be addressed. This should be done at all levels domestically, in cooperation between governments regionally, and globally. Violators should be prosecuted. Similar action was suggested against illicit trade in drugs, natural resources (including gems or diamonds), and works of art, often undertaken to finance the continuation of armed conflict.

- In conflicts where they may have some influence, States should **engage in confidential, discreet negotiations**.[13]

- **Sanctions** may be an efficient action, if they are properly targeted and not harming those whom they are meant to protect in the end. It was noted, however, that in practice sanctions have been easily evaded.

- States were called upon to initiate more actions in **cooperation with the United Nations** (discussed below, p. 11)

- Exert **diplomatic pressure** on violating States – individually, collectively or through the actions of regional or international organizations.

- Make **public denunciations** of violations of international humanitarian law – individually, collectively, or through regional or international organisations.

- Undertake coercive measures, including **lawful reprisals** or **acts of retortion** (including refusal to enter into treaties or agreements with violating State; expulsion of diplomats; severance of diplomatic ties; suspension of public aid).[14] Withdrawal of financial support as in the case of South Africa during Apartheid was seen as an effective measure as well as the refusal to grant over-flight rights for planes from a State that is found to be in breach of international humanitarian law.

- Where a situation has been created through international humanitarian law violations (e.g. the creation of a new state or establishment of a new government), States should **refuse to recognize the state of affairs** politically and should cut all aid or assistance.

- In the context of the upcoming 28th International Conference of the Red Cross and Red Crescent, States should make **pledges to promote respect for and implementation of international humanitarian law**. As indication of this commitment, States should review and consider withdrawing their reservations to the Geneva Conventions and other instruments of international humanitarian law.

[13] One participant noted that although this form of quiet diplomacy may be effective, its one weakness is that it keeps the public in the dark.

[14] One participant questioned the lawfulness of third States taking reprisal action, referring to the Draft Articles on Responsibility of States for internationally wrongful acts (International Law Commission, 53rd Session, 2001), Article 54, *Measures taken by States other than an injured State*: "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." Based on Article 54, the participant argued that the formulation of "lawful measures" excludes reprisals.

- **Resort to International Court of Justice** (ICJ)[15] in cases of difference of opinion concerning the application or interpretation of international humanitarian law in a specific context[16] or request an advisory opinion on a legal question related to compliance with international humanitarian law.[17]

- **Offer to send peacekeeping forces**, making certain that those forces have a specific mandate to ensure respect for international humanitarian law in the context.

- **Amend domestic laws on asylum** to both facilitate the acceptance of individuals who were victims of violations of international humanitarian law and to prevent asylum for perpetrators of violations.

Participants, in particular in Pretoria, Mexico City and Bruges, showed great enthusiasm for **regional cooperation** in ensuring compliance with international humanitarian law, noting that many of the initiatives suggested above would be strengthened if considered collectively or at the regional level. Regional initiatives were considered effective, not only in responding to violations of international humanitarian law but also in preventative systems of "early warning" prior to the outbreak of hostilities. Participants to the Pretoria seminar voiced great hopes for the existing and foreseen regional and sub-regional structures.[18] Participants in Mexico City advocated strongly for recourse to the Organisation of American States (OAS) and its Inter-American Commission and Court of Human Rights, pointing in particular to the credibility the Inter-American Commission has acquired through its accurate and expert dealings with issues of compliance with international humanitarian law. Bruges participants discussed the merits of developing "common positions" within the European Union regarding compliance with international humanitarian law. In Cairo and elsewhere, participants advocated cooperation within the Inter-Parliamentary Union, as well as other means to strengthen internal lobbies ("lobbies of internal elites") within countries that can network and convince States of their international humanitarian law obligations. Thus, even where formal regional bodies do not exist, seminar participants endorsed the usefulness of informal cooperation among States, to ensure respect for international humanitarian law.

3) How can existing international humanitarian law mechanisms and bodies better be used?

Regarding existing international humanitarian law mechanisms, most participants agreed that, in principle, the existing mechanisms are not defective and indeed have great potential. While a bit of fine-tuning might be necessary and possible, the major problem is the **lack of political will** by States to seize them, and in particular, the reliance of most existing IHL mechanisms on the initiative or acceptance of the parties to a conflict in order to act. Absence of political will was also considered to be a result of lack of financial means and other support and lack of knowledge as to their potential. The need to increase specific knowledge concerning existing mechanisms was seen as particularly urgent among influential opinion makers and thus participants pointed to a need to identify those who must be informed and influenced in this regard: state authorities, intellectuals, media, civil society.

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[15] Although this suggestion was supported by some participants, others questioned whether the ICJ is the most effective tool to use in this regard.

[16] This is legally possible if the States in question have given their consent to ICJ's competence, either through the optional clause of compulsory jurisdiction or through *ad hoc* agreement.

[17] An Advisory Opinion may be requested only by the UN General Assembly, the Security Council, or other UN organ or specialized agency authorized by the General Assembly, and only concerning an "abstract legal question" and not a particular dispute, although often a specific dispute may be underlying the question put to the court.

[18] Specific mention was made of the future role of sub-regional organisations such as the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS), and various bodies or councils of the African Union. Participants in Pretoria also discussed the potential effectiveness of the Peer Review process and mediation by members of the African Union Council of the wise.

There was an agreement that the existing mechanisms of IHL suffer from **lack of use and a resulting lack of effectiveness**, although it was also noted that the lack of use in practice makes it impossible to properly evaluate the efficiency of the various mechanisms. Several participants called on everyone to focus creatively and optimistically on how to improve the situation.

From the agreement on lack of use and lack of effectiveness, however, participants were strongly divided on what should be the proper response. Although many participants submitted ideas for new mechanisms (see discussion below, p. 15), others – perhaps a greater number – voiced a strong preference to focus efforts on the reform or re-invigoration of existing mechanisms (discussed immediately below), declaring that the effectiveness of these mechanisms may be properly evaluated only after they have been put to use.

Those participants endorsing the resort to existing mechanisms held strongly to the opinion that more mechanisms will not necessarily mean more effectiveness. Some voiced concerns about a potential danger of fragmentation with a proliferation in IHL compliance mechanisms and advocated for a safeguarding of the universality of international humanitarian law.[19] They pointed to the existing low level of enthusiasm for the current mechanisms on the part of States party to the Geneva Conventions and Additional Protocols, and warned that, although it might be a laudable long-term goal, it is too idealistic in this climate to think about the introduction of new permanent bodies or mechanisms. Proponents of this position called upon all to focus on the improvement of existing mechanisms and their adaptation to situations of non-international armed conflict. Part of the revitalization of existing mechanisms might be to give them functions participants considered desirable in potential new mechanisms and increase their tasks, strengthening them instead of weakening them.

