

## NOTE

# Strengthening compliance with IHL: The ICRC-Swiss initiative

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### Abstract

*Lack of compliance with international humanitarian law (IHL), or insufficient observance of its rules, is probably the greatest current challenge to the continued credibility of this body of international law. The need to strengthen respect for IHL led the ICRC and Switzerland to facilitate unprecedented consultations among States between 2012 and 2015 focused, specifically, on improving the efficiency of mechanisms of compliance with IHL. This note outlines the background of the initiative and summarizes its course and outcome. Ongoing work in the current phase of the process, agreed to at the 32nd International Conference of the Red Cross and Red Crescent held in late 2015, is also very briefly indicated.*

**Keywords:** compliance, respect, compliance initiative, mechanism, IHL, international humanitarian law.

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\* Jelena Pejic was the author of the Concluding Report of the Swiss-ICRC initiative, entitled “Strengthening Compliance with International Humanitarian Law” submitted to the 32nd International Conference of the Red Cross and Red Crescent in 2015 (see note 12 below). With Jonathan Cuénoud and, subsequently, Rochus Peyer, legal officers in the Directorate of International Law of the Swiss Federal Department of Foreign Affairs, she likewise drafted the Background Documents for, and the Chairs’ Conclusions of, the nine Meetings of States, including the preparatory discussions, organized as part of the initiative between 2012 and 2015. These documents are available on the websites of the ICRC and of the Swiss Federal Department of Foreign Affairs, respectively (see note 10 below).

## Introduction

Lack of compliance with international humanitarian law (IHL), or insufficient observance of its provisions, is probably the greatest current challenge to the continued credibility of this body of international rules. The need to strengthen respect for IHL led the International Committee of the Red Cross (ICRC) and Switzerland to facilitate unprecedented consultations among States between 2012 and 2015 focused, specifically, on improving the efficiency of mechanisms of compliance with IHL. The main purpose of this text is to outline the background of the initiative and to summarize its course and outcome. Ongoing work in the current phase of the process, agreed to at the 32nd International Conference of the Red Cross and Red Crescent<sup>1</sup> held in late 2015, is also very briefly indicated.

## Background to the ICRC-Swiss initiative

States and other relevant actors generally agree that, regardless of the evolution in the nature of armed conflicts, IHL remains an appropriate international legal framework for regulating the conduct of the parties to such conflicts and providing protection for the persons affected. Since 1864, when the first Geneva Convention was adopted,<sup>2</sup> great strides have periodically been made to adapt and update the normative content of IHL, whether by means of treaties or customary law. What has remained perplexingly absent is the corresponding development of mechanisms to strengthen compliance with IHL that are unique to IHL. While the rules of this branch of international law aim to prevent or put a stop to human suffering caused by armed conflict, and to deter violations, the norms cannot, in and of themselves, bring about respect and eradicate abuses, nor can they be expected to do so. They need to be complied with.

Compliance, in the broadest meaning of the term, requires a multifaceted effort encompassing a range of activities by a multitude of actors. At one end of the spectrum is prevention. Activities in the area of prevention of IHL violations before an armed conflict occurs remain an ongoing obligation of States, as provided for in the 1949 Geneva Conventions, and Additional Protocol I (AP I) of 1977. Prevention may take many forms, including the adoption of domestic legislation implementing IHL treaty obligations, the adequate instruction of armed forces in peacetime, the appointment of legal advisers to the armed forces, and the teaching and dissemination of IHL to the population at large. Important work in this area has been and continues to be undertaken by States, civil society groups and other organizations, including National Red Cross and Red Crescent Societies (National Societies), and the ICRC itself.

1 International Conferences of the Red Cross and Red Crescent will hereafter be referred to simply as “International Conference” or “Conference”.

2 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

Respect for IHL may also be improved by putting into place mechanisms and procedures necessary to enable the determination of individual criminal responsibility for alleged violations, but this happens only after the relevant transgressions have occurred. Suffice it to say, in this context, that significant progress has been made over the past two decades in the area of criminal justice. At the international level this is evidenced by the creation of international or hybrid courts and tribunals, whereas domestically States have more frequently exercised universal jurisdiction over the alleged perpetrators of war crimes.

However, one issue on which inadequate progress has been achieved, and which was the focus of the joint ICRC-Swiss initiative, is the need to enhance the effectiveness of mechanisms of compliance with IHL “embedded” in this body of law. While the ICRC, in particular, as well as the government of Switzerland, had previously attempted to draw international attention to the imperative of improving compliance with IHL, their respective endeavours did not produce tangible results.

