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Preparatory Discussion in view of the Third Meeting of States on Strengthening Compliance with IHL of mid-2014

Fact-finding and Meeting of States

3 and 4 April 2014

BACKGROUND DOCUMENT

GENEVA, MARCH 2014

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1. Introduction

The purpose of this document is to facilitate discussion among States in follow-up to the Second Meeting of States on Strengthening Compliance with International Humanitarian Law that was held in Geneva on 17-18 June 2013. The preparatory discussion of April 2014, for which this document has been drafted, is taking place within the joint initiative launched by the Government of Switzerland and the International Committee of the Red Cross (ICRC) with a view to implementing Resolution 1 adopted at the 31st International Conference of the Red Cross and Red Crescent in December 2011.

By way of reminder, Resolution 1 which is devoted to "Strengthening Legal Protection for Victims of Armed Conflicts" recognizes "the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL, with a view to strengthening legal protection for all victims of armed conflict".[1] It invites the ICRC "to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to (…) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law".[2] The resolution also expresses its appreciation to the Government of Switzerland for its commitment "to explore and identify concrete ways and means to strengthen the application of international humanitarian law and reinforce dialogue on international humanitarian law issues among States and other interested actors, in cooperation with the ICRC".[3]

Pursuant to the mandate given by Resolution 1 and based on the Second Meeting of States, Switzerland and the ICRC were to design, in continued discussions and consultations with States, concrete proposals and options regarding:

- The form and content of a periodic reporting system on national compliance;
- The form, content and possible outcome of thematic discussions on IHL issues;
- Modalities for fact-finding, including possible ways to make use of the International Humanitarian Fact-Finding Commission (IHFFC);
- The features and tasks of a Meeting of States.[4]

The relevant proposals and options listed above are to be presented to the Third Meeting of States that will be held on 30 June and 1 July 2014. In order to allow appropriate preparations for the Third Meeting of States, Switzerland and the ICRC scheduled two preparatory meetings in the meantime. The primary focus of the 16-17 December 2013 preparatory discussion was reporting on national compliance with IHL, and thematic discussions on IHL issues. The December 2013 meeting also examined, in overview form, the features and tasks of a regular Meeting of States Parties to the Geneva Conventions (hereafter "Meeting of States"). The aim of the April 2014 preparatory discussion is to enable an in-depth review of various aspects of the Meeting of States and a first preliminary discussion on a possible fact-finding function. It will also revisit select outstanding questions related to reporting on national IHL compliance and to thematic discussions carried over from the December 2013 meeting.

As facilitators, Switzerland and the ICRC are fully committed to ensuring that their joint initiative in follow-up of Resolution 1 is conducted in a transparent, inclusive and open manner.

[1] Para. 5 of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.
[2] Para. 6 of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.
[3] Para. 7 of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.
[4] See Chairs' Conclusions of the Second Meeting of States on Strengthening Compliance with IHL, Geneva, 17-18 June 2013, Annex 1.

In addition to transparency, inclusivity and openness, the Swiss-ICRC initiative is premised on several key principles that were enunciated in the discussions and consultations held thus far and were reaffirmed at the Second Meeting of States. It has been generally agreed that the following principles should serve as the overall framework within which the search for possible solutions to the challenges of improving compliance with IHL should be pursued:

- The need for an IHL compliance system to be effective;
- The importance of avoiding politicization;
- The State-driven character of the process;
- The avoidance of unnecessary duplication with other compliance systems;
- The requirement to take resource considerations into account;
- The need to find appropriate ways to ensure that all types of armed conflicts and the parties to them are included.
- The need for the process to ensure universality and impartiality.

This Background Document is structured as follows: Section 2 is devoted to some select questions carried over from the December 2013 discussion on a reporting system on national compliance with IHL and on thematic discussions on IHL issues. Section 3 deals with fact-finding, while section 4 focuses on various aspects of the Meeting of States. Each section contains, or is followed by, a list of questions with a view to focusing the debate at the forthcoming preparatory meeting and to identifying responses to the issues presented for examination.

Given the great degree of inter-linkage between the subjects addressed in the Background Document, it is suggested that the text be first read in its entirety, before responses to the specific queries posed are approached.

2. Issues Carried Over from the December 2013 Preparatory Discussion

2.1. Periodic reporting on national compliance with IHL

The December 2013 preparatory discussion on national IHL compliance reporting allowed for a fairly detailed overview of some of the main issues linked to this function. Improving IHL compliance at the national level by allowing self-assessment by a State as regards the implementation of its obligations, and the sharing of and further dialogue on such an assessment with others, is a main goal of periodic reporting. As noted by many States in the previous meeting, national IHL compliance reports should also enable exchanges among States on their practical experiences in IHL implementation, the sharing of best practices, the identification of challenges in IHL implementation and the identification of possible capacity building needs.

There was general agreement that a reporting function should be limited to States' obligations under the universally ratified 1949 Geneva Conventions, and their three Additional Protocols (of 1977 and 2005, respectively), for States that are parties to the latter. It was mentioned that States not party to the Protocols could also report on specific provisions of the Protocols which they apply in practice. It was likewise generally accepted that a periodic reporting system should not involve an article-by-article review of the relevant treaties.

Participants were of the view that regardless of the reporting system established, it should not be cumbersome. This could, among other things, be facilitated by ensuring that reports are prepared based on guidelines that should not be overly prescriptive, whether in template or questionnaire format. The format should, however, also be sufficiently flexible, leaving room for States to report on the specificity of their experiences as may be necessary. As

regards possible reporting periodicity, it was said that this will depend on a previous determination of other modalities, which need to be further discussed.

Provided below are some of the modalities discussed in December 2013 that require further examination going forward and on which additional, more detailed views of States are sought.

2.1.1. Type of periodic IHL compliance reports

Two possible types of periodic reports were discussed at the December 2013 preparatory discussion; it was also noted that it would be possible to combine them.

It is submitted that, whatever option may be chosen, national compliance reports should be geared towards addressing the legal and practical implementation of IHL obligations before, during, or after armed conflict, as the specific case may be.

Option 1: Comprehensive reports

The first would involve the submission of a thematically grouped, but fairly comprehensive initial report, that would outline the implementation of a State's obligations under the relevant IHL treaties in law and practice. This option would enable a State to undertake a self-assessment of IHL implementation across the range of its IHL obligations and would allow it to identify where more progress might need to be made. An initial comprehensive report would also allow a better understanding of the state of IHL compliance across all States thanks to fairly comprehensive initial reports. Establishing the thematic areas around which the initial report would be structured would clearly be an important issue. Subsequent periodic reports would be less detailed and aim to update the initial baseline of information provided. They would provide an opportunity for States to measure progress made over time.

This option would, on the one hand, require an initial, significant one-off effort in terms of reporting burden but would, on the other hand, allow a continued overview of the state of IHL implementation across all States and highlight improvements made over time. A questionnaire form could be an appropriate format for this type of reporting.

Option 2: Focused thematic reports

The second option envisages the submission of focused thematic reports from the start, with the implementation of a new group (or groups) of IHL obligations being addressed in each subsequent periodic report. This approach would eschew a wide view of IHL implementation and would instead center the reporting system on the gathering of information from States on the implementation of their obligations in law and practice under specific themes. Purely by way of example, topics could be: measures taken to implement IHL at the domestic level, protection of detainees, protection of vulnerable groups, dealing with the dead and missing, protection of the emblems, etc. This reporting option would allow for variety in the sense that each reporting cycle would entail a new topic, or topics. Here too, the establishment of the thematic group(s) of IHL obligations about which States would report would be of crucial importance. A template form could be an appropriate format for this type of reporting.

This option would allow for the submission of more detailed reports given their specific focus, but would not allow for an overview of the States of IHL compliance across a broad spectrum of issues at any one time.

Option 3: Combination of two previous options

At the December 2013 meeting, a proposal - which garnered significant interest - was made to combine the two previous options. Under this proposal a first initial report would aim to

review how IHL is implemented in the domestic legal system, while subsequent periodic reports would focus on State practice and be based on the focused thematic issues that arise from the initial report.[5] Given that this reporting approach was not elaborated upon at the previous meeting, an attempt is made here to flesh it out.

A combined option would entail the submission of an initial periodic report that would focus on the variety of measures that States take to implement IHL in their domestic legal system and armed forces, such as: the dissemination of the applicable IHL treaties, military and civilian instruction in IHL, relevant domestic legislation to implement IHL, the appointment of legal advisers to armed forces, procedures to investigate alleged violations of IHL, etc. Thus, while the initial report would be more "technical" in nature and allow for a baseline of information on measures of national implementation of IHL, subsequent reports would focus on thematic issues and also address recent State practice. At certain intervals, the "technical" information provided in the initial report would also need to be updated.

This option would allow for the provision, in an initial report, of fairly detailed information on the legal framework a State has put into place in order to carry out its treaty obligations. Subsequent focused thematic reports would allow for more detail in relation to specific areas identified, and would also include an overview of a State's practice, depending on its specific circumstances. Here too, the identification of issues for the initial and subsequent reports would be of key importance.

Questions for discussion on types of reports:

a) Improving IHL compliance at the national level by allowing self-assessment by a State as regards the implementation of its obligations, and the sharing of/dialogue on such an assessment with others, is a main goal of periodic reporting. As noted by many States in the previous meeting, national IHL compliance reports should also enable exchanges among States on their practical experiences in IHL implementation, the sharing of best practices, the identification of challenges in IHL implementation and the identification of possible capacity building needs. Which of the following types of reports would best fulfil these goals?
   - Comprehensive initial reports with subsequent update reports
   - Focused thematic reports
   - Combination of both options

2.1.2. Effectiveness of a voluntary reporting system

In the December preparatory discussion there was general agreement that a periodic reporting function would be voluntary in nature, given that legally binding changes to the relevant treaties of IHL are not currently contemplated. In this context, it was emphasized by a large number of participants that ways need to be found to encourage States to commit to a non-treaty reporting system. This means that States will actually submit national IHL compliance reports and will do so within the eventually prescribed time limits.

It may be observed that, in practice, the fulfillment of State reporting obligations usually depends on whether the submission of a periodic report is a legal obligation and whether a follow-up system exists and what that system is (an issue dealt with in the next section). Given that the reporting system being contemplated here will be voluntary, and leaving aside the question of possible follow-up, another key issue identified in the December 2013 preparatory discussion is how to ensure that timely periodic reports will be presented by States.

[5] Under this proposal the reporting system would form the basis for thematic dialogue in subsequent regular Meetings of States, a goal that could be achieved in the first two options as well.

The following measures and incentives could be considered to facilitate the submission of periodic reports:

- A dedicated committee of the Meeting of States could be established and given the task of keeping track of the functioning of the reporting system and of engaging with States who may be experiencing reporting difficulties, and be permitted to recommend action to overcome them, such as capacity building;
- If an expert body is established (see next section) the task of keeping track of the functioning of the reporting system and of engaging with States who may be experiencing reporting difficulties as well as of recommending action to overcome them could be entrusted to such a body;
- An individual - a reporting coordinator - could also be given the task of keeping track of the functioning of the reporting system and of engaging with States who may be experiencing reporting difficulties, and be permitted to recommend action to overcome them;
- In addition to one of the proposals above, States could be incentivized to submit reports by providing that the regular submission of reports will be a factor taken into account in the election of States to the Bureau of the Meeting of States, or other bodies that may be established.

Questions for discussion on the effectiveness of a voluntary reporting system:

a) Which of the measures and incentives below could be provided for to encourage States to effectively submit periodic reports given the voluntary nature of the system?
   - A dedicated committee of the Meeting of States
   - The expert body
   - A reporting coordinator
   - Reporting regularity as a factor in election to the Bureau and other bodies of the Meeting of States

b) Should some of them be combined? If so, which?

c) What other specific measures and incentives could be envisaged in order to facilitate the timely submission of periodic reports?

2.1.3. Follow-up to periodic IHL compliance reports[6]

Most participants in the December 2013 preparatory discussion emphasized that an effective follow-up to periodic reports on national compliance with IHL is of crucial importance. It was said that periodic reports must not fall into a “black hole” and that a balance must be found between the non-treaty character of the system and the requirement of effectiveness, which is one of the underlying principles of the current process.

In this context, a few observations based on the practice of other international compliance systems may be made.

Even where a compliance system provides that reporting is a legal obligation, the lack of appropriate follow-up may often mean, first, that the reporting requirement is unheeded by a significant number of States, and second, that the system as a whole is unable to meaningfully improve compliance with the relevant body of law. For example, States parties to the Anti-Personnel Mine Ban Convention (APMBC) are now discussing, fifteen years into the history of its implementation, the establishment of new mechanisms (in particular,

[6] For the purposes of this document "follow-up" refers to the way in which, once submitted, national compliance reports are further "processed" and presented to the relevant body.

committees), aimed at improving compliance with its provisions.[7] The issue of how to improve compliance, subsequent to its entry into force, has also arisen in the context of the Convention on Certain Conventional Weapons (CCW). It led to the establishment of transparency reports and of pools of experts that may be called on to provide assistance, upon request, on any concerns relating to the fulfillment of a State's obligations under the CCW and its Protocols.[8]

Conversely, where reporting follow-up exists and is meaningful, compliance with reporting requirements, even though they may be non-legally binding, generally improves. An example is the reporting system linked to the Universal Periodic Review that takes place within the UN Human Rights Council (HRC). While the HRC as a body is based on the UN Charter (as was the Human Rights Commission which preceded it), the UPR and its reporting system was established by means of a General Assembly resolution and not a treaty *de iure*. As is well-known, all States take part in the work of the UPR and submit reports.

