

Preparing the meeting of the group of intergovernmental experts for the protection of war victims

NOTE BY THE SWISS GOVERNMENT

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Mandate of the meeting

In its "Final Declaration" adopted on 1 September 1993, the International Conference for the Protection of War Victims (Geneva, 30 August to 1 September 1993) conferred upon an intergovernmental group of experts to be convened by the Swiss Government the mandate to study "*practical means of promoting full respect for and compliance with [international humanitarian] law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent*".

The expert meeting's main topic — respect for international humanitarian law (IHL) — may be divided into **three aspects**, each meriting separate legal and practical consideration: 1. **universal acceptance** of the pertinent international instruments; 2. **prevention** of violations of IHL; and 3. **observance** of IHL and **repression** of violations.

In accordance with this subdivision, the following paragraphs will outline some of the States' basic obligations, comment on the extent to which they have been met, and, in order to initiate the international discussion, present a list of possible measures to diminish the discrepancy between the two.

I. Universal acceptance of IHL instruments

1. Introduction

While the four Geneva Conventions of 1949 enjoy practically universal recognition today, accession to other IHL instruments granting addi-

tional protection to the victims of war, protecting other rights and/or limiting the methods of warfare ought to be further promoted.

The Final Declaration of the International Conference for the Protection of War Victims, in its Part II, paragraph 4, urged all States to consider or reconsider becoming party to the following four IHL instruments adopted since 1949:

- the Protocol additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 (**Protocol I**);
- the Protocol additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (**Protocol II**);
- the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and its three Protocols (**1980 Weapons Convention**);
- the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (**1954 Hague Convention**).

In addition the Final Declaration, Part II, paragraph 6, urged all States to consider recognizing the competence of the **International Fact-Finding Commission** according to Article 90 of Protocol I.

2. International legal obligations

States party to a multilateral legal instrument are, as a rule, **not obliged** to promote accession thereto. On the other hand, it is arguably in their **own best interest** to enlarge the circle of States that are bound by the same legal commitments.

3. Current state of accessions

At the end of February 1994, the following number of States had become party to the four international instruments listed above:

- Protocol I: 130 States;
- Protocol II: 120 States;
- 1980 Weapons Convention: 41 States;
- 1954 Hague Convention: 83 States.

4. Possible measures

The following **players on the international scene** could promote, through appropriate measures, the accession of States to the instruments referred to above as well as recognition of the competence of the International Fact-Finding Commission:

- a) **High Contracting Parties:** by encouraging accession in their bilateral contacts with non-contracting States; through interventions in the general framework of universal and regional organizations; through interventions at multilateral events specifically dedicated to IHL;
- b) **depositaries of IHL instruments:** by expressly inviting individual non-contracting States to accede; through periodical publication of the state of accessions; through interventions at events dedicated to IHL;
- c) **UN:** through regular inclusion of the question of accession in the agenda of the General Assembly;
- d) **regional intergovernmental organizations:** by drawing IHL instruments to the attention of their respective members;
- e) **ICRC:** through bilateral and multilateral appeals to non-contracting States;
- f) **NGOs:** High Contracting Parties could encourage NGOs to join in efforts to promote the accession of non-contracting States to IHL instruments.

5. Non-international armed conflicts and customary rules

The experts may wish to explore and recommend to the States measures designed to **strengthen customary rules** beyond treaty-based obligations, such as the promulgation of national military manuals that do not distinguish between the rules applicable to international armed conflicts and those applicable to non-international armed conflicts.

II. Prevention of violations of IHL

1. Introduction

The atrocities committed on a large scale in many of today's armed conflicts show that practically universal acceptance of the Geneva Conventions and the fact that a considerable number of States have become party to the Protocols are by no means a guarantee for observance of the

rules of IHL. Above and beyond accession to an IHL instrument it is indispensable, on the one hand, to incorporate its provisions in national legislation, thus laying the legal foundation for domestic enforcement and repression, and, on the other hand, to spread knowledge of its content among the general public and, most of all, the armed forces.