In 2003, as part of preparations for the 28th International Conference, the ICRC organized a series of regional seminars with States and other actors on “Improving Compliance with IHL”.<sup>3</sup> The unequivocal view of participants was that compliance with IHL was inadequate, and needed to be improved. At a conference devoted to “60 Years of the Geneva Conventions and the Decades Ahead”, organized in 2009 by the government of Switzerland, States identified compliance with IHL as one of the key challenges to the continued relevance of this body of law going forward.

An ICRC study carried out between 2008 and 2010, and subsequent consultations with States on “Strengthening Legal Protection for Victims of Armed Conflicts”, undertaken ahead of the 31st International Conference in 2011, showed that a significant number of States believed that better implementation of IHL needed to be a priority. Their view was that existing IHL compliance mechanisms have proven inadequate and that further reflection on how to strengthen compliance with this body of international law was required. These observations formed the backdrop to Resolution 1 on “Strengthening Legal Protection for Victims of Armed Conflicts” unanimously adopted by the 31st International Conference in 2011.<sup>4</sup>

Resolution 1 recognized “the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with international humanitarian law, with a view to strengthening legal protection for all victims of armed conflict”.<sup>5</sup> In the Resolution, the 31st International Conference invited the ICRC to pursue further research, consultation and discussion in cooperation with

3 A summary of the outcome of these consultations was annexed to the ICRC’s report on *IHL and the Challenges of Contemporary Armed Conflicts*, presented to the 28th International Conference, available at: [www.icrc.org/eng/assets/files/other/ihlcontemp\\_armedconflicts\\_final\\_ang.pdf](http://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf).

4 Resolution 1, “Strengthening Legal Protection for Victims of Armed Conflicts”, 31st International Conference of the Red Cross and Red Crescent, 1 December 2011, available at: [www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm](http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm).

5 *Ibid.*, para. 5.

States to identify and propose possible means to enhance and ensure the effectiveness of mechanisms of compliance with IHL,<sup>6</sup> and requested that a report, proposing a range of options and recommendations, be submitted to the 32nd International Conference.<sup>7</sup> It also expressed its appreciation to the government of Switzerland for its availability to facilitate a process to explore and identify concrete ways and means to strengthen the application of IHL and to reinforce dialogue on IHL issues among States, in cooperation with the ICRC,<sup>8</sup> based on a pledge to this effect that Switzerland had submitted to the 31st International Conference.

Following the 31st International Conference, Switzerland and the ICRC undertook a joint initiative to facilitate implementation of the relevant provisions of Resolution 1 in order, *inter alia*, to avoid duplicating their respective efforts. The initiative was effectively launched in July 2012 when a First Meeting of States was convened in Geneva. A further eight meetings, which included Preparatory Discussions, were subsequently held, with a final, Fourth Meeting of States within the joint initiative taking place in Geneva in April 2015. In total, over 140 States participated in the consultation meetings.<sup>9</sup>

In accordance with the stipulations of Resolution 1, the facilitators carried out extensive research prior to each of the nine meetings held with States, and presented it in Background Documents submitted ahead of each meeting. The respective Background Documents<sup>10</sup> explored a range of issues and ideas, and included numerous options for State deliberation, along with guiding questions to facilitate the discussions. Each successive Background Document built on the exchanges held and positions expressed by States on a particular topic in the previous meeting(s), thus narrowing down the options in accordance with the general views expressed by delegations.

The nine meetings organized from 2012 were the primary vehicle for consultations among and with States. In addition, numerous bilateral meetings on the initiative were held with States, and regional meetings were organized, or attended, to inform and consult on the process as widely as was feasible. The International Federation of Red Cross and Red Crescent Societies and individual National Societies were likewise periodically briefed on the progress of the initiative; the International Red Cross and Red Crescent Movement's views were solicited and its support was, *inter alia*, expressed by a resolution of the Council of Delegates in 2013.<sup>11</sup>

6 *Ibid.*, para. 6.

7 *Ibid.*, para. 8.

8 *Ibid.*, para. 7.

9 For a list of the participating delegations, see the Annex to the Concluding Report cited in note 12 below.

10 The relevant documents may be found on the ICRC's website at: [www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government](http://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government). They are also available on the website of the Swiss Federal Department of Foreign Affairs at: [www.eda.admin.ch/eda/en/home/topics/intla/humlaw/icrc.html](http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/icrc.html).

11 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 8, 17–18 November 2013, available at: [www.icrc.org/eng/resources/documents/publication/p1140.htm](http://www.icrc.org/eng/resources/documents/publication/p1140.htm).