The purpose of the observations above is not to suggest any particular modality, but rather to illustrate and confirm what many States stressed at the December 2013 meeting, which is that follow-up to periodic reports on compliance with IHL is a key issue. Given that specific follow-up options were not discussed in any detail at the previous meeting, a few are - non-exhaustively - outlined below. It is suggested that certain options could be cumulatively considered.

i. Outcome

Option 1: Generic report

Under this option, national periodic reports would be the basis for a non-context specific review of the measures taken by States in their domestic legal system in order to ensure compliance with IHL. This option would allow the relevant body (see below) to produce a synthesis of the various measures taken by States to comply with their IHL obligations at the domestic level.

The report would also generically identify practical experiences in IHL implementation, best practices, challenges in IHL implementation and capacity building needs. It would do so based on the national IHL reports, and on public sources.

Option 2: Analytical report

Under this option, national periodic reports submitted would be the basis for a non-context specific analytical assessment of how IHL is implemented in law and practice, where there is room for improvement, and how compliance could be strengthened. It would enable an overview of the state of IHL compliance and allow the relevant body to non-contextually analyze the issues and trends observed and make recommendations for improvement. Other public sources could also be non-contextually drawn upon to indicate issues, trends and recommendations.

The analytical report could, in addition, identify, based on information provided by States in their national reports, specific examples of practical experiences in IHL implementation, best practices, challenges in IHL implementation, and possible capacity building needs. It would thus allow States to share with others, if they wish, specific examples of practical

[7] See Proposal for a Meeting Programme and Related Implementation Machinery, 2014-2019, draft document prepared by the APMBC Implementation Support Unit on behalf of Mozambique for the Third Review Conference of the APMBC, 11 February 2014.
[8] See: The Compliance Mechanism for the CCW and Its Protocols, Fourth Review Conference of the High Contracting Parties to the CCW, CCW/CONF.IV/5, 10 October 2011.

experiences, best practices, challenges in IHL implementation, and their capacity building needs, thus enabling them to develop a bilateral or multilateral dialogue on these issues going forward. These specific examples would be presented in the report.

Option 3: Observations on national reports

Under this option, the periodic report of each State would be examined by the relevant body with a view to engaging with the State and making observations on the legal, practical and other actions that it could take to strengthen compliance, as may be necessary.

This type of engagement and outcome could be public. It is also possible to envisage that the national report would be public, but that engagement with the State and the observations made by the relevant body would be confidential, unless the State consented to their disclosure.

This option would allow for a dedicated dialogue with a State that could take into account the specificities of its circumstances, and contribute to improved compliance with IHL over time.

Option 4: National reports in plenary

Under this option, the periodic report of each State would be examined by the others in plenary, by means of a dedicated working group of the Meeting of States established for this purpose.

The review would be prepared and managed by a group of States, who would serve as rapporteurs with respect to the State report under consideration. The outcome of the examination would be recommendations, with information on what has been achieved to implement them being provided by the relevant State in the next reporting cycle.

This option would allow for the engagement of every State with all others over the course of a reporting cycle. It would provide an opportunity for an examination of how a State implements its IHL obligations in law and practice that is tailored to its specific circumstances, in each cycle.

ii. Procedures

Different modalities in terms of follow-up procedures related to national IHL compliance reports may be envisaged.

There are those which the Meeting of States could undertake on its own. Possible modalities are:

- The Meeting of States could hear brief presentations by States in plenary highlighting certain aspects of their periodic reports in a segment dedicated to that.
- A State or a group of States could bring a matter arising from a State's national compliance report to the attention of the Meeting of States.
- A plenary working group of the Meeting of States could examine national reports and make appropriate recommendations on individual State reports.

There are others, which the Meeting of States could not do on its own simply by virtue of its plenary nature and the limited time for its sessions. Thus, a meaningful discussion of issues arising from national compliance reports would require that the information provided in them is previously compiled and processed. Based on the practice of other systems of international compliance, this could be done by a subsidiary body that would be expert in character (expert body). It could be composed of independent experts chosen from a list submitted by States and elected based on criteria of equitable geographical distribution, of acknowledged impartiality and recognized legal, technical or other appropriate competence.

Alternatively, the expert body could be composed of State representatives, acting in their personal capacity, and elected with reference to the same criteria. In that case:

- The Meeting of States could examine the generic report on IHL compliance prepared by an expert body and take such action as it may deem appropriate (option 1 above). Such a report could be prepared in consultation with the ICRC.
- The Meeting of States could examine the analytical report on IHL compliance prepared by an expert body and take such action as it may deem appropriate in relation to recommendations made for strengthening IHL compliance (option 2 above). Such a compilation could be prepared in consultation with the ICRC.
- The Meeting of States could receive an annual report from an expert body entrusted to engage in a dialogue with States on national reports (which would be different depending on whether such a process is public or confidential, as described above).

Questions for discussion on follow-up to periodic IHL compliance reports:

a) Which of the outcomes outlined below would best serve the purpose of strengthening compliance with IHL:
   - Generic report (option 1)?
   - Analytical report (option 2)?
   - Observations on national reports (option 3)?
   - National reports in plenary (option 4)?

b) Should options 1 or 2 be combined with option 3?

c) Are there other follow up outcomes that should be envisaged?

d) Which of the follow-up procedures listed below would best serve the purpose of improving compliance with IHL?
   - The Meeting of States could hear brief presentations by States in plenary highlighting certain aspects of their periodic reports in a dedicated segment
   - A State or a group of States could bring a matter arising from a State's national compliance report to the attention of the Meeting of States
   - A plenary working group of the Meeting of States could examine national reports and make appropriate recommendations on individual State reports
   - The Meeting of States could examine the generic report on IHL compliance prepared by the expert body and take such action as it may deem appropriate
   - The Meeting of States could discuss national compliance reports and take action in relation to recommendations for improvement of IHL compliance based on an analytical report prepared by the expert body
   - The Meeting of States could receive an annual report from the expert body entrusted to engage in a dialogue with States on national reports (which would differ depending on whether such a process is public or confidential, as described above)

e) Which of the procedures above could be combined?

f) Are there other follow-up procedures that could be envisaged?

g) If an expert body were to be established, should it be composed of independent experts or of State representatives acting in their personal capacity?

2.1.4. Other select issues related to periodic IHL compliance reports

i. The role of customary IHL

As already noted above, there was general agreement among the participants in the December 2013 preparatory discussion that a reporting function should be limited to States'

obligations under the universally ratified 1949 Geneva Conventions, and of their three Additional Protocols for States that are parties to the latter. It was likewise said that States not party to the Protocols could also report on specific provisions of the Protocols which they apply in practice.

The role of customary IHL as an additional source of IHL obligations in a reporting process garnered different views. While some States supported its inclusion, others were of the view that certain ambiguities, or lack of agreement among States on what their customary law obligations are, could be a complicating factor. It was thus - non-cumulatively - suggested that: reporting on customary IHL obligations could be undertaken when appropriate; that it could be separated from reporting under treaty obligations; that States could be free to refer in reports to what their customary law obligations are; or that reporting on implementation of customary law obligations could be undertaken once the reporting system is up and running.

In this context it bears reminding that customary IHL remains important in cases where a State may not be a party to a certain IHL treaty, such as Additional Protocol I. For example, Additional Protocol I outlines relevant rules on the conduct of hostilities, including the principle of distinction, i.e. the obligation of the parties to an armed conflict to distinguish between civilians and combatants and between civilian objects and military objectives. These treaty obligations are generally considered to reflect customary IHL. However, if a State is not a party to the Protocol and if customary IHL is excluded from reporting, a review of the implementation of obligations under these fundamental rules could be left out of the content of reports. Also, customary IHL is an important source of legal obligations in situations of non-international armed conflict, for which IHL treaty rules are far less developed. In brief, the inclusion of customary IHL in reporting review would allow the full spectrum of IHL obligations to be encapsulated and would presumably make for a more efficient system.

Question for discussion on customary IHL:

a) If customary IHL is included as a source of legal obligations in national HL compliance reports how should this be done?

ii. Ad hoc reports

Some compliance systems under other bodies of international law provide for the possibility that a State/groups of States/a plenary/a subsidiary body may propose that an ad hoc report related to compliance be prepared by one of the actors within the compliance system outside the regular timeframes. Such an option, as was mentioned by a few States at the December 2013 meeting, may be useful in an IHL compliance system as well. In the present context, for example, a non-contextual ad hoc report could be requested from the expert body on a certain issue related to IHL compliance that is not being addressed in the national compliance reporting cycle or is not on the agenda of a thematic debate. If appropriate, the ICRC could also be called on to prepare such a report.

Questions for discussion on *ad hoc* reports:

a) Would it be useful to provide for the possibility of ad hoc reports on IHL compliance being discussed by the Meeting of States, the exact modalities of which would be determined at a later stage?

b) Who could propose such a report:
   - A State
   - A group of States
   - The Bureau
   - The expert body
   - The Meeting of States?

2.2. Selection of topics of thematic discussions on IHL issues

There was broad agreement at the December 2013 preparatory discussion that thematic discussions on IHL are an important function of an IHL compliance system and could serve the purposes (outlined in the relevant Background Paper), namely: to ensure that States are better informed about current or emerging IHL issues, to enable a better mutual understanding of States' legal and policy positions on current and emerging IHL issues, to enable exchanges of views on key legal, practical and policy issues, to develop a deeper understanding of IHL and of practical measures taken by States to implement it, to strengthen existing networks by bringing together IHL experts from the different States, and to enable for other potential beneficial flow-on effects.

Many participants mentioned that specific sessions of the Meeting of States should be devoted to thematic discussions and that linkages with a national IHL compliance reporting system should be considered, including in the identification of topics of common concern.

In relation to the scope, most States were of the view that thematic discussions should not aim at legal development, but should focus on IHL issues related to the application and interpretation of the law. Different views were expressed on policy-related issues, but many held that the thematic discussions should also allow for an exchange on policy positions adopted by States on how to interpret and apply particular IHL obligations in practice.

Many States mentioned that flexibility was needed with regard to the format and outcome of thematic discussions, as much will depend on the theme that is specifically addressed. However, the view was widely shared that an outcome document would be useful and that, at the least, a factual report on the discussions should be produced and made public.

The selection of topics was mentioned as one of the key issues. There was agreement that such a decision should be taken by States, but it was suggested that more attention to the selection process should be devoted going forward.

Most States were of the view that the selection of topics should be done by States. Some States mentioned that the topics could be suggested by the International Conference of the Red Cross and Red Crescent. It was also mentioned that the ICRC could suggest topics to the Meeting of States or the Bureau, as the case may be.

<u>Questions for discussion on selection of topics for thematic discussions:</u>

a) On the understanding that States would select the topics for thematic discussions, who should be able to propose a topic?
   - A State
   - A group of States
   - The Bureau
   - The International Conference
   - The ICRC
   - The expert body

b) Who would choose the topic(s)?
   - The Bureau
   - The Meeting of States
   - The Meeting of States on recommendation of the Bureau

c) What would the procedure be? Please opine on the suggestions below:
   - A State could make a proposal in its national compliance report, or could address it to the Bureau, or make a proposal at a session of the Meeting of States

- A group of States could submit a proposal to the Bureau, or make a proposal at a session of the Meeting of States
- The International Conference could make a proposal to the Bureau or via the Bureau to the Meeting of States
- The ICRC could make a proposal to the Bureau, or in a session of the Meeting of States
- The expert body could make a proposal in a generic or analytical report or in its annual report to the Meeting of States

3. Fact-Finding Function

Among the various compliance functions discussed within the Swiss-ICRC facilitated consultations, a function that would enable the establishment of facts in the case of alleged serious violations of IHL was believed by a number of States to be a useful element of a new IHL compliance system. The Second Meeting of States held in June 2013 confirmed that the modalities for such a function, including possible ways to make use of the International Humanitarian Fact-Finding Commission (hereafter IHFFC), deserved further examination.

The preparatory discussion of 3-4 April 2014 will be an opportunity for a first preliminary discussion by States on a possible fact-finding function and its parameters. This subsection aims to provide a brief overview of such a function and the mechanism(s) by which it could be performed. It is based on the understanding that further discussions in the process on this issue will be necessary, along with more elaborated proposals regarding relevant modalities going forward.

