

IMPROVING COMPLIANCE WITH
INTERNATIONAL HUMANITARIAN LAW

By

International Committee of the Red Cross (ICRC)

*Background Paper prepared for Informal High-Level Expert Meeting
on Current Challenges to International Humanitarian Law,
Cambridge, June 25-27, 2004*

Over the years, states, supported by other actors, have devoted considerable effort to devising and implementing in peacetime preventive measures aimed at ensuring better respect for international humanitarian law (IHL). Dissemination of IHL generally, within academic circles and among armed forces and armed groups has been reinforced, and IHL has been increasingly incorporated into military manuals and doctrine. Domestic legislation and regulations have been progressively adopted or adapted, and the necessary structures put in place to give effect to the rules contained in the relevant IHL treaties.

In many states specific advisory bodies, such as National IHL Committees, have been established and international humanitarian law is increasingly being considered as part of the political agenda of governments. At the same time, by encouraging the national prosecution of war crimes and, more significantly, by the establishment of international bodies such as the ad hoc international criminal tribunals and the International Criminal Court, the international community has concentrated its efforts since the early 1990s on the repression of serious violations of international humanitarian law.

Despite these advancements in preventive and repressive measures, however, insufficient respect for the rules of international humanitarian law during armed conflict remains an abiding problem. It is the result of both the lack of political will and practical ability of parties to an armed conflict — both States and armed groups — to comply with their legal obligations. While efforts to improve both the prevention and repression of IHL violations are fundamental and must continue, the question of how better compliance with international humanitarian law can be ensured *during* armed conflicts thus deserves greater attention.

In 2003, the International Committee of the Red Cross (ICRC), in cooperation with other institutions and organizations, organized a series of regional expert seminars to examine this issue. Regional seminars were held in Cairo, Pretoria, Kuala Lumpur, Mexico City, and Bruges (Belgium). Participants included government experts, parliamentarians, academics, members of regional bodies or non-governmental organizations, and representatives of National Societies of the Red Cross and Red Crescent.

Based in part on the recommendations coming out of this series of expert seminars,¹ two aspects of improving compliance with international humanitarian law are proposed as the subject of further reflection for Topic III of the Informal High-Level Expert Meeting:

- the role and responsibility of third States not party to an armed conflict to take appropriate action to “ensure respect” for international humanitarian law; and
- the strategies or tools that might be considered in order to influence parties to non-international armed conflicts to adhere to their IHL obligations.

¹ For a detailed report of the proceedings of the series of expert seminars, see the ICRC’s report to the 28th International Conference of the Red Cross and Red Crescent, “[International Humanitarian Law and the Challenges of Contemporary Armed Conflicts](#)”, and in particular, Annex III to that report.

I. Ensuring respect for IHL: Third state roles and responsibilities

Under [Article 1](#) common to the four Geneva Conventions, states undertake to “respect and ensure respect” for these conventions in all circumstances. The same provision is found in [Article 1](#) of Additional Protocol I and, according to the International Court of Justice, the obligation to respect and ensure respect for IHL also applies in respect of obligations provided for in common [Article 3](#) to the Geneva Conventions.² In addition to a clear legal obligation on states to “respect and ensure respect” for international humanitarian law within their own domestic context, common Article 1 also confers a negative legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations.

The International Law Commission Draft Articles on State Responsibility affirm this negative obligation under general international law by attributing responsibility to a state that knowingly aids or assists another State in the commission of an internationally wrongful act.³ An example of this negative obligation would be the prohibition for a state to undertake the transfer of arms or sale of weapons to a State or other party to an armed conflict who is known to use such arms or weapons to commit violations of international humanitarian law.

Question 1: Following the example of a state scrutinizing intended transfers of arms or sales of weapons, what other actions might a state take in order to ensure that it is neither assisting a party to an armed conflict to violate international humanitarian law nor taking action that would assist in such violations?

