

**SEMINAR ON THE IMPLEMENTATION
OF INTERNATIONAL HUMANITARIAN LAW**

Sofia, 20-22 September 1990

1. A Seminar on the Implementation of International Humanitarian Law (IHL), organized by the International Committee of the Red Cross (ICRC) in co-operation with the Bulgarian Red Cross and the International Institute of Humanitarian Law (IIHL), was held in Sofia from 20 to 22 September 1990.

2. *Dr. Kiril Ignatov*, President of the Bulgarian Red Cross, in opening the seminar, noted that participants included IHL and Red Cross experts from 11 European countries, in addition to representatives from various ministries of the Bulgarian Government. He said that the holding of the seminar was particularly important in this period of change within Bulgarian society. *Dr. Ignatov* announced that steps were being taken to remove Bulgaria's reservations to the 1949 Geneva Conventions and for Bulgaria to accept the competence of the International Fact-Finding Commission prescribed under Article 90 of Additional Protocol I. He expressed the hope that the seminar would lead to the adoption of measures to implement IHL in Bulgaria and that all participants would leave the meeting with new ideas about this important subject.

3. *Mr. Bruno Zimmermann*, on behalf of the ICRC, and *Mr. Ugo Genesio*, on behalf of the IIHL, also welcomed participants. The seminar's objectives were to enable persons already working in the field to continue their dialogue, to open up this exchange to new specialists, and to encourage the interest of others.

4. The seminar then appointed *Mr. Bruno Zimmermann* as its Chairman and *Mr. Michael Meyer* as its Rapporteur; it was also agreed that *Ms. Emilia Yaneva* would act as Secretary-General.

5. *Ms. María Teresa Dutli* presented the first paper, giving an overview of the ICRC's efforts to promote the adoption of national measures of implementation and the ICRC's assessment of the present

situation.¹ She noted that national measures of implementation need to be tailored to the specific requirements of each State. She also observed that certain provisions of the 1949 Geneva Conventions and of their two Additional Protocols of 1977 establish specific obligations, such as the duty to translate the Conventions into national languages and the obligation to repress grave breaches. The State party is also required to observe the spirit of other obligations, such as that of distinguishing civilians from military objects. Reference was made to Resolution V of the International Conference of the Red Cross held in 1986, which reaffirmed the duty of States under IHL to adopt national measures of implementation, to inform each other thereof through the depositary, and in addition appealed to States to inform the ICRC of such legislative and other measures, called on National Red Cross/Red Crescent Societies to help in the process, and asked the ICRC to gather and assess this information.

6. Pursuant to this International Conference resolution, the ICRC has twice approached governments for information on national measures to implement IHL. In the 37 responses received, there were various lacunae, including an absence of excerpts from laws or decrees and of suggestions on how the ICRC could be more useful to States in implementing IHL. Only a part of the responses were of a substantial nature, and most of these were from European countries. However this does not mean that countries which neither answered nor provided a substantial response have not taken the necessary measures to implement IHL.

7. In discussion, problems of implementation were identified. These included the need to translate treaty provisions into understandable texts that could be applied in practice; the need for implementation to occur at many different levels, within the armed forces and by governmental and other organizations; and competing priorities within a State.

8. Proposals to help remedy the situation were: a transfer of intellectual and financial resources from government to government and from one National Red Cross or Red Crescent Society to another; the provision of an expert or a group of experts to examine the reasons for non-implementation and to offer legal counselling; the holding of regional seminars; a reporting system that does not require reports at short intervals from those States which have already provided evidence of having implemented IHL; reports on national implementation

¹ See p. 134, "National measures to implement international humanitarian law – Steps taken by the ICRC".

measures by National Red Cross/Red Crescent Societies, and the preparation of model laws, suitable for different areas of the world. It was further suggested that a small committee of experts representing different legal systems could be established to help the ICRC assess the information received from governments.

9. In later discussions it was noted that Resolution V of the International Conference also invited National Red Cross/Red Crescent Societies to assist and co-operate with their own governments in helping them fulfil their obligation to implement IHL. National Societies could help motivate their authorities to take appropriate action. As a practical step, it was proposed that the ICRC could assist in training experts in the National Societies of those countries where no progress in implementation has been made, and such local experts could then help their authorities in tangible ways, such as by drafting implementing decrees.