2. International legal obligations

According to the generally recognized principle of *pacta sunt servanda*, a State party to a treaty is obliged to ensure, within its jurisdiction, that the treaty is put into effect. This **duty to implement** international obligations through appropriate national measures is specifically set forth in Article 80 of Protocol I stating that the High Contracting Parties “shall take all necessary measures for the execution of their obligations under the Conventions and this Protocol”.

Articles 47, 48, 127 and 144 of the four Geneva Conventions respectively, Article 83 of Protocol I, Article 19 of Protocol II, Article 25 of the 1954 Hague Convention and Article 6 of the 1980 Weapons Convention oblige the States party, to varying degrees, to **disseminate** those instruments as widely as possible within their countries (Protocol II), to include the study thereof in the programmes of military, and, if possible, civil instruction (Geneva Conventions and 1954 Hague Convention) and to encourage such study by the civilian population (Protocol I).

Articles 48, 49, 128 and 145 of the Geneva Conventions respectively, Article 84 of Protocol I and Article 26 of the 1954 Hague Convention oblige the States party to **communicate** to each other, *inter alia* through the depositary, their official **translations** of the said instruments as well as the laws and regulations adopted to ensure their application.

Finally, Resolution V of the 25th International Conference of the Red Cross (1986) urged the States party to the Geneva Conventions and the Protocols to meet their obligation to adopt or to supplement national legislation implementing the Geneva Conventions and the Protocols and to inform each other, through the depositary, of the measures thus taken.

3. Current state of national measures taken

The extent to which individual States party have adopted national measures to implement IHL instruments is **difficult to assess**, as only about one third of the States party to the Geneva Conventions have responded to the various appeals of the ICRC to report on those measures (no pertinent information is available with regard to the 1980 Weapons Convention and the 1954 Hague Convention). Information on the efforts

made by States party to disseminate IHL within the individual countries is also difficult to obtain. The exchange, through the depositaries, of official translations of the instruments themselves and the implementing national legislation is **unsatisfactory**.

4. Possible measures

a) To promote implementation of IHL

- aa) Creation of **national committees** at an interministerial level, or appointment of persons or government offices in charge of **coordinating and supervising** within national administrations, the measures adopted to implement IHL instruments.
- bb) **Cooperation between States:**
 - i) translations (into an official UN language) of IHL instruments and of implementing national laws and regulations and transmission thereof to the other States party;
 - ii) exchange of information concerning national measures of implementation in the framework of bilateral and multilateral military cooperation;
 - iii) exchange of information between the offices responsible in each State party for the implementation of IHL.
- cc) Establishment of “**advisory services in the field of IHL**” supporting the States in their efforts to implement IHL. This could notably be done in one of three ways: by inviting the ICRC to assume this task; by utilizing the Centre for Human Rights in Geneva; or by creating a new institution, be it under the Conventions or on another basis (e.g., pursuant to a resolution of the competent body of the International Red Cross and Red Crescent Movement).
- dd) Establishment of a **reporting system** with regard to the national implementing measures taken by States party. Such an institutionalized system could be created under the Conventions or in other ways. The constituent international instrument would have to determine the nature and duration of the mandate of the institution, its composition and powers, the funding of its operations, its relationship to the ICRC, the frequency of the reports, their content as well as the manner in which they are examined, etc.

It may be added in this context that Resolution V of the 25th International Conference of the Red Cross (1986) already contained rudi-

mentary steps towards the creation of such a reporting system: paragraph 3 calls upon the States to give the ICRC their full support and all necessary information to enable it to monitor the progress made in taking national measures of implementation.

- ee) Organization, by the ICRC, of regional seminars to promote the adoption of implementation measures.

b) To promote dissemination of IHL

- aa) **Education** and training of the members of the **armed forces and security forces** and of **contingents** placed at the disposal of the United Nations, having due regard to their respective level of responsibility.
- bb) **Education in schools** and other institutions of education; dissemination through the media, non-governmental organizations and National Red Cross and Red Crescent Societies.
- cc) **Specific education** as part of **military** assistance and cooperation programmes.
- dd) **Reports to the ICRC** on national efforts of dissemination with a view to improving the coordination of those efforts.
- ee) Establishment of “**advisory services in the field of IHL**” to assist the States in their dissemination efforts as well (see 4 a) and cc)).
- ff) **Appeals** to the States party to transmit to the depositaries **translations** of the relevant IHL instruments and of national implementing laws and regulations.