In addition, common Article 1 is now generally interpreted as enunciating a responsibility on third States not involved in an armed conflict to ensure respect for international humanitarian law by the parties to an armed conflict by means of positive action. Third States have a responsibility, therefore, to take appropriate steps — unilaterally or collectively⁴ — against parties to a conflict who are violating international humanitarian law, in particular to intervene with states or armed groups over which they might have some influence to stop the violations.

It is generally understood that the positive responsibility under common [Article 1](#) is not to be construed as an obligation to reach a specific result, but rather as an “obligation of means” on States to take all appropriate measures possible in an attempt to end violations of international humanitarian law. In addition, it is widely accepted that, considering violations of international humanitarian law to be matters of international concern, action taken

² As affirmed by the International Court of Justice in the Nicaragua case, wherein the Court noted that under common [Article 1](#), [the State in question] was under “an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of [Article 3](#) common to the four 1949 Geneva Conventions [...]”. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 14, para. 115.

³ [Draft Articles on Responsibility of States for internationally wrongful acts](#) (International Law Commission, 53rd Session, 2001), Article 16: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.”

⁴ See [Article 89](#) of Protocol I Additional to the Geneva Conventions of 12 August 1949.

pursuant to common Article 1 should not be understood as an unlawful interference in the internal affairs of another State. Finally, it is also understood that common [Article 1](#) is not an entitlement to the use of force, a matter governed solely by the [UN Charter](#), and that any action undertaken pursuant to common Article 1 must be in accordance with international law.

Building on this basic understanding of the scope and implications of common Article 1, it remains to be considered how to practically translate states' "positive" responsibility into practice and policies.

Question 2: How can the political will of third States to take appropriate action to ensure compliance with IHL by parties to an armed conflict be fostered? In particular, how can third states be motivated to intervene with states or armed groups over which they might have some influence to stop the violations, in both international and non-international armed conflicts?

Question 3: What strategies by third states for improving compliance with IHL have worked in the past and why? What other third state actions or strategies could be envisaged in order to ensure respect for international humanitarian law?

Consider, perhaps the following suggestions:

- States should engage in *confidential, discreet negotiations* with parties to an armed conflict, to encourage respect for international humanitarian law.
- Where international humanitarian law is being violated, states should consider exerting *diplomatic pressure* on violating States or making *public denunciations* of the violations.
- States should utilize the *existing mechanisms of IHL*, for example by referring situations of conflict to the International Fact Finding Commission, or by offering to serve as a Protecting Power.
- Where a situation has arisen through violations of international humanitarian law, states should *refuse to recognize the state of affairs* politically and should withdraw aid or assistance until the issue of the IHL violations has been addressed.
- States should consider undertaking *coercive measures against violating states* (including refusal to enter into treaties or agreements with a violating State; expulsion of diplomats; severance of diplomatic ties; suspension of public aid).

Question 4: Are there enhanced possibilities for *regional or other collective cooperation* among third states that could seek to enhance respect for international humanitarian law by parties to both international and non-international armed conflict? What specific actions might regional or other collective bodies undertake in this regard?

II. Strategies for influencing parties to non-international armed conflicts

Most contemporary armed conflicts are waged within the boundaries of states. Although it is uncontroversial that both states and armed opposition groups are bound by the rules of IHL applicable in non-international armed conflict,⁵ an abiding challenge is how to ensure better compliance with this body of law.

As is well known, a number of obstacles impede attempts to ensure such compliance: States often deny the applicability of international humanitarian law out of reluctance to acknowledge that a situation of violence amounts to an internal armed conflict and an unwillingness to grant “legitimacy” to the armed group. Armed groups often lack sufficient incentive to abide by international humanitarian law, given that implementation of their IHL obligations is usually of little help to them in avoiding punishment under domestic law for their mere participation in the conflict. Other problems include the asymmetrical nature of the relationship and the methods of warfare between State armed forces and armed groups, the difficulties posed by conflicts in failed states, and so forth.

The specific issue to be examined is what mechanisms or tools of influence might be employed — by either States or armed groups — to increase respect for international humanitarian law in non-international armed conflict.