Participants considered each existing mechanism and the possibilities for reform or renewal:

Enquiry procedure (Geneva Conventions I-IV, arts. 52/53/132/149)

Some participants supported the enquiry procedure as a potentially attractive option to parties to an armed conflict, due to the bilateral nature of the procedure. Given that a belligerent State *is bound* to accept the enquiry once activated by a party to the conflict, but that States need to agree on the procedure of enquiry or the appointment of an umpire, it was suggested that the drafting of a model procedure might facilitate acceptance by States. One proposal for a more stringent provision was the requirement of automatic acceptance of a proposed model procedure.

It was also recommended that agreement on an enquiry procedure be routinely included in bilateral agreements between parties to an armed conflict. Participants disagreed, however, on whether such bilateral agreements would be more realistically pursued during the "soft phase" preceding a full-fledged armed conflict or after hostilities have begun.

The provisions on arbitration contained in the Hague Convention (I) for the Pacific Settlement of International Disputes (Hague I) (29 July 1899) revised on 18 October 1907 might serve as a basis today. Their lack of use in the past does not mean they could not be used in the future.

[19] In order to reduce the risk of fragmentation of IHL interpretation, one participant advocated for a system of referral of an IHL related case from a domestic court system to an IHL body, modelled on the opportunity within the European Union to refer cases to the European Court of Justice. With regard to the *ad hoc* Tribunals, it was pointed out that the common Appeals Chamber facilitates a uniform case law, and the hope was expressed that the International Criminal Court would take into consideration jurisprudence from the two *ad hoc* tribunals.

Meeting of High Contracting Parties (Additional Protocol I, art.7)

Participants saw value in pursuing meetings of High Contracting Parties. The proposal for more regular periodic meetings gained support.

Two main challenges were called to mind: first, the subject matter, and second, who might propose the convening of a meeting. Regarding subject matter, article 7 of the First Additional Protocol provides that meetings of High Contracting Parties may be convened "to consider general problems concerning the application of the Conventions and of the Protocol." Although some might consider that a meeting to discuss "general problems" might not have a direct impact on the conduct of Parties during an armed conflict, several experts pointed out that all "general problems" concerning compliance with international humanitarian law necessarily stem from specific violations. Thus, there should be no hesitancy to convene meetings of High Contracting Parties, as any decisions or deliberations will be relevant to state practice. A number of those who saw some merit in a conflict-specific meeting of High Contracting Parties indicated that such a meeting would not have an effect without the possibility of adopting sanctions in case of non-compliance.

Article 7 meetings of High Contracting Parties were discussed, at one seminar, as a potentially valuable opportunity to achieve State consensus on interpretations of general issues of international humanitarian law. Such a consensus on interpretation was considered easier to secure than agreement on revisions or amendments to the law.

Under Article 7 of the First Additional Protocol, the depositary of the Additional Protocol convenes meetings of the High Contracting Parties at the request of one of the Parties. Some participants suggested that the ICRC might also take an active role to propose that the depositary convene a meeting, noting that it is often politically difficult for States to take such an initiative. One new proposal was for meetings of High Contracting Parties to be convened on the basis of a report on problems related to lack of respect for international humanitarian law. Although some advocated for the report to be submitted by the ICRC, it was generally considered that this might have a negative impact on the neutrality of the institution. Alternatively, a proposal was made for a new expert body to be created whose task it would be to compile reports from States, non-governmental organizations, and individuals, for submission to the High Contracting Parties. This body would not take decisions on compliance, but would simply put together the report and request the meeting to be convened.

International Fact Finding Commission[20] (Additional Protocol I, art. 90)

Of all discussions of existing mechanisms, the greatest support was voiced for the International Fact Finding Commission (IFFC) and the advantages that might be gained through its seizure. The Commission was described as an existing body of expert members, poised ready to aid in the efforts to improve compliance with international humanitarian law, both through fact finding as well as by assisting with reconciliation efforts through its "good offices" function. Compared to the enquiry procedure described above, it has the advantage of being a permanent body with a standard procedure.

However, the **lack of will** by parties to an armed conflict was seen as the main impediment in the existing IFFC procedure that is based on State initiative and acceptance. For States that might be subject to enquiry, they may decide not to seize the Commission because they are protective of sovereignty, unwilling to have their actions scrutinized by others, or concerned that the Commission's findings might have a direct impact on State

[20] The Commission is often referred to, in the alternative, as the International Humanitarian Fact Finding Commission (IHFFC).

responsibility and possibly also on issues related to the *ius ad bellum* (international rules governing the right to employ force). However, it was noted that recent advances such as the adoption of the International Criminal Court Statute and developments in the context of the World Trade Organization[21] signal a change in State willingness to accept scrutiny by others. To benefit from this shift in attitude, however, requires awareness building concerning the utility of and need for the International Fact Finding Commission.

It was urged that the **UN should be encouraged to utilize the International Fact Finding Commission**,[22] for example based on UN Charter Chapter VII, and thus use the expertise of its members. The question was asked why the UN has thus far used *ad hoc* fact-finding missions and not relied on the existing International Fact Finding Commission. Given their expertise in international humanitarian law the members of the Commission may be used in fact finding missions mandated by the UN, and thus have the opportunity to prove in practice their competence and increase the acceptability of future work of the International Fact Finding Commission.

To counter the problem of lack of will some participants advanced the possibility of **amendments to the trigger mechanism** of the International Fact Finding Commission, in order to dissociate seizure of the Commission from State initiative. Several proposals were put forward: The Commission may have a *proprio motu* competence; a right of initiative could be given to non-governmental organizations or individuals; protecting powers or the UN Security Council may make a referral to the Commission. Where the International Fact Finding Commission itself takes initiative to encourage States to seize it for enquiry, it was recommended that they make public a State refusal to do so. It was reminded that, without any change to Article 90 or existing procedures, States not involved in an armed conflict might trigger the Commission, provided that the States party to an armed conflict have accepted the Commission's competence, by either Declaration or *ad hoc* acceptance. Third states should also encourage parties to an armed conflict to seize the International Fact Finding Commission.

In response to concerns that the procedures of the Commission are prohibitively cumbersome or heavy, Commission members advised that there is **freedom by consent to alter the procedures** and to adopt others on an *ad hoc* basis that might be more compatible with a given situation. For example, it was proposed that the membership of the Commission for a specific enquiry might be modified to a smaller number of three (from the seven members foreseen in Article 90).

Furthermore, more emphasis should be placed on the alternative role of the International Fact Finding Commission, through the offering of the **Commission's good offices**, which, as compared to the enquiry function, has the advantage of being forward-looking and thus perhaps perceived as less threatening to state sovereignty. It was submitted that an appeal to the good offices of the Commission might be included in bilateral agreements between parties to an armed conflict and the procedures adapted to the needs of the parties.