III. Observance of IHL and repression of violations

1. Introduction

IHL is based on the principle that parties which have failed to find peaceful means to settle their differences are bound by basic rules of humanity in conducting any armed conflict that might ensue. Observance and enforcement of IHL is therefore primarily the responsibility of the civilian and military leadership of a party to an armed conflict.

It is imperative that the domestic laws and prosecution mechanisms necessary to repress violations of IHL be established already in peacetime: firstly, for reasons of prevention and dissuasion; secondly, because it may

for political and practical reasons be less feasible to do so during an armed conflict; and thirdly, because the existence of a comprehensive penal code for war crimes ensures from the outset of an armed conflict that repression of IHL violations does not contravene the principle of *nulla poena sine lege*.

2. International legal obligations

Article 1 common to the four Geneva Conventions and Article 1 of Protocol I oblige the States party "to respect and to ensure respect for" those instruments in all circumstances. There is no equivalent provision in Protocol II, the 1954 Hague Convention and the 1980 Weapons Convention. The obligation to respect the latter instruments, however, is indubitably an implicit consequence of accession thereto.

The Geneva Conventions (Articles 49 and 50 of the First Convention, 50 and 51 of the Second, 129 and 130 of the Third, and 146 and 147 of the Fourth), Protocol I (Articles 85 and 86) and the 1954 Hague Convention (Article 28) oblige the States party to provide in their national legislation for the prosecution of (or disciplinary measures against) persons violating those instruments.

3. Observance and repression in today's armed conflicts

As the manner in which the hostilities are conducted in many armed conflicts around the world today speaks largely for itself, a detailed analysis of the degree to which IHL is currently observed would seem unnecessary in this context. Suffice it to refer to the "Report on the Protection of War Victims" submitted by the ICRC to the International Conference for the Protection of War Victims.

One frequent situation that should be addressed in this context, however, is that characterized by a total **collapse of all governmental authority** capable of effectively ensuring observance of IHL and repression of breaches thereof.

4. Possible measures

a) *Questions of a general nature*

The experts may wish to initiate the discussion of measures to promote observance of IHL and repression of violations by attempting to **define the content and the extent** of the obligation of States party to "**ensure respect**" for the Geneva Conventions and Protocol I, i.e., to examine the role to be played by third States not involved in a given armed conflict.

Such an undertaking could prove to be as difficult as it would be useful, as the Geneva Conventions and Protocol I impose upon all States party the obligation to enforce IHL without providing them with the necessary means to do so. The measures currently available to the said States to ensure respect for IHL do not differ from those normally relied upon to enforce any other international obligation, such as diplomatic intervention, retorsion or non-military reprisals. Even the ultimate mechanism to ensure respect for IHL, i.e., the use of force, has its legal foundation not in IHL but in the pertinent rules of the Charter of the United Nations.

Along similarly general lines, the experts may wish to address the fact, criticized at times, that political bodies have on occasion provided **assistance** to victims of armed conflicts according to **political** rather than humanitarian **criteria**.

b) Improving existing mechanisms

aa) Protecting Powers

The Geneva Conventions, Protocol I and the 1954 Hague Convention provide for the Protecting Powers entrusted with representing the interests of the parties to an armed conflict to facilitate and monitor their application. This supervisory mechanism can function, however, only if the Protecting Power appointed by one party to an armed conflict is accepted by the other. In the course of the last 45 years, this mechanism has been resorted to in but a handful of armed conflicts, e.g., the Suez crisis (1956), the Goa conflict (1961), the conflict between India and Pakistan (1971-1972) and the Falkland-Malvinas conflict (1982). Even in those cases, the Protecting Powers were not able to carry out all the tasks conferred upon them by IHL.