3.1. Introduction: fact-finding in IHL and other bodies of international law

Throughout the history of the development of modern IHL, States have been of the view that a fact-finding function was a necessary component of efforts to strengthen compliance with IHL. This is evidenced by the fact that a fact-finding procedure was provided for as early as 1929, in the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field that was adopted in Geneva.[9] Pursuant to Article 30 of the Convention: *"On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible".*

Subsequent developments of IHL, and the diplomatic negotiations that enabled them, illustrate a continued understanding on the part of States as regards the importance of a fact-finding function. After the Geneva Convention of 1929, attention was focused on further strengthening such a function by elaborating, in new treaties, certain elements that were missing from its provisions. In 1949, States included a common article in each of the four Geneva Conventions outlining an Enquiry Procedure. Under this Article: *"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay".*[10]

[9] Available at: http://www.icrc.org/ihl/INTRO/300?OpenDocument.
[10] See Commentary to Art. 149 of the Fourth Geneva Convention of 1949.

The inclusion, almost thirty years later, of provisions for an International Humanitarian Fact-Finding Commission in Article 90 of Additional Protocol I of 1977, was equally the result of a recognition by States that a fact-finding function should be still further developed and that it was an essential element of efforts to strengthen compliance with IHL.[11] The IHFFC, which was created in 1991, is composed of 15 individuals acting in their personal capacity. It is competent to: a) enquire into any facts alleged to be a grave breach or other serious violation of the 1949 Geneva Conventions or Additional Protocol I, and b) facilitate, through its good offices, the restoration of an attitude of respect for these instruments. In 2009, the UN General Assembly granted the Commission observer status.[12]

The competence of the IHFFC is mandatory if the relevant States involved in an international armed conflict are Parties to the Protocol and have made a formal declaration accepting its competence for allegations of grave breaches or of other serious violations of IHL, and one of them requests its services. The parties to an international armed conflict may also use the services of the Commission on an *ad hoc* basis, in which case all involved must give their consent.[13] Following an investigation, the IHFFC is meant to present its conclusions to the parties, together with any recommendation it might deem appropriate. The report is not disclosed publicly, unless all parties to the conflict agree to do so.

It is known that neither the Enquiry Procedure nor the IHFFC have been used in the past. As noted in previous consultations, this is a consequence of structural impediments that cannot be remedied without renegotiating the relevant treaties, which is not being contemplated in the current initiative. A major reason for their lack of use is that neither of these mechanisms is attached to a broader institutional structure: in other words, they lack the institutional support that may be necessary to ensure they are utilized, to facilitate the performance of their tasks and to assist in follow-up. Furthermore, both mechanisms are provided for in treaties that apply only in international armed conflicts. Given that the majority of contemporary armed conflicts are non-international in nature such conflicts are inevitably excluded from the existing remits of both the Enquiry Procedure and of the IHFFC, rendering them less relevant to present day circumstances. It should also be noted that these two mechanisms are based on the premise that the parties to an international armed conflict would be in a position to agree on their institution. Practice has shown that arriving at mutual agreement is usually not a realistic proposition in circumstances in which the relationship between the parties is already significantly degraded. Generally speaking, the challenge in IHL fact-finding has been to introduce some degree of automaticity in the application of the procedures, such as exists in other international compliance systems.

In recent years, in the absence of an effective fact-finding mechanism provided for in IHL, several inquiries related to situations of armed conflict have been launched by the UN system, the majority of which were triggered by the UN Human Rights Council. It is submitted that this too may be taken as an indication that States consider fact-finding in times of armed conflict to be an important tool for strengthening compliance with the law. While this development has been important for the victims of armed conflicts, the commissions of inquiry established by the UN Human Rights Council were not able to fully substitute for a specific IHL fact-finding function. A number of commissions of inquiry carried out missions in situations of armed conflicts, even though IHL was not systematically included in their mandates. This is likely to be a corollary of the human rights focus of the UN Human Rights Council.[15] Others extended the scope of their mandate on their own motion once the inquiry

[11] See Commentary to Art. 90 of Additional Protocol I.
[12] UN General Assembly resolution 64/121, December 2009.
[13] In non-international armed conflicts, the IHFFC has stated its willingness to enquire into alleged violations of IHL, so long as all parties to the conflict agree. Thus, if it were given a mandate in a non-international armed conflict it would deal with alleged violations of IHL committed by all parties to the conflict (see *Report of the work of the IHFFC on the Occasion of its 20th Anniversary*, IHFFC, 2011, p. 14).
[15] See resolution 60/251 of the UN General Assembly, in particular paras. 2 and 3.

was underway, and still others did so where a situation that was initially not an armed conflict became one during the course of the inquiry. In such cases, the inquiries lacked the formal competence to deal with violations of IHL even when fact-finding was conducted in situations of armed conflict. Moreover, the composition of some commissions did not necessarily fully reflect the need to include the requisite IHL expertise.

An IHL-specific fact-finding function would thus be one that would be set-up so as to ensure that the required IHL expertise exists and that a possible enquiry is carried out by persons familiar with the law, practice and spirit of this branch of international law. This would facilitate the quality of the findings and that could, in turn, promote their credibility with those who are responsible for implementing IHL at the policy level and on the ground.

An IHL fact-finding function would, finally, complement the other possible elements of a future compliance system that have been discussed in previous consultations. The establishment of a Meeting of States would be an important advancement in the protection of victims of armed conflicts. States have indicated that this forum should hold thematic discussions on IHL issues and serve as an institutional anchor for a reporting procedure. These functions are crucial in building up a culture of compliance, but they do not permit direct responses to events in armed conflict, which States deem necessary in certain cases, as evidenced by the fact-finding functions performed by commissions of inquiry established in the human rights fora. The creation of a dedicated fact-finding mechanism would serve to compensate for this gap and significantly increase the effectiveness of the IHL compliance system overall.

In this context it should be stressed that the establishment of fact-finding inquiry under any body of international law does not mean automatic access to a State's territory. This is an issue of sovereign decision, and a State may decline to welcome and receive a fact-finding body on its soil.

Questions for discussion on fact-finding in IHL and other bodies of international law:

a) In what ways could a dedicated fact-finding function, as part of a new IHL compliance system, help enhance respect for this body of norms?

3.2. The purposes of an IHL fact-finding function

In general, fact-finding can be described as a method of ascertaining facts on the basis of information gathered, compiled and analyzed from a range of sources, which serves to shed light on the circumstances, causes and consequences of an event (or events). There is no international template that provides guidance on the possible purpose(s) of a fact-finding inquiry. Mentioned below are a few approaches, which are provided on the understanding that the goals of such inquiries are invariably determined on a case-by-case basis.

The main purpose of fact-finding is to establish facts; the need for it usually arises when the facts are unclear or are in dispute in a given situation. A fact-finding enquiry may in practice be limited just to ascertaining the facts and conveying them to the parties concerned and the body that established the enquiry.

In addition to ascertaining the facts, the purpose of a fact-finding enquiry may also be to formulate appropriate practical recommendations to the parties concerned and the body that established the enquiry, as regards changes in behavior on the ground that may be necessary to restore an attitude of respect for the law and prevent future violations.

In some cases, fact-finding missions are also tasked with making a legal appreciation of the facts established[16] and submitting them to the parties concerned and the body that established the enquiry, for appropriate action.

Questions for discussion on the purposes of a possible IHL fact-finding function:

a) If a fact-finding function were to be established within a future IHL compliance system, what purposes could it serve?
   - Establish facts
   - Recommendations to change behavior
   - Legal appreciation of the facts
   - Others?

b) Could an enquiry serve more than one purpose?

3.3. Scope

As with purpose(s), the scope of a fact-finding inquiry is also usually determined on a case-by-case basis. An inquiry may thus be entrusted to examine the facts of one or more specific events, or facts linked to a broader context/situation. In the latter case, in particular, defining the temporal and geographic scope of an inquiry may also be necessary.

As regards material scope, most current fact-finding mechanisms deal with facts related to alleged violations of a particular treaty[17] or a particular body of law.[18] In the case of a possible IHL fact-finding mechanism, this would mean that it should be competent to investigate alleged violations of the 1949 Geneva Conventions and of their Additional Protocols, for States that are a party to the latter, as well as customary IHL obligations where this may be necessary. It bears repeating here that one of the principles of the current initiative is that all types of armed conflicts should be included; in this context customary IHL remains an important source of legal obligations in non-international armed conflicts.

Questions for discussion on scope:

a) What facts could be the subject of a fact-finding function in the present context?
   - Facts that are alleged to constitute a serious violation of the Geneva Conventions of 1949 or their Additional Protocols, provided the concerning State is a party to the latter
   - Facts that are alleged to constitute a violation of customary obligations of the parties to a conflict, as may be necessary

3.4. Instituting an enquiry

The question of instituting a fact-finding enquiry relates to the entity (or entities) that may propose such an enquiry, and to the entity entrusted with making the relevant decision.

It should be noted that the fact-finding enquiries provided for in the 1949 Geneva Conventions and Additional Protocol I do not contain these two stages. A State party to an international armed conflict may propose an Enquiry Procedure or the engagement of the IHFFC to the other party (or parties), but the process may stop there. The requested side may reject the proposal or could, conceivably, also simply ignore it. As mentioned above,

[16] See Background Document prepared for the Second Meeting of States held in June 2013, p. 29.
[17] See, e.g., the fact-finding procedures established in the APMBC, Art. 8(8).
[18] The Commissions of Inquiry of the UN Human Rights Council mainly address situations of violations of international human rights law.

these two mechanisms are based on the premise that the parties to an international armed conflict would be able to agree on their institution. Practice has, however, shown that it is not realistic to expect that such an agreement can be reached when the relationship between the parties has already broken down, as evidenced by the existence of an armed conflict between them. This is one of the likely reasons that neither procedure has been used so far.

Other international legal frameworks have adopted a different approach. Proposals for an enquiry may be made by authorized actors, and provision is made regarding the entity that can make a decision. The institution of a fact-finding inquiry by means of a decision taken by an intergovernmental body seems to be gaining acceptance at the international level. As has been noted, fact-finding inquiries have been triggered by bodies of the UN system (e.g., the UN Human Rights Council, the UN General Assembly and the UN Security Council). Regional intergovernmental bodies have also instituted inquiries, including the African Commission on Human and Peoples' Rights, the Economic Community of West African States, the Council of the European Union, and the Organization for Security and Co-operation in Europe.[19] According to recent research, inquiries also appear to be increasingly acceptable to the governments concerned.[20]

Several issues related to the institution of an enquiry will need to be the subject of further examination within the current consultations, including criteria and procedure. In order to obtain a preliminary overview, on this occasion, of the possible structure of the process, participants' views are sought below on: 1) which entity could be able to propose a fact-finding enquiry, and 2) which entity could make the relevant decision on a proposal.

Questions for discussion on instituting an enquiry:

a) Which entity could be authorized to propose an enquiry:
   - A State
   - A group of States
   - The Bureau
   - The fact-finding body (see below)
   - The expert body (see section 2.1.3. above)
   - Others?

b) Which entity could make the relevant decision?
   - The Meeting of States
   - Others?

3.5. Nature of the outcome

In the current practice of other international legal systems, the outcome of fact-finding inquiry is usually a report that is prepared within the parameters of the purpose(s) and scope that have been previously defined by the relevant body.[22]

[19] See Marina Aksenova and Morten Bergsmo, "Non-Criminal Justice Fact-Work in the Age of Accountability", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding* (Torkel Opsahl Academic Publisher, 2013, pp. 6-8).

[20] The *Draft Siracusa Guidelines*, for example, found that 70% of the inquiries examined for this project (the project examined 31 inquiries, see pp. 97-100) received the approval of the subject State (see *Draft Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, International Institute of Higher Studies in Criminal Sciences, 2013, p. 69).

[22] See *International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice*, United Nations Office of the High Commissioner for Human Rights, 2013, pp. 96-114 (hereafter *UN Fact-Finding Guidance and Practice)* on issues related to outcome and follow-up in the practice of the UN fact-finding missions.

A further question concerns how the outcome is dealt with. In general, in particular in the UN system, reports are released publicly and are submitted to and considered by the body that established the inquiry.[23] Various modalities in that regard may be considered in the present context. It could be envisaged that the results of a fact-finding enquiry are made public, but they could also be rendered in private and be entirely or partly confidentially examined by the relevant body, unless the party or parties concerned consent otherwise.[24]

Questions for discussion on outcome:

a) Should the report of a possible IHL fact-finding enquiry be rendered public by the relevant body?

b) If the report were to be confidential, should it be entirely or partly confidential? In the latter case, which parts of the report could be public and which could be confidential?

c) Are there any other modalities that could be envisaged?

3.6. Fact-finding body

In previous consultations, some States suggested that the IHFFC could be entrusted with an IHL fact-finding function that may be established as part of a new IHL compliance system. In practical terms, this would mean that the IHFFC would carry out enquiries in accordance with a mandate, and procedures, that States would deem appropriate for an IHL enquiry function and that could be devised in further consultations.

It is important to note in this context that possible agreement on a new role for the IHFFC would leave untouched the IHFFC's mandate, structure, etc., as provided for under Article 90 of Additional Protocol I, should States parties to the Protocol wish to resort to it.