Some suggested that the International Fact Finding Commission should have **quasi-judicial powers** to give binding decisions. Also, one participant considered the main problem to be the question of publication of results, recommending that the Commission should be able to make its findings public.

[21] In relation to the World Trade Organization, States have accepted procedures with a certain degree of automatic review.
[22] Similarly, during the Bruges seminar it was suggested that the European Union adopt a common position calling upon European States to make use of the International Fact Finding Commission.

A major problem for some countries appears to be the **financial burden** that they have to bear if the International Fact Finding Commission takes action. This argument of cost was seen as a crucial issue for the acceptability of any compliance mechanism. To address this issue, some participants advocated for the creation of a fund to be managed by an independent body, where fifty percent of the costs of a Commission enquiry would come from the fund and the other fifty percent from the parties to the conflict in question.

Protecting Powers and their substitutes (Geneva Conventions I-IV, arts. 8/8/8/9; Additional Protocol I, art. 5)

Although the Geneva Conventions and the First Additional Protocol foresee an *obligation* to designate a Protecting Power, this mechanism has seldom been used since World War II. Some participants claimed that this provision has now fallen into disuse, doubting that the mechanism can be revived.[23] A number of possible reasons for the failure to designate a Protecting Power were indicated: (1) the perception that very few States are considered "neutral" and either able or willing to carry out the role of Protecting Power; (2) the majority of current conflicts are non-international armed conflicts, where Protecting Powers are not foreseen; (3) States may not recognize the existence of the armed conflict; (4) sometimes diplomatic relations are maintained despite the conflict; (5) often the ICRC *de facto* undertakes most of the functions of a Protecting Power.

In order to revitalize the role of Protecting Powers, a number of suggestions were made:

- Improve knowledge of the potential utility of Protecting Powers.
- Establish a list of neutral States willing and able to take on the role of Protecting Powers.
- Suggest appointment of a single Protecting Power common to all parties in the armed conflict.
- Conversely, to lighten the burden on one or two Protecting Powers, appoint three States with one State coming from the region of the conflict.
- Entrust to the Protecting Power the function of referral of alleged grave breaches and other serious violations of international humanitarian law to the IFFC, removing the condition of consent of/initiative by the parties to the conflict.

Participants also proposed that the ICRC should display a greater readiness to accept the role of substitute protecting power or that the ICRC should automatically take this role. However, it was noted that the ICRC prefers to act from its own legal basis, as this enables the institution to freely pursue its initiatives without threat to the fundamental principles of neutrality and independence.

Cooperation with the United Nations (Additional Protocol I, art.89)

Article 89 of the First Additional Protocol provides: "In situations of serious violations or the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." Although there was no in-depth discussion on whether this provision creates an *obligation* to resort to the UN in situations of serious violations of international humanitarian law, many of the suggestions from participants as to how States might fulfil their common Article 1 obligation referenced cooperation with the UN and greater use of the various UN bodies and mechanisms for IHL compliance. When encouraging States to consider cooperation with the UN in this regard, participants noted the increasingly active role the UN,

[23] Interestingly, it was noted that although European governments may see this mechanism as having fallen into disuse, governments in other regions (Asia and Africa in particular) allegedly are not aware of it or its potential.

and in particular the Security Council, are taking regarding compliance with international humanitarian law.

The numerous submissions referring to use of existing UN mechanisms are summarized below (p. 15), with the summary of deliberations concerning existing human rights mechanisms. More generally, participants made the following additional proposals for State cooperation with the UN:

- As constituent members of the various UN organs, States should request appropriate UN bodies to: issue statements on applicability of international humanitarian law and denunciation of violations committed; impose sanctions; establish *ad hoc* tribunals; trigger prosecution by the International Criminal Court; give specific mandate to peacekeeping forces to ensure a better respect for international humanitarian law.
- Create a Security Council-affiliated supervisory mechanism for international humanitarian law, which is triggered automatically when the Security Council makes a resolution authorizing use of force. This might be conceived of as either a permanent mechanism, triggered by Chapter VII resolution, or an *ad hoc* mechanism established for the specific context related to the authorized use of force.
- Ask the Security Council to, using its mandatory powers, decide that the International Fact Finding Commission must be seized.
- Advocate for the creation of UN *ad hoc* fact-finding commissions to evaluate international humanitarian law compliance. To the contrary, however, other participants noted that this role should be left to the International Fact Finding Commission and the UN should be encouraged to seize the existing Commission rather than create its own *ad hoc* fact finding commission.
- Seek a declaration from heads of States, at UN level similar to the millennium summit, in which they reiterate their support for international humanitarian law and set concrete targets.

Despite the frequent calls for State cooperation with the UN, some participants also strongly declared concerns that the Security Council in particular is currently too politicised and thus constrained and selective in which issues it addresses. Other experts, however, indicated that the Security Council must still be called upon to act, regardless of such concerns. Speakers recalled that, despite an apparent imbalance of power between decision makers, all States must recognize that the protections of international humanitarian law are universal, to be applied and complied with by both weak and strong nations. A number of experts identified a possible obligation on permanent members of the Security Council not to use an unreasonable or politically motivated veto, although other participants disagreed.

Interestingly, under this agenda topic many of the participants focussed on cooperation with regional bodies rather than with the UN.

Role of the ICRC

Participants at all seminars commended the ICRC for its initiatives concerning compliance with international humanitarian law, noting its great reputation for independence and impartiality and the prestige that has followed its successful endeavours. ICRC activities in areas of promotion of treaties and implementation, monitoring of IHL compliance, and contributions to the further development of international humanitarian law were specifically called to mind.

Commenting on the moral and political authority that the ICRC enjoys, many participants advocated for a greater ICRC role in reminding States and non-state actors of their obligations under international humanitarian law. To further improve IHL compliance, seminar participants suggested that the ICRC might consider doing the following:

- When aware of international humanitarian law violations in a particular context, ICRC might bring these concerns to a group of interested states, encouraging them to take action through denunciation, bilateral pressure, etc. A willingness to do this will enhance the ICRC role of facilitator, and protect it from having to take the role of denunciation.
- For particularly egregious and systematic violations of international humanitarian law, the ICRC should make public appeals – as it has done at various times over the years.
- In addition to its current efforts to educate armed forces concerning IHL, the ICRC should train legal advisors to the armed forces in the "soft skill" of how to make themselves heard in the chain of command during armed conflict regarding respect for international humanitarian law. This is not intended to increase knowledge, which the military instructor likely already has, but focuses rather on improving skills of influence during the armed conflict.

While calling for greater ICRC activity and initiative, participants also cautioned that the unique role of the ICRC must be protected; it must not be asked to do anything that would impinge on its neutrality and impartiality or compromise its operational activities and the protection offered on the ground for those vulnerable to the effects of armed conflict. In addition, the mandate of the ICRC must be reinforced in order to permit increased access to the victims of armed conflict. One participant who was not in favour of an increased role for the ICRC in denouncing violations noted that the institution is appropriately "victim-oriented" and not "violation-oriented".

