

The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation

by Paul Berman

Implementation is the major challenge facing international humanitarian law today. The problem of translating States' legal obligations into action is common to all areas of international law. There is however a particularly acute contrast between humanitarian law's highly developed rules, many of which enjoy nearly universal acceptance, and the repeated violations of those rules in conflicts around the world.

While a number of international mechanisms have been developed to promote compliance with humanitarian law,¹ it is States themselves which have the primary responsibility for implementation. Under the 1949 Geneva Conventions and their 1977 Additional Protocols, States have clear obligations to ensure that humanitarian law is implemented and respected, and to this end to adopt a range of national legislative and administrative measures.² It is in order to help States discharge their

¹ On implementation in general, see Adam Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts", in *Law in humanitarian crises*, Vol. I, European Commission, Luxembourg, 1995, pp. 13-82; Hazel Fox, Michael Meyer (eds), *Effecting Compliance: Armed Conflict and the New Law*, Vol. II, British Institute of International and Comparative Law, London, 1993; Frits Kalshoven, Yves Sandoz, *Implementation of international humanitarian law*, Martinus Nijhoff, Dordrecht/Boston/London, 1989; Yves Sandoz, "Implementing International Humanitarian Law", in *International Dimensions of Humanitarian Law*, Henry Dunant Institute, UNESCO, Martinus Nijhoff, Paris/Geneva/Dordrecht/Boston/London, 1988, pp. 259-282.

² On national implementation, see Dieter Fleck, "Implementing international humanitarian law: Problems and priorities", *International Review of the Red Cross (IRRC)*, No. 281, March-April 1991, pp. 140-153; Michael Bothe, Peter Macalister-Smith, Thomas Kurzidem (eds), *National implementation of international humanitarian law*, Martinus Nijhoff, Dordrecht/Boston/London, 1990; Zidane Mériboute, "Mesures nationales de mise en œuvre du droit international humanitaire dès les temps de paix", in *International Institute of Humanitarian Law Yearbook 1986-87*, San Remo, pp. 103-114.

international obligations, and to promote these national implementing measures, that the ICRC has established an Advisory Service on International Humanitarian Law.

Establishment of the Advisory Service

The promotion of national implementing measures has been a long-standing concern of the ICRC and has frequently been included on the agendas of International Conferences of the Red Cross and Red Crescent. Following the adoption at a resolution on "National measures to implement international humanitarian law" of the 25th International Conference (1986), the ICRC wrote to States in 1988 and again in 1991 concerning the adoption of such measures.³

These efforts received strong support from the International Conference for the Protection of War Victims, convened by the Swiss government in Geneva in 1993, which urged States to:

"Adopt and implement, at the national level, all appropriate regulations, laws and measures to ensure respect for international humanitarian law applicable in the event of armed conflict and to punish violations thereof."⁴

The 1993 Conference called for the convening of an Intergovernmental Group of Experts to study practical means of promoting full respect for and compliance with humanitarian law. The Group of Experts met in Geneva in January 1995. Amongst its recommendations were the establishment of national committees to advise and assist governments in the implementation and dissemination of humanitarian law, the exchange of information on implementation measures, and the strengthening of the ICRC's "capacity to provide advisory services to States, with their consent, in their efforts to implement and disseminate IHL".⁵

³ See *National measures to implement international humanitarian law: Resolution V of the 25th International Conference of the Red Cross (Geneva, 1986): Written representations by the International Committee of the Red Cross*, ICRC, Geneva, October 1991; "National measures to implement international humanitarian law: A new move by the ICRC", *IRRC*, No. 263, March-April 1988, pp. 121-140.

⁴ "Final Declaration of the Conference", Section II, para. 5, *IRRC*, No. 296, September-October 1993, pp. 377-381.

⁵ "Meeting of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 23-27 January 1995): Recommendations" (hereinafter referred to as "Recommendations"), Sections III, V, VI, *IRRC*, No. 304, January-February 1995, pp. 33-38.

The ICRC responded quickly to the Experts' Recommendations. By the time of the 26th International Conference of the Red Cross and Red Crescent in December 1995, it was able to report the establishment of a new unit within its Legal Division, the Advisory Service on International Humanitarian Law, aimed at providing specialist legal advice to governments on national implementation.⁶ The Recommendations of the Intergovernmental Group of Experts were endorsed by Resolution 1 of the 26th International Conference,⁷ adopted by consensus, with a number of delegations specifically welcoming the establishment of the new Advisory Service.

