

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

* * *

PROTECTION OF WAR VICTIMS

* * *

*Suggestions of the International Committee
of the Red Cross*

Geneva, April 1994

TABLE OF CONTENTS

Pages

Introduction	427
1. Universal accession to the instruments of international humanitarian law	427
2. Prevention of violations of international humanitarian law	429
2.1 Implementation of international humanitarian law	429
2.1.1 Setting up of national interministerial committees	429
2.1.2 International cooperation	430
2.1.3 Dissemination of international humanitarian law	431
2.1.3.1 Coordination of efforts	431
2.1.3.2 Instruction to the armed forces	432
2.1.3.3 Role of the media	433
3. Respect for international humanitarian law and repression of violations	434
3.1 Clarification of international humanitarian law	434
3.1.1 Humanitarian rules applicable to the conduct of hostilities	434
3.1.2 Environment and war	435
3.1.3 War at sea	435
3.1.4 Right of victims of armed conflicts to receive protection and assistance	435
3.2 Joint responsibility of States party to the Geneva Conventions to "ensure respect" for international humanitarian law by parties to conflict	437
3.2.1 Content of the obligation to ensure respect for international humanitarian law	437
3.2.2 Cooperation of States party to the Geneva Conventions in the event of grave violations of international humanitarian law	438
3.2.2.1 Cooperation within the UN	438
3.2.2.2 Cooperation outside the UN framework	439
3.2.2.3 Possibility of setting up new structured multilateral fora	439
3.3 Repression of grave breaches of international humanitarian law (war crimes)	440
4. Reparation	441

Introduction

This document is based on the Final Declaration of the International Conference for the Protection of War Victims, the report prepared by the ICRC for that Conference and the note sent to States at the beginning of March 1994 by the Swiss Government, concerning the meeting of the group of experts.

The present paper does not take up all the points referred to in the Swiss Government's note, but defines more precisely, for certain of them, issues that the experts might look into more closely.

At the beginning of each section reference is made to relevant passages of the ICRC's report to the 1993 Conference, the Final Declaration of the Conference and the document drawn up by the Swiss Government.

Finally, in view of the number of questions that merit examination and the complexity of some of them, an order of priorities will have to be set for the work of the group of experts.

1. Universal accession to instruments of international humanitarian law

References:

- Report on the Protection of War Victims, *International Review of the Red Cross*, No. 296, September-October 1993, pp. 405-406;
- Final Declaration of the Conference, Part II, para. 4;
- Note of the Swiss Government, Part I.

The universality of international humanitarian law is a major factor for proper implementation of its provisions. Indeed, the fact that belligerents may not all be bound by the same conventions gives rise to confusion and weakens humanitarian standards.

Provisions that place limits on methods and means of combat, in particular, if not universally accepted are barely observed at all, because States preparing for military operations are hesitant to relinquish a particular means of waging war if they are convinced that their potential enemies have this same means and are ready to use it.

Numerous resolutions have been passed in international fora urging States to become party to the instruments of international humanitarian law.

For example, in resolution 47/30 the United Nations General Assembly appealed to “*all States parties to the Geneva Conventions of 1949 that have not yet done so to consider becoming parties also to the Additional Protocols at the earliest possible date*” (para. 3).

Similarly, in resolution 47/56 relating to the Convention on prohibitions or restrictions on the use of certain conventional weapons, the General Assembly urged “*all States that have not yet done so to exert their best endeavours to become parties to the Convention and the Protocols annexed thereto as early as possible, as well as successor States to take appropriate action so as ultimately to obtain universality of adherence*” (para. 3).

Furthermore, resolution 48/30 on the United Nations Decade of International Law took note with appreciation of the Final Declaration of the International Conference for the Protection of the Victims of War “*as an important means for reaffirming, strengthening and promoting international humanitarian law*” (para. 4).

Finally, in the Vienna Declaration and Programme of Action adopted on 25 June 1993, the second World Conference on Human Rights appealed to “*States which have not yet done so to accede to the Geneva Conventions of 12 August 1949 and the Protocols thereto, and to take all appropriate national measures, including legislative ones, for their full implementation*” (Part E, para. 93).

