

**WORKING GROUP MEETING ON STRENGTHENING COMPLIANCE  
WITH IHL**

**November 8 and 9, 2012**

**BACKGROUND DOCUMENT**

**GENEVA, OCTOBER 2012**

**THE PURPOSE OF THIS DOCUMENT IS TO FACILITATE DEBATE AT THE WORKING GROUP MEETING. IT DOES NOT EXPRESS, EITHER IN WHOLE OR IN PART, THE POSITIONS OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) OR OF THE GOVERNMENT OF SWITZERLAND.**

## Contents

1. Introduction.....	3
2. Existing IHL compliance mechanisms .....	4
2.1. Protecting Powers and their substitutes .....	4
2.2. Enquiry procedure .....	4
2.3. International Humanitarian Fact-Finding Commission .....	5
2.4. International Committee of the Red Cross .....	5
2.5. Meetings of the High Contracting Parties to Additional Protocol I, and Resolution I of the International Conference of the Red Cross and Red Crescent (1995) <sup>7</sup>	
3. Other IHL compliance mechanisms.....	8
3.1. Convention on Anti-Personnel Mines .....	8
3.2. Convention for the Protection of Cultural Property in the Event of Armed Conflict .....	9
3.3. Monitoring and reporting mechanism on children affected by armed conflict..	9
3.4. Regional IHL mechanisms and procedures on IHL .....	10
3.5. Reporting to the International Conference of the Red Cross and Red Crescent 13	
4. Other compliance mechanisms .....	15
4.1. Human rights law .....	15
4.2. CoE Convention on Action against Trafficking in Human Beings .....	16
5. Improving compliance with IHL: what are the prerequisites? .....	17

## 1. Introduction

This document provides background information on the international system for monitoring compliance with international humanitarian law (IHL). It is aimed at fostering discussion with a view to identifying ways of strengthening the compliance system, given that - contrary to most other branches of international law - IHL has only a limited number of mechanisms to ensure compliance and no specific forum in which IHL issues may be discussed. Moreover, except for the ICRC, the existing compliance mechanisms provided for under the 1949 Geneva Conventions and their 1977 Additional Protocols are not being used.

This first meeting of the informal Working Group (WG) is part of the consultations that are being undertaken by the Swiss Government and the International Committee of the Red Cross (ICRC) with a view to implementing Resolution 1 adopted by the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent in December 2011.<sup>1</sup> The resolution, devoted to “Strengthening Legal Protection for Victims of Armed Conflicts”, recognizes “the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL, with a view to strengthening legal protection for all victims of armed conflict” (OP 5). It invites the ICRC “to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to (...) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law” (OP 6). The resolution also expresses its appreciation to the Government of Switzerland for its commitment “to explore and identify concrete ways and means to strengthen the application of international humanitarian law and reinforce dialogue on international humanitarian law issues among States and other interested actors, in cooperation with the ICRC” (OP 7). The Swiss government adopted a pledge to this effect at the International Conference which has thus far been signed by over 50 States from every region.

The informal meeting of States held on July 13, 2012 showed that there is general and serious concern about the pervasive disregard for IHL and a common understanding that solutions need to be explored. In this sense, there was agreement that States need to have a more regular dialogue on issues of compliance.

The informal WG meeting has two main objectives:

- a) To enable the participants to share their assessment of the current system of IHL compliance. The discussion should help provide a better understanding of the strengths and weaknesses of each of the relevant existing mechanisms and to draw lessons and best practices from compliance mechanisms under other bodies of law, including human rights law.
- b) To enable the participants to discuss and identify the possible functions that an IHL compliance system could have in order to be effective.

This background document is structured as follows: Section 2 provides an overview of existing mechanisms of IHL compliance under the Geneva Conventions and their 1977 Additional Protocols. Section 3 outlines additional mechanisms of compliance with IHL, while section 4 focuses primarily on compliance mechanisms under human rights law. The aim of sections 3 and 4 is to provide a source of relevant information for further thought with regard to IHL compliance mechanisms. Section 5 examines the possible functions that an effective IHL compliance system should have. The institutional framework of such a system will be discussed in future meetings.

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<sup>1</sup> [http://www.icrcconference.org/docs\\_upl/en/R1\\_Strengthening\\_IHL\\_EN.pdf](http://www.icrcconference.org/docs_upl/en/R1_Strengthening_IHL_EN.pdf).

## **2. Existing IHL compliance mechanisms**

This section provides an overview of mechanisms aimed at promoting greater compliance with IHL during armed conflicts, which are specifically provided for in the Geneva Conventions and their 1977 Additional Protocols: (2.1.) the Protecting Powers and their substitutes; (2.2.) the Enquiry Procedure; (2.3.) the International Humanitarian Fact-Finding Commission; (2.4.) the International Committee of the Red Cross, and (2.5.) meetings of High Contracting Parties to Additional Protocol I.<sup>2</sup>

It should be noted that this document does not deal with mechanisms of international criminal justice, including the International Criminal Court (ICC). This area has been significantly developed over the past couple of decades. Its aim is to establish individual criminal responsibility after alleged crimes under international law, including war crimes, have been committed.

### **2.1. Protecting Powers and their substitutes**

The Protecting Powers mechanism is based on common Article 8/8/8/9 of the 1949 Geneva Conventions and Article 5 of Additional Protocol I and applies in international armed conflicts (IAC) only. It obliges each Party to the conflict to designate a neutral State, with the agreement of the other side, to safeguard its humanitarian interests, and to therefore monitor compliance with IHL. The Parties may also agree to entrust the duties of a Protecting Power to “an organization which offers all guarantees of impartiality and efficacy” (common Art. 10/10/10/11 and Art. 5 of AP I).

In practice, the Protecting Powers system has been used on very few occasions since World War II, the last reported instance being the international armed conflict between the United Kingdom and Argentina over the Falklands/Malvinas Islands in 1982.