Entrusting the IHFFC with a fact-finding function under a new IHL compliance system could have various advantages. The Commission is, notably, already in existence and is set-up as a standing body. As a result, an enquiry could be instituted within a relatively short time, while allowing for necessary flexibility in the composition of a particular enquiry team. On the other hand, it should also be recalled that the IHFFC has not been used so far, for the reasons submitted above. It may thus also be deemed that a fact-finding function linked to the Meeting of States should be given a fresh start in institutional terms.

If the IHFFC were to be given the role to carry out enquiries in the context of the envisaged IHL compliance system, provisions of a general nature on this issue could be provided for in the relevant document establishing the new IHL compliance system. The procedure could then be further elaborated in the future Rules of Procedure of the Meeting of States.

If alternatives to the IHFFC are deemed preferable, two would seem possible, based on the current practice of other international legal frameworks. First, a standing fact-finding body linked to the Meeting of States could be created. Second, a fact-finding function could be carried out on an *ad hoc* basis, with members selected each time for a given task, or selected from a roster of existing experts. Either solution could be provided for in general terms in the relevant document establishing the new IHL compliance system, while the procedures could then be further elaborated on in the future Rules of Procedure of the Meeting of States.

[23] See *UN Fact-Finding Guidance and Practice*, pp. 100-102.
[24] See, for example, Art. 90(5)(c) of AP I.

Questions for discussion on a new fact-finding body

a) Should the IHFFC be entrusted with a fact-finding function that may be established as part of the envisaged IHL compliance system? What would be the possible advantages and disadvantages?

b) Should alternative solutions be examined, such as the establishment of a standing body for the fact-finding function, or the performance of such a function on an ad hoc basis? What are the advantages and disadvantages of each?

4. Meeting of States Parties to the Geneva Conventions

The preparatory discussion of 16-17 December 2013 permitted for a preliminary overview of a Meeting of States Parties to the Geneva Conventions (hereafter "Meeting of States"). The debate affirmed that the States consider such a meeting a useful tool to strengthen compliance with IHL and that it should be established. A number of aspects requiring further clarification were identified. These include the institutional structure of the Meeting of States and the tasks of the possible components, the participation of observers, the relationship between the Meeting of States and the International Conference of the Red Cross and Red Crescent, questions related to resourcing and ways to establish the Meeting of States.[25]

This section addresses the above mentioned aspects of a Meeting of States. The goal of the Preparatory Discussion of 3-4 April 2014 will not be to replicate the discussions that have taken place thus far within the Swiss/ICRC facilitated process, but to build on the previous debates and to further refine the features of a possible Meeting of States.

4.1. Purpose

At the December 2013 Preparatory Discussion, the general purposes of the Meeting of States, reiterated below, were considered appropriate. Accordingly, the Meeting of States should be set-up in a way to respond to the following goals:

- To serve as a dedicated forum for States to discuss issues of common concern and to perform a variety of functions related to implementation of and compliance with IHL with a view to strengthening respect for that body of law;
- To serve as an institutional anchor for the other elements[26] of the future IHL compliance system.

4.2. Structure and organs: basic set-up and tasks

This subsection addresses the possible institutional structure of the Meeting of States. An emphasis is put, with regard to each component of the Meeting of States, on the procedural tasks and those tasks related to the compliance functions identified in past consultations, namely the thematic discussions on IHL issues and the periodic reporting on national compliance with IHL.

4.2.1. Plenary sessions

At the December 2013 preparatory discussion, it was noted that the plenary sessions could serve to perform a variety of activities related to the specific compliance functions linked to

[25] See Chairs' Conclusions of the Preparatory Discussion of 16-17 December 2013, p. 4.
[26] At the December 2013 preparatory discussion, it was noted that thematic discussions on IHL issues and periodic reporting on national IHL compliance will be closely linked to the Meeting of States.

the Meeting of States. In particular, it was mentioned that the plenary sessions could serve to hold thematic discussions on IHL issues or to consider the national compliance reports (possibly in addition to a separate expert body). Related tasks are not repeated here, as they are outlined in more detail in the previous sections of this Background Document.

In addition to these specific functions, most Meetings of States established under other treaties have the general competence to take action with regard to the application or implementation of the relevant convention.[27] It is thus submitted that the plenary sessions in the present context could also serve to decide on actions, as may be necessary, in respect of general matters concerning compliance with or implementation of IHL. Such actions could consist in the establishment of an inter-sessional program of work, the establishment of committees or working groups to prepare particular topics for consideration at the following plenary session, or decisions on follow-up activities in respect to the work of the Meeting of States.

In addition, plenary sessions usually perform a variety of procedural tasks, such as:

- Adopt the Rules of Procedures;
- Adopt the budget of the Meeting of States as well as of other bodies, such as the Secretariat (it is understood that the financial implications still need to be discussed);
- Elect officers, such as the Chair, Vice-Chairs and the members of the Bureau;
- Establish subsidiary bodies (such as the already mentioned expert body) and elect the members of such bodies (see below, subsection 4.2.5.);
- Oversee and consider the work done by a subsidiary body or another organ, such as the Secretariat.

Questions for discussion on the plenary sessions:

a) In addition to the possible tasks outlined in Sections 2 and 3, should the plenary session serve to decide on actions, as may be necessary, in respect to general matters concerning compliance with and implementation of IHL, such as establishing an inter-sessional program of work, establishing committees or working groups to prepare topics

[27] See, e.g.:

- Art. 17(4) of the Arms Trade Treaty (ATT): "The Conference of States Parties shall: (a) review the implementation of this Treaty, including developments in the field of conventional arms; (b) consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular promotion of its universality";
- Art. 11(1) of the Convention on Cluster Munition (CCM): "The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Convention, including: (a) the operation and status of the Convention" (see also similar wording in Art. 10(1) of the APMBC);
- Art. 13(3)(a) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the CCW): "The work of the conference shall include review of the operation and status of this Protocol";
- Art. 10(2) of the Protocol on Explosive Remnants of War of 28 November 2003 (Protocol V to the CCW): "The work of the conferences of High Contracting Parties shall include: (a) review of the status and operation of this Protocol; (b) consideration of matters pertaining to national implementation of this Protocol, including national reporting or updating on an annual basis";
- Art. 8(19) of the Chemical Weapons Convention (CWC): "[The Conference] shall consider any questions, matters or issues within the scope of this Convention […]. It may make recommendations and take decisions on any questions, matters or issues related to this Convention raised by a State Party or brought to its attention by the Executive Council", Art. 8(20) of the CWC: "The Conference shall oversee the implementation of this Convention, and act in order to promote its object and purpose. The Conference shall review compliance with this Convention" and Art. 8(21)(k) of the CWC: "The Conference shall take the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention".

for consideration at the following plenary session, take decisions on follow-up activities in respect to the work of the Meeting of States?

b) In addition to those outlined below, are there other procedural tasks that may be performed during the plenary sessions?
   - Adopt Rules of Procedures
   - Adopt budget
   - Elect officers
   - Establish subsidiary bodies (such as the already mentioned expert body), and elect the members of such bodies
   - Oversee and consider the work done by other organs

4.2.2. Chair

Every Meeting of States has a Chair. In general, it is the role of the Chair to preside over the Meeting of States. In the present context, the Chair could coordinate the substantive preparation of the plenary sessions and ensure, during these sessions, the orderly conduct of the meeting.[28] In that regard, he/she could draw up the draft agenda in consultation with the Bureau and coordinate the work of the Meeting of States in general. In between the meetings, the Chair could serve as the point of contact for all relevant issues.

The length of the term of the Chair could be equivalent to that of the members of the Bureau (see below) or he/she could hold the office for a longer duration to ensure continuity. The Chair could be elected *ad personam* from among the representatives of the States parties to the Geneva Conventions or this role could be assigned to a State. In the latter case, that State would designate a representative to perform the functions of the Chair.

Questions for discussion on the Chair:

a) In addition to those outlined below, are there other tasks that might be performed by the Chair?
   - Preside over the Meeting of States
   - Ensure the substantive preparation of the plenary sessions of the Meeting of States, including drawing-up the draft agenda
   - Coordinate the work of the Meeting of States
   - In between the meetings, serve as the point of contact

b) What should be the length of the term of the Chair?
   - Equivalent to the duration of the terms of the members of the Bureau
   - Longer term than the terms of the members of the Bureau

[28] For an illustration of the tasks performed by the Chair at the plenary sessions, see Rule 14 of the Rules of Procedure of the Seventh Review Conference of the States Parties to the Biological Weapons Convention (BWC), applicable *mutatis mutandis* to the Meetings of States Parties to the BWC: "(1) In addition to exercising the powers conferred upon him elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, he shall declare the opening and closing of each meeting, direct the discussion, ensure observance of these rules, accord the right to speak, ascertain consensus, put questions to the vote and announce decisions. He shall rule on points of order. The President, subject to these rules, shall have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers and on the number of times the representative of each State may speak on a question, the adjournment or the closure of the debate and the suspension or the adjournment of a meeting. (2) The President, in the exercise of his functions, remains under the authority of the Conference."

c) Should the Chair be elected *ad personam* from among the representatives of the States parties to the Geneva Conventions or should this role be assigned to a State, in which case that State designates a representative to fulfil that function?

4.2.3. Bureau

At the preparatory discussion of December 2013, a Bureau was thought to be useful by several States. In general terms, the Bureau would fulfill a procedural role in the preparation and conduct of the Meeting of States. Various Meetings of States established in other contexts feature an organ with such or similar functions.

i. Composition

Bureaus are usually composed of the Chair, the Vice-Chairs and sometimes additional members.[29] Seats on the Bureau could be attributed to States parties of the Geneva Conventions in which case they designate a representative to participate in the activities of the Bureau. Alternatively, the members could be elected *ad personam*.

In the present context, its members could be elected at the plenary sessions based on a number of agreed criteria, such as:

- The composition of the Bureau must ensure equitable representation of all regions;
- When electing the members of the Bureau, States take into consideration the commitment of each candidate (or the commitment of the State represented by the candidate) to strengthening compliance with IHL,[30] such as the timely submission of national compliance reports.

ii. Tasks and working modalities

The Bureau would be responsible to prepare the Meetings of States and ensure their orderly conduct. In that regard, it would assume the following procedural tasks:

- Consider the draft agenda drawn-up by the Chair;
- Assist the Chair in the discharge of his/her duties;
- Coordinate the work of the Meeting of States, including on documents that may be submitted to the Meeting of States.

In addition to performing these procedural tasks, the Bureau could play a role in some of the compliance functions. They primarily relate to the preparation and organization of thematic discussions on IHL issues and to the periodic reporting on national compliance with IHL. As these issues are discussed above in Section 2, they are not repeated here.

The performance of these tasks may require meetings of the Bureau also in between the plenary sessions of the Meeting of States.

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[29] The Bureau of the Assembly of the States Parties to the Rome Statute of the International Criminal Court (ICC) consists of a President, two Vice-Presidents and 18 members (Art. 112(3) of the Rome Statute); the General Committee of the Meeting of the High Contracting Parties to the CCW consists of the President, ten Vice-Presidents, and the Chairpersons and Vice-Chairpersons of other committees (Rules 10-13 of the Rules of Procedures of the Fourth Review Conference of the High Contracting Parties to the CCW, applicable *mutatis mutandis* to the Meetings of the High Contracting Parties to the CCW); the Bureau of the Human Rights Council consists of a President and four Vice-Presidents (Rule 9 of the Rules of Procedure of the UN Human Rights Council, annexed to its resolution 5/1).

[30] In electing the Member States of the UN Human Rights Council, the General Assembly shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto (para. 7 of the UN General Assembly resolution 60/251).

iii. Length of terms

In the case of most existing frameworks, the members of the Bureau are elected at the beginning of each meeting and hold terms until the following meeting.[31] In the present context, different options could be envisaged:

- The members of the Bureau are elected at the beginning of each plenary session and hold terms until the following plenary session. This allows for a greater turn-over of members and therefore more States assuming responsibilities in that body over time.
- The members of the Bureau are elected for longer terms, such as four years. This increases continuity and efficiency in the preparation and conduct of the meetings.