It should be noted, however, that these resolutions have had relatively little effect.

Suggested questions

- a) *What can be done to ensure that effective action is taken at national level to follow up resolutions adopted by international or regional bodies that encourage States to ratify or accede to the international humanitarian law treaties?***
- b) *How can States be encouraged to accept the binding competence of the International Fact-Finding Commission (Article 90 of 1977 Protocol I)?***
- c) *What can be done to raise awareness on the part of States of the 1980 Convention on conventional weapons and to persuade them to ratify or accede to this treaty?***

2. Prevention of violations of international humanitarian law

The International Conference for the Protection of War Victims stressed the preventive effort that must be made to avert situations in which humanitarian standards are flouted.

In this regard, before looking into preventive measures which could be taken within the framework of international humanitarian law to prevent violations during armed conflicts, it must be remembered that the States have also, and perhaps first and foremost, a responsibility to seek measures designed to prevent conflicts themselves. The complementary nature of these two types of measures must, furthermore, be stressed.

2.1 Implementation of international humanitarian law

References:

- Report on the Protection of War Victims, pp. 407-408;
- Final Declaration, Part II, para. 5;
- Note of the Swiss Government, Part II, Section 4, para. a (aa).

To be effective, international humanitarian law must be accompanied by national implementation measures. For States whose national language or languages are not those in which the treaties were adopted, obviously one of the first steps to be taken is to have them translated.

The incorporation of international humanitarian law in national law, moreover, is all the more important since many of its provisions depend on internal law for their application. This is notably the case for the rules designed to protect the Red Cross or Red Crescent emblem and, more generally, all the provisions for the repression of violations of international humanitarian law.

Finally, the drawing up of documents drafted in simple language to familiarize the local population, the armed forces and all other groups concerned with international humanitarian law is an essential complementary measure.

2.1.1 Setting up of national interministerial committees

The setting up of national interministerial committees is an essential measure for implementation of international humanitarian law, considering the obvious implications of implementation, if seriously undertaken,

for areas affecting a number of ministries (Defence, Education, Justice, etc.).

Such committees generally begin by making an assessment of existing legislation and other national measures in relation to the obligations of implementation created by international humanitarian law. In areas where shortcomings are noted, they can make practical proposals to the authorities. To be really effective, the role of the committees must also include coordination of the measures adopted and monitoring of their execution.

Suggested questions

- *How can the setting-up of interministerial committees be promoted?*
- *What mandate should such committees ideally be given?*

2.1.2 International cooperation

References:

- Report on the Protection of War Victims, p. 410-411;
- Note of the Swiss Government, Part. II, Section 4, para. a (bb-ee).

The exchange of information, experience and documents among States can facilitate the taking of national implementation measures. This cooperation is particularly useful at regional level and among States whose legislative systems and cultural traditions are similar. Regional seminars organized by the ICRC have enabled national officials to exchange views on the best ways of organizing this task and the pitfalls to be avoided.

This cooperation can be reinforced if States communicate all relevant information on national measures to a central body, which may then be consulted and will supply the data needed. Resolution V of the 25th International Conference of the Red Cross, which met in Geneva in 1986, asked the ICRC to play this role. The ICRC subsequently confirmed its willingness to do so on a number of occasions. In particular, on 28 January 1991 it sent to States and National Red Cross and Red Crescent Societies a document entitled "*Proposals aimed at helping States adopt national measures to implement international humanitarian law. ICRC's Compilation*".

It should, moreover, be recalled that the Geneva Conventions and Protocol I additional thereto require States to communicate the official translations of these treaties, and the laws and rules of application they adopt to ensure their application, through the government of the depositary State, Switzerland.