10. As the next step for the ICRC in encouraging governments to implement IHL, it was suggested that the most effective action might be to send experts to the countries concerned to speak to the people responsible rather than to rely on further written communications.

11. *Mr. Ugo Genesio* explained the role of the IHL in the promotion of IHL, particularly in the area of training, and the Institute's support for the efforts of the Red Cross and Red Crescent Movement to promote implementation of humanitarian law. He noted the difficulty of translating treaty obligations into national law and observed that one way to do this may be to establish an interministerial commission, entrusted with studying the treaty and, after taking into account the recommendations of international bodies, with giving advice on the adoption of national measures of implementation. *Mr. Genesio* then referred to various measures requiring implementation at national level, identified by the ICRC and set out in the 1986 International Conference document distributed to seminar participants. In conclusion, *Mr. Genesio* suggested that a future seminar might consider the adequacy of the international machinery for the implementation of IHL.

12. *Mr. Manuel Sager* described the role of Switzerland as the depositary State in the implementation of humanitarian law. This role is purely administrative in nature, and entails the transmission of the official translations of the Geneva Conventions and Additional Protocol I, and of implementing laws and regulations, to the High Contracting Parties. However, Switzerland, in its capacity as a High Contracting Party to these treaties, has submitted to the other States parties comprehensive information on its national measures of imple-

mentation to try to encourage them to fulfil their obligations in this area. Mr. Sager noted that if resources are a problem, then States that have the resources could provide assistance to other Governments in drafting national legislation, and the transmission of such laws by the depositary State could have a positive influence. Mr. Sager also discussed the role of Switzerland in relation to the establishment of the International Fact-Finding Commission under Article 90 of Additional Protocol I. It has been observed that inequitable geographical distribution of the States which have accepted the competence of the Commission could pose a problem, and suggested that until this situation is remedied, the establishment of the Commission should perhaps be postponed.

13. In discussion, it was suggested that, as the depositary, the Swiss Government could take a more active role, by reminding the High Contracting Parties of their duties under IHL and even by initiating joint activity by States to help other States implement their obligation to respect the Geneva Conventions and Additional Protocol I under Common Article 1 of those treaties. Mr. Sager was uncertain whether the Swiss Government would wish to fulfil such a role, although they may well be willing to respond to requests for help in implementing IHL at national level.

14. Comments were made regarding the establishment of the International Fact-Finding Commission. In the event of a problem of interpretation, all States party to Protocol I could be consulted as envisaged by Article 7 of that treaty. Moreover the States eligible to nominate members of the Commission may well nominate persons from different parts of the world. Indeed the acceptability of the Commission as a means of dispute settlement in every part of the world would require such a wide selection. More generally, the linkage between implementation and enforcement was noted, and it was recommended that States should give the ICRC a broader mandate in the area of implementation.

15. *Mr. Dieter Fleck* (Federal Republic of Germany) identified various problems related to the implementation of IHL, including the lack of motivation in peacetime to implement these rules; the perception that during armed conflict IHL is often violated without any penalty for such contraventions; ignorance of the content of humanitarian rules, and the complex and technical nature of certain implementing measures.² In his view, organizational and educational

² See p. 140, Dieter Fleck: "Implementing International Humanitarian Law: Problems and Priorities".

measures and publicity are most important for implementing IHL at national level. Joint efforts and continuous international co-operation are also required to work out plans of action and lists of priorities. He referred to the experience of the Federal Republic of Germany and gave a comprehensive account of implementing measures which have been taken and those which need to be taken. Serious efforts to implement IHL may have confidence-building effects.

16. Participants agreed that all legal commitments under IHL have the same status but that, for the purpose of implementation, a selection of priorities needs to be made. It was further agreed that, whereas it would be useful to study rules of engagement for armed forces, these were often regarded by States as being confidential in nature. Consequently, as a first step in that direction, States might be required to evaluate their rules of engagement internally, to ensure that they are in accordance with IHL, as they are required to do for new weapons under Article 36 of Protocol I. Certain measures of implementation are necessary to ensure the protection provided for by an IHL treaty, such as the protection of medical personnel and units under Additional Protocol I. In response to a recommendation that, since non-international armed conflicts are more prevalent, rules pertaining to them should be a priority for implementation, it was observed that no armed forces are trained to apply different rules in non-international armed conflict from those they apply in international armed conflicts.