Structure of the Advisory Service

The Advisory Service became fully operational in early 1996. While not the ICRC's first departure into the area of implementation,⁸ the Service constitutes an attempt to create a specialized structure to tackle the issue of national implementation on a systematic basis. In focusing on legal advice to governments, it complements other ICRC activities aimed at increasing respect for international humanitarian law — notably the institution's long-standing dissemination activities.

The Advisory Service is intended to supplement governments' own resources by raising awareness of the need for implementing measures, providing specialist advice and promoting the exchange of information between governments themselves. While responding to requests for advice, the Service has also, where appropriate, actively offered its assistance. In all cases, however, the Advisory Service is designed to work in close cooperation with governments, taking account of both their specific requirements and their respective political and legal systems.

This is reflected in the decentralized structure of the Advisory Service itself. In addition to a team operating from ICRC headquarters in Geneva,

⁶ "International humanitarian law: From law to action", report presented by the ICRC, in consultation with the International Federation of Red Cross and Red Crescent Societies, on the follow-up to the International Conference for the Protection of War Victims, *IRRC*, No. 311, March-April 1996, pp. 194-222.

⁷ See *IRRC*, No. 310, January-February 1996, pp. 58-60.

⁸ On the ICRC's role in relation to implementation, see Toni Pfanner, "Le rôle du Comité international de la Croix-Rouge dans la mise en œuvre du droit international humanitaire", in *Law in humanitarian crises*, *op. cit.* (note 1).

the Service comprises a number of lawyers based at ICRC delegations around the world.⁹ Even with this decentralized structure, it is still essential to have local legal advice. In some cases this may be provided by the legal adviser to the National Red Cross or Red Crescent Society, while in others it is necessary to appoint a local consultant. In all cases knowledge of local needs and conditions is paramount.

National measures

The work of the Advisory Service encompasses advice on all legal and administrative measures which States must take in order to comply with their obligations under international humanitarian law. It focuses in particular on those measures which all States are obliged or advised to take, regardless of whether they are currently parties to a conflict.¹⁰

The 1949 Geneva Conventions and their 1977 Additional Protocols stipulate a range of national measures which States must take in peacetime as much as in time of armed conflict. Some of these measures require legislation while others may, depending on the legal system concerned, be implemented through regulations or administrative provisions. A number of obligations, while strictly applicable only in time of conflict, require legislative or administrative action that can realistically be undertaken only in peacetime.

These obligations are discussed in detail elsewhere,¹¹ but may be summarized as follows:

- (a) to adopt legislation punishing grave breaches of the Geneva Conventions and (where applicable) their Additional Protocols;

⁹ By mid-1996, the Service comprised three lawyers and a researcher based in Geneva, and five lawyers based in Abidjan, Amman, Bogota, Moscow, and New Delhi.

¹⁰ The Advisory Service has also assumed responsibility for the ICRC's role in encouraging States to become party to the 1977 Additional Protocols. An important part of this task is to explain to governments the obligations which this entails. See Hans-Peter Gasser, "Universal acceptance of international humanitarian law — Promotional activities of the ICRC", *IRRC*, No 302, September-October 1994, pp. 450-457.

¹¹ See notes 1 and 2 above and in particular Dieter Fleck, "Implementing humanitarian law: Problems and priorities", *op. cit.* (note 2). The ICRC has prepared an "indicative list" of those articles of the Geneva Conventions and their Additional Protocols which may require national implementing measures, published in the *IRRC*, No. 263, March-April 1988, pp. 133-140. See also "Implementation of the Protocols", *IRRC*, No. 217, August 1980, pp. 198-199.

