



Intergovernmental Process on Strengthening Respect for International Humanitarian Law (IHL)

First Formal Meeting

Geneva, 28-29 November 2016

Background note prepared by the co-facilitators

1. Introduction

The 32nd International Conference of the Red Cross and Red Crescent of December 2015 adopted Resolution 2 entitled “Strengthening compliance with international humanitarian law”. Therein, the Conference recommended by consensus “the continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd International Conference and in line with the guiding principles enumerated in operative paragraph 1 [of the resolution] to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums in order to submit the outcome of this intergovernmental process to the 33rd International Conference.”

Resolution 2 builds on the consultation process on strengthening compliance with IHL that was jointly facilitated by Switzerland and the ICRC in follow-up to Resolution 1 of the 31st International Conference in 2011. These consultations were open to the participation of all States parties to the Geneva Conventions of 1949. They served primarily to enable States to jointly explore ways and means of enhancing the effectiveness of mechanisms of compliance with IHL and of strengthening dialogue among States on this issue.

On 3 June 2016, a first preliminary discussion among States was held in Geneva to share views on implementing the mandate provided for in resolution 2. The aim of the discussion was to allow an initial exchange of views among States on how the intergovernmental process should be taken forward and to give participants an opportunity to provide guidance to the co-facilitators in this regard. The discussion confirmed that the adoption of resolution 2 signalled the start of a new phase, i.e. an intergovernmental process devoted to strengthening respect for IHL and more specifically to finding agreement on the features and functions of a potential forum of States and to finding ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums. States reiterated, *inter alia*, the importance of the guiding principles listed in resolution 2, and particularly stressed the State-driven character of future work, the need for it to be consensus-based, non-politicized, inclusive and transparent. State ownership of the process was particularly highlighted.

In follow-up to the preliminary discussion of June 2016, a letter was sent to all Permanent Missions in Geneva on 6 July which informed about the next steps that were announced by the co-facilitators at the close of the discussion and supported by participating States. In this letter, States were furthermore invited to share with the co-facilitators, including by way of written contributions, further views on: the procedural questions/modalities that will be relevant to moving the intergovernmental process forward, with proposals for how they could be addressed, and, the way in which the November meeting should address the substantive elements of resolution 2. In accordance with the concerned States, the written submissions have been made available online (see below).

On 12 October 2016, a second preliminary discussion among States was held in Geneva. This discussion mainly served to further refine the ideas and proposals that were raised at the preliminary discussion of 3 June, as well as in subsequent written submissions by States, with a view to giving maximum guidance to the co-facilitators for the preparation of the first formal meeting, scheduled for 28-29 November 2016 in Geneva. More specifically, the discussion focused on the following questions: the organizational issues that should be agreed on by States at the first formal meeting in November; the work plan of the future intergovernmental process and notably whether examination of the substantive elements of resolution 2, i.e. the International Conference, regional IHL forums and the potential forum of States, should be carried forward in a parallel or sequenced manner; how the mapping of existing mechanisms and bodies that discuss IHL should be carried out; and, the format and content of the outcome documents of each meeting held in the process.

At this preliminary discussion, it was confirmed that the first formal meeting on 28-29 November 2016 should mainly serve to find an agreement on the organizational issues and a work plan for the future intergovernmental process. The co-facilitators proposed to prepare a background note outlining the views expressed on the organizational issues and the work plan at the preliminary discussions of June and October, as well as in the written submissions sent by States to the co-facilitators. The co-facilitators furthermore proposed to prepare a proposal for the organizational issues and the work plan for the consideration of and possible agreement by States at the first formal meeting in November 2016.

2. Purpose of the first formal meeting and of this background note

The first formal meeting held within the intergovernmental process will be devoted to an examination of and agreement on organizational matters related to the process and on a work plan/timetable.

The November meeting should, firstly, enable a common understanding of the organizational issues of the intergovernmental process so as to ensure it remains State-driven, predictable, transparent, inclusive and consensus-based. Agreement should notably be reached on how the facilitation of the process will be organized, it being understood that Switzerland and the ICRC will continue to serve as co-facilitators, how working documents and other texts are prepared and fed into the process, and how the conclusions and/or summaries of the meetings held within the framework of the intergovernmental process are to be dealt with. Other questions of an organizational nature include, for example, the use of the website.

The November meeting should, secondly, agree on a work plan for the intergovernmental process. The meeting will thus provide an opportunity to set the scene in terms of the substantive topics to be covered and to agree on a timetable with a view to fulfilling the mandate of the 32nd International Conference (i.e. to submit the outcome of the process to the 33rd International Conference that will take place in three years' time, at the end of 2019). In this context, an agreement should also be reached on the order in which the topics of substance in resolution 2 will be addressed, the frequency of the meetings held in the process and the format they should take.