17. *Professor Krzysztof Drzewicki* (Poland) described aspects of the relationship between international and national law. According to basic principles of international law, States must implement their international obligations in their domestic law, but at the same time, international law does not interfere with the way States will give effect to a treaty in their national legislation. Since the Second World War, the trend in international law has been to evolve from an inter-State law to a law governing the relationship between a State and an individual.

18. No single method of implementation is most effective or valid for all countries. What matters most is the will of a State to implement its obligations, not whether treaty rules become part of domestic law through incorporation or transformation. Most rules of IHL are self-executing, depending then only on direct applicability by State bodies and individuals. However, some of these provisions do contain an implicit obligation to adopt certain measures of implementation. Consideration needs to be given to the sort of measures that can help the ICRC convince States to implement IHL.

19. Problems arising from the recent past in Romania were identified, including a gap between national legislation and international treaty obligations, a lack of dissemination and an absence of legislative and administrative machinery designed to achieve the systematic implementation of IHL. In view of this, the priorities of the Romanian Association of Humanitarian Law include promotion of international humanitarian standards through the provision of professional advice to State agencies and educational activities.

20. Another participant observed that, since it is unrealistic to expect an individual to take legal action against his own State under the Geneva Conventions, the most effective measure to implement IHL at national level would be to remove obstacles to the work of the ICRC. However it was also noted that other implementing measures are necessary and required by IHL. The doctrinal controversy concerning the relationship of international and national law has practical relevance where a norm of IHL can be invoked in a domestic court: this can occur if such a norm is self-executing. Since the self-executing nature of norms is open to interpretation, and no court exists to give a ruling, writers on humanitarian law are able to help influence opinion on such matters. Lawyers need to learn more about IHL so that they feel more able to apply it. Measures for implementation can be divided into the five categories of dissemination, assistance, pressure, motivation and control.

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21. On 21 September, the session began with a presentation by *Mr. Luc De Wever* (Belgium) on the situation regarding the implementation of IHL in Belgium, and in particular the work of the Inter-Departmental Commission on IHL. This Commission is empowered to draw up a complete inventory of implementation measures and to draft the texts required by governmental bodies to implement IHL. The Commission also has a monitoring function once such measures have been implemented.³

22. The Inter-Departmental Commission consists of representatives of federal government departments, of the communities and regions, and of the Belgian Red Cross. The Chairman is a high-ranking military officer who also chairs the Commission for National Defence

³ See p. 154, Marc Offermans: "The Belgian Inter-Departmental Commission for Humanitarian Law".

Problems. The Belgian Red Cross provides the Secretariat. The Commission has drawn up two lists; one enumerating priority measures for implementation, and the other listing those measures which can be implemented gradually. Matters are dealt with by making one governmental department responsible for co-ordinating a particular item and for drawing up a working paper. To date 42 such documents have been produced; these are in the Flemish and French languages and are available to anyone interested.

23. Steps have been taken to set up a group of persons qualified in IHL, as envisaged under Article 6 of Protocol I, and to institute legal advisers, as prescribed by Article 82 of Protocol I. Efforts are being made to introduce a new penal law to repress grave breaches (Article 85 of Protocol I), and to conclude an agreement between the Government and the Red Cross on dissemination (Article 83 of Protocol I).

24. In discussion, it was reported that the ICRC had received information about similar inter-ministerial bodies but unfortunately did not know much about their work. The Belgian experience could provide a useful model both for States and for National Red Cross and Crescent Societies. In response to a question on creating an inter-departmental committee to deal with wider humanitarian problems such as refugees, it was stated that this did not seem feasible. Another query concerned financial aspects, and it was explained that the establishment and work of such a commission was not expensive, and that the government department responsible for an implementation measure also assumed its financing. It was reported that Sweden had a similar experience and that even with Sweden's familiarity with implementing reforms, it took 12 years to give effect to measures to implement the 1977 Additional Protocols.