### **2.2. Enquiry procedure**

The formal enquiry procedure was first provided for in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Art. 30). It was later repeated, with additional details, in the four 1949 Geneva Conventions (common Art. 52/53/132/149) and is applicable in international armed conflicts only. Pursuant to this mechanism, an enquiry into an alleged violation of the Geneva Conventions must take place at the request of a party to the conflict. The details of the procedure are to be decided by the belligerents or by an umpire whom they appoint. If the enquiry concludes that a violation of the Conventions occurred, the parties are obliged to put an end to it and to repress it with the least possible delay.

Very few attempts to use the formal enquiry mechanism have been made since the 1929 Convention was adopted,<sup>3</sup> and none have resulted in the actual launching of the procedure.

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<sup>2</sup> Common Article 1 of the Geneva Conventions and Article 89 of Additional Protocol I are not listed here as their provisions do not provide for the establishment of a compliance mechanism as such.

<sup>3</sup> Resort to this mechanism was proposed on four occasions only: a) during the war between Italy and Ethiopia (1935-36), both sides addressed complaints of IHL violations to the ICRC, and the organization offered its services to help them set up an international commission of enquiry. The parties never reached an agreement on the formation of such a commission; b) following the Katyn Massacre (1943), the German Red Cross asked the ICRC to participate in the exhumation of the victims and the Polish government in exile asked the ICRC to conduct an independent investigation. The ICRC answered that it would be ready to lend its assistance to establish an enquiry commission with the consent of all the parties. The Soviet government never answered and the Polish government

### 2.3. International Humanitarian Fact-Finding Commission

The International Humanitarian Fact-Finding Commission (IHFFC) was created in 1991 on the basis of Article 90 of Additional Protocol I. The IHFFC is composed of 15 individuals acting in their personal capacity. It is competent to: a) enquire into any facts alleged to be a grave breach or other serious violation of the 1949 Geneva Conventions or Additional Protocol I, and b) facilitate, through its good offices, the restoration of an attitude of respect for these instruments. In 2009, the UN General Assembly granted the Commission observer status.<sup>4</sup>

The competence of the IHFFC is mandatory if the relevant States involved in an international armed conflict are Parties to the Protocol and have made a formal declaration accepting its competence for allegations of grave breaches or of other serious violations of IHL, and one of them requests its services. The parties to an armed conflict may also use the services of the Commission on an *ad hoc* basis, in which case all involved must give their consent. Following an investigation, the IHFFC is meant to present its conclusions to the parties, together with any recommendation it might deem appropriate. The report is not disclosed publicly, unless all parties to the conflict agree to do so.

Regardless of the fact that the IHFFC has never been triggered, its potential relevance as a mechanism for improving respect for IHL while armed conflict is ongoing has been emphasized on various occasions. Participants of the 31st International Conference of the Red Cross and Red Crescent, while recognizing that all options should be studied with a view to strengthening the international system for monitoring respect for IHL, expressed a desire to find ways of making the IHFFC efficient.<sup>5</sup> More recently, at the July 13, 2012 informal meeting, several States noted the potential of the International Humanitarian Fact-Finding Commission and advocated that it be used.

### 2.4. International Committee of the Red Cross

It is mainly the ICRC which, in practice, carries out a range of functions aimed at improving compliance with IHL when an armed conflict is ongoing (e.g. visits to detainees, protection of the civilian population, confidential representations in the event of violations of IHL, etc.). The ICRC carries out some of these tasks on the basis of specific mandates provided for in the Geneva Conventions in international armed conflict (e.g. Art. 126(4) GCIII, Art. 143(5) GCIV). It is also entitled to offer its services to the parties to a non-international armed conflict pursuant to common Article 3 to the Geneva Conventions. Activities carried out on this basis are subject to the consent of the parties or actors in question.

However, the ICRC's role in monitoring compliance with IHL is characterized by certain limits that are inherent to its mission and working method. It is generally not the ICRC's practice to publicly condemn authorities responsible for violations of IHL, nor does the organization seek to provoke international pressure to promote better respect for IHL. Except in strictly defined

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withdrew its request; c) during the Korean War (1952), the Democratic People's Republic of Korea accused the United States of America of using bacteriological weapons. The USA asked the ICRC to conduct an independent enquiry. The organisation answered that it would set up an enquiry commission if all parties would agree. The DPRK never reacted to this proposal; d) during the war between Israel and Arab States (1973-1974), the parties to the conflict alleged serious violations of IHL against each other and asked the ICRC to investigate. The ICRC proposed the constitution of two bipartite enquiry commissions, but no agreement between the parties was reached on this procedure.

<sup>4</sup> A/RES/64/121, December 2009.

<sup>5</sup> 31st International Conference, Report of the plenary session on strengthening legal protection for victims of armed conflict.

circumstances,<sup>6</sup> the ICRC focuses on a confidential and bilateral dialogue with each party to an armed conflict with the aim of persuading those responsible for violations to change their behaviour and meet their obligations. Confidentiality has proven to be an indispensable tool for obtaining direct access to victims of armed conflicts and for being able to undertake operational work of long duration. It is also key to staff security, particularly in contexts where the ICRC is the only humanitarian organization providing services on the ground.

In this context, it is worth recalling the work of the *ICRC Advisory Service on International Humanitarian Law*. The Advisory Service was established further to the Recommendations of the Intergovernmental Group of Experts on the Protection of War Victims that met in January 1995 in Geneva to study practical means of promoting full respect for and compliance with IHL (the Recommendations were subsequently endorsed by Resolution 1 of the 26th International Conference adopted by consensus<sup>7</sup>). The aim of the Advisory Service, which became fully operational in 1996, is to foster and support efforts to enhance States participation in IHL treaties and national implementation thereof on a systematic basis with a view to creating conditions for enhanced compliance with IHL. By focusing on legal advice and technical support to governments, it complements other ICRC activities aimed at creating an environment conducive to IHL respect.