- (b) to protect the use of the Red Cross and Red Crescent emblems;
- (c) to define and guarantee the status of protected persons;
- (d) to ensure fundamental guarantees of humane treatment and due legal process in time of armed conflict;
- (e) to disseminate humanitarian law as widely as possible;
- (f) to train and appoint personnel qualified in humanitarian law, including legal advisers within the armed forces;
- (g) to ensure that protected sites are properly situated and marked.¹²

Promoting implementation

The Advisory Service has a number of means of pursuing its objective of promoting the full implementation of humanitarian law. Initial bilateral contacts between the Service and the relevant government authorities may be made through the local ICRC delegation, the National Red Cross or Red Crescent Society or the State's diplomatic mission in Geneva. This may lead to bilateral discussions aimed at explaining the need to adopt implementing measures or providing more detailed advice. In some cases such contacts may follow a request by the government concerned or may arise in the context of broader discussions between the ICRC and national authorities. In other cases, the Advisory Service may approach a government following the latter's decision to become a party to the Additional Protocols or as part of systematic efforts to promote implementation in a particular region.

Seminars, bringing together representatives of national authorities, have proven a useful method of promoting implementation. Organized on a national or regional basis, they provide an opportunity to examine the issue of implementation, having regard to the local context, and to analyse

¹² For a discussion of national implementation legislation, see e.g. Michael Meyer and Peter Rowe, "The Geneva Conventions (Amendments) Act 1995: A Generally Minimalist Approach", *International and Comparative Law Quarterly*, April 1996, Vol. 45, Part 2, pp. 476-484; Lauri Hannikainen, "Implementation of International Humanitarian Law in Finnish Law", in Lauri Hannikainen, Raija Hanski and Allan Rosas, *Implementing Humanitarian Law Applicable in Armed Conflict: The Case of Finland*, Martinus Nijhoff, Dordrecht/Boston/London, 1992, pp. 114-145; Krzysztof Drzewicki, "International humanitarian law and domestic legislation with special reference to Polish law", *Revue de droit pénal militaire et de droit de la guerre*, XXIV-1-2, 1985, pp. 29-52.

existing measures and future action. They are also intended to promote contacts among all those who might contribute to the task of national implementation, including government ministries, the armed forces, civil defence organizations, local authorities, academic experts and the National Red Cross or Red Crescent Society.

Since its establishment in 1995, the Advisory Service has participated in seminars attended by representatives from some 16 countries.¹³ While a number of these seminars were planned directly by the ICRC, others were held on the initiative of a National Red Cross or Red Crescent Society. National Societies, with their wide range of contacts and local expertise, are essential partners in the Advisory Service's efforts to promote implementation.¹⁴ Some seminars have been organized in cooperation with international or regional organizations such as UNESCO, the Organization for Security and Cooperation in Europe and the Council of Europe. Many of these organizations have long experience in providing advice on the implementation of international obligations, as well as valuable regional expertise. While their mandates and approaches may differ from those of the ICRC, their cooperation and experience is greatly valued in the promotion of humanitarian law.

Seminars can usually only provide the starting point. Detailed follow-up work is often required — notably in the preparation and promotion of implementing legislation. In this area, the work of the Advisory Service may vary from general support to detailed and specific advice. Through its Documentation Centre, the Advisory Service can provide examples of existing national legislation and relevant literature. Members of the Service are also engaged in on-going research aimed at clarifying States' obligations in the area of implementation, examining the adequacy of existing national measures and, where appropriate, identifying suitable model legislation and regulations. There is however no substitute for direct, detailed discussions with national officials. The Service is therefore

¹³ Armenia, Azerbaijan, the Czech Republic, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Namibia, Slovenia, Tadjikistan, Turkmenistan, Uzbekistan, Zambia, and Zimbabwe. An example of the conclusions of one of these seminars (Namibia) is published below on pp. 348-350.

¹⁴ The Intergovernmental Group of Experts referred to the assistance of National Societies and of the International Federation of Red Cross and Red Crescent Societies in providing advisory services ("Recommendations", *op. cit.* (note 5), Section III, para. 1). A meeting of ICRC, the Federation and National Society experts was held in Geneva in November 1995 to discuss the work of the Advisory Service.

always open to requests for its lawyers or consultants to work *in situ* with those responsible for implementation.

The Advisory Service Documentation Centre

The exchange of information is an essential means of promoting and facilitating the implementation of humanitarian law. The Intergovernmental Group of Experts for the Protection of War Victims recommended that States participate in the "fullest possible exchange" on implementation measures and provide the ICRC with information which might be of assistance to other States. It also recommended that the ICRC "collect, assemble and transmit" such information.¹⁵ To this end, the Advisory Service established a Documentation Centre at ICRC headquarters in 1995.