- States party to non-international armed conflict are bound to “respect and ensure respect” for international humanitarian law by their own armed forces. In addition to IHL dissemination and other activities carried out in peacetime, as well as post facto repression of violations, there is a range of other initiatives that States may take to ensure better respect for IHL.

First, as described above, a significant obstacle to better implementation of humanitarian law by non-state actors in internal armed conflicts is that they have little legal incentive to abide by the norms. The domestic law of all states prohibits, i.e., criminalizes, the taking up of arms against the government, which means that those directly participating in hostilities in a non-international armed conflict will be penalized even if they comply with international humanitarian law. This leaves the armed groups with little motivation to adhere to international humanitarian law in practice, as they know they will likely face maximum penalties for mere participation in hostilities.

In order to provide a greater incentive to members of armed groups to comply with international humanitarian law, states might consider the possibility of a *grant of immunity from prosecution* or *amnesty* for acts of mere participation in hostilities. International humanitarian law applicable to non-international armed conflict encourages states to

⁵ Norms of international humanitarian law applicable in non-international armed conflict include the provisions of [Article 3](#) common to the four Geneva Conventions (1949), the [1977 Second Additional Protocol to the Geneva Conventions](#) (if ratified), and norms of customary international law. A limited number of weapons treaties also specifically apply in non-international armed conflicts. For example, the scope of the [Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects \(1980\)](#) and its Protocols has been amended to include non-international armed conflict (2001).

grant the “broadest possible” amnesty to persons who have taken part in hostilities at the end of an armed conflict,⁶ on the understanding that such amnesties are usually necessary to foster national reconciliation. It is clear, however, that there can be no amnesty or other form of immunity from criminal process for alleged war crimes or other crimes under international law.

Recognizing that the suggestion of the “broadest possible” amnesty comes only at the end of an armed conflict and is discretionary, states might also consider committing themselves to a *mandatory amnesty* for acts of mere participation in hostilities, excluding of course acts committed in violation of humanitarian law.

States could also consider the possibility of granting members of armed groups some sort of “*combatant-like*” status, if they fulfill certain conditions inspired by the law applicable in international armed conflicts, such as distinction from civilian population and respect for the provisions of international humanitarian law. With this status, members of armed groups could not be prosecuted for mere participation in hostilities and for acts that respect the rules of IHL applicable in non-international armed conflict. Thus, acts that are lawful under international law would also be lawful under national law.

In addition to amnesties or immunities, states might also consider a *reduction of punishment* in cases of compliance with international humanitarian law so that during a domestic trial of members of armed groups for taking part in hostilities, the tribunal will take their level of respect for international humanitarian law into consideration when deciding upon punishment or sentences. A willingness to reduce punishment could also be announced during or prior to the end of a non-international armed conflict.

Question 1: Would a grant of amnesty or immunity from prosecution for participation in the armed conflict provide a useful incentive to armed groups to abide by their IHL obligations? Would any of the proposals suggested above be politically and legally feasible? If yes, how might States be encouraged to take such action?

- Although unquestionably bound legally by the relevant provisions of IHL, armed groups party to a non-international armed conflict do not have the possibility of ratification of IHL treaties. Without the opportunity to expressly commit themselves to the treaty provisions, armed groups may be unwilling to consider themselves bound to international obligations agreed to by political structures of which they were not part.

One means by which a state party to a non-international armed conflict could address this challenge would be to enter into a *special agreement* with the armed opposition group, provided for in [Article 3](#) common to the four Geneva Conventions. Through such agreements the parties to a non-international armed conflict may make an explicit commitment to comply with a broader range of treaty rules of international humanitarian

⁶ “At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” [Article 6 \(5\)](#), Second Additional Protocol to the four Geneva Conventions.

law, beyond the obligations described in common Article 3⁷ and in other rules applicable in non-international armed conflicts. It must be emphasized that the plain language of common Article 3 indicates that a special agreement does not affect the legal status of the parties.