All of the above-mentioned mechanisms are mandated for use during international armed conflict and do not apply *per se* to non-international armed conflict. Under Article 3 common to the four Geneva Conventions and First Additional Protocol and Article 18 of the Second Additional Protocol, the ICRC or other organizations may offer their services in non-international armed conflict. In addition, the International Fact Finding Commission has expressed its willingness to conduct an enquiry related to a non-international armed conflict. Further discussion of compliance with international humanitarian law in non-international armed conflict is included below, p. 19.

4) To what extent can existing supervision mechanisms or bodies of other branches of international law be effectively used in the field of international humanitarian law?

Seminar discussions on this topic focussed predominately on the various universal and regional human rights systems, and their consideration of issues of compliance with international humanitarian law.[24] It was noted that many human rights bodies – both universal and regional – have taken the initiative to consider issues of international humanitarian law; this growing trend may not be surprising given that, in times of armed conflict, human rights often are not respected unless international humanitarian law is likewise respected.

At all seminars, the majority of participants recognized a strong complementarity between human rights and international humanitarian law, particularly as to their common objective: the protection of humanity. Participants noted, in particular, the overlapping of fundamental human rights and provisions of international humanitarian law pertaining to issues such as right to life, prohibitions against torture and degrading treatment, and conditions of detention. However, participants at all seminars also cautioned strongly against

[24] Participants also discussed avenues of criminal repression, including bringing cases before the International Criminal Court or *ad hoc* tribunals and the pursuit of cases based on principle of universal jurisdiction. As criminal repression was, however, outside of the direct scope of the seminars, specific details of these interventions are omitted from this report.

any blurring of the distinction between the two bodies of law and voiced concerns that increased consideration by regional human rights bodies in particular might lead to a fragmentation or lack of universality in the application of international humanitarian law.

Regarding the degree to which existing human rights bodies and mechanisms should be encouraged to consider issues of international humanitarian law, despite the fact that each seminar witnessed some participants in favour of and others against the growing trend, there was a noticeable difference of majority opinion between the various seminars. Generally speaking, participants in Pretoria and Mexico City strongly supported the consideration of international humanitarian law by human rights bodies whereas in Kuala Lumpur experts preferred the reinvigoration of existing IHL mechanisms. Participants in Cairo and Bruges were equally in favour of both options.

The majority of participants in Pretoria and Mexico City who spoke on this issue advocated strongly in support of human rights bodies – and in particular, the regional systems – taking international humanitarian law into consideration.[25] Their increasing practice of considering international humanitarian law was generally considered useful, because of the availability of universal and regional human rights systems, the mounting public recognition they enjoy, and the acknowledgement that both human rights and international humanitarian law apply during armed conflict.

In Pretoria, the participants who did not support the creation of new IHL-specific mechanisms appeared to advocate predominately for the use of existing mechanisms of human rights to consider international humanitarian law. Many of the Pretoria experts expressed hope in the potential for the regional and sub-regional systems in Africa to become more effective in the field of international humanitarian law.

In Mexico City, much of the discussion in this regard focussed on the current practice of the Organization of American States (OAS) and its Inter-American Commission on Human Rights and Inter-American Court of Human Rights. In particular, the Inter-American Commission was commended for its invocation of international humanitarian law in country reports, general reports, and cases. The Inter-American Court has made it clear that neither the Commission nor the Court have a competency to directly apply international humanitarian law or pronounce on violations thereof, although they are free to consider and use international humanitarian law in interpretation of the provisions of the Inter-American Convention, in particular when discussing human rights in the context of an armed conflict. The OAS as a whole was also commended for being very IHL-oriented.

It should be noted that in both Pretoria and Mexico City, despite calls for human rights bodies to be more active in the field of international humanitarian law, participants also cautioned against blurring the distinctions between the two bodies of law. Furthermore, most experts were generally in favour of a *concurrent* examination of international humanitarian law by human rights mechanisms, in addition to the revitalization or creation of an IHL body where human rights would not be considered.

At each seminar, participants who advocated against the increased consideration of international humanitarian law by human rights bodies noted a number of specific problems: lack of express competence to examine issues of international humanitarian law, except where some fundamental human rights and protections of international humanitarian law overlap; lack of adequate knowledge of international humanitarian law by members of the human rights bodies; the slow pace of deliberations and decisions among many of the

[25] Examples include: European Court applying human rights to conflict situations; Inter-American system pointing out the IHL violations and then arguing how they violate the human rights enshrined in the Inter-American treaty. The African system might be given clear competency regarding international humanitarian law, although this is not yet clear.

human rights bodies; the lack of ability to address violations by armed groups; the opinion in some regions that human rights bodies are overly politicised or lack neutrality; the potential fragmentation or "regionalization" of international humanitarian law.

In Kuala Lumpur, in particular, the majority of participants speaking on this issue strongly cautioned that mechanisms should reflect the clear distinction between the bodies of human rights and international humanitarian law. In addition, a number of Asian experts expressed the opinion that human rights mechanisms have become too politicised, and thus there would be a risk of "tainting" international humanitarian law by subjecting it to consideration by human rights mechanisms. In conclusion, the majority of experts in Kuala Lumpur appeared to agree that although existing human rights bodies might be able to contribute something to the improvement of respect for international humanitarian law, given the inherent risks in this approach as described above, the human rights mechanisms should not be the only resort and should not be actively encouraged. They preferred, in the alternative, to focus efforts on the reinvigoration of the existing IHL mechanisms.

Seminar participants who advocated a greater emphasis on international humanitarian law by the existing human rights mechanisms suggested the following:[26]

- Refer matters of international humanitarian law to the UN Commission on Human Rights, making use of its public and confidential procedures.
- Encourage the appointment of special rapporteurs or working groups on issues of IHL compliance.
- Broaden the scope of State periodic reports on compliance to include issues of international humanitarian law, to be followed as usual by public consideration and issuance of general observations or recommendations.
- Continue to support the consideration of international humanitarian law by regional human right bodies, using international humanitarian law indirectly as a source of authoritative guidance when applying human rights treaties in time of armed conflict.

5) Can new supervision mechanisms be envisaged?

6) Can a new international humanitarian law body be envisaged?

Participants at all seminars entered into creative and productive deliberations on what new proposals might be considered, summarized below.[27] Generally speaking, participants noted that proposals for new mechanisms must be considered as complementary to the improvements in existing mechanisms already recommended; some participants observed that new innovations should serve to strengthen existing mechanisms.