Suggested questions

- *Can the consultative services of the ICRC be strengthened to assist States in the implementation of international humanitarian law?*
- *Should cooperation with other similar services be developed?*
- *Should the sending of national reports be placed on a systematic basis, and should precise instructions be issued for the drafting of these reports?*
- *What body should be responsible for examining such reports?*
- *Could the role of the depositary State be developed?*
- *Could a group of governmental experts — or an international body — play a supportive, advisory role in this area?*

2.1.3 Dissemination of international humanitarian law

References:

- Report on the Protection of War Victims, pp. 408-412;
- Final Declaration, Part. II, Sections 1-2;
- Note of the Swiss Government, Part II, Section 4, para. b.

In signing the Geneva Conventions and their Additional Protocols, the States undertook to make these instruments known as widely as possible and to include study of their provisions in military and, if possible, civil instruction programmes.

Bearing this in mind, three matters call for particular consideration:

- coordination of the efforts undertaken to spread knowledge of international humanitarian law and of teaching and dissemination activities conducted with a view to preventing conflicts;
- instructions to armed forces;
- the role of the media.

Without neglecting the other points referred to in the Swiss Government's note, the group of experts might usefully continue to reflect on these three themes, with due respect, as regards the third one, for the independence of the media.

2.1.3.1 Coordination of efforts

The principles of international humanitarian law can be taught to children at a very young age. Moreover, the increased involvement of the

young in conflicts and disturbances makes it even more important to teach these principles as soon as schooling begins, and to return to them in increasing detail throughout the years of education, including, of course, university education.

In this regard the coordination of endeavours on the international level is desirable: indeed, resolution 47/128 of the UN General Assembly encourages coordination of the efforts of the UN and the ICRC.

At the regional level, particular mention should be made of the resolution passed in December 1993 by the African Commission on Human and Peoples' Rights which highlights the importance of giving instruction in international humanitarian law and human rights to military and police forces, and stresses the importance of coordinating the efforts of the Commission, the ICRC and the other institutions concerned.

Suggested questions

- *How can the principles of international humanitarian law be incorporated in national education programmes?*
- *What support do governments expect in this area from international bodies such as the UN Centre for Human Rights, UNESCO or the ICRC?*
- *What type of cooperation with national bodies, in particular the National Red Cross and Red Crescent Societies, can governments envisage?*
- *How can regional cooperation be developed in this area?*

2.1.3.2 Instruction to the armed forces

The Conference on the Protection of War Victims underlined the primordial importance of instructing the armed forces in international humanitarian law.

In view of the diversity of combatants engaged in hostilities today, new means must be sought to promote the teaching of humanitarian rules to all who bear arms, whether they form part of conventional armed forces or not.

The engagement of armed forces in situations of internal disturbances not covered by international humanitarian law, and the need to train police

forces in such situations, call for an approach to instruction appropriate to these particular circumstances.

The more active role being assumed by UN contingents, moreover, means that these forces too have to receive instruction in international humanitarian law.

In conclusion, particular attention should be given to harmonizing the efforts made at international level.

Suggested questions

- *How can instruction in international humanitarian law be made systematic and be permanently incorporated in training programmes for the armed forces?*
- *How can international cooperation with regard to the instruction of armed forces in international humanitarian law be developed and better harmonization of international efforts be achieved?*
- *What can be done to ensure that troops engaged in UN operations receive adequate training in international humanitarian law?*

2.1.3.3 Role of the media

The independence of the media precludes an exhaustive examination in a meeting of intergovernmental experts of the role it plays, both in peacetime and in situations of conflict, in spreading knowledge of humanitarian values or, conversely, in denigrating those values.

It seems however that an examination of certain questions with the experts is warranted, particularly in view of the use made of the media by political leaders in time of war, and the possibilities thus offered them to make their countries' population aware of the values of international humanitarian law and to encourage it to respect those values.

Suggested questions

- *In peacetime and in time of conflict, what can be done to facilitate media campaigns to enhance knowledge of international humanitarian law and how can respect for its values be encouraged?*
- *How can cooperation with official press services be established in order to communicate messages relating to international humanitarian law?*

3. Respect for international humanitarian law and repression of violations

3.1 Clarification of international humanitarian law

References:

- Report on the Protection of War Victims, pp. 413-424;
- Final Declaration, Part I, Section 4; Part II, Sections 8, 9, 10 and 12.