This background note serves to provide an overview of the various ideas and options that were proposed by States both with regard to the organizational issues related to the intergovernmental process and the work plan, including a timetable. It does not serve to provide conclusions on these questions, but rather to ensure that States are informed about each other's propositions. Where the proposals lack specificity, the background note attempts to offer additional elements for States' consideration. In addition to the background note, the co-facilitators have drawn up proposals on the organizational issues and on a work plan, which are included in a separate document. The background note thus serves to provide additional information on these proposals as well, in order to facilitate possible agreement among States.

3. Organizational issues

Various proposals on the organizational issues of the intergovernmental process were put forward by States at the preliminary discussions held on 3 June and 12 October 2016, as well as in the written submissions addressed by States to the co-facilitators in response to their letter of 6 July 2016.

Guiding principles

At the outset, it should once again be reiterated that the principles listed in paragraph 1 of resolution 2 will continue to guide discussions going forward, as agreed at the 32nd International Conference. The principles are the following:

- the State-driven and consensus-based character of the process and the need for the consultations to be based on applicable principles of international law
- the importance of avoiding politicization, including by ensuring that States address the implementation of IHL only within their own sphere of competence and responsibility
- the need for an IHL compliance system to be effective
- the avoidance of unnecessary duplication with other compliance systems
- the requirement to take resource considerations into account
- the need to find appropriate ways to ensure that the discussions address all types of armed conflicts, as defined in the Geneva Conventions of 1949 and their Additional Protocols (for the latter as may be applicable), and the parties to them
- the need for the process to ensure universality, humanity, impartiality and non-selectivity
- the need for the process to be based on dialogue and cooperation
- the voluntary, i.e. non-legally binding, nature of the consultation process, as well as of its eventual outcome
- the need for the process and the mechanism to be non-contextualized.

In this context, the importance of ensuring that the process is consensus-based was particularly highlighted.

It should furthermore be recalled that the process is based on the understanding that “nothing is agreed until everything has been agreed”.

Facilitation

As regards the facilitation of the process, Switzerland and the ICRC reiterated their availability to continue to serve as co-facilitators of the new phase of the process, as they had done between the 31st and the 32nd International Conference. The facilitation role could notably include the arrangement, convening and chairing of the meetings, ensuring that adequate documents are provided as a basis for discussion at the meetings, as States may consider useful, and drawing up conclusions and/or summaries of the discussions at formal and/or preparatory meetings held in this process. Furthermore, many States stressed the essential role of the ICRC, especially with a view to providing expert support allowing States to move the discussions forward.

Different options have been proposed by States, or may be envisaged, as regards the facilitation of the intergovernmental process. They include the following:

- *Facilitation is ensured by Switzerland and the ICRC*: according to this option, Switzerland and the ICRC would continue to serve as co-facilitators and co-chairs in a similar manner as they had done for the consultations held between 2011 and 2015.
- *Switzerland and the ICRC as co-facilitators assisted by a group of States*: this group would be of a regionally balanced composition. Taking into account the need for efficiency as well as inclusiveness, the group could be composed of 10 or 15 members, i.e. 2 or 3 States per regional group. The role of the group would be, notably, to assist Switzerland and the ICRC by acting as a sounding board for the co-facilitators where necessary, and to ensure that all members of the respective regional groups are informed of the progress of the process at all stages and facilitate buy-in among States. An additional or alternative role, as outlined further below, could be for the members of the group to act on a rotating basis as rapporteurs of specific meetings (i.e., one or more rapporteurs per meeting), entrusted with drawing up and/or presenting the conclusions reached at each meeting with the help of the co-facilitators.

- *Switzerland and the ICRC assisted by thematic focal points*: In order to assist the co-facilitators, one or two States could act as focal points on a particular topic identified as needing further discussion at the next meeting. This could include drawing up proposals for States' consideration in preparatory meetings and/or reporting on the results achieved in preparatory meetings to the next formal meeting. Balanced geographical representation would need to be ensured in this option as well.
- *A group of States assisted by Switzerland and the ICRC*: according to this proposition, the role of a group of States would be to lead the process, with the assistance of Switzerland and the ICRC, notably to develop solutions for the practical issues surrounding the process (e.g., arranging one or more open, informal discussions among interested States, canvassing views on the dates for the formal meetings of States, examining how a website dedicated to the process would develop). The group of States would also serve to examine any issue, as may be necessary, before it is brought to the formal meetings in the intergovernmental process, and help ensure outreach related to the process among States. Under this model, the group would be open to the participation of all interested States and participation from different geographical regions would be encouraged. In addition, encouraging the participation of States with significant experience in implementing and applying IHL would be important.