It was suggested that the creation of any new permanent IHL body be undertaken gradually, perhaps beginning as an *ad hoc* mechanism, a body with one or two functions, or a subject-specific mechanism focussed only on one aspect of the law, earning trust and support over time. This was in response to voiced concerns that the general atmosphere at present is not conducive to the establishment of a permanent or automatic institution. Participants attributed this to the problem of political will, noting that States appear to want to reserve the option only to initiate a procedure or utilize a mechanism when they stand to benefit from it. Participants in one seminar suggested that gradual acceptance might be accomplished through the initial creation of a regional IHL mechanism. Therefore, despite

[26] It should be noted that suggestions were made without discussion of feasibility or likelihood of change of mandate necessary for direct consideration of issues of IHL by existing human rights bodies and mechanisms. Without change of mandate, the scope of consideration would likely be limited to those human rights provisions that overlap directly with issues of international humanitarian law.

[27] In addition to new legal means by which to improve compliance with IHL, participants also noted the need to think outside the legal framework and contemplate non-legal means. These considerations are discussed throughout the report.

potential risk of double standards or selectivity, most participants advocated for a gradual beginning with *ad hoc* mechanisms or procedures, with the ultimate goal of gaining momentum leading to a permanent institution, in the same way that the *ad hoc* tribunals paved the way for the great success of acceptance of the International Criminal Court. In all cases, the universality of international humanitarian law must be preserved.

In order to more constructively consider proposals for a new IHL body or mechanisms, seminar participants advised an examination of the failures/weaknesses of existing mechanisms.[28] In brief, it was recommended that any new proposed mechanism or body:

- Must be neutral and impartial; any form of bias or self-interest on the part of an IHL supervisory body will undermine the whole process.
- Must have sufficient power over the States, in order to operate effectively.
- Must be able to act independent of state initiative/acceptance by states in question (i.e. must have mandatory powers).
- Must take considerations of cost and administrative burden into account.

Keeping these various considerations in mind, the participants gave the following proposals for new IHL supervision mechanisms or bodies:

One of the recurring proposals was for an **IHL Commission** or **Office of the High Commissioner for International Humanitarian Law**. Such a Commission might be created by resolution at a meeting of the High Contracting Parties, out of the International Conference of the Red Cross and Red Crescent, as a "treaty body" to the Geneva Conventions through an optional protocol, by the initiative of the ICRC, or through the UN Security Council or General Assembly. Many of the proposed functions for an IHL Commission are analogous to those found in existing human rights bodies, including the following:

- Reporting System
- Individual Complaints Mechanism
- Examination of complaints by one State against another, or complaints by/against armed groups
- Observation or fact-finding mechanism linked to reporting or general recommendations
- Quasi-judicial consideration of violations

Several of the proposed functions were also considered independently, without the creation of an overriding Commission. These individual functions and proposals are described in more detail below.

Regarding the proposed IHL Commission, some participants expressed apprehension that it would infringe on the already existing mandate and work of the ICRC, expressing preference for strengthening the role of the ICRC and other existing mechanisms. Other concerns voiced by participants included: costs, ineffective bureaucracy, and the current political climate and feasibility of creation.

Regarding the suggestion of a reporting system, a few variations were proposed. First, an **Information Exchange System / Periodic Reporting System** was considered, wherein States would submit reports on implementation of international humanitarian law.

[28] In addition, one presenter recommended that when considering new IHL mechanisms, lessons should be drawn from other bodies of international law. Specifically, the expert noted that in the fields of labour law, environmental law, and the law of disarmament, the various existing supervision and enforcement mechanisms (including reporting, enquiry, settlement of disputes, and non-compliance mechanisms) are designed to respond to the specificities and objectives of each respective branch of law. Furthermore, effective mechanisms often consider the control of compliance to be a long-term process of dialogue with a State, with the objective of encouraging a violating State back into the conventional community.

Given concerns about the "reporting fatigue" that exists under the mandatory reporting systems found in human rights and other legal fields, it was suggested that the IHL system might begin as a voluntary review procedure by States willing to submit such reports, and grow in acceptance and permanence from there.[29] Participants noted that this proposal is likely to be effective only in peacetime.

Other participants advocated for a system of ***Ad hoc* Reporting**, where States allegedly in violation of international humanitarian law are called upon to submit a report regarding the allegations, either during or post-conflict. Although acknowledging it would be difficult to expect a State in conflict or directly post-conflict to be accurate or to report factually, participants felt that such an *ad hoc* reporting system targeting alleged violators would be more effective regarding compliance and could be most easily implemented in cases of long-lasting conflict or occupation.

Regarding both of these reporting proposals, it was considered that reports might be submitted to a new IHL Commission (discussed above) or independently, perhaps to a Meeting of High Contracting Parties, to the International Conference of the Red Cross and Red Crescent, or to a committee established solely for the purpose of reviewing such reports and cross-checking the information therein.[30] Some experts felt that any reporting mechanism should be accompanied with an inspection mechanism. As with reporting systems in environmental law or disarmament law, it was noted that the ultimate objective of an international humanitarian law reporting system should be to give solutions or work towards improving the situation; thus it should also be considered what follow-up a reporting mechanism should require of the States under scrutiny.

Some participants voiced support generally for the institution of an **Individual Complaints Mechanism**,[31] either independently or as part of an IHL Commission (discussed above). Advocates pointed to the self-disciplining effect such a mechanism would have on States and also highlighted its potential as a forum for the granting of remedies to victims of violations of international humanitarian law.[32] It was again noted that this mechanism might not be effective in active armed conflict, except for long-lasting conflict or occupation. In the same vein as discussions about a reporting system, experts voiced hope that a complaints mechanism might somehow be linked with a follow-up tool leading to improvement of the situation for all, not simply addressing violations committed against a few complainants. Although the concept of an individual complaints mechanism was received favourably by some participants, many questions were left unanswered, however, concerning procedures, subject-matter jurisdiction, exhaustion of local remedies, involvement of armed groups, and whether the desired outcome should be recommendations, decisions, or some quasi-judicial determination.

More generally, it was suggested that, to be effective, the proposed IHL Commission should be endowed with **quasi-judicial powers**. This might be accomplished through the establishment of a **quasi-judicial Committee on IHL** or through granting such powers to an alternatively proposed **Committee of States** or **Committee of IHL Experts** (discussed below). The quasi-judicial capacities for the proposed IHL Commission were suggested as an alternative to a previous proposal to endow the existing International Fact Finding

[29] A prototype of the Information Exchange System (IES) was recently tested in Germany, on issues of national implementation. The German Red Cross prepared the framework and ministries fed the information.
[30] One participant encouraged participants to consider building on the current preparations for the 28th International Conference of the Red Cross and Red Crescent, where all States have been asked to submit a report on the status of their pledges and plans of action from the previous conference.
[31] This mechanism has been under consideration for some time, beginning with a proposal by the Hague Appeal for Peace and currently under consideration by Amsterdam University.
[32] The requirement to pay compensation to victims is contained in the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, Article 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." It was argued that this provision confers an entitlement for the individual to claim compensation.