The mandate of the group of intergovernmental experts is not to look into the development of international humanitarian law. Nevertheless, certain work in progress will probably afford clarifications that should facilitate improved compliance with the existing law. It would therefore be useful to give an outline of this work.

3.1.1 Humanitarian rules applicable to the conduct of hostilities

The process of reviewing the 1980 UN Convention on prohibitions or restrictions on the use of certain conventional weapons has begun. It involves reflection on weapons which are prohibited or the use of which is limited by one of the Convention's three existing Protocols, and on the possibility of adding one or more new protocols, as authorized by the Convention. The conclusions reached at expert meetings organized by the ICRC on mines and blinding weapons will be examined within this framework.

It is still no less necessary to promote the 1980 Convention, which will be effective only if States adhere to it on a large scale.

As regards the Convention itself, some wish to see its field of application extended to non-international armed conflicts. Indeed, it seems absurd that a State should countenance using against its own population means of warfare that it would not consider using against an external enemy. Harmonization of the rules governing the conduct of hostilities for all armed conflicts, however, is a more general problem.

Suggested questions

- *How can the rules governing the conduct of hostilities be harmonized for all types of armed conflict?*
- *Could cooperation be established in this regard among the military, particularly in terms of drawing up military manuals?*

3.1.2 Environment and war

The protection of the environment during armed conflict remains an extremely topical issue. It has been the subject of three meetings of experts organized by the ICRC. These meetings concluded that the existing rules, if they were universally and scrupulously respected, should suffice to bring about a very significant reduction in the damage inflicted on the environment in times of armed conflict. The proceedings of the latest two meetings were included in a report submitted by the UN Secretary-General to the 48th session of the General Assembly. Resolution 48/30 invited States to communicate their observations and comments on this report to the ICRC. The latter declared that it was prepared to pursue the question and, in particular, to review the draft it had prepared on the basis of the experts' work, with a view to incorporating in military manuals, in plain language, the rules relating to protection of the environment that are explicitly or implicitly contained in international humanitarian law. These clarifications are essential, but it seems premature to put questions on this matter to the group of intergovernmental experts; it is possible, nevertheless, that this could be done at a later date, depending on the observations and comments communicated to the ICRC by the States.

3.1.3 War at sea

The Falkland/Malvinas conflict revealed certain shortcomings in international humanitarian law applicable to war at sea. A review of this law was undertaken under the auspices of the International Institute of Humanitarian Law in San Remo, in cooperation with the ICRC. This study should be completed in 1994.

Examination of the question whether practical or legislative measures will have to be envisaged and, if so, what procedure should be followed will be based on the report summarizing this study. The report could be examined in 1995 within the framework of the International Conference of the Red Cross and Red Crescent or of the UN General Assembly. There is no need, therefore, for this question to be broached at this stage by the group of intergovernmental experts.

3.1.4 Right of victims of armed conflicts to receive protection and assistance

The difficulties encountered in reaching the victims of armed conflicts, and especially in bringing aid to populations lacking the basic means of survival, have given rise to intense reflection within the international community.

Two matters are at the heart of this reflection.

- The refusal of certain governments or other parties in conflict to allow free passage of essential goods intended for the population of the adverse party, or even for their own population, has given fresh impetus to the debate on the concept of intervention on humanitarian grounds.
- The rise in the number of cases in which personnel working under the protection of the Red Cross or the Red Crescent emblem, UN staff and that of non-governmental organizations engaged in emergency aid operations are not respected — whether they are attacked by members of armed forces or armed groups or whether they are victims of banditry — has obliged the organizations involved to increase their concern about the safety of their personnel.

The UN has undertaken a study on the safety of its personnel, further to a decision taken by the General Assembly (resolution 48/37 of 9 December 1993).

The difficulties of access associated mainly with the two matters referred to above have also prompted practical measures, such as military protection for personnel engaged in emergency aid operations, the setting-up of militarily protected zones or corridors, and the imposition of blockades.