Working worldwide through a network of legal advisers, the ICRC Advisory Service supplements and supports governments' own resources by: encouraging and supporting adherence to IHL and related instruments; providing specialist advice and assistance to States as they adopt legal and administrative measures to give effect to their IHL obligations; and collecting and facilitating exchange of information between States on national IHL implementation laws and other measures adopted. It also supports the work of committees on IHL or similar bodies established to facilitate the IHL implementation process.

In keeping with the request of the 26<sup>th</sup> International Red Cross and Red Crescent Conference, the Advisory Service regularly shares with States parties to the Geneva Conventions information on its activities, on the steps taken by States to enhance IHL treaty participation and domestic implementation, and on the progress made by national Committees of IHL and similar bodies. To this end, in addition to an electronic database created as a means of information sharing, it publishes annual and biennial reports (from 1996 to 2004) and periodic (annual or biennial) progress reports that are in some cases prepared for submission to member States of regional organisations<sup>8</sup>.

It also produces a *Bi-annual Update on National Legislation and Case Law* which is published in the *International Red Cross Review*<sup>9</sup>. It regularly submits contributions for inclusion in thematic reports of international (in particular the UN Secretary General) or regional (e.g. Council of Europe) organisations and presents progress reports to the International Red Cross and Red Crescent Conference. Country reports with similar information submitted by States' authorities on invitation of the ICRC are furthermore shared in the frame of regular regional conferences for governmental experts and peer to peer

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<sup>6</sup> See ICRC, "Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393-400.

<sup>7</sup> Resolution I "From Law to Action", 26th International Conference of the Red Cross and Red Crescent and Annexe II : Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, GENEVA 23- 27 January 1995: Recommendations.

<sup>8</sup> For recent examples see: Sixth Annual Report on the Implementation of International Humanitarian Law (IHL) at the Level of Arab States for the years 2010 – 2011; Implementing IHL: participation of the American States in IHL treaties and their national implementation - report 2010/2011; Participation of Member States of the Commonwealth of Independent States (CIS) to International Humanitarian Law treaties and their National Implementation (2012).

<sup>9</sup> See last: What's new in law and case law around the World, Article IRCR N° 883, Biannual update on national law and case law January – June 2011

meetings of national Committees on IHL convened by the Advisory Service often in cooperation with States' authorities and other partners.

As may be concluded, while invaluable, the role of the Advisory Service is focused on helping States implement their IHL obligations by means of the adoption of national legislation and other measures that aim to ensure that the required legal framework is in place if and when an armed conflict should occur.

## **2.5. Meetings of the High Contracting Parties to Additional Protocol I, and Resolution I of the International Conference of the Red Cross and Red Crescent (1995)**

Pursuant to Article 7 of Additional Protocol I, the depositary of the Protocol, i.e. the Swiss Federal Council, shall convene a meeting of the States parties thereto "to consider general problems concerning the application of the Conventions and of the Protocol" if requested to do so by one or more parties to the Protocol and agreed to by the majority of States parties to that treaty.

The depositary has never organized such a meeting since the Additional Protocol came into force.

Article 7 of Additional Protocol I should be distinguished from the mandate given to the depositary in 1995, by means of Resolution I of the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent,<sup>10</sup> which endorsed Recommendation VII of the Intergovernmental Group of Experts for the Protection of War Victims.<sup>11</sup>

Recommendation VII requests "the depositary to organize periodical meetings of the States party to the 1949 Geneva Conventions to consider general problems regarding the application of IHL".<sup>12</sup> Acting on Recommendation VII and on Resolution I of the 26th International Conference, the Swiss Government convened the First Periodical Meeting of States Parties to the Geneva Conventions on general problems relating to the application of IHL. The meeting took place in Geneva, from January 19-23 1998, and was the only meeting of its kind to date.

### **Questions for discussion:**

1. Why have the compliance mechanisms outlined above - except for the ICRC - been rarely, or never used?
2. Is there a prospect that any of these IHL compliance mechanisms might be relied on more in the future? If so, why and which ones?
3. Which functions of the mechanisms above do you think could improve compliance with IHL?

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<sup>10</sup> Resolution I of the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent of 1995.

<sup>11</sup> Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995, Recommendations (<http://www.icrc.org/eng/resources/documents/misc/57jmbm.htm>).

<sup>12</sup> Paragraphs 4 and 7 of Resolution I of the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent of 1995:

"4. also endorses the Recommendations drawn up by the Intergovernmental Group of Experts (Recommendations), which aim at translating the Final Declaration of the Conference into concrete and effective measures and which are attached to the present Resolution".

"7. recommends that the outcome of meetings convened by the Depositary of the 1949 Geneva Conventions, including those mentioned in Recommendation VII of the Intergovernmental Group of Experts, be transmitted to the next International Conference of the Red Cross and Red Crescent as well as to States party to those Conventions".

### **3. Other IHL compliance mechanisms**

#### **3.1. Convention on Anti-Personnel Mines**

Most weapons conventions provide for a monitoring system that is aimed at ensuring their implementation. This often includes a reporting obligation to Meetings of States Parties to the Convention and on occasion to the UN Secretary-General. A large number of weapons conventions also provide for an annual Meeting/Conference of States Parties to consider the application of the relevant Convention.

The Convention on Anti-Personnel Mines<sup>13</sup> - which was adopted in 1997 and entered into force in 1999 - is relied on below to illustrate the system of compliance established under some of the weapons conventions.

The Convention provides that Meetings of States Parties are to be held regularly to consider and, where necessary, take decisions on any matter related to the application or implementation of the Convention (Art. 11). It foresees a variety of mechanisms for promoting its implementation and ensuring that its provisions are respected. These involve the participation of the UN Secretary-General and Meetings of States Parties.