The Centre, which is open to government officials, National Societies, interested institutions and researchers, seeks to make available a wide range of legal material relevant to national implementation. This includes national constitutions, legislation and regulations; national and international case-law; translations of the Geneva Conventions and their Additional Protocols; articles, commentaries and reference works; military manuals and details of national dissemination programmes.

In compiling this information, the Centre relies not only on the ICRC's own resources, but also on the assistance of governments, National Societies, international organizations, academic institutions and individual experts. It may also call on the resources of universities, libraries and other documentation centres.

In addition to compiling material in traditional print form, the Centre is seeking to establish an electronic database of national measures which will be cross-referenced with the texts of the Geneva Conventions and their Additional Protocols. This is intended to provide a powerful research tool which, when completed, will be made available for consultation at the Documentation Centre and will be published in an updated version of the ICRC's CD-ROM on international humanitarian law.

¹⁵ "Recommendations", *op. cit.* (note 5), Section VI.

National committees

National implementation of humanitarian law is an on-going process requiring the cooperation of a range of government ministries and national organizations. A number of States have therefore established national committees or working groups¹⁶ on international humanitarian law bringing together national authorities, experts, and in some cases organizations such as the National Red Cross or Red Crescent Society. The role and composition of these committees vary from country to country, in some cases covering both human rights and humanitarian law. While there is no legal obligation to establish such committees, they have been found to be a valuable means of promoting national implementation.

The Intergovernmental Group of Experts for the Protection of War Victims recommended that States "be encouraged to create national committees, with the possible support of National Societies, to advise and assist governments in implementing and disseminating IHL" and "to facilitate cooperation between national committees and the ICRC".¹⁷ The Advisory Service therefore seeks, where appropriate, to promote the establishment of national committees, working groups or similar structures responsible for the on-going implementation of humanitarian law. As part of this effort, and on the recommendation of the Group of Experts,¹⁸ the Service is planning a meeting of national experts, both from States with national committees and from other interested States, to discuss the establishment, composition and role of such committees.¹⁹

Annual reports

The Advisory Service has already embarked on a series of seminars, meetings and studies aimed at promoting implementing measures and national committees. However, while the preliminary structure of the

¹⁶ These include Albania, Argentina, Australia, Austria, Belgium, Bolivia, Bulgaria, Chile, Denmark, Finland, Germany, Indonesia, Italy, Norway, Portugal, Sweden, Uruguay and Zimbabwe. For a description of the composition and work of a national committee, see Marc Offermans, "The Belgian Interdepartmental Commission for Humanitarian Law", *IRRC*, No. 281, March-April 1991, pp. 154-166.

¹⁷ "Recommendations", *op. cit.* (note 5), Section V, paras 1-2.

¹⁸ *Ibid.*, para. 3.

¹⁹ This meeting will be held in Geneva in October 1996.

Advisory Service is already in place, much work remains to be done in collecting and analysing information, building up networks of contacts and consultants, and undertaking legal research and national studies.

On the recommendation of the Intergovernmental Group of Experts,²⁰ the ICRC will submit annual reports on its advisory services to States party to the 1949 Geneva Conventions, as well as to the International Conference of the Red Cross and Red Crescent and other interested bodies. These reports will cover the full range of advisory services provided by the ICRC, comprising not only the efforts of the Advisory Service on International Humanitarian Law, but also advisory work undertaken by the Dissemination Division and the Division for Dissemination to the Armed Forces. These reports will in addition enable the ICRC to circulate information on measures taken by States themselves to promote implementation.

Conclusion

Last year's recommendations of the Intergovernmental Group of Experts for the Protection of War Victims, unanimously endorsed by the 26th International Conference of the Red Cross and Red Crescent, reflect increasing international concern about the national implementation of international humanitarian law. The ICRC has sought to respond quickly to this concern by establishing, through the Advisory Service, a structure designed to provide States with advice and information tailored to local requirements and conditions. However, the task of promoting national implementation is vast. It requires close cooperation with other components of the Red Cross and Red Crescent Movement, international and regional organizations, and academic and professional institutions. Even where national laws and regulations are adopted, much will depend on how effectively and readily such measures are used. National implementation is the responsibility of States, and it is on States that full and effective compliance with humanitarian law will ultimately depend.

²⁰ "Recommendations", *op. cit.*, Note 5, Section III, para. 3.

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