Questions for discussion on the Bureau:

a) Should seats on the Bureau be attributed to States who designate a representative to participate in the activities of that body, or should its members be elected *ad personam*?

b) Which criteria should be taken into consideration when electing the members of the Bureau? Are there additional criteria?
   - The composition of the Bureau ensures equitable representation of all regions
   - The members of the Bureau (or the States represented by the members) are committed to strengthen compliance with IHL

c) In addition to those listed below, are there other procedural tasks that the Bureau could perform?
   - Consider the draft agenda drawn-up by the Chair
   - Assist the Chair in the discharge of his/her duties
   - Coordinate the work of the Meeting of States, including on documents that may be submitted to the Meeting of States

d) How long should the officers composing the Bureau hold their function?
   - For the duration of the interval between two Meetings of States
   - For longer terms, such as four years

4.2.4. Secretariat

At the December 2013 discussion, many States considered a Secretariat to be potentially useful. Most Meetings of States established under other frameworks rely on the administrative and other support of a secretariat, sometimes referred to as Implementation Support Unit (hereafter ISU). Such units have been established either by treaty or, as in most cases, by a subsequent decision of the States parties to the relevant convention.[32]

[31] See Rules 5 of the Rules of Procedure of the Meeting of the States Parties to the APMBC and the CCM; Rule 35 in conjunction with Rule 1 of the Rules of Procedure of the Conference of the States Parties of the Organisation for the Prohibition of Chemical Weapons (OPCW). The terms of the members of the Bureau of the UN Human Rights Council last for one year, which consist of three regular sessions and possible special sessions (see Rule 9(a) of the Rules of Procedure of the Human Rights Council, annexed to its resolution 5/1). The Bureau of the Assembly of States Parties to the ICC, whose members are elected for three-years terms, stands out as an exception (see Rule 29(1) of the Rules of Procedures of the Assembly of States Parties to the Rome Statute of the ICC).

[32] Implementation Support Unit for the APMBC (established at the Third Meeting of the States Parties to the APMBC in 2001, para. 33 of the Final Report, APLC/MSP.3/2001/1); Permanent Secretariat of the Assembly of States Parties to the Rome Statute of the ICC (established by a resolution adopted at the 2nd Session of the Assembly of States in 2003, see resolution ICC-ASP/2/Res.3); Implementation Support Unit for the BWC (established at the Sixth Review Conference of the States Parties to the BWC in 2006, see para. 5 of Part III. Decisions and Recommendations of the Final Document, BWC/CONF.VI/6; the mandate of the ISU BWC was amended at the Seventh Review Conference in 2011, see para. 31 of Part III. Decisions and Recommendations of the Final Document,

In general terms, the Secretariat would provide administrative and logistical support to the Meeting of States and the Bureau, as well as the Chair.

i. Possible tasks

The secretarial tasks required in support of the Meeting of States and the compliance functions linked to it can be divided between logistical/administrative tasks and organizational tasks.

The following administrative/logistic services may be provided by the Secretariat:

- Conference services/conference secretariat:
  - Coordination of the preparation and functioning of the meetings (make necessary arrangements for interpretation, conference rooms, catering, supplies, equipment, security services) before and during meetings;
  - Prepare meeting documentation, including editing, translation, printing and distribution;
- General secretarial tasks:
  - Make necessary arrangements for meetings of the Bureau and, if applicable, subsidiary bodies;
  - Receive and distribute communications of States, including national compliance reports;
  - Maintain records and archives.

A further series of tasks are of an organizational nature. They primarily relate to the support of the work of the Chair and the Bureau and to the promotion of the work of the Meeting of States in general:

- Provide support to the Bureau and the Chair, including the note-taking during meetings, drafting speaking points/statements, facilitating contacts with States and other relevant actors;
- Liaising with intergovernmental organizations and other relevant actors (see subsection 4.5) on technical matters;
- Liaising with delegations on technical matters;
- Drafting of non-legal documents, such as financial reports of the Meeting of States, reports on the activities of the constituents of the Meeting of States, or other documentation as required by the Meeting of States;
- Website management;
- Administrate the funds of the Meeting of States (see also subsection 4.7 below);
- Maintain public relations.

ii. Possible structure

The size and structure of the Secretariat depend on the tasks assigned to it. Existing secretariats and ISUs are composed of between 2.5[33] and 9[34] fulltime positions.

BWC/CONF.VII/7); Implementation Support Unit for the CCM is in the process of being established (the decision to that end was taken at the Second Meeting of States Parties to the CCM in 2011, see para. 29 of the Final Document, CCM/MSP/2011/5); Technical Secretariat of the Conference of States Parties to the OPCW (provided for in Art. VII(38) of the CWC); under the framework of the UN Human Rights Council, the Office of the High Commissioner for Human Rights acts as secretariat (see Rule 14 of the Rules of Procedure of the Human Rights Council, annexed to its resolution 5/1); Secretariat of the Conference of States Parties to the ATT (provided for in Art. 18 of the ATT).

[33] See Report of the CCW Implementation Support Unit, CCW/MSP/2013/5, submitted to the 2013 Meeting of the High Contracting Parties to the CCW.

[34] Permanent Secretariat of the Assembly of States Parties to the Rome Statute of the ICC, see para. 1 of Resolution ICC-ASP/12/Res.1, adopted at the twelfth session of the Assembly of States Parties to the Rome Statute of the ICC in 2013.

During the plenary sessions, the Secretariat could form the conference secretariat, with its head assuming the role of the Secretary of the Meeting of States. In between the plenary sessions, the Secretariat could operate as an independent entity in accordance with directives adopted by the Meeting of States.

Regarding the institutional set-up of the Secretariat, the following questions may be examined. The structure must reflect the intergovernmental nature of the Meeting of States and remain as lean and cost-effective as possible. Furthermore, a variety of activities will require legal personality, such as opening a bank account and administering the funds of the Meeting of States, concluding contracts with companies providing conference services, such as interpretation and translation, or hiring additional staff for the Meeting of States, such as welcome or security personnel if required. The Secretariat could be set-up either as an independent structure under the national law where it will be located, such as an association or a foundation under Swiss law,[35] or it could be hosted by an existing institution that is authorized to carry out the activities requiring legal personality on behalf of the Secretariat.[36]

iii. Issues for further discussion

A number of issues pertaining to the Secretariat need further examination. These aspects will have to be devised on the basis of the results of the preparatory discussion of April 2014:

- The structure of the Secretariat, including questions related to its management, staffing and financial implications;
- Institutional set-up of the Secretariat.

Questions for discussion on the support services:

a) In addition to those outlined below, could a permanent Secretariat perform other tasks?
   - Administrative and logistic tasks:
     - Conference service functions
     - General secretarial functions
   - Organizational tasks:
     - Provide support to the Bureau and the Chair, including the note-taking during meetings, preparation of draft speaking points/statements, facilitating contacts with States and other relevant actors
     - Liaising with intergovernmental organizations and other relevant actors (see subsection 4.4) on technical matters
     - Liaising with delegations on technical matters
     - Drafting of non-legal documents, such as financial reports of the Meeting of States, reports on the activities of the constituents of the Meeting of States, or other documentation as required by the Meeting of States
     - Website management
     - Administrate the funds of the Meeting of States (see also subsection 4.6 below)
     - Maintain public relations

b) In addition to the aspects below, are there other issues that require further examination?
   - Structure, including management, staffing and financial implications
   - Possible hosting and location of the Secretariat

[35] See, e.g., the Justice Rapid Response Association, set-up as an international association under Swiss law enabling the Justice Rapid Response Secretariat to perform its functions (http://www.justicerapidresponse.org/about-jrr/jrr-secretariat/).

[36] See, e.g., the Implementation Support Unit for the APMBC, hosted by the Geneva International Centre for Humanitarian Demining (http://www.apminebanconvention.org/implementation-support-unit/overview/).

4.2.5. Expert body

The usefulness of an expert body has already been considered in some parts of the Background Document, in particular with respect to procedures related to national compliance reports and ways of ensuring the effective submission of such reports (see Section 2). These possible roles will not be repeated here. In addition, as was discussed at the December 2013 preparatory discussion with regard to thematic discussions on IHL issues, an expert body could also possibly draw up summary reports or other outcome documents upon request, prepare background documents for certain thematic discussions upon request, or advise the relevant body on the selection of topics.

It should be noted that questions could also arise in the work of the Meeting of States more broadly, which would require legal and/or other expertise that the Secretariat may not be able to provide due to resource or other constraints. It may thus be considered whether certain substantive legal tasks should be provided by the expert body. In particular, that body - established as a subsidiary body of the Meeting of States and operating under its authority - could act in an advisory capacity to the Meeting of States and the Bureau in particular. It could, for example examine (and/or validate from a legal perspective) conference documentation such as requests, proposals and other documents that may be forwarded to the attention of the Bureau and/or Meeting of States, or provide advice on any other legal question that may arise in the work of the Bureau and/or the Meeting of States. It could also have a role to play in the drafting of *ad hoc* reports as described in Section 2. Other similar tasks may arise once the Meeting of States is established.

Questions for discussion on an expert body:

a) Could an expert body be entrusted with the tasks outlined below?
   - Preparing background documents for thematic discussions on IHL issues upon request
   - Drawing up summaries or other outcome documents for thematic discussions on IHL issues upon request
   - Advising the Meeting of States and/or the Bureau on any legal question that may arise in their work
   - Examine documents (requests, proposals, etc) that may be forwarded to the Meeting of States and/or the Bureau from the point of view of legal sufficiency
   - Draft *ad hoc* reports upon request

b) Are there other issues that might require the input of the expert body? If so, which?

c) If an expert body is established, should it be composed of independent experts or government experts acting in their personal capacity? (This question has been posed earlier, under subsection 2.1.3, but is repeated here for the sake of consistency.)

4.3. The role of the ICRC

During the December 2013 preparatory discussion, as well as at previous meetings held within the process, many States expressed the view that the ICRC should play an important role in any new IHL compliance system that may be established and that such a role should be specifically acknowledged.

By way of reminder, it is mainly the ICRC which in practice carries out a range of functions aimed at strengthening compliance with IHL. The ICRC's mandate in international armed conflicts is provided for in the Geneva Conventions of 1949 and in Additional Protocol I of 1977. 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. The ICRC's operational work, carried out in some 80 contexts all over the world, is aimed at providing

protection and assistance to persons affected by armed conflict.

A particularly important part of the ICRC's work, which should be recalled in the context of the present process, is that of its Advisory Service, established in 1995 further to the Recommendations of the Intergovernmental Group of Experts on the Protection of War Victims that met in January 1995 in Geneva to study practical means of promoting full respect for and compliance with IHL.[37] These Recommendations were subsequently endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent also held in 1995.[38] As a specialized structure of the ICRC the focus of the Advisory Service is on furthering the participation in and national implementation of IHL treaties by States. With a global network of legal advisers, the Advisory Service complements the work of national authorities by advising States on specific domestic implementation measures required to give effect to their IHL obligations. The Advisory Service provides legal advice and technical support, assists in capacity building efforts, and facilitates the exchange of information on national measures of implementation. It also supports the work of national IHL bodies established by States to improve IHL implementation processes at the domestic level. The Advisory Service discharges its mandate through a broad variety of means, ranging from bilateral contacts, to working with international and regional organisations, hosting expert workshops and regional or national meetings for Government representatives, and developing tools and specialized documents. While the ICRC will continue to provide these services, it can share its experiences in that field with the Meeting of States.

The ICRC is bound by and operates in accordance with the fundamental principles of the International Red Cross and Red Crescent Movement, including neutrality, independence and impartiality. Its role in monitoring compliance with IHL is characterized by certain limits that are inherent to its mission and working method based on these principles. It is not the ICRC's practice to publicly condemn authorities responsible for violations of IHL, nor does the organization seek to provoke international pressure to promote better respect for IHL. Except in strictly defined circumstances,[39] the ICRC focuses on a confidential and bilateral dialogue with each party to an armed conflict with the aim of persuading those responsible for violations to change their behaviour and meet their obligations. Confidentiality has proven to be an indispensable tool for obtaining direct access to victims of armed conflicts and for being able to undertake operational work of long duration. It is also key to staff security, particularly in contexts where the ICRC is the only humanitarian organization providing services on the ground.

As noted by several participants in the December 2013 preparatory meeting, the current process should not aim to impinge on the role of the ICRC, its mandate or working method. To the contrary, synergies – if possible – should be sought in articulating the relationship between the ICRC's work, particularly in the legal domain, and an effective IHL compliance system.

It is submitted that the ICRC will be able to significantly contribute to the system once the main elements, some of which have been referred to above, are better known. Thus, as regards national IHL compliance reporting, the ICRC's possible role will depend on the type of reports that are eventually agreed on and on the type of reporting follow up that may be established. By way of example:

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[37] Among these were the establishment of national committees to advise and assist Governments in the implementation and dissemination of IHL, 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".

[38] Available at: http://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-1-1995.htm.

[39] See ICRC, "Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393-400.

- The ICRC could be invited to regularly submit its views on the non-context specific state of IHL compliance globally at the opening of each Meeting of States;
- It could be invited to present an overview report to the Meeting of States (and/or a subsidiary body, as the case may be), based on an examination of national IHL compliance reports, with a view to indicating issues of common concern or highlight trends or good practice;
- It could likewise be called on to advise the relevant body on possible follow-up action;
- It could be consulted by the relevant body on guiding questions/templates – making available tools that the ICRC's Advisory Service uses – and the format of national IHL compliance reports.[40]

As regards thematic discussions, the ICRC could:
- Be granted the opportunity to propose topics for thematic discussions of States on IHL issues;
- Identify emerging issues that would merit discussion;
- Prepare background documents/reports for the sessions;
- Take part in panel discussions on thematic issues as expert briefer;
- Act as the rapporteur of certain thematic debates, including drafting summaries or other outcome documents.