Commission with such powers. The ICRC or other independent bodies could refer alleged violations of international humanitarian law to such a Committee or Commission for consideration.

A number of participants advocated for the creation of a diplomatic forum such as a **Committee of States** or **Committee of IHL Experts**, similar to the UN Commission on Human Rights or its Sub-Commission on the Promotion and Protection of Human Rights. Either body might be created independently or considered as part of an IHL Commission (discussed above). Such a Committee might give general observations to establish doctrine, consider both thematic and country-specific situations, designate special rapporteurs or working groups that might conduct fact-finding enquiries or otherwise look into specific issues of compliance with international humanitarian law. The participants did not deliberate on how the States might be selected for such a committee, but regarding the proposed Committee of IHL Experts, it was recommended that the experts be independent persons of high integrity, acting in their personal capacity. Participants considered the possibility that the ICRC might seize this Committee when particularly concerned about violations, without stepping outside of its mandate.

During one seminar, participants strongly endorsed the proposal for deployment of **"Monitors"** on the ground in armed conflict, who will be eyewitness to violations, inducing States to comply with international humanitarian law. It was proposed that the contribution of individuals to serve as monitors might come jointly from non-governmental organizations, the UN, and civil society, with some coordinating body. Ideally the monitors would be on the ground before the outbreak of hostilities, and thus might serve as part of a regional or global "early warning" system.

Other proposals that were not discussed in great detail included the following:

- **National Commissions on IHL – proposed fact-finding mandate**, whereby the national commissions would be given the mandate to monitor or carry out fact-finding tasks while a conflict is ongoing. It was noted that States might be more comfortable with this suggestion than with an enquiry by the International Fact Finding Commission, given that it would be a national body. Such a national mechanism should not, however, be considered as an obstacle to the initiatives of an international mechanism or body.

- Based on concepts from the 1954 Convention for Cultural Property:
    - The creation of a **National High Commissioner for IHL** (see Art. 6 of the Regulations for the Execution of the 1954 Convention);
    - **National on-site inspectors** (into armed forces, police forces, government authorities) (see Art. 7 of the Regulations for the Execution of the 1954 Convention);
    - **A representative for specially protected persons and groups** and protected objects, competent for persons or property under control of that country (based on Art. 2 (a) of the Regulations for the Execution of the 1954 Convention).

- **Network of Internal Lobbies**, establishing a regional or global network of internal elites from States (Ministries of Foreign Affairs, Ministries of Defence, parliamentarians) who will advocate together for greater compliance with international humanitarian law. Such a network might also be useful for dissemination efforts and serve as a pressure group to address the problem of lack of political will of States.

III. Discussion Theme II – How to Ensure Compliance in Non-International Armed Conflicts

The spirited discussions on the issue of improving compliance during non-international armed conflicts revealed the expert participants' interest in this particularly challenging task. As most current armed conflicts are waged within the boundaries of states, the participants welcomed the opportunity to wrestle with this pressing and timely subject.

The questions posed during this portion of the seminars dealt both with how to better hold armed groups accountable for compliance with international humanitarian law, as well as what mechanisms or procedures might be envisaged to increase respect for international humanitarian law by both State actors and armed groups.

Seminar participants concurred that both State actors and armed groups, without question, are bound by the rules of international humanitarian law applicable in non-international armed conflict.[33] However, participants also noted a number of obstacles that impede attempts to ensure their compliance: States often deny the applicability of international humanitarian law out of reluctance to acknowledge that a situation of violence amounts to an internal armed conflict and an unwillingness to grant "legitimacy" to the armed group by recognizing them as party to a conflict. The frequent "internationalization" of many contemporary internal armed conflicts creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. Furthermore, armed groups often lack sufficient incentive to abide by international humanitarian law, given that implementation of their IHL obligations is usually of little help to them in avoiding punishment under domestic law for their mere participation in the conflict. Other problems discussed include the asymmetrical nature of the relationship and the methods of warfare between State armed forces and armed groups; increased prevalence of involvement of private security companies in situations of armed conflict; and the dilemmas posed by conflict in failed states.

One recurrent theme throughout the deliberations was the importance of taking into account the cause of the conflict or the motivation of the armed groups, when considering what incentives or solutions might work in improving compliance. The motives for waging war are as diverse as the actors involved: pursuit of power, territorial disputes, economic interests, ethnic or religious differences, denial of fundamental human rights or the rights of minorities, or common criminality. Participants cautioned that any proposed solution – whether supervision mechanisms, incentives offered, or mediation negotiations – must take the objectives of the parties to the conflict into consideration. Proposals should also take into account other characteristics that may vary from one non-international armed conflict to another, including the level of organization and control of the armed group and the degree of intensity of the conflict and violence in that particular context.

As one means to address compliance with international humanitarian law by all actors, participants also considered the potential of reaffirming the essential considerations of humanity, perhaps through a text that would gather and reiterate the fundamental legal standards that should be observed in all situations of organized armed violence.

1) How can armed groups better be held accountable for compliance with international humanitarian law?

Although it was acknowledged that armed groups are bound by the provisions of international humanitarian law governing non-international armed conflict, it was

[33] Norms of international humanitarian law applicable in non-international armed conflict includes the provisions of Article 3 common to the four Geneva Conventions, Additional Protocol II (where the State has ratified), and norms of customary international law.

recommended that better accountability by armed groups for international humanitarian law might be achieved by granting them an opportunity to express their consent to be bound by the rules, something not provided for in existing IHL treaty law. The express consent would provide evidence of willingness to comply and could make a tremendous impact in terms of dissemination.

Participants advocated for the encouragement of **special agreements** between States and armed groups, such as those envisaged under common Article 3 (3) of the Geneva Conventions, considering such agreements to be one of the most powerful ways under the current treaty regime to better regulate non-international armed conflict. Special agreements provide added incentive to comply based on mutual consent of the parties, making clear the equal international humanitarian law obligations on both the State and armed groups. The primary obstacle would be the willingness of States to enter into such agreements, in particular where the State denies that the violence has reached the level of internal armed conflict or where the State refuses to acknowledge the armed group as party to the conflict. It must be emphasized that the plain language of common Article 3 indicates that a special agreement does not affect the legal status of the parties.

If a special agreement on implementing a broader scope of international humanitarian law obligations is unattainable, State actors and armed groups might be convinced to reach a limited agreement on selective IHL provisions that should appeal to both sides, for example safety zones or hospital zones, provisions on missing persons found in Article 33 of the First Additional Protocol, or judicial guarantees. An agreement on a more limited number of additional provisions would not change the fact that the parties to the armed conflict would nevertheless remain bound to all applicable international humanitarian law norms.