Discussions and outreach on the initiative by ICRC and Swiss government representatives were undertaken in a variety of international and regional organizations, as well as with academic and civil society circles in different parts of the world.

A Concluding Report on the consultation process, as required by Resolution 1, was presented to the 32nd International Conference held in December 2015.<sup>12</sup> A corresponding draft resolution entitled “Strengthening Compliance with IHL” was likewise submitted – for action – to the 32nd International Conference.

## The course of the ICRC-Swiss initiative

### Initial work and the guiding principles

The Swiss-ICRC process began with an examination of existing mechanisms foreseen in IHL itself. By way of a reminder, there are essentially three: the Protecting Powers system, the Enquiry Procedure, and the International Humanitarian Fact-Finding Commission (IHFFC).

The Protecting Powers mechanism is provided for in the 1949 Geneva Conventions and AP I.<sup>13</sup> It obliges each party to the conflict to designate a neutral State, with the agreement of the other side, to safeguard its humanitarian interests, and to thereby monitor compliance with IHL. In practice, the Protecting Powers system has been used on very few occasions since World War II, the last reported instance having occurred well over three decades ago.

The formal Enquiry Procedure was first included in the 1929 Geneva Convention, and was later repeated, with additional details, in the 1949 Geneva Conventions.<sup>14</sup> Under the relevant provisions, an enquiry into an alleged violation of the Geneva Conventions must take place at the request of a party to the conflict. Very few attempts to use the Enquiry Procedure have been made since 1929, and none resulted in its actual launching.

The IHFFC was created in 1991 pursuant to Article 90 of AP I.<sup>15</sup> It is competent to enquire into any facts alleged to be a grave breach or other serious violation of the 1949 Geneva Conventions or AP I, or to facilitate, through its good offices, the restoration of an attitude of respect for these instruments. The IHFFC has not been triggered to date.

12 International Committee of the Red Cross in conjunction with the Swiss Federal Department of Foreign Affairs, *Strengthening Compliance with International Humanitarian Law*, Concluding Report, document prepared for the 32nd International Conference of the Red Cross and Red Crescent, 32IC/15/19.2, Geneva, October 2015, available at: [rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Concluding-report-on-Strengthening-Compliance-with-IHL\\_EN.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Concluding-report-on-Strengthening-Compliance-with-IHL_EN.pdf).

13 See Articles 8/8/8/9 of the four Geneva Conventions of 1949, respectively, and Article 5 of AP I.

14 See Articles 52/53/132/149 of the four Geneva Conventions of 1949, respectively.

15 See Article 90 of AP I.

In practice, it is mainly the ICRC which carries out a range of functions aimed at strengthening observance of IHL. However, the ICRC is not a compliance mechanism as such, but a *sui generis* international humanitarian organization.<sup>16</sup> Its operational and legal work is closely linked to a specific working method, which is essentially based on a bilateral and confidential dialogue with the parties to armed conflicts as a means of improving compliance with IHL. The Swiss-ICRC initiative did not aim to impinge on the role of the ICRC or to duplicate the activities performed by the organization. To the contrary, synergies – where possible – were sought in articulating the relationship between the ICRC’s work, particularly in the legal domain, and an effective IHL compliance system (see further below). The ICRC’s existing role and mandate were thus not a focus of the consultation process.

Two broad observations may be made about the three current IHL mechanisms proper to IHL mentioned above: (1) they have never, or rarely, been used, and (2) they were crafted only for international armed conflicts, whereas the majority of current armed conflicts are non-international in nature.

The reasons why the existing IHL compliance mechanisms have not been utilized arguably lie – among other things – in the way in which they were configured, as well as in the lack of an appropriate institutional anchoring.

They are based on the premise that States involved in an international armed conflict will have the willingness and capacity to propose to the other party, or agree with it, to trigger the mechanism in question. This approach is based on an expectation that is not likely to be fulfilled in the present day, and is perhaps due to the different times in which the respective mechanisms were designed. No current branch of international law, especially one dealing mainly with the protection of persons, relies exclusively on mechanisms that are thus configured.

Existing IHL compliance mechanisms are also standalone – that is, they lack attachment to a broader compliance structure. The absence of such a framework means that these specific mechanisms lack the institutional support which may be necessary to ensure that they are utilized, to facilitate the performance of their tasks, and to assist in any follow-up that may be appropriate.

Discussions within the Swiss-ICRC consultation process did not produce any initiatives to reconfigure the three existing mechanisms of IHL.<sup>17</sup> It was said instead that they remain available should the parties to an international armed conflict wish to resort to them in the future, under the terms provided for in the relevant treaties.