States Parties are required to report annually to the UN Secretary-General on a range of matters, including the types and numbers of anti-personnel mines destroyed, the extent and the location of areas contaminated by anti-personnel mines, the status of clearance programmes, measures taken to provide warnings to the population and measures taken domestically to prevent and suppress violations of the Convention (Art. 7). The UN Secretary-General transmits the reports received to the States Parties.

When a dispute between States Parties occurs with regard to the application or the interpretation of the Convention, they may bring any such a dispute before a Meeting of the States Parties (Art. 10).<sup>14</sup>

Article 8 provides an elaborate process related to the “facilitation and clarification of compliance”. States Parties may submit, through the UN Secretary-General, a “request for clarification”, together with all appropriate information, on any question relating to compliance with the provisions of the Convention by another Party (Art. 8 (2)). The State whose behaviour is at issue must provide relevant information. If there is no reply or the reply is not satisfactory, the State Party that raised the question may submit the matter to the Meeting of the States Parties through the UN Secretary-General for further consideration (Art. 8 (3)). Pending the convening of a Meeting of States Parties, any State Party concerned may request the UN Secretary-General to exercise his good offices to facilitate the clarification requested (Art. 8 (4)).

The requesting Party may propose, through the UN Secretary-General, the convening of a Special Meeting of the States Parties to consider the matter (Art. 8 (5)). The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first

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<sup>13</sup> The full title of the Convention is: “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction”.

<sup>14</sup> The Convention on Cluster Munitions also foresees a procedure for settling disputes arising between two or more States Parties on the interpretation or application of its provisions (Art. 10). In such situations, the States Parties concerned must consult together with a view to settle the dispute by negotiation or other peaceful means of their choice. The Parties may decide to solicit the support of a Meeting of States Parties, which can adopt procedures or specific mechanisms to clarify the situation and adopt a resolution. They may also refer the case to the International Court of Justice.



determine whether to consider the matter further, taking into account all the information submitted by the States Parties concerned (Art. 8 (6)). All States Parties are to cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in their review of the matter, including any fact-finding missions that are authorized in accordance with Article 8 (8) (Art. 8 (7)).

If further clarification is required, a Meeting of the States Parties or a Special Meeting of the States Parties may authorize a fact-finding mission and decide on its mandate by a majority of the States Parties present and voting (Art. 8 (8)).

Upon receiving a request from a Meeting of the States Parties or a Special Meeting of the States Parties, the UN Secretary-General may, after consultations with the requested State Party, appoint members of the mission, including its leader (Art. 8 (10)). The fact-finding mission then reports the results of its findings, through the UN Secretary-General, to a Meeting of the States Parties or a Special Meeting of the States Parties (Art. 8 (17)).

Finally, a Meeting of the States Parties or a Special Meeting of the States Parties may suggest to the States Parties concerned ways and means of further clarifying or resolving the matter under consideration, including the initiation of appropriate procedures in conformity with international law (Art. 8 (19)).

### **3.2. Convention for the Protection of Cultural Property in the Event of Armed Conflict**

The Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted on 14 May 1954. Article 10 of the Convention lays the groundwork for ensuring “international control” over cultural property under special protection, while the procedure is elaborated in the Regulations for the execution of the Convention.

The international control procedure requires the involvement and cooperation of three partners:

- First, Parties to the Convention must appoint a “representative for cultural property” as soon as they are engaged in an international armed conflict (Regulations, Art. 2(a) and 18).
- Second, delegates of Protecting Powers (or of substitutes to the Protecting Powers) must also be appointed and accredited (Regulations, Art. 2(b), 3 and 9).
- Lastly, a Commissioner-General for Cultural Property must be chosen among a list of international experts to be prepared by the Director-General of UNESCO (Regulations, Art. 1 and 2(c), and 4) and is accredited to the State involved in an international armed conflict.

The Commissioner-General is allowed to “deal with all matters referred to him in connexion with the application of the Convention, in conjunction with the representative of the Party to which he is accredited and with the delegates concerned” (Regulations, Art. 6(1)). In particular, he may undertake investigations, make representations to the Parties to the conflict or their Protecting Powers, and may exercise the functions of the Protecting Power, in the absence of such a Power (Regulations, Art. 6). The Commissioner-General may also have recourse to the support of an “an inspector of cultural property”, to be charged with a specific mission, or may also request the services of experts (Regulations, Art. 7).

### **3.3. Monitoring and reporting mechanism on children affected by armed conflict**

The Monitoring and Reporting Mechanism on children affected by armed conflict (MRM) is based on Resolution 1612 (2005) of the UN Security Council, supplemented by Resolution 1882 of 2009 and Resolution 1998 of 2011. The resolution established the UN Security

Council Working Group on Children and Armed Conflict and laid the groundwork for the MRM.

The Working Group is composed of representatives of the 15 Members of the Security Council. Its main tasks are to review reports prepared within the framework of the MRM procedure and action plans that parties to armed conflicts must adopt to halt the recruitment and use of children in violation of their international obligations, as well as other violations of children's rights (Resolution 1612, para. 8).<sup>15</sup> The MRM focuses on six "grave violations" against children in situations of armed conflict and/or in "other situations of concern", namely: a) the killing or maiming of children; b) the recruitment or use of children as soldiers; c) rape and other grave sexual violence against children; d) the abduction of children; e) attacks against schools or hospitals; f) denial of humanitarian access for children.

The MRM is a bottom-up procedure in which UN agencies, NGOs and other partners collect information in the field and channel it up to the UN Secretariat. The drafting of the reports is coordinated by the Special Representative of the UN Secretary-General for children and armed conflicts and UNICEF. Once the report has been submitted to the UN Secretary General for approval, it is shared with the concerned government. It is then submitted to and reviewed by the Working Group. The Working Group may address recommendations to the Security Council on possible measures to promote the protection of children affected by armed conflict. Available measures include targeted sanctions, as well as recommendations on appropriate mandates for peacekeeping missions (Resolution 1612, para. 8). The Working Group may also address recommendations to other bodies within the UN system.