The ICRC could be called on to act in a consultative capacity to the Meeting of States and Bureau (and/or a subsidiary body), in the performance of certain tasks once these have been agreed on. For example, the ICRC could be consulted as regards experts to be invited to take part in thematic discussions.

It is submitted, in summary, that any future reference to and possible elaboration of ICRC tasks in an IHL compliance system should be based on the principle that the organization may act in an expert and consultative capacity, while taking fully into account its mandate, operational role and its standard working procedures. The exact modalities of the ICRC's contribution will continue to be the subject of further exploration in the current process, within these parameters.

Questions for discussion on the role of the ICRC:

A few specific ways in which the ICRC could contribute to an IHL compliance system have been proposed above, by way of example:

a) Are they agreeable?

b) Are there other specific ways in which the ICRC could contribute to:
   - the national IHL compliance reporting function? Please suggest.
   - thematic discussions on IHL issues? Please suggest.

c) On what issues, if any, should the Meeting of States or a subsidiary body, i.e. Bureau, or a follow up body if one is agreed to, be able to seek the ICRC's views?

d) Is there any other way, additional to the ones above, in which the ICRC could or should contribute to the effectiveness of an IHL compliance system?

[40] At the domestic level, the ICRC could, at the request of a State, offer its advice and technical cooperation during the drafting of national IHL compliance report or in any follow up action that may be requested by the relevant body.

4.4. Membership of the Meeting of States

As a general rule, the members of a Meeting of States are the States parties to the relevant treaty.[41] An exception is the UN Human Rights Council whose membership is not composed of all States members of the UN, but of 47 States elected by the UN General Assembly.[42]

It is submitted that all States parties to the Geneva Conventions of 1949 would be members of the Meeting of States. Each delegation would consist of a head of delegation and such alternate representatives or advisers as may be necessary. While every State is free to decide on the composition of its delegation, it would be useful to include representatives of relevant government services that have responsibilities relating to the application of IHL, as well as requisite legal, IHL, operational and other expertise. Their presence may facilitate the substantive activities of the Meeting of States. Furthermore, how effectively the Meeting of States will be able to contribute to the strengthening of compliance with IHL may partly depend on whether the concerned government entities feel concerned by its work.[43]

Question for discussion on membership:

a) Should the members of the Meeting of States be the States Parties to the Geneva Conventions of 1949?

b) What composition of delegations would be best suited for the work of the Meeting of States?

4.5. Participation of observers

4.5.1. General

The topic of participation of observers at the preparatory discussion of 16-17 December 2013 generated various views and was noted as deserving further discussion.

The participation of observers has become a regular feature of Meetings of States established in other contexts. In the present context, various entities could, *a priori*, be eligible for observer status. Depending on their nature and status, different roles and arrangements could be established. Therefore, the possible participation of the components of the International Red Cross and Red Crescent Movement, of intergovernmental organizations and entities, as well as of civil society actors, in particular non-governmental organizations (hereafter NGO), are discussed separately below.

4.5.2. The components of the Red Cross and Red Crescent Movement

The International Red Cross and Red Crescent Movement is composed of the National Red Cross and Red Crescent Societies (hereafter NRCS), the International Federation of the Red Cross and Red Crescent Societies (hereafter International Federation) and the ICRC. It forms the largest humanitarian network in the world. The Statutes of the International Red

[41] See, e.g., Rule 1(1) of the Rules of Procedure of the Meeting of the States Parties to the APMBC; Rule 1(1) of the Rules of Procedure of the Meeting of States Parties to the CCM; Rule 1(1) of the Rules of Procedure of the Meetings of the High Contracting Parties to the CCW.
[42] Para. 7 of UN General Assembly resolution 60/251.
[43] Where applicable, the National Committees on the implementation of IHL could be consulted on that matter. As the committees usually include representatives from different ministries concerned with implementing IHL, conferring with these bodies on the composition of the delegation could be a means to ensure that relevant government entities are represented at the Meeting of States.

Cross and Red Crescent Movement (hereafter Statutes)[44] attribute different roles to each of the components.

Considering its unique status, the possible role of the ICRC is addressed separately above and will not be repeated here.

The International Federation comprises all recognized NRCS and has as a general object to facilitate and promote their humanitarian activities with a view to preventing and alleviating human suffering.[45] While the International Federation does not have a mandate directly related to strengthening compliance with IHL, it is recognized as a major humanitarian actor. It is furthermore "the official representative of the member Societies in the international field".[46] It was given permanent observer status at the Meetings of States Parties to the APMBC and the CCM[47] as well as at the UN General Assembly and its subsidiary bodies.[48]

On the domestic level, NRCS may provide valuable support to the respective public authorities, including in the implementation of their obligations under IHL, and by cooperation in related tasks.[49] At the December 2013 Preparatory Discussion, the possible role of NRCS was briefly raised. It was asked whether NRCS could be involved in the drafting of the compliance reports at the domestic level and some States stated that this would be welcome. There were no specific suggestions regarding other aspects.

It is submitted that the role of the components of the Red Cross and Red Crescent Movement (excluding the ICRC), will be further revisited within the process.

4.5.3. Intergovernmental organizations and entities

Intergovernmental organizations regularly participate in Meetings of States established under other frameworks as observers. The procedures of most of these meetings give permanent observer status to the UN;[50] some of them specify particular UN programs, funds or specialized agencies.[51] Other relevant intergovernmental organizations or entities must usually send a request for participation or may participate upon invitation.[52] Under some frameworks, intergovernmental organizations with observer status in the UN may participate.[53]

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[44] The Statutes were adopted by the 25th International Conference of the Red Cross in 1986 and amended by the 26th International Conference in 1995 and by the 29th International Conference in 2006. It is reminded that States are members of the International Conference of the Red Cross and Red Crescent, without being a component of the Movement. In other terms, the Statutes of the Movement have received the sanctioning from all States Parties to the Geneva Conventions of 1949.

[45] Art. 6(1) and (3) of the Statutes.

[46] Art. 6(4)(k) of the Statutes.

[47] See Rule 1(3) of the Rules of Procedure of the Meetings of the States Parties to the APMBC and Rule 1(2) of the Rules of Procedure of the Meetings of States Parties to the CCM.

[48] UN General Assembly resolution 49/2 adopted in 1994.

[49] See Art. 4(2) of the Statutes.

[50] Rule 1(2) of the Rules of Procedure of the Meetings of States Parties to the CCM; Rules 35-36 of the Rules of Procedure of the Assembly of States Parties to the Rome Statute of the ICC; Rule 31 of the Rules of Procedure of the Meeting of States Parties to the OPCW; Rule 47 of the Rules of Procedure of the Meeting of the High Contracting Parties to the CCW. Specialized UN agencies and other intergovernmental organizations have observer status with the Human Rights Council (Rule 7(a) of the Rules of Procedures of the Human Rights Council, annexed to its resolution 5/1).

[51] Rule 1(3) of the Rules of Procedure of Meeting of the States Parties to the APMBC: the UNHCR, UNDP, UNICEF, WHO, and WFP.

[52] See, e.g., Rule 1(3) of the Rules of Procedure, Meeting of States Parties to the CCM; see also Rule 32 of the Rules of Procedure of the Conference of the States Parties to the OPCW; Rule 92(2) of the Rules of Procedure of the Assembly of States Parties to the Rome Statute of the ICC.

[53] Rule 46 of the Rules of Procedure of the Meeting of the High Contracting Parties to the CCW; Rule 92(1) of the Rules of Procedure of the Assembly of States Parties to the Rome Statute of the ICC.

Many intergovernmental organizations have relevant competences, activities and experiences in the field of IHL. They are thus likely to enrich the deliberations taking place at the Meeting of States. While membership of the Meeting of States must be restricted to the contracting parties of the Geneva Conventions of 1949, the participation of intergovernmental organizations that have a direct responsibility, role or influence to enhance compliance with IHL should be particularly encouraged.

As regards the question which intergovernmental organizations and entities are eligible for observer status, the following considerations may be taken into account. The most concerned parts of the UN are to be found in the Secretariat (the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Department of Peacekeeping Operations (DPKO), Office for Disarmament Affairs (ODA), Office of the United Nations High Commissioner for Human Rights (OHCHR), Office of the Special Representative for Children in Armed Conflict (OSRSG-CAC), etc.). Some subsidiary bodies such as the Human Rights Council and its mechanisms (notably the special procedures) could also be relevant in the context of a Meeting of States.

The other following UN programs, funds and specialized agencies may also be considered for participation. The list below is not exhaustive:

- The Office of the High Commissioner for Refugees (HCR);
- The United Nations International Emergency Children's Fund (UNICEF);
- The United Nations Educational, Scientific and Cultural Organization (UNESCO).

Regional and sub-regional organizations, as well as collective security organizations, should also be considered, as most of them deal with IHL related issues. The list below is not exhaustive:

- African Union (AU);
- Association of Southeast Asian Nations (ASEAN);
- European Union (EU);
- League of Arab States;
- Organization of American States (OAS);
- Organization for Security and Co-operation in Europe (OSCE);
- North Atlantic Treaty Organization (NATO).

A number of other intergovernmental organizations and entities, for example the International Criminal Court (ICC), could also be considered as potential observers at the Meeting of States.

Questions for discussion on the participation of intergovernmental organizations and entities:

a) Which intergovernmental organizations and other entities could be considered for participation?
   - The UN (main and subsidiary bodies)
   - UN programs, funds and specialized agencies
   - Regional and sub-regional organizations
   - Other intergovernmental organizations and entities

b) What could be the role of intergovernmental organizations and other entities?[54]
   - Participate as observers
   - Participate, upon invitation, in specific sessions of the Meeting of States, such as thematic discussions on IHL issues, to present their views and activities in a given domain

4.5.4. Civil society

Civil society actors, in particular relevant NGOs, participate as observers in most Meetings of States.[55] Their presence in such fora may serve a variety purposes.[56] For example, it could enable States to secure expert information or advice from organizations that have special competences in the subject matters. Furthermore, inviting civil society actors as observers could permit relevant elements of public opinion to express their views and ensure that perspectives from the ground are adequately represented. It can finally be a means to reinforce national and international efforts in dissemination of IHL, to increase public awareness on the issue of strengthening compliance with IHL and to increase cooperation with various relevant actors in the field of IHL.

Depending on the purposes that are pursued, different modalities for civil society participation were mentioned in previous consultations within the current process. The following arrangements could be examined:

- Participation of civil society representatives as observers in all public segments of the Meeting of States: civil society actors may attend all public segments of the Meeting of States. They may be given, in general, the right to submit written statements and/or make oral interventions; alternatively, they may make such contributions only on the invitation of the Chair and to the extent that the Meeting of States has no objection.[57] They do not have the right to vote.
- Participation of civil society representatives as observers in some segments of the Meeting of States: civil society actors may attend some segments of the Meeting of States, such as the opening and closing sessions, general debates, thematic discussions on IHL issues, or parts or all segments dedicated to the consideration of national compliance reports. They may be given, in general, the right to submit written statements and/or make oral interventions; alternatively, they may make such contributions only on the invitation of the Chair and to the extent that the Meeting of States has no objection. They do not have the right to vote.

Lists of civil society actors accredited as observers in other international fora, such as the UN, could provide a useful basis for defining which civil society actors may be eligible for observer status.[59] It is thus submitted that those organizations with ECOSOC consultative status may, as a general rule, be eligible for observer status at the Meeting of States.[60]

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[54] At the December 2013 preparatory discussion, the question of the submission of compliance reports by intergovernmental organizations that may have obligations under IHL in situations of armed conflicts was raised. It is suggested that this particular matter be addressed once the features of the reporting procedure are devised.

[55] E.g., Rule 1(4) of the Rules of Procedure of the Meetings of the States Parties to the APMBC; Rule 1(3) of the Rules of Procedure of the Meetings of States Parties to the CCM; Rule 49 of the Rules of Procedure of the Meetings of the High Contracting Parties to the CCW; Rule 33 of the Rules of Procedure of the Conference of the States Parties to the OPCW; Rule 93 of the Rules of Procedure of the Assembly of States Parties to the Rome Statute of the ICC.

[56] See, e.g., para. 20 of ECOSOC resolution 1996/31.

[57] See, e.g., Rule 9(3) of the Rules of Procedure of the International Conference of the Red Cross and Red Crescent; Rule 93(c) of the Rules of Procedure of the Assembly of States Parties to the Rome Statute of the ICC.

[59] See the list as of 1 September 2013 online: http://csonet.org/content/documents/e2013inf6.pdf.

[60] See, e.g., those NGOs with ECOSOC consultative status are eligible for observer status at the Assembly of States Parties to the Rome Statute of the ICC (see Rule 93 of the Rules of Procedure).