In this situation, the experts may want to examine the reasons for the poor functioning of this mechanism and explore ways of promoting the designation and acceptance of Protecting Powers.

bb) Investigation under the Geneva Conventions

According to Articles 52/53/132/149 common to the Geneva Conventions an investigation of alleged violations of those instruments shall be conducted pursuant to a procedure agreed upon by the parties to a particular armed conflict. The main weakness of this mechanism is that its functioning depends entirely on the willingness of the parties to the armed conflict to cooperate. The experts are invited to examine possibilities to promote the utilization of this verification mechanism.

cc) International [Humanitarian] Fact-Finding Commission (IHFC)

Mainly in order to **remedy the flaw** inherent in the investigation procedure under the Geneva Conventions, Protocol I introduced in its Article 90 a mechanism designed to render it more difficult for the parties to an armed conflict to escape international scrutiny. The International Fact-Finding Commission is competent to **enquire** into allegations of **grave breaches** as defined in the Geneva Conventions and Protocol I and other serious violations of these instruments and to facilitate, through its good offices, the restoration of an attitude of respect for the said Conventions and Protocol.

The principal novelty of this enquiry mechanism is its **obligatory** character for those States party to Protocol I having recognized *ipso facto* and **without special agreement the competence** of the International Fact-Finding Commission. While the Commission may also enquire into situations where the party requesting the enquiry and/or the one against which the enquiry is conducted has (have) not made the declaration provided for in Article 90, it may do so only with the consent of the other party(ies) concerned.

So far, 38 States party to Protocol I have made the declaration to the depositary.

It is thus of great **importance** that the Commission attain universal recognition.

dd) Cooperation of the States party to Protocol I with the UN

In situations of serious violations of the Geneva Conventions or of Protocol I, the States party “undertake to act, jointly or individually, in cooperation with the United Nations” and in conformity with its Charter (Article 89 of Protocol I).

Here, the experts could explore ways and means of cooperation between States and the UN to ensure respect for IHL within the realm of *jus in bello* (see 4 a) *supra*).

ee) Improvement of national measures to repress violations of IHL

As the obligation to repress violations of IHL is often not observed in a satisfactory manner, the experts may wish to discuss possible means of improving this situation.

ff) Compensation of damages

Each party to an armed conflict bears the responsibility for acts committed by members of its armed forces. In cases of wrongful acts, it

is obliged to repair the damages caused and to pay compensation (Article 91 of Protocol I).

The experts could explore procedures for the payment of compensation which would effectively give the victims what they are legally entitled to.

c) Establishment of new mechanisms

aa) Periodic convocation of conferences by depositaries

According to Article 7 of Protocol I, the depositary “shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon approval of the majority of the said Parties, to consider **general problems** concerning the **application** of the Conventions and of [Protocol I]”. The 1954 Hague Convention and the 1980 Weapons Convention contain similar provisions (Articles 27 and 8 respectively). Objectives, organization and convocation procedure would merit a more thorough examination.

bb) Multilateral framework for discussing specific cases of violations of IHL

Conferences to discuss concrete violations of IHL instruments could also be held regularly and within a structured framework. The establishment of a new forum for that purpose — or the utilization of an existing one, such as the International Conference of the Red Cross and the Red Crescent — would have to be examined.

cc) Internal reporting on the observation of IHL

Some States require their **armed forces** to report to a **supervisory body** (e.g., the legislative power) on how the hostilities were conducted in a given armed conflict and how IHL considerations influenced their military operations.

The experts could recommend that all States adopt such a policy of international reporting and accountability for the observation of IHL during armed conflicts.

dd) Establishment of an international penal court for the repression of violations of IHL

Since the adoption of the Geneva Conventions, penal repression of violations of IHL has depended exclusively on the willingness of an individual State to prosecute or extradite suspected war criminals appre-

hended within its jurisdiction. For various reasons, this system of dissuasion and repression has not always worked satisfactorily.

Therefore, the establishment of an international penal court exercising universal jurisdiction over violations of IHL is necessary in order to ensure an equitable administration of international justice uninfluenced by the political mood of the times. Hence, the experts may wish to address some of the issues surrounding the establishment of such a court. On the other hand, this topic should probably not constitute a priority at the expert meeting, as the establishment of a penal jurisdiction is already extensively dealt with in other international fora.

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