Although understandable in certain circumstances, these measures have often had adverse repercussions on the populations concerned and might in some cases have made it difficult to maintain a certain scope for humanitarian action independent of any political considerations. Thus, should such measures become generalized and systematic, the very meaning of international humanitarian law could be called into question.

Here mention must be made of the special role entrusted to the ICRC to ensure implementation of international humanitarian law and the significance of the results the institution has obtained over time by its approach based primarily on persuasion and negotiation with the parties in conflict.

Suggested questions

- *How can greater respect for the Red Cross and Red Crescent emblems be secured?*

- *What can be done to increase support for the ICRC in the discharge of its mandate?*
- *What can be done to ensure better protection for the personnel of non-governmental organizations engaged in emergency aid operations?*
- *How can the coercive measures adopted for humanitarian purposes be reconciled with the maintenance of the dynamics and scope of action of international humanitarian law?*

3.2 Joint responsibility of States party to the Geneva Conventions to “ensure respect” for international humanitarian law by parties to conflict

References:

- Report on the Protection of War Victims, pp. 424-433;
- Final Declaration, Part II, Section 11;
- Note of the Swiss Government, Part III.

The obligation to “ensure respect” for international humanitarian law is legally binding. It may imply cooperation in regard to preventive measures that have to be adopted in peacetime, but is usually evoked to remind every High Contracting Party that it is obliged to take measures vis-à-vis any other High Contracting Party which fails to comply with international humanitarian law, so as to restore an attitude of respect for the law. This obligation engages third-party States, i.e., States that are not party to an international or non-international armed conflict.

However, it seems necessary on the one hand to specify the content of that obligation, and on the other hand to examine the framework in which it can best be enforced in the event of grave violations of international humanitarian law.

3.2.1 Content of the obligation to ensure respect for international humanitarian law

Under the terms of Article 1 common to the four Geneva Conventions and Protocol I additional thereto, States party to those treaties undertake to respect and ensure respect for them in all circumstances. Article 1, however, as an integral part of international humanitarian law, does not itself afford any indication as to the measures which might be taken to enforce its provisions.

In identifying such measures one should be guided primarily by a principle, i.e. their legitimacy in international law, and by a concern for effectiveness, that is, the likelihood that they would actually improve the lot of the victims.

Suggested question

— *Is it possible to draw up a list of the measures that a State party to the Geneva Conventions can adopt in order to “ensure respect” for international humanitarian law in a situation of armed conflict in which that State is not directly involved?*

3.2.2 Cooperation of States party to the Geneva Conventions in the event of grave violations of international humanitarian law

3.2.2.1 Cooperation within the UN

Article 89 of Protocol I of 1977 provides that, in situations of grave violations of the Conventions or of the Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter. The ways and means of implementing such cooperation have not, however, been defined.

In fact, problems associated with respect for international humanitarian law are often raised at the UN General Assembly, which also offers an ideal opportunity for bilateral contacts concerning humanitarian issues.

Faced with conflicts in which violations of international humanitarian law are becoming one of the major dimensions of crises that constitute a threat to international peace and security, on a number of occasions in the past few years the Security Council has also decided to take measures provided for in the UN Charter, in particular Chapter VII, such as blockades or the dispatch of armed forces. In these cases such measures are examined from the wider angle of the restoration of peace.

Moreover, the good offices of the Secretary-General, as well as the publication of his reports, have facilitated the adoption of practical measures for the implementation of international humanitarian law.

Finally, the Commission on Human Rights, particularly when examining the work of the Special Rapporteurs, has often looked into the way in which parties to conflict apply international humanitarian law.

3.2.2.2 Cooperation outside the UN framework

The cooperation of States in ensuring respect for international humanitarian law is not limited to the UN framework. It can also be useful in terms of preventive action, as has been noted above, for which bilateral cooperation or regional organizations offer very favourable possibilities.

These structures are also valuable in certain circumstances for coordinating the approach of States in the event of grave violations of international humanitarian law.