In this context, it was examined whether mechanisms created under other bodies of international law, human rights for example, should not (continue to) be relied on to secure better compliance with IHL. The consultation process confirmed

16 The ICRC’s mandate is provided for in the Geneva Conventions and API in international armed conflicts. The organization is also entitled to offer its services to the parties to non-international armed conflicts pursuant to common Article 3 to the Geneva Conventions.

17 An exception, according to some States, is the IHFFC, the triggering and mandate of which was believed to be deserving of further reflection.

that it is precisely the examination of IHL issues in non-specialized fora that demonstrates the need for a more regular dialogue among States on this separate branch of international law and its implementation. It was pointed out that IHL questions are currently not dealt with on a regular and systematic basis at the international level, but are taken up *ad hoc*, when a particular issue mobilizes sufficient interest, usually as a result of a situation of real or perceived emergency. The actors involved in IHL discussions, it was likewise stressed, often lack the requisite IHL expertise and/or mandate to engage in a qualified examination of the application of IHL norms.

Apart from an evaluation of current IHL compliance mechanisms, the consultation process initially also focused on the possible functions that a new IHL compliance system should have. The workings of a range of such functions, drawn for illustrative purposes from other international legal frameworks, were presented at the Second Meeting of States held in 2013. The list included: the establishment of a regular Meeting of States; periodic reporting; fact-finding; early warning; urgent appeals; country visits; non-binding legal opinions; good offices; State inquiries; dispute settlement; and the examination of individual complaints.<sup>18</sup>

It became clear fairly quickly that periodic reporting on national compliance with IHL and thematic discussions on IHL issues (a function proposed by several States at the Second Meeting of States) were to be given priority in further deliberations within the consultation process. A fact-finding function was also deemed desirable by a number of States, but proved too controversial over time and was eventually not included in the official draft resolution submitted by the ICRC to the 32nd International Conference (see below). Importantly, the consultation process also affirmed that there was general support for the establishment of a forum for regular dialogue among States on IHL – i.e., for a Meeting of States.

In sum, three elements – a regular Meeting of States, periodic reporting on national compliance with IHL, and thematic discussions on IHL issues – emerged as the backbone of a possible new IHL compliance framework. Before a brief review of their main purposes and features, a point of background should be recalled.

States were unanimous from almost the very beginning that discussions on a new IHL compliance system, as well as its eventual establishment, must be underpinned by certain guiding principles. These are reflected in Resolution 2 on “Strengthening Compliance with IHL” adopted by the 32nd International Conference.<sup>19</sup> Among them are: the State-driven and consensus-based character of the discussions; the imperative of avoiding politicization; the requirement that an IHL compliance system be effective, that it avoid unnecessary duplication with other compliance systems and that it take resource considerations into account;

18 See Background Document for the Second Meeting of States on Strengthening Compliance with IHL, June 2013, available at: [www.icrc.org/en/document/strengthening-compliance-ihl-second-meeting-states-strengthening-compliance-ihl-june-2013](http://www.icrc.org/en/document/strengthening-compliance-ihl-second-meeting-states-strengthening-compliance-ihl-june-2013).

19 Resolution 2, “Strengthening Compliance with International Humanitarian Law”, 32nd International Conference of the Red Cross and Red Crescent, 32IC/15/R2, available at: [http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Compliance\\_EN.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Compliance_EN.pdf).

that all types of armed conflicts and the parties to them be addressed; that any new mechanism operate in a non-contextual manner; and that such a mechanism should ensure universality, impartiality and non-selectivity. Last but not least on the list is the principle of voluntariness, which means that the consultation process and its possible outcome should be non-legally binding. This element was the result of a clear convergence of views which emerged early on in the deliberations, according to which the search for ways to enhance the effectiveness of mechanisms of compliance with IHL should not entail amendments to the 1949 Geneva Conventions, or the negotiation of a new treaty.

### The proposed IHL compliance framework

The official draft resolution submitted by the ICRC and Switzerland to the 32nd International Conference<sup>20</sup> contained the basic outline of a regular Meeting of States and the two functions – periodic reporting and thematic discussions on IHL issues – that should be linked to it, and touched upon a range of other issues that had been discussed in the consultation process. It was envisaged that work would continue in 2016 in order to finalize the necessary details, before the convening of a first Meeting of States by Switzerland.

The official draft as a whole, and its specific wording, aimed to reflect a balanced approach between the various positions of States expressed in the nine meetings held between 2012 and 2015, as well as between the range of comments received from members of the International Conference – both States and National Societies – on its preceding iterations. Another consideration that informed the draft was the need to find a compromise between the positions of those members of the International Conference who wanted every aspect of the future system to be agreed on before a first Meeting of States could be held, and those who preferred a text that would provide the impetus for its establishment but leave certain less crucial elements to further deliberations. Needless to say, the text listed the guiding principles mentioned above as essential for future discussions and repeated their relevance in certain key provisions.