Conclusions and/or summaries of meetings

As regards the outcome of each meeting held within the intergovernmental process, specific views were expressed with regard to: 1) the format and content of such documents, 2) responsibility for drawing up and presenting the outcome documents at the end of each meeting, and 3) how and whether such documents could be discussed and/or agreed among States.

As regards the format and content, two possibly complementary suggestions were made, or could be envisaged:

- *Conclusions*: it was proposed that each formal meeting could result in conclusions that should reflect both points of convergence of views and those on which views remain divergent. This would enable participants to gradually build on the agreed conclusions reached at each meeting. Agreed conclusions could also take the form of textual elements that could ultimately form the basis of the outcome document of the process as a whole, or be considered elements of a rolling text that would be included in an outcome document as such. In either case, at the end of the process, there would be an agreed text to be integrally reviewed.
- *Summary*: it was proposed that a summary of the main substantive points made by States at each meeting be produced. Such summaries would be factual and reflect the views expressed in the meetings in an objective and fair manner.

As regards the question of who would be responsible for drawing up the conclusions of the formal meetings, two basic proposals were made. This task could either fall on Switzerland and the ICRC as co-facilitators, or interested States could act as rapporteur(s), in order to ensure the State-driven nature of the work. In the event of the second option, consideration would be given to ensuring a balanced geographical representation over the course of the process. In other words, if five formal meetings are held in the process as of 2017, each of the five geographical regions would delegate a rapporteur for one meeting. There is also the possibility of entrusting the task to a pair of States or a group of States. Switzerland and the ICRC reiterated their readiness to support the rapporteur(s) in this task.

Concerning the question of how and whether conclusions and/or summaries would be discussed and/or agreed among States, the importance of consensus was stressed. It was emphasized that sufficient time should be allocated for States' consideration and discussion of conclusions and/or summaries, so as to ensure a consensus-based outcome. Given that the meetings held in this process will be of a relatively short duration, it was said that these documents, notably the conclusions, would not necessarily need to be negotiated, provided that they adequately and fairly reflected States' positions. Alternatively, notably with regard to the summaries, it was suggested that they would not be presented at the meeting itself, but rather circulated shortly thereafter among States that participated in the meeting for comments and/or rectifications of their interventions through a transparent written procedure. All comments to the summaries submitted in this procedure would be made available to all States on a dedicated website.

Working documents submitted to the process

It was suggested that the preparation of background or other documents for each meeting be ensured by the co-facilitators. Taking into consideration that States have the lead in moving the process forward, it was noted that States should be prepared to submit working papers/non-papers to the process and that their views should also be sought by means of questionnaires so as to be reflected in the background documents prepared by the co-facilitators. It was likewise suggested that documents prepared by the co-facilitators be based on the conclusions and/or summaries agreed at the previous meeting.

Further organizational questions

Website/virtual working modalities: the view was widely shared that a dedicated website for the intergovernmental process should be created in order to facilitate the exchange of documents, including working papers/non-papers submitted by States. The website has in the meantime been set up. The URL is: www.respect-ihl.ch. Access to the website is limited to States and protected with the following password: Geneva2019. Documents and written comments that States wish to upload on the website should be sent to the co-facilitators by e-mail (respectIHL@eda.admin.ch and respectIHL@icrc.org). States are likewise welcome to share other general or specific comments on the website at any time.

It was underlined that States are free to submit communications in any language they wish; however, if they do, they are kindly requested to also provide an unofficial translation in English. This would appear necessary to ensure adherence to the guiding principles and to ensure that the written communications are understood by the largest possible number of participants. It was thus proposed that the working language of the website be English.

Outcome of the process that will be submitted to the 33rd International Conference of the Red Cross and Red Crescent: With regard to the outcome of the intergovernmental process that will be submitted to the 33rd International Conference, it was said that consideration should be given at an early stage to whether this should take the format of a report, a resolution, a resolution with an annex attached to it, or a combination thereof. Many States indicated a flexible view on the issue at this stage, and it was suggested that a decision on this question be taken at a later stage. One specific proposal was to address this question half-way through the process, i.e. some 18 months before the 33rd International Conference.

The issue of the *location* of the meetings was also raised. It was proposed that consideration should be given to the opportunity of convening meetings at a location other than Geneva.

Engagement with components of the International Red Cross and Red Crescent Movement (the Movement): it was pointed out that considering that the International Conference is the supreme deliberative body of the Movement¹ and taking into account that its membership is composed of States parties to the Geneva Conventions of 1949 and the components of the Movement (i.e. National Red Cross and Red Crescent Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies),² adequate modalities must be found to ensure that National Red Cross and Red Crescent Societies, as well as the International Federation, are well informed of the discussions held in the intergovernmental process at all stages.