A **unilateral declaration** by the armed group of their commitment to comply with international humanitarian law might also be pursued, especially where the State is unwilling to enter into a special agreement. A tool already utilized by the Geneva Call[34] with regard to the Ottawa Treaty banning anti-personnel landmines, the aim of such a declaration is to provide a self-disciplining effect on the armed groups, in particular where groups are concerned about their public image and reputation. Although acknowledging the risk that unilateral declarations might be made for purely political motives without real commitment to adhere to the rules stated therein, seminar participants regarded the declarations positively, as an additional tool of leverage available to encourage compliance with international humanitarian law. For greater enforceability, a number of participants suggested that the unilateral declaration be combined with a verification mechanism that might supervise compliance with international humanitarian law in the conflict. It was unclear with whom the declarations should be deposited, although one expert suggested the creation of an "International Forum for Non-State Actors" that might serve as depositary. The roles of supervision and depository also might be given to a proposed IHL Commission, discussed previously, or to the ICRC, although there was some opposition from participants pointing to the limits of the ICRC mandate.

Armed groups should also be encouraged to adopt an internal code of conduct or disciplinary code incorporating international humanitarian law provisions. Although perhaps less public than a declaration or special agreement, this device might lead to greater implementation of IHL norms by the armed group and thus more directly impact their training and dissemination. The willingness of the armed group to include these provisions might also be made public.

[34] Geneva Call is a non-governmental organization dedicated to engaging armed groups in a landmine ban and to respect humanitarian norms. To facilitate this process, Geneva Call provides the opportunity for armed groups to sign a "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Minds and for Cooperation in Mine Action."

Finally, it was also suggested that a commitment to adhere to international humanitarian law norms be included in ceasefire agreements. Such a commitment would apply to provisions of the law that come into force after the cessation of hostilities, such as provisions for repatriation, and would also be important in case of renewal of hostilities.

2) What kind of incentive can be given to armed groups to apply international humanitarian law in practice, given the fact that they enjoy no criminal immunity for mere participation in hostilities?

When faced with internal armed conflict, States are likely to react with repressive action and severe penalties against members of armed groups, even when they comply with international humanitarian law. The participants noted that this leaves the armed groups with little incentive to adhere to international humanitarian law in practice, as they know they will likely face maximum penalties for mere participation in hostilities.

When asked what alternative incentives might be given to armed groups to comply with international humanitarian law, participants engaged in intense discussions about the possibilities of a **grant of immunity from prosecution for participation in the armed conflict**. Throughout the consideration of possible methods for granting immunity, discussed below, it was of course underscored by all participants that there can be no amnesty or other form of immunity from criminal process for alleged war crimes or serious violations of international humanitarian law.

Participants saw great potential in the possible **granting of amnesty** to members of armed groups for acts of mere participation in hostilities. Recognizing that the Second Additional Protocol's formulation that States should consider granting the "broadest possible" amnesties (Additional Protocol II, art. 6(5)) comes only at the end of an armed conflict and contains no guarantees for the members of armed groups, participants recommended that States be persuaded to commit themselves to a **mandatory amnesty** for acts of mere participation in hostilities. In the words of one participant, it is simply a matter of, in non-international armed conflicts, refraining from prosecution of acts that would be lawful in an international armed conflict.

Participants advocated for a link between a proposed grant of amnesty by the State and an express consent of compliance with international humanitarian law by the armed group, recognizing that if members of armed groups are given the necessary guarantees, they might more readily commit themselves to abide by the provisions of international humanitarian law. Therefore, States might make such a commitment in a special agreement entered into with the armed group, making the amnesty contingent upon the armed group's commitment to and subsequent compliance with international humanitarian law.

States might also consider including in their criminal law some sort of immunity for acts of participation in hostilities. Although States may consider such a commitment to grant immunity to be an incentive for rebellion, participants believed that States could be convinced of the benefits that would follow, in terms of greater respect for international humanitarian law by both sides to the armed conflict. Some participants noted that such immunity would not cover all acts initiating rebellion or an uprising; regarding possible prosecution for resorting to armed violence in violation of the national law of a State, the authorities in power should abstain from applying the maximum penalty.

Participants reflected upon the recent practice in the Latin American context and elsewhere of grants of improper "blanket" amnesties for war crimes and other serious violations of international humanitarian law and human rights law, most frequently granted to State actors. Due to this practice, some participants who otherwise supported granting of immunity for participation in hostilities were hesitant to embrace the label "amnesty". In

Mexico City, therefore, it was suggested not to use the word “amnesty” but to use a different term for this grant of immunity permissible under international humanitarian law.

Although amnesties were the primary focus of deliberation, participants also discussed a possible **reduction of punishment** in cases of compliance with international humanitarian law where, during a domestic trial of members of armed groups for taking part in hostilities, the tribunal will take their level of respect for international humanitarian law into consideration when deciding upon punishment or sentences. A number of participants saw this as a useful incentive.

A final suggestion was that armed group members be afforded some sort of **"combatant-like" status**, if they fulfil certain conditions such as distinction from civilian population and respect for the provisions of international humanitarian law. During the limited discussions of this proposal, diverging views were expressed.

In addition to these legal incentives, the seminar experts also considered what **strategic incentives or arguments** might be used to convince armed groups, as well as State actors, of the benefits and protections of adherence to international humanitarian law. Armed group leadership should be counselled that compliance might lead to the following gains: reciprocal respect by the State actors, including proper treatment of detained members of the armed group; increased effectiveness and cohesiveness of the armed group itself; enhanced legitimacy as a political actor; saved lives and preservation of the dignity of civilians; greater probability of dialogue with the State; facilitation of aid or assistance to conflict-affected areas through agreed upon "humanitarian corridors". In addition, the armed groups should be reminded that one day the conflict will end, and that regardless of whether they take the role of legitimate governing authority or not, they may be held accountable for the crimes they committed during the conflict. Conversely, participants observed that many of these incentives might not appeal to armed groups that are motivated by pure criminality or with links to organized crime. The strategic arguments raised will have to take into consideration the motivation and objectives of the armed group.

Participants remarked that States might also be receptive to many of these strategic arguments, especially where the conflict is long lasting or where there is protracted violence between various armed groups. Additional considerations to be presented to States included the following: criminalization alone is likely to lead to unlimited violence; respect for international humanitarian law may serve as a model for humanitarian respect within civil society; adhering to international humanitarian law and calling upon the armed group to do the same may lead to a correlative stigmatization or change in public perception of the armed group if they refuse to comply.