An important feature of the MRM is that it allows for the monitoring of both States and non-State armed groups. Resolution 1612 recognizes that contacts with such groups may, within certain limits, be required for the implementation of the procedure. Paragraph 2(d) "stresses that any dialogue established under the framework of the monitoring and reporting mechanism by United Nations entities with non-State armed groups in order to ensure protection for and access to children must be conducted in the context of peace processes where they exist and the cooperation framework between the United Nations and the concerned Government". A number of such groups have also adopted action plans, whose implementation may be reviewed by the Working Group.

The Secretary General issues an annual report on children and armed conflict which includes two annexes naming (and shaming) parties who have committed "grave violations" against children. Annex I lists parties who are on the Security Council's agenda, while Annex II lists parties who are not, but also raise concerns in relation to the protection of children in armed conflict. The lists include both States and non-State armed groups.

In Resolution 1882 of 2009, the UN Security Council requested enhanced communication between its Working Group on children and armed conflict and the relevant Security Council sanctions committees.

### **3.4. Regional IHL mechanisms and procedures on IHL**

There is at present no regional IHL compliance mechanism as such, which is perhaps not surprising given that IHL is and should remain a universally accepted system of norms. There are nevertheless some important regional good practices, particularly as regards reporting, that are outlined below for the sake of completeness of overview presented in this background document.

#### **League of Arab States**

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<sup>15</sup> For an overview of existing action plans, see Children and Armed Conflict, Report of the Secretary-General, A/65/820-S/2011/250, 23 April 2011.

In 2001 and in implementation of a recommendation of the first regional meeting of Arab Government Experts on IHL that was held in Cairo on 7-9 May of the same year, a follow-up commission on the implementation of IHL, composed of representatives of the Legal Division of the League of Arab States (LAS) and the ICRC Advisory Service on IHL was established. This follow-up commission organized on an annual basis (bi-annual starting from 2009), eight regional meetings of Arab government experts on IHL and prepared their agendas. These meetings aim to assess efforts undertaken in the Arab States toward implementation and dissemination of IHL before each meeting, and to draft a future regional action plan to be implemented before the next one.<sup>16</sup>

In addition, the LAS-ICRC follow-up commission started, since 2002, to monitor implementation of IHL in Arab States and to publish reports on the status of IHL implementation and dissemination in each of the Arab States. The sixth such report was published in 2012 covering 2010-2011.

### **Arab Inter-Parliamentary Union (IPU)**

In 2010 and in implementation of a recommendation of the second meeting of Arab members of parliament on IHL that was held in Cairo in May of the same year, a follow-up commission was established composed of the Arab IPU and the ICRC Advisory Service on IHL. The commission aims at following up and monitoring efforts undertaken in Arab parliaments toward the implementation of IHL. The situation in Syria where the IPU is based during 2011 hindered the work of this commission. However, coordination toward the activation of its monitoring role is currently taking place.

### **Commonwealth of Independent States (CIS)**

In the frame of the CIS, IHL treaty participation and national implementation by member States is monitored at two different levels: the Inter-Parliamentary Assembly (IPA\_CIS) and the Justice Ministers' Council.

#### **Inter-Parliamentary Assembly (IPA\_CIS)**

Following encouragement from the ICRC Advisory Service on IHL, and to foster harmonization of domestic legislation, the IPA\_CIS adopted between 1998 and 2008 several model laws and recommendations for the national implementation of IHL including, amongst others, on the suppression of war crimes, the use of the Red Cross and Red Crescent Emblems, the protection of the civilian population and the rights of prisoners of war, and on the missing.

With the aim to monitor action taken by member States further to the adoption of these model laws and recommendations, the IPA\_CIS in cooperation with the ICRC prepared a questionnaire to be endorsed by the member States and, once approved, circulated to respective parliaments and executive authorities. The responses will be compiled in a report to be submitted to CIS member States in 2013.

#### **Council of Justice Ministers**

The recent meeting of the Council of Justice Ministers from the CIS (Minsk, 21 September 2012) for the first time addressed the issue of participation in IHL related treaties and their implementation at domestic level based on a progress report submitted by the ICRC

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<sup>16</sup> All action plans adopted by the meetings of the Arab government experts on IHL, as well as reports on the status of IHL in the Arab world published by the LAS-ICRC follow up commission are available online at [www.icrc.org](http://www.icrc.org).

Advisory Service on IHL. If accepted, the topic would be systematically included in the agenda of future meetings of the Council.

### **Economic Community of West African States (ECOWAS)**

In 2001 a cooperation agreement focusing on national implementation of IHL was signed between the ECOWAS and the ICRC. The agreement resulted in the joint organisation of an annual "Seminar on the Implementation of IHL in West African States" which was conducted for the 11<sup>th</sup> time in May 2012. The Seminar's objectives have been, amongst others: a) to review and discusses the state of implementation of IHL instruments in respective ECOWAS member States based on national reports submitted by these States; b) to examine the requirements and challenges related to some IHL instruments; and c) to brief the representatives of the 15 member States on the most recent developments in IHL.

The annual ECOWAS-ICRC joint Seminar offers a unique opportunity for member States to regularly exchange on good practices, challenges and obstacles in the domestication of IHL. The Seminar has clearly enhanced the motivation of member States to adhere to IHL treaties and develop domestic measures for their national implementation.