In keeping with views expressed in the consultation process, the official draft resolution recommended the establishment of a regular Meeting of States as the centrepiece of a possible new IHL compliance system. In this context it must be recalled that, in contrast to other international legal frameworks, the Geneva Conventions and their Additional Protocols do not provide that States Parties will meet on a regular basis to discuss the application of these treaties. It was recognized in the discussions that this important gap should be filled by creating a dedicated venue in which States could gather to examine issues of common concern and perform other functions related to IHL compliance. The proposed

20 International Committee of the Red Cross in conjunction with the Swiss Federal Department of Foreign Affairs, “Strengthening Compliance with International Humanitarian Law”, official draft resolution, document prepared for the 32nd International Conference of the Red Cross and Red Crescent, 32IC/15/19.2DR, Geneva, October 2015. On file with the author.

Meeting of States was thus meant to “serve as a forum”<sup>21</sup> to enhance knowledge of IHL at the domestic and international levels and support universal respect for its rules, to enable exchanges on practical experiences and challenges in the implementation of IHL, to share best practices, to allow States to indicate their capacity-building needs and to foster international cooperation in addressing them, so as to strengthen the observance of this body of rules.

It had been understood early on in the consultation process that the scope of a possible Meeting of States, and therefore of its functions, should encompass the Geneva Conventions and their Additional Protocols (for States party to the latter). This, *inter alia*, meant that the system would be limited to situations in which this body of international law applies,<sup>22</sup> excluding circumstances that do not meet the definition of armed conflicts provided for in these foundational treaties. The guiding principles of the process confirmed that the armed conflicts referred to are both international and non-international.

With regard to possible compliance functions, the official draft resolution recognized that two were deemed in the consultation process to be particularly relevant to improving respect for IHL: thematic discussions on issues of IHL and periodic reporting on national compliance with IHL. It was stressed in the text that these functions should be organized so as to be non-contextual and non-politicized, with the specific modalities to be determined by the first Meeting of States.

The thematic discussions function had garnered widespread support. There was general agreement that a specific segment of the plenary sessions of the Meeting of States should be devoted to such discussions and that they should serve *inter alia* to ensure that States are better informed about current or emerging IHL issues and enable a better understanding of mutual legal and policy positions on these issues, provide an opportunity for exchanges of views on key legal, practical and policy questions of IHL, and develop a deeper understanding of this body of law and of practical measures taken by States to implement it. It was also said that thematic discussions should not aim at legal codification or the creation of binding rules, but should focus on a better knowledge and application of IHL. It was noted that linkages with the reporting system on national compliance with IHL (see below) should be established, and that the format of thematic discussions should ensure that they are non-politicized and interactive. Participants also discussed the criteria that should guide the selection of topics for thematic discussions, as well as their specific modalities, including the format of a possible outcome document.

21 *Ibid.*, op. para. 7.

22 The consultations had confirmed that States not party to the Additional Protocols should be able to invoke them if they so wish. The same general view was expressed with respect to other sources of IHL, including norms of a customary nature: States that want to do so should feel free to rely on them in their engagements at the Meeting of States, i.e., in national reports on compliance with IHL or in thematic discussions on IHL issues. This is, *inter alia*, because a number of older IHL treaties, such as the 1907 Hague Conventions, are now considered to reflect customary IHL.

A periodic reporting function was examined at almost every meeting held within the ICRC-Swiss-facilitated consultation process. The discussions started with an overview of reporting as carried out in other international fora. They then delved, in some detail, into possible reporting modalities on IHL, with many successive options having been presented and reviewed in the course of the deliberations.

This text cannot replicate the specificity of those debates. Outlined below are only points of a general nature on which the views of a large majority of States who opined on this question may be said to have converged. Possible types of national reports, and follow-up, were also examined.<sup>23</sup> There was no discernible convergence of views on these issues, and it was widely felt that discussions should be completed by the Meeting of States, once it is established. In this context, it should be noted that some States were not in favour of a reporting function as such, or were of the opinion that the submission of a national compliance report with IHL should be a one-off, rather than a periodic occurrence.

As regards points of a general nature, it was said that a periodic reporting function is an important tool for strengthening respect for IHL, and would thus be an essential component of any future IHL compliance system. It provides an opportunity for self-assessment by States in the process of preparing a national report because it requires States to gather, collate and analyze their own law and practice. It also facilitates the establishment of a necessary baseline of information on the state of IHL implementation in various parts of the world, permitting the identification of common experiences and challenges related to IHL observance, enabling the exchange of best practices, and allowing for an expression of, and responses to, capacity-building needs that may be requested by States.