The prevalent challenge conveying such strategic arguments, however, is the question of who can serve as a messenger, to the armed groups in particular. Participants persisted in calling upon the ICRC to take this role, referring to the Institution's proven practice in establishing contacts with armed groups, in order to both recall their obligations under international humanitarian law, as well as to advocate for protection and assistance for the civilian population. Although other actors might use similar strategies when attempting to negotiate between armed groups and State actors, many participants concluded that the ICRC is in the best position to succeed in this regard, especially in light of its legal bases for action during non-international armed conflict.

It was suggested that the ICRC undertake to prepare a study of practice in non-international armed conflicts with a view to identifying situations in which amnesties or something similar to combatant status were granted to armed groups and to summarize the "lessons learned". This study should also examine the motives that have in the past led armed groups and State actors to respect international humanitarian law.

3) How can existing international humanitarian law mechanisms and bodies be used in non-international armed conflicts?

None of the existing IHL supervision mechanisms, apart from the ICRC, are expressly mandated to address situations of non-international armed conflict. However, the **International Fact Finding Commission** has expressed a willingness to be seized in situations of non-international armed conflict, and most participants recommended that the Commission should indeed be utilised in this way, on an *ad hoc* basis.

In addition, participants considered how the **bilateral enquiry procedure** and the concept of **protecting powers** might be used as models for situations of non-international armed conflict. There was particular interest in the protective function of a protecting power, with participants submitting that the ICRC might step in as a substitute Protecting Power to establish contact between the parties, assist the victims, and remind the parties of their responsibilities under international humanitarian law. Third States, especially those who have credibility with both sides of the conflict, might consider doing the same, or might even be willing to attempt to negotiate between the State and the armed groups, as Norway has done in Sri Lanka. Regional bodies might also appoint facilitators to bring parties to an internal armed conflict together. Regardless of who plays the role, many participants noted that it is vital to have a neutral third party, who may offer their good offices to the parties to the conflict.

Once again, the **ICRC** was credited as the most probable to succeed in these efforts. Where outside actors might be accused of "illegal interference", the trusted and respected position of the ICRC, and the role acknowledged for it in common Article 3, puts it on a better footing to encourage special agreements or unilateral declarations, to advocate for the victims, or to call to mind the international humanitarian law obligations of both sides to the conflict.

In the absence of other existing mechanisms, participants stressed that States should criminalize serious violations of international humanitarian law under their national laws based on universal jurisdiction to make sure that violations can be punished, no matter whom the perpetrator might be. Domestic prosecution, which must cover both sides of the conflict, will be possible during an armed conflict, while international tribunals often only work after an armed conflict.

Given the lack of mandate among IHL mechanisms to deal with non-international armed conflicts, **mechanisms and bodies of other branches of international law** such as the UN Commission on Human Rights and the Inter-American Commission on Human Rights have taken initiative in this regard. However, as discussed previously, the absence of a formal mandate for international humanitarian law restricts their practice. Furthermore, human rights mechanisms lack the competence to deal directly with violations by armed groups, although they attempt to address them in reports or General Recommendations, or by finding States responsible for omission or acquiescence in the face of violations by armed groups.[35] The existing individual complaints mechanisms in human rights law are therefore only partially useful in situations of non-international armed conflict. Nonetheless, participants once again spoke of great hopes for the potential of the **regional systems** to address issues of compliance with international humanitarian law in non-international armed conflict, in particular in Africa and Latin America.

[35] One expert pointed out that one weakness of the existing system is that there is no international mechanism for scrutinizing compliance of armed groups, available in case of violations committed by a collectivity. For the time being one has to rely solely on concepts of individual responsibility for war crimes.

4) Is there a need for specific supervision, enquiry or fact-finding possibilities?

Deliberations concerning a new mechanism or body for addressing international humanitarian law compliance in non-international armed conflicts evoked many of the same sentiments as the previous discussions related to international armed conflict. As stated above, some participants were convinced that in the current political climate it is more advisable to consider beginning gradually, with *ad hoc* systems or with mechanisms incorporating a limited number of possible functions, and working towards a permanent comprehensive body in the future.

Despite this hesitation, participants nevertheless engaged in imaginative deliberations of what mechanisms might be worth considering for the long-term. Once again, the idea of an **IHL Commission** was raised, with participants suggesting that many of the functions considered previously in the context of international armed conflict might likewise be utilized for improving compliance in non-international armed conflicts. Individual functions might also be considered independently and might include **reporting**, a **complaints mechanism**, and **observation or fact-finding missions**. For an IHL Commission or any other individual mechanism to be successful in non-international armed conflict, it would have to be carefully considered how to include the rights and responsibilities of armed groups. For the non-international armed conflict context, it was also suggested that an IHL Commission might take on the additional tasks of supervising or monitoring unilateral declarations or special agreements entered into by the parties, or of serving as depository for such declarations or special agreements.

A slight variation was advanced during the discussions of non-international armed conflicts, with the suggestion of a **High Commissioner for IHL** or **IHL Ombudsman** modelled after the OSCE High Commissioner for National Minorities. In this respect, the High Commissioner or Ombudsman would be envisaged as a wise statesman who engages in discussions predominately behind the scenes, with a view to anticipating and ultimately resolving disputes. This was endorsed as potentially useful for internal armed conflicts, in particular.

Another new proposal was the establishment of a **pool of respected statesmen**, including former heads of states or ambassadors or former heads of humanitarian organizations, or a "committee of the wise", who might be called upon to intervene in non-international armed conflicts, perhaps negotiating between the State and armed groups to arrive at cease-fire or peace agreements.

In particular, at the Pretoria seminar, participants supported the idea that non-governmental organizations should be encouraged to report on international humanitarian law compliance in the same way as they do on human rights compliance.

In addition to specific proposals for new IHL mechanisms or procedures, seminar participants also discussed what steps might be taken more generally to improve respect for international humanitarian law in the context of non-international armed conflict. As with the discussions concerning international armed conflict, many participants advocated for increased **dissemination and education** to the armed groups, recalling to them their obligations under international humanitarian law and reminding them that because the conflict *will* come to an end some day, their future acceptance and position of power may rest on their adherence to the principles of international humanitarian law during the armed conflict. Dissemination *before* the outbreak of an internal armed conflict is essential, as it will not only help to curb violations during the armed conflict, but will ideally create a spirit of humanitarianism that will serve to mitigate the tensions within a society before the outbreak of armed conflict, hopefully making the outbreak less likely. Participants noted that it is important to educate the general public about international humanitarian law protections and

provisions, making people aware of under what circumstances it applies and what protections must be afforded.

Sanctions were also advocated, against States or armed groups who violate international humanitarian law in internal armed conflict (through cutting of supply lines and financial support, travel restrictions, weapons embargoes, etc.), as well as against States who aid armed groups who are violating international humanitarian law.

Finally it was recommended that armed groups be offered **technical assistance** in order to better comply with international humanitarian law, for example assistance with the clearance of landmines.