In addition, the possibility should be mentioned of States party to Protocol I of 1977 requesting a meeting of the parties to the Protocol, in order to study the general problems relating to the application of the Geneva Conventions and Protocol I.

Finally, at International Conferences of the Red Cross and the Red Crescent, which bring together, as a rule every four years, the States party to the Geneva Conventions and the various components of the International Red Cross and Red Crescent Movement, problems of compliance with international humanitarian law are discussed and resolutions are passed on the subject.

3.2.2.3 Possibility of setting up new structured multilateral fora

We have seen above that the problems associated with respect for international humanitarian law can be dealt with in a number of fora.

The difficulty of holding the 26th International Conference of the Red Cross and Red Crescent in due time warranted the convening by the Swiss Government, at the request of the ICRC, of the International Conference for the Protection of War Victims, which met on 30 August-1 September 1993.

Ad hoc conferences on problems concerning respect for international humanitarian law and arising from precise and particularly sensitive situations can also be envisaged.

Suggested questions

- ***How can the best possible use be made of existing fora to examine problems associated with failure to comply with international humanitarian law?***

- *What, in particular, would be the best way to prepare for International Conferences of the Red Cross and Red Crescent and to achieve greater involvement of the governments of States party to the Geneva Conventions in their preparation and in the follow-up to their resolutions?*
- *Should other international fora be envisaged and, if so, how frequently should they take place and in what framework, and what should be their objectives and the procedures for organizing them?*

3.3 Repression of grave breaches of international humanitarian law (war crimes)

References:

- Report on the Protection of War Victims, pp. 433-437;
- Final Declaration, Part II, Section 7;
- Note of the Swiss Government, Part III, Section 3.

Responsibility for punishing those who commit grave breaches of international humanitarian law lies first and foremost with governments in regard to their own population, and in particular members of their armed forces. We have drawn attention to the importance of adopting national laws on this subject in peacetime (point 2.1 above).

At the international level, the establishment of an international tribunal for the prosecution of persons suspected of being responsible for grave violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991 (see UN Security Council resolution 808, adopted on 22 February 1993), and the examination of a draft Code of crimes against the peace and security of mankind and of a draft statute for an international criminal tribunal (UN General Assembly resolution 48/31 of 9 December 1993), create a new impetus for fulfilment of the obligation incumbent on each State party to the Geneva Conventions to punish or extradite any war criminal on its territory.

The preventive role that the creation of such tribunals can play cannot be underestimated, as long as they meet the challenges facing them (stringency, consistency, independence, cooperation of States, etc.).

Suggested questions

- *How can the obligation to arrest and punish or to extradite those suspected of committing war crimes be made effective?*

- *How would the obligations created by international humanitarian law mesh with those which might arise from a permanent international criminal tribunal?*

4. Reparation

References:

- Report on the Protection of War Victims, pp. 437-439;
- Final Declaration, Part II, Section 7;
- Note of the Swiss Government, Part III, Section 4 b (ff).

Although the principle of reparation is reaffirmed in international humanitarian law by Article 91 of Protocol I of 1977, its application has proved very uncertain. Practice has shown that cases in which an arrangement is reached between belligerent parties are generally settled after the armed conflict is over, according to terms imposed by the victor. At this stage considerations associated with *jus ad bellum* apply, and not the humanitarian exigencies of *jus in bello*. Moreover, requests that the State responsible make reparation are submitted through the intermediary of the State of origin of the injured persons (individuals or bodies corporate).

The ambiguous nature of many current conflicts and the frequent lack of a clear passage from war to peace, moreover, make the problem a particularly difficult one.

The question of reparation for damage resulting from acts contrary to international humanitarian law is, however, a very topical issue, owing in particular to the work of the International Law Commission and the reports of the Special Rapporteur of the Sub-Commission on prevention of discrimination and protection of minorities on questions relating to “right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms”.

Suggested question

- *What practical means should be employed to enable the victims of violations of international humanitarian law to obtain the reparation to which they are entitled?*