It was clear in the discussions that a reporting function should not involve an article-by-article review of the relevant IHL treaties, and that the reporting system should not be cumbersome. It was said that, subject to further debate among States on format, reports could be prepared based on guidelines or templates that are not overly prescriptive. Appropriate follow-up procedures should likewise be established; they should be non-individualized, non-contextual and non-politicized, in keeping with the aforementioned guiding principles.

As may be deduced from the above, national reporting and an IHL thematic discussions function would require expert support in order to properly operate in practice. The establishment of an expert, subsidiary body of the Meeting of States for the purpose of carrying out the necessary work (e.g., a committee composed of independent or government experts) was proposed as an option in the consultation process, but was rejected by a great majority of States. This begged the question of who might perform such a role. Most States who opined were in favour of inviting the ICRC to undertake these and other expert tasks, on its own or with the appropriate engagement of a Bureau of the Meeting of States (see below). Some States expressed doubts in this regard, but did not suggest an alternative approach.

<sup>23</sup> For the specifics on these two issues, see Concluding Report, above note 12, pp. 18–20.

The ICRC was ready, upon invitation, to provide expert support to the functions of the Meeting of States, provided that the relevant tasks were compatible with the organization's mandate, operational activity and standard working modalities, in particular confidentiality. Corresponding provisions were thus included in the official draft resolution submitted to the 32nd International Conference.

For the reasons already noted, the Meeting of States that emerged in the consultation process as the centrepiece of a possible IHL compliance system was intended to be voluntary – that is, not legally binding. Thus, the question of how such a system could be established was examined on several occasions within the consultation process, with the most comprehensive expression of views having taken place at the Fourth Meeting of States in 2015. Three options emerged.

Some States were of the view that the 32nd International Conference itself could establish a Meeting of States, given that a corresponding resolution adopted at the 32nd International Conference would be an adequate and sufficient expression of the sovereign will of States, as well as of the desire of the other members of the International Conference, to create such a forum. An additional key factor informing this approach was that the future IHL compliance system would not be legally binding – i.e., that the Meeting of States would be established as a regular forum on IHL issues open to all States on a voluntary basis.

Other States were of the view that the 32nd International Conference does not have the authority to establish the Meeting of States. Under this approach, the International Conference could, by way of a resolution, only invite Switzerland to convene a diplomatic conference for the purpose of establishing the future Meeting of States.

According to a third, compromise proposal, the relevant resolution should aim to capture those elements of the future IHL compliance system that are acceptable to States, while deferring the formal establishment of the system to an initial Meeting of States to be held within a predetermined timeframe. The resolution of the 32nd International Conference would thus not formally establish the Meeting of States, but would request the government of Switzerland to convene the first meeting. This last option was reflected in the official draft resolution submitted by the ICRC and Switzerland to the 32nd International Conference.

In addition to the “backbone” of a new IHL compliance system, States had discussed a range of other questions during the consultation process, some of which were likewise included in the official draft, on the understanding that certain topics would be the subject of further deliberations prior to the first Meeting of States. Some of these additional questions are briefly described below.

It was suggested in the text that the new forum be called a “Meeting of States on International Humanitarian Law”. This denomination was believed to be the shortest and simplest, as it immediately indicated the particular area for which the meeting was to be established. It was likewise recommended that the Meeting of States be open on a voluntary basis to all States party to the Geneva Conventions, and that it take place annually. Yearly sessions were deemed most

appropriate to its overall purpose and would also allow efforts towards improved IHL implementation to be undertaken in a sustained manner.

The participation of observers in the Meeting of States was discussed on several occasions within the consultation process and was included in the official draft. There was a widely held view that entities other than States should be able to contribute to its work in an observer capacity. It was generally felt that a discussion on the specific modalities of observer participation was premature, meaning that it should take place at the Meeting of States, once it is established. It was stressed that the subsequent examination of this issue should be guided by the need to devise procedures for observer participation which would be consistent with the guiding principles of the process listed above, notably the avoidance of politicization and the need to ensure non-contextual dialogue and the State-driven character of the Meeting of States, as well as the need to take resource constraints into account. Three categories of possible observers at the Meeting of States were discussed in the various meetings. It was clear that National Societies and their International Federation would enjoy such status, with the precise modalities to be further discussed. Observer participation was also examined with regard to international and regional organizations and entities, and civil society actors.