25. *Mr. Konstantin Obradović* (Yugoslavia) discussed the legislative and regulatory measures necessary for the application of IHL. He referred to the relevant articles of the Geneva Conventions, which are reaffirmed in Article 80 of Additional Protocol I. He noted that these duties entail an obligation of result. In his opinion the minimum action required of a State must cover the following areas: military regulations concerning the application of IHL by armed forces; penal legislation to repress grave breaches; legislation on the status of the National Red Cross or Red Crescent Society and on the protection of the Red Cross or Red Crescent emblem. He then referred to the experience of Yugoslavia, where the most important implementing measure is a manual for the armed forces. *Mr. Obradović* noted that under

Yugoslavia's Constitution, it is a crime to recognize occupation. This is reflected in Yugoslavia's reservation to Additional Protocol I, which may have the effect of absolving an occupying power from respecting the relevant provisions of the Fourth Geneva Convention. Steps are being taken in the context of revising the Constitution to change this article, and consideration is also being given to withdrawing all Yugoslavia's reservations to the Geneva Conventions and to Protocol I.

26. In the debate, it was observed that IHL contains obligations of conduct, as well as of result. In this connection, reference was made to the prohibition of indiscriminate attacks under Article 51 of Additional Protocol I where what counts is not necessarily the damage to civilian objects but the way in which the damage is caused. Individual responsibility for grave breaches under Article 85 requires a wilful act and therefore also involves an obligation of conduct rather than result. A representative of the Hungarian Ministry of Defence gave an account of recent action taken in his country to implement IHL. These regulatory and educational measures demonstrated an admirable awareness and readiness to act in the area of implementation of humanitarian law.

27. *Professor Michael Bothe* (Federal Republic of Germany) addressed the matter of penal legislation to prevent and repress grave breaches. The repression of violations of IHL by criminal sanctions is not greatly influential in encouraging respect for the law. However, criminal sanctions are necessary in this area to show that violations of the fundamental values of the international community are subject to criminal law. Such sanctions must be properly established in terms of legal technique, entailing the adoption of clear legal rules and procedural guarantees.

28. States have used three approaches to repress breaches of IHL: first, some States have simply relied on their general criminal law; others have provisions of criminal law that make reference to conventional and customary international law; while other countries have specific provisions of criminal law relating to specific acts of warfare which are punishable. All three approaches have their drawbacks: the first is often used as a pretext for inaction, and the other two result in a lack of clarity. Professor Bothe considered that national criminal laws require evaluation to see if they do in fact cover all grave breaches, which in the case of Additional Protocol I is unlikely. The Belgian draft bill on penal sanctions is a useful model of legislation stipulating that specific acts of warfare are crimes, and it also contains

the Martens Clause which provides general protection to the victims of armed conflict based on customary law.

29. The law governing violations of non-international armed conflict requires development. It was noted that in such conflicts, individuals may be punished for the fact of mere participation in the conflict. National criminal laws also require examination from the viewpoint of criminology.

30. In the discussion, it was observed that extra-legal factors, such as reciprocity and public opinion, are more important than penal sanctions for promoting observance of humanitarian law. Regarding the question of superior orders, the prevailing opinion is that an individual tortfeasor should not be absolved from responsibility as a result of obeying manifestly illegal superior orders. Professor Bothe discussed the different fora which could be used to prosecute a person for violations of IHL. He concluded that the time may now be right for a cautious attempt to be made to raise once again the possibility of establishing an international criminal court.

31. The last speaker on 21 September, *Mr. Krister Thelin* (Sweden), discussed Sweden's experience in establishing a system of legal advisers in armed forces, as prescribed by Article 82 of Protocol I. Appointments were made following the coming into force of the 1986 Ordinance which instituted measures for the implementation of the Additional Protocols in Sweden. Seven legal advisers from the senior judiciary serve part-time in periods of peace, and 50 more legal advisers, also career judges, were appointed to serve as legal advisers in wartime. These 57 appointments should be considered in relation to the fact that in the event of armed conflict, 800,000 men may be mobilized.