Under other frameworks, procedures have been established regarding the invitation of civil society actors. In the present context, the following procedures could coexist or apply individually:

- Standing invitation:[61] Permanent observer status could be awarded by a decision of the Bureau or of the Meeting of States.
- Participation upon invitation:[62] Interested actors could send a request for participation to the Bureau. The Bureau would review the requests and draw up a list of observers that may participate at the following Meeting of States. Procedures would need to be established regarding civil society actors that lack ECOSOC consultative status. States could be consulted on these organizations and/or approval of the Meeting of States could be required.[63]

Questions for discussion on the participation of civil society actors:

a) What could be the modalities for participation of civil society actors?
   - Participation in all public segments of the Meeting of States as observers
   - Participation in some segments of the Meeting of States as observers; if so, which?

b) Which organizations may be eligible for observer status?
   - Those with ECOSOC consultative status
   - Others

c) According to which procedures should civil society actors be invited to participate as observers? The options below could apply simultaneously:
   - Standing invitation: Particularly relevant civil society actors receive a standing invitation to participate as observers.
   - Participation upon invitation: Interested actors could send a request for participation to the Bureau. The Bureau would review the requests and draw up a list of civil society actors that may participate as observers. Procedures would need to be established regarding civil society actors that lack ECOSOC consultative status. States could be consulted on these organizations and/or an approval of the Meeting of States of their participation as observers could be required.

4.6. Relationship with International Conference of the Red Cross and Red Crescent

During the December 2013 preparatory discussion several States stressed that it would be important to establish a link between a Meeting of States and the International Conference of the Red Cross and Red Crescent. As is well-known, the International Conference, which takes place every four years, is the supreme deliberative body of the Red Cross and Red Crescent Movement. At the International Conference, representatives of the components of the Movement (National Societies, International Federation, ICRC) meet with representatives of the States Parties to the Geneva Conventions, the latter in exercise of their responsibilities under the Geneva Conventions.

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[61] See Rule 1(2) of the Rules of Procedure of the Meetings of States to the CCM: Geneva International Centre for Humanitarian Demining and the Cluster Munition Coalition; Rule 1(3) of the Rules of Procedure of the Meetings of the States Parties to the APMBC: International Campaign to Ban Land Mines and the Geneva International Centre for Humanitarian Demining.

[62] Under the framework of the APMBC, this task is conferred on the Coordination-Committee (see Rule 1(4) of the Rules of Procedure of the Meeting of the States Parties to the APMBC); under the framework of the CCM, the President-designate may issue invitations (see Rule 1(3) of the Rules of Procedure of the Meetings of States Parties to the CCM); under the framework of the International Conference of the Red Cross and Red Crescent, the Standing Commission establishes by consensus a list of observers (see Art. 18(1)(d) of the Statutes).

[63] See Rule 93 of the Rules of Procedure of the Assembly of States Parties to the Rome Statute of the ICC.

As set forth in the Movement Statutes, the function of the International Conference is to contribute to the unity of the Movement and to the achievement of its mission in full respect of the Fundamental Principles. A further function is to contribute to the respect for and development of IHL and other international conventions of particular interest to the Movement. In its 150 year history the International Conference has played a key role in this regard.

Thus, an International Conference discusses a wide range of issues of interest to the actors involved, including IHL, and adopts an IHL resolution and/or a four year action plan which usually serves as the basis for voluntary pledges made by States and National Red Cross and Red Crescent Societies. It should be recalled that the International Conference does not constitute an IHL compliance system of the type being examined within the current initiative, and does not carry out the functions that are being contemplated. The periodicity of its meetings, as noted by many States, also sets it apart from one of the goals of the current process, which is to establish a permanent venue for a regular dialogue among States on IHL compliance. The International Conference, however, provides impetus for the discussion of humanitarian matters in general and could, for example, initiate topics before a Meeting of States. In addition, as mentioned above, the International Conference has a recognized role with respect to the development of IHL given to it by States through the Statutes of the Red Cross and Red Crescent Movement, a task that the Meeting of States will not duplicate, as confirmed in the previous December 2013 discussion meeting.

In the discussions held so far, several proposals were made as regards possible synergies and links between a Meeting of States and the International Conference which would be mutually reinforcing. In accordance with the functions attributed to the International Conference in the Statutes and with its Rules of Procedure, links between the International Conference and the Meeting of States could take the following form:

- The International Conference could be invited to propose topics for thematic discussions on IHL issues at a Meeting of States;
- The International Conference could make proposals for the future institutional development of the Meeting of States by means of recommendations in this regard;
- The Meeting of States could be requested to present a report on its activities to the International Conference, which could be invited to discuss it, to take stock of the activities of the Meeting of States, and to inform the Movement about its work;
- The Meeting of States could be invited to take into account action points addressed to States in any IHL Plan of Action that may be adopted by the International Conference;
- States could make various pledges at the International Conference in relation to their activity or contribution to the Meeting of States, including regarding the submission of reports, financial contributions, or other.

Questions for discussion on the relationship with the International Conference of the Red Cross and Red Crescent:

a) What principles should underlie the overall relationship between the Meeting of States and the International Conference?
   - The need for synergies
   - Care about the need for mutually reinforcing outcomes
   - In mutual relations, respect for the Fundamental Principles binding the Movement
   - Others?

b) In addition to those mentioned below, are there other links that may be created between the International Conference and the Meeting of States?
   - The International Conference could propose topics for thematic discussions
   - The International Conference could contribute to the future development of the Meting of States

- The Meeting of States could present reports on its activities to the International Conference, which would take stock of them and inform the Movement
- The Meeting of States could be invited to take into account action points addressed to States in any IHL Plan of Action that may be adopted by the International Conference
- States could make pledges related to the Meeting of States at the International Conference

4.7. Resourcing

At the December 2013 preparatory discussion, a number of States put emphasis on questions related to resourcing. It was stressed that resource constraints must be taken into account and that the general structure of the Meeting of States must be as lean and as cost-effective as possible. This subsection aims at providing a preliminary overview of the possible budgetary items that must be taken into consideration for the purpose of estimating the costs of the Meeting of States.

4.7.1. General

A variety of factors on which the costs will depend are not yet sufficiently established to provide a reliable basis for an estimation of costs. Further consultations are thus necessary before an evaluation of possible costs can be submitted for discussion. Depending on the decisions taken on these various matters, the total costs of the Meeting of States as well as of the Secretariat may vary.

When considering the costs related to the Meeting of States and its institutional structure, attention may be paid to the following budgetary items:

- The working languages at the Meeting of States (simultaneous translation and interpretation of conference documentation generally consume a large part of the total budget; costs will depend on the number of working languages and the number and length of documentation to be translated);
- Rental costs for the venue of the Meeting of States and conference equipment (costs will mainly depend on the number of participants, hence of the number and size of the delegations);
- Catering and other conference services not provided by the conference secretariat (this includes the possible hiring of additional personnel, such as welcome or security personnel);
- Salaries and social costs of Secretariat staff (including possible travel costs);
- Logistical and administrative infrastructure of the Secretariat (including office rent and supplies, telecommunications and information technology, website, publications, insurance, human resources management, etc.);
- Equipment and supplies for the Secretariat, as well as for the Meeting of States;
- The establishment of a Sponsorship Programme to encourage the participation of Least Developed Countries;
- Possible subsidiary bodies, such as an expert body (funding models for such bodies will need to be developed; costs may relate to expense allowance, travel expenses and administrative and logistical support).

4.7.2. Funding models

The costs of Meetings of States set-up under other international treaties are generally borne by the States parties to the relevant treaty and other States participating at the meeting as observers, in accordance with the UN scale of assessment.[64] The Meeting of States which

[64] See, e.g., Art. 14(1) of the CCM; Art. 14(1) of the APMBC; Para. 6 of the Decision on a Compliance Mechanism Applicable to the Convention on Prohibitions or Restrictions on the Use of Certain

this process endeavors to establish cannot foresee financial rules on the basis of obligatory contributions as a matter of law unless States were to agree to establish such a forum by way of a legally binding instrument, such as an amendment to the 1949 Geneva Conventions and/or their Additional Protocols. For the time being, the challenge is thus to create financial rules that, while voluntary as a matter of law, ensure sufficient funding, predictability (that is, that the budget can be planned in a reliable way), and fair distribution of costs among States.

Without precluding the outcome of a discussion on funding models which will have to take place once the costs of the Meeting of States can be estimated reliably, the following measures to ensure sufficient funding, predictability and fair distribution of costs could be considered:

- The Bureau, on the basis of an agreed budget of the Meeting of States, issues recommendations on the contribution to be made by each State, on the basis of the model on which the UN scale of assessment is based;
- The voluntary contributions of each State are disclosed in the financial report;
- Possibility for States to contribute in kind, including through staff secondments;
- The establishment of a working capital fund[65] to meet short term liquidity problems (to ensure capital to cover expenses related to the regular operations of the Meeting of States pending receipt of contributions) and/or a contingency fund to meet costs associated with unforeseen developments.

The funds of the Meeting of States could either be administered by the Secretariat, provided it has legal personality under the national legislation of the country where it is located, or by an institution possibly hosting the Secretariat, in accordance with an agreement between that institution and the States.[66] A financial report would be presented to the Meeting of States at the end of the financial year.

Questions for discussion on resourcing:

a) What principles should guide the financial rules of the Meeting of States in general?
   - Ensure sufficient funding
   - Ensure fair distribution of costs among States
   - Transparency
   - Predictability
   - Others?

b) Acknowledging that the financial rules of the Meeting of States cannot foresee obligatory contributions as a matter of law, should the determination of the contribution of each State be made pursuant to the model on which the UN scale of assessment is based?

c) What measures could be adopted to ensure sufficient funding and fair distribution of costs?
   - Disclose contributions of each State in the financial report
   - Possibility for States to contribute in kind, including through staff secondments
   - Establishment of a working capital fund and/or a contingency fund

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Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, as adopted by the Third Review Conference on the CCW on 17 November 2006 and Rule 16 of the Rules of Procedures of the Meetings of the High Contracting Parties to the CCW.

[65] The Assembly of States Parties to the Rome Statute of the ICC decided at its 1st session to establish a Working Capital Fund (see resolution ICC-ASP/1/Res.13; see also Report of the Court on its Working Capital Fund, ICC-ASP/12/7, considered at the 12th session).

[66] See, e.g., para. 6 of the Agreement between the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction and the Geneva International Centre for Humanitarian Demining (GICHD) on Implementation Support for the Convention, as amended in 2011.

4.8. Ways and means to establish the Meeting of States and next steps

The December 2013 preparatory discussion noted that further consideration should be given to the question of how the Meeting of States could be established. For the time being, the possibility of creating the Meeting of States by way of an international treaty is not being contemplated. In light of the views expressed by States on that topic, other options must be examined for going forward. As an alternative to an international treaty, a Meeting of States could be created by way of a resolution adopted by a pre-existing international body,[67] or at an international conference convened for that purpose.

Resolution 1, adopted at the 31st International Conference of the Red Cross and Red Crescent in 2011, initiated the ongoing consultations on concrete ways and means to enhance the effectiveness of mechanisms of compliance with IHL and to reinforce dialogue on IHL issues. That resolution furthermore provides for the results of these consultations to be submitted, for appropriate action, to the 32nd International Conference of the Red Cross and Red Crescent, that will take place in late 2015. In other words, there will be a new resolution on the implementation of the proposals explored and identified in the ongoing consultation process that will be considered and adopted by the 32nd International Conference.[68]

The discussion on possible elements of this resolution could commence at the Third Meeting of States scheduled for 30 June and 1 July 2014. Proposals and options on the topics addressed at the December 2013 and April 2014 preparatory discussions will be presented to that meeting. As a basis for discussion, Switzerland and the ICRC could prepare, based on the views expressed at the preparatory discussions of December 2013 and April 2014, a document ascertaining areas of general agreement, as well as those questions on which further discussion is necessary.

Questions for discussion on the ways and means to establish the Meeting of States:

a) Is a resolution adopted by the 32nd International Conference of the Red Cross and Red Crescent an adequate means to pave the way for the establishment of the Meeting of States?

b) In preparation for the Third Meeting of States to be held on 30 June and 1 July 2014, does a document ascertaining areas of general agreement and questions for further discussion, based on the views expressed at the Preparatory Discussions of December 2013 and April 2014, provide a useful basis to commence discussions on elements of a resolution to be adopted at the 32nd International Conference of the Red Cross and Red Crescent in late 2015?

[67] See, e.g., resolution 60/251 of the UN General Assembly by which it created the UN Human Rights Council; see also Decision on a Compliance Mechanism Applicable to 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, as adopted by the Third Review Conference on the CCW on 17 November 2006, by which the Meeting of the High Contracting Parties to the CCW was established.

[68] It is recalled that the 26th International Conference of the Red Cross and Red Crescent endorsed in its resolution 1 (para. 4) a recommendation (made by Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995) according to which the Depositary may organize periodical meetings to consider general problems regarding the application of IHL. This led to the convening of the Periodical Meeting of States party to the Geneva Conventions on general problems relating to the application of international humanitarian law in the beginning of 1998.

ANNEX I: Chairs' Conclusions of the Second Meeting of States on Strengthening Compliance with IHL, Geneva, 17-18 June 2013

Context

In its Resolution 1, the 31st International Conference of the Red Cross and the Red Crescent held in 2011 stressed that greater compliance with international humanitarian law (IHL) is an indispensable prerequisite for improving the situation of victims of armed conflict.