The subsequent Seminars lead to the adoption in 2009 by the participants of an "ECOWAS Plan of Action on Implementation of International Humanitarian Laws in West Africa (2009-2014)". The Plan was endorsed in the "ECOWAS Humanitarian Policy" and in the "ECOWAS Action Plan" (2012-2017) adopted by the Ministers in charge of Humanitarian Affairs during the ECOWAS member States meeting in Cotonou, Benin on 9 March 2012.<sup>17</sup> The "Strategic Objective" 4 of the Humanitarian Policy ("Ensuring Member States and Citizens Compliance with International Humanitarian Law as a means of preventing or mitigating conflict related impacts on the civilian populace") provides, inter alia, for the following priority measures:

- Ensure the designation of National Focal Points for reporting on progress achieved in ensuring compliance with International Humanitarian Laws in member States;
- Ensure reporting, monitoring and evaluation of progress recorded in implementation of the Plan of Action.

### **Organization of American States (OAS)**

Various mechanisms and processes exist today at the level of the OAS aimed at contributing to respect for IHL, and preventing and sanctioning violations of its norms. The following ones can be considered a form of institutionalized IHL reporting and/or compliance mechanisms:

At the diplomatic, multilateral level, IHL is formally part of the OAS agenda. Since 1994 successive specific OAS General Assembly Resolutions have been passed (until 2010 on an annual basis, and since then biennially) to promote IHL and its respect. These resolutions urge members States to consider taking the necessary steps of signing and ratifying IHL instruments and of promulgating domestic laws designed to bring them into force, urge member States to actively participate in relevant diplomatic conferences and expert meetings and to continue to support efforts to implement and strengthen IHL with a view to making its application more effective and to finding solutions to shortcomings in protection.<sup>18</sup> In addition and more importantly, they contain specific mandates for member States, inter-American entities and for the OAS General Secretariat aimed to enhance IHL respect, and request the OAS Permanent Council to report to the General Assembly on their implementation and on activities conducted by the organization and member States to foster IHL respect.

<sup>17</sup> [http://www.westafricagateway.org/files/Common%20Humanitarian%20Policy\\_0.pdf](http://www.westafricagateway.org/files/Common%20Humanitarian%20Policy_0.pdf)

<sup>18</sup> See as example: AG/RES. 2650 (XLI-O/11), PROMOTION OF AND RESPECT FOR INTERNATIONAL HUMANITARIAN LAW, adopted on June 7, 2011).

The commitment of the OAS General Assembly to IHL is also demonstrated through its requests to the Permanent Council to organize special meetings on topics of interest in IHL. In fulfillment of these requests the OAS Secretariat's Department of International Law, in coordination with the ICRC, has been organizing since 1999 annual at first, and now biennial, "Special Sessions" of the Permanent Council's Committee on Juridical and Political Affairs (CJPA) on the promotion of and respect for IHL. In these meetings, OAS member States discuss progress reports submitted by the ICRC on developments in IHL treaty adherence and national implementation, share country reports on actions taken and activities conducted, including those by national Committees for IHL where they exist, to give effect to the OAS General Assembly resolutions on IHL, and on the challenges met in their endeavours. The IHL Special Sessions of the CJPA also offer a formal platform for member States to be provided with information on relevant issues and developments concerning IHL, which in turn constitutes input for the drafting and negotiation of relevant resolutions.<sup>19</sup>

More recently, an OAS General Assembly mandate requests that the CJPA encourage member States to report on information regarding the adoption of measures contained in resolutions adopted since 2005 on the subject of persons who have disappeared and assistance to members of their families. Similarly, the abovementioned resolutions include a novel provision mandating member States to identify mechanisms for promoting the participation of national IHL committees in the OAS's activities, possibly opening the door for yet another way of tracking and reporting on advances in the implementation of the law where such bodies exist.

As may be concluded, some regional systems have developed activities aimed at promoting respect for and implementation of IHL by member States at the national level. Discussions and reporting on progress made are undoubtedly useful and can contribute to raising and maintaining awareness of the need to create a legal framework that may be relied on should the need arise.

### **3.5. Reporting to the International Conference of the Red Cross and Red Crescent**

International Conferences of the Red Cross and the Red Crescent are a unique forum in that they bring together, as members of the Conference, every four years, not only all States parties to the Geneva Conventions, but also non-State representatives from all components of the Red Cross and Red Crescent Movement, i.e. the ICRC, the International Federation of Red Cross and Red Crescent Societies and 188 National Red Cross and Red Crescent Societies to examine and decide upon *humanitarian matters of common interest*.<sup>20</sup> Guided by this common humanitarian focus, one of the specific functions of International Conferences is to contribute *to the respect for and development of international humanitarian law (IHL)*.<sup>21</sup>

The formal outcome of International Conferences takes the form of resolutions, including on matters of IHL, on which all members of the Conference have equal voting rights.<sup>22</sup> However, most resolutions are adopted by consensus, and do not proceed to a vote. Even if an IHL-related resolution is not legally binding as such, it nonetheless constitutes a position adopted by all the members of an International Conference which is of significant humanitarian importance, especially if it is adopted unanimously.

In addition to resolutions, the members of the Conference may submit, either individually or jointly with other members of the Conference, voluntary humanitarian commitments in the form of pledges for the four-year period until the next International Conference. As such,

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<sup>19</sup> See: [www.oas.org/juridico/english/ihl\\_sp\\_ses.htm](http://www.oas.org/juridico/english/ihl_sp_ses.htm).

<sup>20</sup> Art. 8 of the Statutes of the International Red Cross and Red Crescent Movement.

<sup>21</sup> Ibid., Art. 10(2).

<sup>22</sup> Ibid., Art. 9(2).

pledges may even go further than the measures recommended in an IHL-related resolution, or they may simply highlight certain issues of specific interest to those submitting them.