For example, a special agreement based on common [Article 3](#) was entered into on May 22, 1992, between the various factions of the conflict within the Republic of Bosnia and Herzegovina. According to the International Criminal Tribunal for the former Yugoslavia, “this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only.”⁸

In addition to bringing into force provisions of the Geneva Conventions generally applicable only in international armed conflicts, special agreements might also provide the parties to the conflict with added incentive to comply based on mutual consent, making clear the equal international humanitarian law obligations on both the state and armed groups.

Furthermore, a *link between a proposed grant of amnesty by the state and an express consent of compliance* with international humanitarian law by the armed group might also be made within the special agreement. States could, in other words, make a grant of amnesty contingent upon the armed group’s commitment to and subsequent compliance with international humanitarian law, thus recognizing that if members of armed groups are given the necessary guarantees, they might more readily commit themselves to abide by the provisions of international humanitarian law.

Question 2: What is the potential impact of special agreements between States and armed groups? How might States and armed groups be persuaded to enter into such agreements? Should a model special agreement be drafted?

- Where a special agreement cannot be achieved, a *unilateral declaration* by an armed group of its commitment to comply with international humanitarian law could be suggested. Such declarations, also referred to as “declarations of intent”, have been made by various armed groups in the past, and are currently being pursued by the Geneva Call⁹ with regard to the Ottawa Treaty banning anti-personnel landmines. The aim of such declarations is to provide a self-disciplining effect on the armed groups, in particular where groups are concerned about their public image and reputation. Although there is a risk that unilateral declarations might be made for purely political motives, they could still serve a positive function as an additional tool of leverage to encourage compliance

⁷ “The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.” [Article 3](#) common to the four Geneva Conventions of 1949.

⁸ Prosecutor v. Dusko Tadic, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, International Criminal Tribunal for the former Yugoslavia, para. 73.

⁹ Geneva Call is a non-governmental organization dedicated to engaging armed groups in a landmine ban and to respect humanitarian norms. To facilitate this process, Geneva Call provides the opportunity for armed groups to sign a “Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action.”

with international humanitarian law. For greater enforceability, a unilateral declaration could be combined with a *verification mechanism* that could ensure supervision of compliance with international humanitarian law in the conflict. The question of who might serve as *depository* for unilateral declarations would need to be addressed.

Armed groups could also be encouraged to adopt an internal *code of conduct* or disciplinary code incorporating international humanitarian law provisions. Although less public than a special agreement or a unilateral declaration, this device might lead to greater implementation of IHL norms by the armed group and thus more directly impact their training and dissemination. The willingness of an armed group to include IHL provisions in a code of conduct could also be made public.

Question 3: What is the potential impact of unilateral declarations or of the inclusion of IHL obligations in codes of conduct for influencing the behavior of armed groups party to a non-international armed conflict? Would the drafting of a model unilateral declaration be useful? Who could serve as depository for such declarations? How might a verification mechanism be established?

- In addition to the legal tools or incentives discussed above, a range of *strategic arguments* might also be used to convince armed groups of the benefits and protections of adherence to international humanitarian law. Armed group leadership could be counseled that compliance might lead to the following gains: reciprocal respect by the state actors, including proper treatment of detained members of the armed group; increased effectiveness and cohesiveness of the armed group itself; enhanced legitimacy as a political actor; saved lives and preservation of the dignity of civilians; greater probability of dialogue with the state; facilitation of aid or assistance to conflict-affected areas through agreed upon “humanitarian corridors”. In addition, the armed groups should be reminded that at the end of the conflict, whatever its outcome, they may be held accountable for crimes committed during the conflict.

States might also be receptive to many of these strategic arguments, especially where the conflict is long lasting or where there is protracted violence between various armed groups. The following additional considerations might also be presented to states: criminalization alone is likely to be counter-productive in terms of curbing violence; State respect for international humanitarian law may serve to foster a culture of respect for humanitarian values within civil society; adhering to international humanitarian law and calling upon the armed group to do the same may lead to a correlative stigmatization or change in public perception of the armed group if they refuse to comply.