It was envisaged in the consultation process that the work of the Meeting of States would be carried out in plenary sessions, which would be the core body of the future IHL compliance system. Specific segments of the sessions would be dedicated to the performance of the compliance functions outlined above, and of the relevant procedural tasks. It was understood that the precise modalities of the plenary sessions should be specified by the Meeting of States, once it is established. A provision in the official draft recommended that the Meeting of States be supported by an institutional structure, such as a chair, bureau and secretariat, the specific modalities of which were to be further discussed.

Questions related to the budgetary implications of the Meeting of States and how it will be financed had been discussed in a preliminary manner by States in late 2014 and were revisited at the Fourth Meeting of States in 2015. It was unequivocally established that the financial contributions of States to the work of the future Meeting of States would be voluntary, given its non-legally binding nature. It was furthermore reaffirmed that the need to ensure sufficient funding, predictability (i.e., that the budget can be reliably planned) and a fair distribution of costs among States were important criteria to be taken into account when devising possible funding models. The establishment of a trust fund for the purpose of financing the work of the Meeting of States was particularly highlighted, as well as the creation of a periodic pledging procedure. The draft text thus also included a paragraph on the issue of resourcing.

Last but not least, the official draft resolution recommended that the work, functions and tasks of the Meeting of States be periodically reviewed by the participating States with a view to enabling adaptations, as may be deemed useful and necessary, in keeping with the guiding principles.

## The 32nd International Conference

As already mentioned, the text of the official draft resolution aimed to strike a balanced approach between the various positions of States expressed during the consultation process. An indication that the proposed framework may not garner consensus at the 32nd International Conference was given late in the process, essentially at the fourth, last Meeting of States held in April 2015, and emerged more clearly only in the written consultations on the successive iterations of the draft text ahead of its formal submission by the ICRC and Switzerland to members of the Conference in October 2015. An alternative draft resolution was received by the Joint Organizing Committee of the International Conference from nine States a few days before the actual opening of the Conference on 8 December 2015.<sup>24</sup>

The alternative draft did not include reference to the possible establishment of a Meeting of States. It suggested, instead, that improving respect for IHL should take place (1) within the International Conference, (2) through the engagement of States with the ICRC, and (3) in regional discussion fora on IHL between States and the ICRC. The relevant provisions did not elaborate on these respective elements.

With respect to the first element, the alternative draft emphasized that the “International Conference should play a more significant role for the purposes of non-politicised and non-contextual State-driven thematic discussions on topical IHL issues based on the primary responsibility of States for the development of international humanitarian law”.<sup>25</sup> In this context it should be noted that most States had indeed stressed in the consultation process that synergies needed to be established between a possible Meeting of States and the International Conference. However, the prevailing view was that the relationship between the two bodies “should be guided by the distinct and autonomous character of each”.<sup>26</sup> This, as was pointed out, is due to the fact that the breadth of functions of the International Conference is not limited to IHL, because its composition is not confined to States, and because it meets only every four years.

As regards the second element, the alternative draft “recognize[d] the importance of the voluntary bilateral dialogue on IHL between the ICRC and particular States that provides an opportunity to discuss IHL issues in a truly confidential and non-politicized manner” and “invite[d] States to utilize this mechanism in good faith for the purposes of strengthening compliance with IHL”.<sup>27</sup> It may be recalled in this regard that a confidential, bilateral dialogue

24 The alternative draft resolution dated 2 December 2015, addressed to the Joint Organizing Committee of the 32nd International Conference of the Red Cross and Red Crescent, was submitted by the Permanent Mission of the Russian Federation on behalf of the Republic of Belarus, the Republic of Cuba, India, the Democratic People’s Republic of Korea, the Republic of Nicaragua, the Russian Federation, the Syrian Arab Republic, the Republic of Tajikistan and the Bolivarian Republic of Venezuela. On file with the author.

25 Alternative draft resolution, above note 24, op. para. 5.

26 Official draft resolution, above note 20, op. para. 16.

27 Alternative draft resolution, above note 24, op. para. 6.

with States and non-State parties to armed conflicts aimed at improving compliance with IHL is an important aspect of the ICRC's ongoing operational and legal work, which will continue. It was stressed in the consultation process that, in addition to the preservation of an opportunity for two-way exchanges between States and the ICRC, the establishment of a regular Meeting for dialogue and cooperation on IHL issues *among* States was needed. As has been noted, IHL is a rare branch of international law which currently does not have a forum for exchanges among States that would serve to raise awareness and understanding of its norms and allow discussions of its implementation, thereby increasing States' ownership of and expertise in this field. The guiding principles of the process were devised – by States – precisely to enable them to participate in the work of the new IHL compliance system while developing mutual trust in pursuit of the common goal of improving respect for IHL.