Conference resolutions typically outline the follow-up to be given to resolutions and pledges, including invitations or requests to report on progress made in their implementation. In this regard, there is usually a general resolution that invites all members of the Conference to share information on their progress in implementing resolutions and pledges, and requests the ICRC<sup>23</sup> to report to the next International Conference on the follow up to resolutions and pledges.<sup>24</sup> Moreover, the subject-matter specific resolutions often also include recommendations on follow-up reporting on implementation of these resolutions and pledges submitted in relation thereto.<sup>25</sup>

Subsequently, usually at the beginning of the year when an International Conference is to take place, the ICRC prepares a follow-up questionnaire on the IHL-related resolutions which is sent to members of the Conference. This questionnaire asks members of the Conference to report on significant activities in the form of specific projects in relation to matters covered by the respective resolutions and associated pledges.<sup>26</sup> On the basis of answers received a few months before an International Conference, the ICRC prepares a follow-up report which provides a breakdown of the information received in relation to each resolution. This follow-up report is presented in plenary at the next International Conference.

While the value of an International Conference in view of its unique composition, humanitarian focus and specific function in terms of compliance with IHL is undeniable, it must be noted that any undertakings made are voluntary in character and that there is in practice a limited number of follow-up reports on resolutions and pledges.<sup>27</sup>

### Questions for discussion:

1. Can the IHL implementation systems outlined in the section above, or some elements thereof, serve as a useful model for conceptualizing a universal system of IHL compliance (for example meetings of States)? If so, which? What features would be particularly useful (discussions, reporting, etc.)?
2. What can be learned from the examples at the regional level?

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<sup>23</sup> As well as the International Federation on matters unrelated to IHL.

<sup>24</sup> See, for example, OP 5, Resolution 1 of the 30<sup>th</sup> International Conference, and OP 3, Resolution 9 of the 31<sup>st</sup> International Conference. In addition, OP 2 of Resolution 9 of the 31<sup>st</sup> International Conference introduced the innovation of a mid-term review in 2013 on implementation of resolutions adopted at that Conference.

<sup>25</sup> For instance, Resolution 2 of the 31st International Conference entitled "4-Year Action Plan for the Implementation of international humanitarian Law" invites all members of the Conference to inform the ICRC on progress made on implementation of the Action Plan, with a view to the presentation of a report on implementation to the 32nd International Conference in 2015, and requests the members of the Conference to report to the 32nd International Conference in 2015 on the follow-up to their pledges.

<sup>26</sup> See, for example, Questionnaire on the follow-up to the 30<sup>th</sup> International Conference of the Red Cross and the Red Crescent, available at [http://www.icrcconference.org/docs\\_up/en/IC30\\_follow\\_up\\_questionnaire\\_eng.doc](http://www.icrcconference.org/docs_up/en/IC30_follow_up_questionnaire_eng.doc)

<sup>27</sup> For instance, before the last Conference, only 39 States and 75 National Societies out of 166 States and 178 National Societies participating in the 30<sup>th</sup> International Conference responded to the questionnaire sent out by the ICRC and the International Federation. Moreover, while in total 73 governments and 120 National Societies submitted pledges at the 30<sup>th</sup> International Conference, only 23 governments and 36 National Societies reported back on these. See Follow-Up Report to the 30<sup>th</sup> International Conference (2007-2011), October 2011, 31IC/11/7.1, pp. 3-4.

## 4. Other compliance mechanisms

### 4.1. Human rights law

A variety of mechanisms created within the human rights (HR) law framework are increasingly dealing with situations of armed conflict, albeit primarily, but not exclusively, from the perspective of HR violations that may have been committed. A growing number are including references to IHL in their activities.

This document does not aim to provide a detailed or comprehensive review of existing international HR mechanisms, based on the understanding that participants of the expert meeting are familiar with them. Only a brief reminder is provided below.

International HR monitoring mechanisms may be broadly divided into essentially political, UN Charter-based mechanisms, or into the treaty-based ones, depending on the source of their mandate.

The main Charter-based mechanism is the Human Rights Council (HRC), a subsidiary body of the UN General Assembly, which replaced the HR Commission in 2006. The HRC reviews States' HR compliance by means of:

- The Universal Periodic Review Mechanism, which allows for periodic examinations of every State's HR record based on three reports (one submitted by the State, one by the Office of the High Commissioner for Human Rights and one by NGOs), and comments/recommendations made by other States (peer review) and NGOs.
- The HRC also has Special Procedures - Special Rapporteurs or Working Groups - both thematic and country specific, which report on activities within their mandates to the Council.
- The HRC inherited a confidential complaints procedure from the HR Commission, based on individual or group allegations of HR violations, the main purpose of which is to enable the Council "to address consistent patterns of gross and reliably attested violations of human rights" anywhere in the world.<sup>28</sup>

The HRC meets in regular sessions three times a year and has also held numerous special sessions, called at fairly short notice, mainly on country specific issues. A number of resolutions have established HRC-mandated Commissions of Inquiry (COI), composed of independent experts, to undertake and present fact-finding or other reports to the Council (some of which engage/interact with non-State armed groups).

Part of the UN compliance system, therefore also relevant to HR compliance, is the UN Security Council, whose resolutions if adopted under Chapter VII of the Charter are of a legally binding nature, and can result in the use of force. The Security Council has of late taken a more active role in IHL matters, through, for example, annual discussions on the protection of civilians in armed conflict, the establishment of thematic procedures that deal with HR and IHL violations (e.g. related to children in armed conflict), the setting up Commissions of Inquiry and the integration of "protection of civilians" into the mandates of peace operations.

The HR treaty body system is made up of committees of independent experts, chosen in their personal capacity, charged with monitoring the implementation of the core international HR treaties (currently nine). Depending on their mandate the Committees:

- Receive periodic reports from States parties, engage in a dialogue with and issue

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<sup>28</sup> OHCHR factsheet: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Complaint.aspx>. The HRC also has an Advisory Committee whose mandate is primarily research and is usually referred to as a think-tank.

- findings on a State's compliance with its obligations under the relevant treaty (all);
- Deal with inter-State complaints;
- Receive and issue findings with respect to individual complaints;
- May, on their own initiative, initiate inquiries if they receive reliable information containing well-founded indications of systematic violations of the relevant convention by a State party.<sup>29</sup>
- They have also developed a practice of issuing comments or observations of a general nature on how the relevant treaty provisions should be interpreted.