Question 4: Have strategic arguments, such as the ones outlined above, been successful in encouraging greater respect for IHL by States and armed groups? What other arguments might be considered? Who is in the best position to raise these points with parties to non-international armed conflict? (e.g. Neutral third States involved in negotiations between the parties to the conflict? The ICRC? Others?)

- When considering what incentives might be offered to parties to a non-international armed conflict to successfully encourage compliance with international humanitarian law, there also remains the importance of taking into account the cause of the conflict or the motivation of the armed groups. The motives for waging war are as diverse as the actors

involved: pursuit of power, territorial disputes, economic interests, the instrumentalization of ethnic or religious differences, denial of fundamental human rights or the rights of minorities, or common criminality. In addition, other characteristics may vary from one non-international armed conflict to another, including the level of organization and control of the armed group and the degree of intensity of the conflict and violence in the particular context.

Question 5: How can strategies of influence for ensuring IHL compliance be calibrated to take account of the diverse characteristics of non-international armed conflicts?

- In addition to actions that might be undertaken by either states or armed groups party to non-international armed conflict, a number of other initiatives might be considered. First, greater respect for international humanitarian law might be encouraged through increased utilization of existing IHL mechanisms. Although none of the existing supervision mechanisms for international humanitarian law, apart from the ICRC, are mandated expressly to address situations of non-international armed conflict, the International Fact Finding Commission¹⁰ (IFFC) might be seized, on an ad hoc basis, for this purpose. Established through [Article 90](#) of the First Additional Protocol, the Commission is authorized to enquire into alleged grave breaches or serious violations of the Geneva Conventions or the First Additional Protocol, and to facilitate, through its good offices, the “restoration of an attitude of respect” for the same treaties. The Commission has expressed its willingness to be seized in situations of non-international armed conflict, and has the flexibility to modify its procedures in this regard, by consent of the parties.

Question 6: Given the International Fact Finding Commission’s willingness to enquire into situations of non-international armed conflict, how might states and armed groups party to such a conflict be persuaded to seize the Commission for their specific context? Should third states not involved in the conflict request an IFFC enquiry, subject to the subsequent acceptance by the parties to the conflict? In the longer term, should the trigger mechanism for the IFFC be amended to dissociate seizure from state initiative, permitting the Commission to act on its own initiative, without requiring consent of the parties to the conflict?¹¹

- Given the lack of mandate among IHL mechanisms to deal with non-international armed conflicts, *mechanisms and bodies of other branches of international law* such as the UN Commission on Human Rights and the Inter-American Commission on Human Rights have taken initiatives in this regard. This growing trend may not be surprising given that,

¹⁰ The IFFC was officially constituted in 1991 and, to date, 67 countries have formally accepted its competence. However, despite the vigorous efforts of the IFFC itself in encouraging its use, it has never been seized to conduct an investigation or perform its good offices function in the international armed conflict context, let alone for non-international armed conflict.

¹¹ One explanation for why the Commission has not yet been seized is the current requirement of acceptance by the States party to an international armed conflict of the competence of the Commission. In order to counter this problem, it has been suggested that the trigger mechanism of the IFFC be amended, to dissociate seizure of the Commission from state initiative. Such an amendment might give the Commission the right of initiative to conduct its own investigations, even without the express acceptance of the parties to the armed conflict, or might permit protecting powers, the UN Security Council, non-governmental organizations or individuals to request an inquiry by the Commission.

in times of armed conflict, international humanitarian law and human rights provide complementary protection to affected persons.

However, the absence of a formal mandate for international humanitarian law restricts their practice. Furthermore, the response of human rights mechanisms to non-international armed conflict is limited in that they lack the competence to deal directly with violations by armed groups, although they attempt to address them in reports or General Recommendations, or by finding States responsible for omission or acquiescence in the face of violations by armed groups.

Question 7: Should the existing universal or regional human rights systems be encouraged to continue and expand their considerations of violations of international humanitarian law in non-international armed conflicts? What is the legal and political feasibility?

Concluding Question 8: Are there other strategies for influencing parties to non-international armed conflict or mechanisms for ensuring that they respect IHL, apart from the ones outlined above, which should be considered?