The Conference invited the International Committee of the Red Cross (ICRC) to pursue further research to identify possible means to enhance the effectiveness of mechanisms of compliance with IHL and requested that a report, proposing a range of options and recommendations, be submitted to the 32nd International Conference in 2015. It also expressed its appreciation to the Government of Switzerland for its availability to facilitate a process to explore ways and means to strengthen the application of IHL and to reinforce dialogue on IHL issues among States, in cooperation with the ICRC.

In 2012 the Swiss Government and the ICRC launched a series of discussions on strengthening IHL compliance. An initial Informal Meeting with all States was convened on 13 July 2012 in Geneva. The purpose of that meeting was to inform States of the initiative, to raise awareness of the challenges of IHL compliance, and to enable a first survey of States' views. The meeting showed that there was general concern about lack of compliance with IHL, as well as broad agreement on the need for a regular dialogue among States on improving respect for IHL, and on compliance issues in particular. It was also noted that an examination of specific thematic issues should be the next step.

Following the July 2012 meeting, Switzerland and the ICRC continued consultations and discussions with a broad range of States, in order to identify the main substantive issues of relevance to moving the process forward. The facilitators also remained open for bilateral consultations with any interested State. Given that it is difficult to have a meaningful discussion on questions of substance in a format that would encompass all States at all times, a discussion with a number of States, representing all regions, was held in Geneva on 8/9 November 2012. This discussion was focused on a review of existing IHL compliance mechanisms, the reasons why they did not work, and whether some could be resuscitated. Lessons that could be learned from other bodies of law for the purpose of envisaging an effective IHL compliance system were also examined. There were also preliminary discussions on the functions that such a system would need to have, regardless of what its eventual institutional structure might be.

As more in-depth discussions were deemed necessary to prepare for the meeting of States of 17/18 June 2013, a second discussion with a number of States representing all regions took place in Geneva on 8/9 April 2013. The discussion in April 2013 was aimed at examining the possible functions of an IHL compliance system in more depth. The functions considered were periodic reporting; fact-finding; early-warnings; urgent appeals, non-binding legal opinions and others. An important topic of discussion was the format that a regular dialogue on IHL compliance among States should have, given that the lack of an appropriate forum was underlined at the 31st International Conference and at the Meeting of States held in July 2012. 2

Purpose of the Second Meeting of States

The purpose of the June 17/18, 2013 Meeting of States was to present all States with an overview of the discussions and consultations that have taken place thus far and to seek guidance on the substantive questions that have arisen, as well as on possible next steps.
This second Meeting of States dealt with:

- - an Overview and Inadequacies of Existing IHL Compliance Mechanisms;
- - the Possible Functions of an IHL Compliance System; and
- - the Possible Tasks and Features of a Meeting of States.

General comments by States

States reiterated their concerns about the lack of compliance with IHL and agreed that this is an important and serious issue that needed to be addressed. The participants expressed strong support for the Swiss-ICRC initiative aimed at exploring ways of strengthening IHL compliance mechanisms and expressed appreciation for their joint efforts in facilitating the process of consultation and discussion among States on how this could be done. The Background Document prepared for the Meeting was believed to be useful in outlining the questions to be addressed and in focusing deliberations on options that could be considered for moving the process forward.

There was general recognition of the need for a regular and structured dialogue among States on IHL issues, with a particular emphasis on the usefulness of establishing a Meeting of States as platform within which such a dialogue could take place. It was acknowledged that compliance systems under other bodies of international law cannot fill the IHL compliance system gap due to their focus on different sets of norms and the lack of requisite IHL expertise. In this context it was noted that a regular Meeting of States could serve as point of anchorage for specific IHL mechanisms, such as the IHFFC, which was a subject subsequently addressed in more detail.

It was recognized that a regular dialogue on IHL among states should focus on a range of other possible ways of enhancing compliance with IHL. Such a dialogue should showcase steps undertaken by States in the area of prevention of possible breaches of IHL. It should likewise enable exchanges of experiences among States in IHL implementation, allow the sharing of best practices among them, and highlight the need for capacity building where it exists. The dialogue should also include issues related to the challenges faced by States in implementing their IHL obligations, as means of seeking cooperative solutions to issues of common concern. It was understood that mechanisms of criminal justice aimed at establishing individual criminal responsibility, whether at the domestic or international level, were not within the scope of the process.

States were likewise of the view that the process of enhancing the effectiveness of IHL compliance mechanisms should be undertaken so as to ensure that the solutions arrived at were of added value. In this context it was pointed out, among other things, that current IHL compliance mechanisms do not envisage ways in which compliance with IHL by non-State armed groups could be considered. It was stated that such a need exists, given the increasing number of non-international armed conflicts and the humanitarian consequences of this type of armed conflict.

In their general comments, delegations expressed support for striving for concrete, pragmatic and meaningful outcomes of the consultation process. It was recalled that the results achieved are to be reported to the next International Conference of the Red Cross and Red Crescent scheduled for 2015.

Guiding principles of the process

As facilitators, Switzerland and the ICRC are fully committed to ensuring that their joint initiative in follow-up of Resolution 1 is conducted in a transparent, inclusive and open manner.
In addition to transparency, inclusivity and openness, the Swiss-ICRC initiative is premised on several key principles that were enunciated in the discussions and consultations held thus far and were reaffirmed at the Second Meeting of States. It was emphasized that the following principles should serve as the overall framework within which the search for possible solutions to the challenges of improving compliance with IHL should be pursued:

- The need for an IHL compliance system to be effective;
- The importance of avoiding politicization;
- The State-driven character of the process;
- The avoidance of unnecessary duplication with other compliance systems;
- The requirement to take resource considerations into account;
- The need, as already mentioned above, to find appropriate ways to ensure that all types of armed conflicts and the parties to them are included.

Existing IHL compliance mechanisms: overview and inadequacies

The need to "enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law", which was recognized in Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, is based on the assessment that existing IHL compliance mechanisms are inadequate.

In the session of the Second Meeting of States that examined existing IHL compliance mechanisms it was acknowledged that, contrary to most other branches of international law, IHL has a limited number of mechanisms to ensure compliance with its norms. In addition, their configuration and remit are such that they do not allow for a comprehensive approach to ensuring compliance. It was noted that existing IHL compliance mechanisms also lack attachment to a broader institutional compliance structure.

The Geneva Conventions and their Additional Protocols are an exception among international treaties in that they do not provide that States will meet on a regular basis to discuss issues of common concern and perform other functions related to treaty compliance. The absence of such a structure means that specific compliance mechanisms lack the institutional support that may be necessary to ensure they are utilized, to facilitate the performance of their tasks, and to assist in any follow-up that may be appropriate.

It was stressed that the Protecting Power system and the Enquiry Procedure provided for in the 1949 Geneva Conventions remain available to States in situations of international armed conflict, although doubts were voiced whether the two mechanisms would be relied on in the future. It was pointed out, among other issues, that they could not be easily reconstituted for use in non-international armed conflicts in which humanitarian needs are currently in greatest evidence. As a result it was stated that the process of strengthening IHL compliance mechanisms should not focus on ways of "reforming" the Protecting Power system or the Enquiry Procedure.

Many States were of the view that it would be worth examining how the IHFFC could be put to better use so as to serve as part of an effective compliance system. A range of proposals for further examination were put forward based on the fact that the IHFFC is in existence, that regular elections for its members take place, and that the Commission is ready and willing to perform the functions provided to it, that is, fact-finding and good offices. It was said that ways could be found to enable the Commission to exercise its mandate, while not re-negotiating Article 90 of Additional Protocol I to the Geneva Conventions. The Commission's remit could be expanded to include situations of non-international armed conflict. Additional

tasks could be given to it by States on a voluntary basis. A Meeting of States could be authorized to trigger the Commission. A Meeting of States could also recommend to the parties to an armed conflict to avail themselves of the Commission's services.

It was considered that, in addition to the Commission's mandate and trigger mechanism, it would be necessary to examine further issues related to the Commission's possible effectiveness going forward. They include its capacity to perform its tasks in terms of composition, the requisite balance of expertise, and resource considerations.

Possible functions of an IHL compliance system

The Second Meeting of States also looked at the possible functions that an IHL compliance system could be endowed with. The functions dealt with were: periodic reporting, fact-finding, early warning and urgent appeals, country visits, non-binding legal opinions, good offices, State inquiries, dispute settlement, and examinations of complaints. There was broad agreement that reporting, thematic discussions and fact-finding (as mentioned above), should be given priority in further deliberations within the Swiss-ICRC facilitated process and that discussions should focus on examining the various aspects of these functions. Some States were of the view that a good offices function would also be useful, and others that an early warning function would be desirable. Country visits were likewise mentioned as deserving of further attention. Still other States were open to examining all the compliance functions listed above.

It was pointed out that reporting on national compliance serves as a basis for self-assessment by States, but also provides a baseline of information that allows for exchanges with other States on compliance issues. A reporting function should not entail a detailed overview of States' implementation of the applicable IHL treaties according to their provisions, but could be more focused, for example grouped according to topics or issues. It should be structured so as to also allow the sharing of relevant information on questions related to prevention such as IHL dissemination, the incorporation of IHL into domestic law, the training of armed forces and others. It should enable exchanges among States on their practical experiences and challenges in IHL implementation, as well as best practices. Another function identified for further consideration was discussions of States on thematic issues, including policy-related concerns common to States. It was also noted that further consideration could be given to whether non-governmental organisations should be involved in the preparation of reports. In addition, it was noted that the inclusion of non-State armed group actions should be the subject of further examination and that reporting should not create new legal obligations.

A range of other aspects related to the reporting and fact-finding functions deserving of attention in the process were noted. These include the body to which these functions would be attached, their periodicity, the public or confidential nature of the function, voluntariness, sources of information relevant to the function, resourcing, interface with other actors including NGOs and civil society, and others. As regards fact-finding, it was pointed out that this function may or may not be linked to conclusions about the legal consequences of the facts established. These and other topics will be the subject of deliberations within the process in the months ahead.

Meeting of States

The Second Meeting of States affirmed that there was strong general support among States for establishing a forum for a regular dialogue on IHL, that is, a regular Meeting of States. Such a Meeting would enable States to examine a range of issues related to implementation and compliance with IHL, and also be a venue for thematic discussion on IHL issues. It was also suggested that a Meeting of States could serve as an anchor for other elements of an IHL compliance system. The Meeting of States could also complement and inform the

discussions at the quadrennial International Conference of the Red Cross and Red Crescent. Several States also noted the desirability of ensuring, as far as possible, coherence and complementarity between an IHL compliance system and other international and regional fora that address IHL issues.

A range of aspects related to the Meeting of States were noted as meriting further consideration. They include the periodicity of the meetings, the possible means of initiating and institutionalizing the meetings, and whether a body could be created, such as a Bureau and/or a Secretariat, that could serve to prepare the Meetings and perform possible intersessional and administrative functions. Other issues identified for further examination included the method of selecting topics for discussion, the outcomes of the Meetings, the means by which a Meeting could include engagement with international organizations, non-governmental organizations and civil society, and the question of resourcing. It was also noted that, given the prevalence of non-international armed conflict, further consideration needs to be given to appropriate means of addressing the issue of compliance with IHL by non-State armed groups, to ensure their perspectives are taken into account.

It was felt that the function of periodic reporting should be linked to the Meeting of States, regardless of its exact configuration. Another issue raised as meriting further consideration is the relationship a Meeting of States could have with fact-finding functions, including the International Humanitarian Fact-Finding Commission. It was generally emphasised that the potential role the ICRC could play as an expert body in the Meeting of States should also be considered further.

Next steps

Pursuant to the mandate given by resolution 1 of the 31st International Conference of the Red Cross and Red Crescent and based on the Second Meeting of States, Switzerland and the ICRC will devise, in continued discussions and consultations with States, concrete proposals and options notably regarding:

- the form and content of a periodic reporting system on national compliance;
- the form, content and possible outcome of thematic discussions on IHL issues;
- the modalities for fact-finding, including possible ways to make use of the IHFFC;
- the tasks and features of a Meeting of States.

Prior to the next meeting of all States to be held in the summer of 2014, there will be two preparatory meetings in Geneva in November 2013 and in the spring of 2014, open to all States, to further exchange views on concrete aspects of the topics mentioned above.

The November preparatory meeting will be held on November 25 and 26, 2013 in Geneva, and States will be advised of the dates for the spring 2014 meeting at a later stage.

Switzerland and the ICRC remain available for bilateral talks with interested States at all times and will continue to inform the International Red Cross and Red Crescent Movement, National Committees for the Implementation of IHL, as well as international and regional organizations, and others, on the development of the initiative.

Proposals from States with regard to both the procedural and substantive aspects of the initiative being facilitated by Switzerland and the ICRC likewise remain most welcome. Please send any proposals, views or comments you may want to share to: dv-badih@eda.admin.ch.