4. Work plan and timetable

Resolution 2 of the 32nd International Conference provides that the outcome of the intergovernmental process is to be submitted to the 33rd International Conference, which will take place towards the end of 2019. In keeping with the relevant Statutory deadlines for the submission of documents to the International Conference, the intergovernmental process should thus result in an outcome well in advance of the 33rd International Conference, i.e. in the first half of 2019. This means that the de facto

¹ Article 8 of the Statutes of the International Red Cross and Red Crescent Movement.

² Article 9 of the Statutes of the International Red Cross and Red Crescent Movement.

timeframe for discussing and agreeing on the points of substance is approximately two and a half years from this writing. The intergovernmental process must thus be organized in a manner that permits States to address all substantive elements provided for in resolution 2 in this timeframe.

The substantive elements of resolution 2 are provided for in paragraph 2. According to the consensus reached at the 32nd International Conference, the intergovernmental process is to “find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums”. In this context, it was observed that significant consultations had taken place between 2011 and 2015 notably pertaining to the features and functions of a potential forum of States. The results of the discussions held at the four Meetings of States and of the several preparatory meetings, as well as the Concluding Report submitted to the 32nd International Conference, could form a starting point for the forthcoming discussions and/or be updated as may be deemed appropriate. All documents that were produced in the previous phase of the process, including Background Documents and the Chairs’ Conclusions, have also been made available on the dedicated website.

Overview of existing mechanisms

The proposal was made that the co-facilitators should prepare a mapping of existing mechanisms and bodies dealing with IHL, including bodies set up under other branches of international law (building on the work done in this regard during the previous consultation process in 2012), prior to a debate on the substantive elements of resolution 2. This proposal raises the question as to which mechanisms should be included in that overview and what should be its scope. It was suggested that this question be further explored at the first formal meeting in November.

It was stressed by the co-facilitators that such a mapping could only be factual in nature and aim to provide a summary overview of relevant mechanisms. The mandate provided for by the International Conference would not permit an assessment of the work of bodies belonging to other branches of international law, or include suggestions as to how the work of such bodies could be improved.

As concerns the question of when the overview should be discussed, two proposals were made. It was suggested that the overview be addressed already at the first formal meeting in November 2016. Alternatively, it was proposed that the mapping be discussed as soon as possible thereafter, and no later than at the second formal meeting in the first half of 2017.

In this context it was also observed that States who proposed an enhanced role in IHL implementation for the International Conference and/or for regional forums, as per resolution 2, should be prepared to set out their proposals in detail.

Order in which the substantive elements in resolution 2 are addressed

Suggestions were made with regard to the order in which the substantive elements of resolution 2, i.e. the International Conference, regional forums and the potential forum of States, should be addressed.

Two basic options, as well as a combination thereof, were proposed or may be envisaged:

- *Sequenced approach*: the substantive elements identified in resolution 2 could be addressed one after the other. Under this approach, the November meeting would decide on whether the discussions should start with the International Conference, regional IHL forums or the functions and features of a potential forum of States.
- *Parallel approach*: each of the substantive elements of resolution 2 would be discussed in a dedicated open-ended work stream. Meetings of the different work streams would not take place at the same time, and progress made in each work stream would be discussed in the formal meetings on each occasion.
- *Combined approach*: discussions could start in a sequenced manner, but it would be ensured that all the substantive elements of resolution 2 are opened in 2017. At the end of 2017, States could take stock of the discussions, and consider whether separate work streams should be opened in 2018, having in mind the timeframe of the intergovernmental process.

Format and frequency of the meetings

Discussions within the intergovernmental process will take place in both formal meetings, and in meetings of a preparatory nature. All the meetings will be held in plenary format, open to all states. To allow for the participation of all interested States in all meetings, no meetings will be scheduled at the same time.

Formal meetings: it was suggested that one or two formal meetings of two to three days could be held per year. As mentioned above, these meetings would take place in plenary, so as to allow for the participation of all interested States.

Preparatory meetings: it was suggested that preparatory meetings should take place in between the formal meetings so as to ensure adequate preparation of the latter, and enable States sufficient opportunity to discuss the relevant issues. Preparatory meetings would equally be open-ended and allow for the participation of all interested States. It was said that preparatory meetings would enable States to present proposals, including in advance by way of written contributions, to comment on their respective proposals, and exchange views in that regard. It was also noted that preparatory meetings, could, more specifically, serve to prepare simplified written proposals to be presented for examination, revision and agreement at the following formal meeting. Such simplified proposals could, accordingly, form the basis of conclusions to be adopted at each formal meeting.

In this context it may also be stressed that the website of the intergovernmental process will allow for further exchanges of views among States in between the formal and preparatory meetings.