In addition to treaty bodies at the international level, there are also regional mechanisms of HR protection which are mentioned here for the sake of completeness. The most important are regional HR courts, mandated to issue binding decisions on inter-State or individual complaints (e.g. the European or Inter-American HR courts), and HR commissions. The European Court of HR has dealt with the largest number of cases arising from situations of armed conflict, but has for the most part avoided explicit reliance on IHL. In this context, it must be noted that the jurisdiction of regional mechanisms is limited to certain geographical areas.<sup>30</sup> It is not clear how the universality of IHL could be maintained if regional bodies were to take up IHL implementation as a matter of course.

#### **4.2. CoE Convention on Action against Trafficking in Human Beings**

The Council of Europe Convention on Action against Trafficking in Human Beings is a relatively new instrument. It was adopted in 2005 and entered into force in 2007. Its monitoring system is based on the complementary work of two bodies: a) the Committee of the Parties, which represents the political side of the procedure; b) the Group of Experts on Action against Trafficking in Human Beings (GRETA), which is a technical body, composed of 10 to 15 qualified persons acting in their personal capacity. The Committee of the Parties elects the Members of GRETA for a 4 year term, renewable once (Art. 36).

GRETA's role is *inter alia* to collect information and draft reports evaluating the measures taken by the Parties to ensure full implementation of the Convention. GRETA may obtain relevant information from a State under review or from civil society. It may also conduct country visits. Its report, which is public, is submitted to the Committee of the Parties together with any comments a concerned State might have made. The Committee may adopt recommendations addressed to the State, including a deadline for the submission of information on implementation measures undertaken by it. The Committee may also make recommendations addressed to the State "aimed at promoting cooperation" with it "for the proper implementation of the Convention" (Art. 38).

#### **Questions for discussion:**

1. What are the limits, if any, to the HR system/monitoring bodies being the only option relied on for ensuring compliance with IHL?
2. Are there differences between IHL and HR law, and the different situations they were primarily intended to govern, that militate in favour of the establishment of an IHL compliance system? If so, what features of the HR system should be incorporated and which should be avoided?

<sup>29</sup> For example, the Committee Against Torture, pursuant to Art. 20 of the Convention against Torture.

<sup>30</sup> It is submitted that there are currently other limitations to the ability of regional courts to deal with IHL: they do not have a specific mandate over IHL; they cannot engage with non-State actors (who are not bound by the relevant HR treaties); they lack the relevant IHL expertise.



3. Are there other compliance models/mechanisms that could be useful? If so, what is the relevant instrument and how does the procedure work?

## 5. Improving compliance with IHL: what are the prerequisites?

One of the conclusions of the July 13, 2012 informal meeting of States devoted to improving compliance with IHL was that there is currently no opportunity for a regular and structured dialogue on issues of IHL compliance by States - and that establishing a framework for such a dialogue would be useful. Before further thinking on what an appropriate framework might be, it appears necessary to examine the functions that any effective compliance system should have. This section of the background document aims to briefly outline a non-exhaustive list of possible functions drawing from the existing mechanisms of compliance with IHL, as well as mechanisms established under other bodies of law. The list submitted is in no particular order of priority:

- a) Regular meetings. Most of the compliance systems described above, with the exception of the mechanisms provided for in the Geneva Conventions and their two Additional Protocols, are premised on the idea that there is a permanent and periodic venue in which the parties meet to discuss general and specific issues related to the implementation of the relevant body of law. In addition, ad hoc meetings may be convened as provided for under the corresponding instrument.
- b) Periodic reporting. The submission of periodic reports on compliance with the relevant body of law is a regular feature of many international compliance systems, as outlined in the sections above.
- c) State inquiries. Some systems provide that a State (or States) may submit an inquiry to another State where the former wishes to “clarify and seek to resolve questions” relating to a matter of IHL compliance by the requested State.
- d) Dispute settlement. In case of a dispute between States over the interpretation or application of the relevant treaty provisions, some compliance systems are authorized to perform a dispute settlement function.
- e) Fact-Finding. Given that compliance with a relevant body of law may require an investigation of facts and an opinion on the law that was possibly breached, some compliance systems provide for the establishment of bodies that are authorized to perform fact-finding functions and submit their views on the legal consequences of the facts determined.
- f) Examination of complaints. A function that some compliance systems provide for is the examination of complaints. This function exists in a number of legal frameworks, at both the universal and regional level, and can be mandatory or depend on *ad hoc* consent. It includes both State and individual complaints.
- g) Early warning function. A specific function that exists within some compliance systems is an early warning function that aims to bring to the attention of parties situations that could potentially result in breaches of the relevant law and proposes measures to prevent or halt the behaviour in question.
- h) Urgent appeals. Some compliance systems allow for an urgent appeal function the goal of which is to enable immediate action in response to allegations of violations of the relevant law and allow a rapid dialogue with the authorities concerned aimed at

clarifying the situation and contributing to a change in behaviour.

- i) Country visits. There are compliance systems which provide for country visits by a body or individual for the purpose of observation of the implementation of the relevant body of law. This serves as a basis for dialogue with the relevant interlocutors on ways of improving its implementation.
- j) Legal opinions. Some compliance systems provide for the issuance of quasi-judicial as well as non-binding opinions on matters of interpretation or application of the relevant law.
- k) Supervision and follow up. Most compliance systems are based on the premise that recommendations or findings made, either by a plenary body, or by subsidiary bodies or mechanisms attached to it will be supervised and given follow up. They also provide for the process by means of which this is to be achieved.

**Questions for discussion:**

1. Which of the functions listed above would it be useful and possible for an IHL compliance system to have?
2. Based on your experience, are there other functions, not outlined above, that could/should be envisaged?