32. The duties of the peacetime legal advisers, based on the 1986 Ordinance, include designing education in IHL, instruction for the wartime legal advisers, advice to military commanders on all aspects of international law, and participation in peacetime operational planning. To date, legal advisers have been welcomed by military commanders, but this may be because they are a novelty. It has proved important for the legal advisers to be of sufficiently high rank to be taken seriously. At the same time they must retain their integrity as lawyers and show their understanding of military requirements. The

legal advisers have not been tested in situations of armed conflict, and they must take steps to introduce IHL into military exercises.⁴

33. In discussion, it was reported that Bulgaria is instituting its own system of legal advisers, but that these are military officers trained in IHL. It was observed that such persons may be unable to interpret the law with sufficient flexibility. Poland also will be establishing a system of legal advisers, although that will take time and financial resources. It was noted that the need for legal advisers in armed forces illustrates the importance of having adequate staff to implement IHL, and this may be a relevant topic for discussion in connection with confidence-building in Europe. There was a clear consensus on the importance for the implementation of IHL of legal advisers in armed forces.

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34. The final day of the seminar was opened by *Ms. Emilia Yaneva* (Bulgaria), who explained the role of National Red Cross and Red Crescent Societies in initiating the dissemination and implementation of IHL and, in particular, described the many activities undertaken by the Bulgarian Red Cross in these areas. The International Humanitarian Law Commission of the Bulgarian Red Cross played an important role in promoting ratification of the Additional Protocols. They support regular training in IHL in the armed forces and encourage interest in the subject at universities, among young people and the

⁴ In 1979 Sweden ratified the 1977 Protocols additional to the 1949 Geneva Conventions, and was thus one of the first countries to do so.

In fulfilment of its obligations under the Conventions and Additional Protocols, the Swedish government appointed a special committee — the International Humanitarian Law Committee — to study and present proposals for the interpretation and application of the rules of international humanitarian law governing war, neutrality and occupation, and also to disseminate information on and promote teaching of these rules.

The Committee's comments and proposals were submitted to the Minister of Defence in 1984 in a report entitled "International Law in Armed Conflict".

In the late 1980s, on the basis of this report, the Swedish government drew up orders and directives for the military and civil authorities within Sweden's Total Defence System. In 1990 the government issued an ordinance — The Total Defence Ordinance relating to International Humanitarian Law — containing a summary of its views and related directives for the Swedish authorities concerned. The authorities are now adopting measures for the implementation of international humanitarian law.

In January 1991 the Swedish Ministry of Defence published a booklet entitled "International Humanitarian Law in Armed Conflict with reference to the Swedish Total Defence System".

This booklet is a compilation of the most important sections of the report of the International Humanitarian Law Committee and of the government's related decisions addressed to the Swedish authorities concerned.

general public. Suggestions have been made to the authorities regarding national measures of implementation and, in due course, the establishment of an inter-ministerial commission may be proposed.

35. In discussion, the importance of co-operation among the ICRC and National Societies, and other bodies interested in dissemination, such as the IIHL, was stressed. Dissemination work does not require great financial means: determination and courage are more essential factors.

36. *Colonel Hristo Rastashki* (Bulgaria) reported on the background to the development of dissemination within the Bulgarian armed forces. International seminars, held in Bulgaria with the assistance of the ICRC and the IIHL, helped significantly to promote ratification of the Additional Protocols and gave impetus to regular training in IHL at different levels within the armed forces. Such training is a prerequisite to observance of Bulgaria's obligations under IHL. The political will to promote IHL in Bulgaria is clear, and with the help of the Bulgarian Red Cross and others, efforts in that direction will continue.

37. In his concluding remarks, *Mr. Zimmermann* said that the ICRC's objectives for the seminar had been achieved. Note had been taken of all the proposals to enhance the implementation of IHL at national level. These could be placed into three categories: those measures which have already been taken and could be repeated, like regional seminars, and which should be increased, such as co-operation between State and other bodies; those ideas meriting consideration, but which cannot be undertaken, at least not in any systematic way, until after the next International Conference of the Red Cross and Red Crescent in 1991, such as meetings with the responsible officials of each country; and those more extensive proposals which, it is hoped, will include proposals from States and National Societies, and will require further study at the next International Conference, such as the establishment of a group of experts, possibly on an informal basis, to help assess information received by the ICRC. The ICRC hopes to submit to that Conference substantial information and specific proposals to promote the implementation of IHL, and towards this end it will also make every possible effort to ensure that the subject of national measures for the implementation of humanitarian law is discussed in the most effective way at the Conference.

38. *Ms. Yaneva*, on behalf of the Bulgarian Red Cross, expressed the hope that all the participants had found the seminar useful, and said that a copy of the summary report would be considered by the Legislative Commission of the Bulgarian Parliament.