The third element of the alternative draft “recognize[d] the importance of regional discussion forums between governments and the ICRC which provides an opportunity for the sharing of best practices and for promoting respect for and disseminating knowledge of IHL, including by organizing thematic discussions, especially on topics relevant for a given regional context”.<sup>28</sup> This type of activity, mainly undertaken by the ICRC's Advisory Service on IHL, is likewise a staple of the organization's work in the legal field, and will continue. While the convening of regional fora is an invaluable way of facilitating exchanges on IHL among a group of States, it should also be stressed that the universal nature of IHL needs to be preserved. A regular Meeting of States was thus meant to add a global “roof” to other efforts aimed at enhancing compliance with IHL.

Discussions within the Drafting Committee of the 32nd International Conference proved difficult and did not suggest that a consensus on the official draft resolution could be achieved.<sup>29</sup> Three main views emerged: some members were in favour of the official draft as proposed, others supported the alternative text, and still others were essentially in favour of the idea of establishing a Meeting of States, but wanted more time to further discuss the relevant modalities. It should be stressed that all members were anxious to avoid a vote and to ensure adoption of the relevant resolution by consensus as a means of maintaining the unique and constructive space for dialogue that is the International Conference. Aside from the complexity of the issue at hand, the limited time available for negotiations on this and the other Conference resolutions was also a factor objectively constraining a possible narrowing down of positions.

The result of the deliberations is encapsulated in Resolution 2 of the 32nd International Conference. Due in no small part to the exceptional efforts and capability of the chair of the Drafting Committee, the Permanent Representative

<sup>28</sup> *Ibid.*, op. para. 7.

<sup>29</sup> The International Conference takes action by means of resolutions, which are habitually adopted by consensus. However, consensus is not a statutory requirement and the Conference may decide to vote on a resolution, in which case a simple majority suffices for its adoption. See Statutes of the International Red Cross and Red Crescent Movement, Articles 10(5) and 11(7).

of Denmark to the United Nations in Geneva, Ambassador Carsten Staur, the text was adopted by consensus. The first operative paragraph reiterates the guiding principles of the consultation process. The second operative paragraph sets out the mandate for future work. The International Conference

recommends the continuation of an inclusive, State-driven inter-governmental process based on the principle of consensus after the 32nd International Conference and in line with the guiding principles enumerated in operative paragraph 1 to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums in order to submit the outcome of this intergovernmental process to the 33rd International Conference.

Resolution 2 may be said to represent a compromise between the official draft resolution and the alternative text – i.e., between all the proposals that emerged and which may, in effect, be considered complementary. It was the best that could be obtained under the circumstances and represents an outcome which, importantly, keeps the process going. Future work is described in the key paragraph of the resolution as a “State-driven inter-governmental process”. The text thus signals a shift from the consultative character of the previous four years of meetings to deliberations among States in order “to find agreement” and to “submit the outcome” of the intergovernmental process to the 33rd International Conference. This will presumably require and generate more State ownership of the work to come, including the development of specific proposals by some States that will have to be tested against the views of other States in order to move forward and eventually achieve consensus.

Given that Resolution 2 recommends the continuation of an intergovernmental process, it was agreed that Switzerland and the ICRC should carry on in their role as co-facilitators. Due to lack of time, no specific provisions on this issue or on the organization of work more broadly were included in the final text. The facilitators’ role was instead expressed in the Drafting Committee, with the conclusion that it would be memorialized in the written record of the Conference.

## Going forward

The intergovernmental process mandated by Resolution 2 is underway as of this writing. A first preliminary discussion among States, represented by their Permanent Missions in Geneva, was held in June 2016. The purpose of the meeting, convened by Switzerland and the ICRC, was to allow an initial exchange of ideas among States on how the process should be taken forward and to provide guidance to the facilitators in this regard. A second gathering in the same format took place in October 2016, while the first formal Meeting of States is scheduled for November 2016. Based on the views expressed so far, the principal

aim of the November meeting will be for States to examine and agree on procedural issues related to fulfilling the mandate provided by the International Conference. It is anticipated that a draft programme of work will also be discussed, along with a timetable of activity leading up to the 33rd International Conference.

### **Concluding remark**

As stressed by members of the 32nd International Conference in 2015, there is an “imperative need” to improve compliance with IHL. The ICRC and Switzerland, each within their respective roles, continue to work daily to ensure that the rules of this body of law are better respected. As facilitators, they will do their best to help the intergovernmental process reach an agreement that will contribute to this goal as well.