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ICRC

Third Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL)

30 June and 1 July 2014

BACKGROUND DOCUMENT

GENEVA, JUNE 2014

Contents

1. Introduction

In its Resolution 1, the 31st International Conference of the Red Cross and 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.[1]

The Conference invited the International Committee of the Red Cross (ICRC) to pursue further research, consultation and discussion in cooperation with States to identify and propose possible means to enhance and ensure the effectiveness of mechanisms of compliance with IHL[2] and requested that a report, proposing a range of options and recommendations, be submitted to the 32nd International Conference.[3] 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,[4] based on a pledge to this effect that Switzerland had submitted to the 31st International Conference.

Following the International Conference, Switzerland and the ICRC undertook a joint initiative to facilitate implementation of the relevant provisions of Resolution 1 in order, inter alia, to avoid duplicating their respective efforts. The relevant steps undertaken in this process are separately outlined further below.

1.1. Background Document for Third Meeting of States

1.1.1. Purpose

The purpose of this Background Document is to summarize the discussions within the Swiss-ICRC initiative that have taken place since June 2013, i.e., the Second Meeting of States. The Document:

1) Overviews the main topics examined over the past year, while attempting to also reflect the convergence and divergence of views on particular issues expressed in the discussions.
2) Poses questions that are meant:
   - to enable the preparation of States for the discussion at the Third Meeting of States, and
   - to allow States to reflect on the questions included, with a view to providing guidance to the facilitators as to the direction of further work.

As on previous occasions, it is suggested that the Background Document first be read in its entirety given that the issues, and thus various sections of the text, are interlinked.

1.1.2. Nature

This Background Document is the sole responsibility of the facilitators of the process and does not purport to express the agreed views of States. Like the previous Background Documents prepared within the process, it is the means by which the necessary research, as well as consultations and discussions with States mandated by Resolution 1 of the 31st International Conference are being carried out. Similar to previous Background Documents, it outlines the gist of previous debates within the process and poses questions/provides options that States are invited to opine on in order to move the process forward. It will serve, along with the previous Background Documents (and Chairs' Conclusions, which likewise do

[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. 8 of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.
[4] Para. 7 of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.

not engage States), to inform the ICRC's concluding report on the process, which will be prepared in conjunction with Switzerland, and presented to the 32nd International Conference. The concluding report to the next International Conference will likewise be the sole responsibility of the facilitators.

1.1.3. Scope

As already mentioned, the Background Document attempts to summarize the discussions held over the past year, which have covered a range of issues, based on the Background Documents prepared for the two preceding Preparatory Discussions, of December 2013 and April 2014. While this Document can be read as a stand-alone text, it has been drafted on the understanding that participants will be able to consult the proceedings of the previous meetings - the Background Documents and the Chairs' Conclusions - if they find it necessary for their preparation. The relevant documents have been posted on the ICRC's website at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm, and on the website of the Swiss Federal Department of Foreign Affairs at: http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/icrc.html.

1.2. The Consultation Process

1.2.1. Guiding Principles

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 reiterated and further refined at the Preparatory Discussion of April 2014.

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 and consensus-based character of the process and the need for the consultations to be based on applicable principles of international law;
- 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, as defined in the Geneva Conventions of 1949 and their Additional Protocols (for the latter as may be applicable), and the parties to them are included;
- The need for the process to ensure universality, impartiality, and non-selectivity;
- The need for the process to be based on dialogue and cooperation.

1.2.2. Voluntary Nature

The nature of the consultations being facilitated by Switzerland and the ICRC with States and among States - at the meetings held within the process, as well as in other forms of consultations - is voluntary. The initiative is based on Resolution 1 of the 31st International Conference, which was adopted by consensus at the Conference, and which provided for the submission of a report, with options and recommendations, to the 32nd International Conference. As mentioned above, the concluding report on the process to the 32nd International Conference, which will be prepared by the ICRC in consultation with Switzerland as co-facilitator, will be their sole responsibility.

In this context it should be noted that the nature of any outcome that may eventually be agreed by States based, inter alia, on the current process, will likewise be voluntary, that is, non-legally binding. The Geneva Conventions of 1949 do not foresee the establishment of a forum for regular meetings of States on IHL issues, to which certain compliance functions and/or mechanisms may be attached, such as exist under other branches of international law (usually called a conference of States/meeting of States/meeting of States Parties, etc.). In the consultations held within the Swiss-ICRC process to date, a clear convergence of views seems to have emerged among States that the possible establishment of an IHL compliance system should not entail amendments to the 1949 Geneva Conventions, or the negotiation of a new treaty. It may thus be concluded that any IHL compliance system that may eventually be established will not be treaty-based. The nature of the any future system will be voluntary, with no obligation that would legally bind States to take part.

1.3. Overview of the Past Meetings Held Within the Initiative on Strengthening Compliance with IHL

1.3.1. First Meeting of States

The initiative was effectively launched on 13 July 2012 when a first Informal Meeting of all States was convened in Geneva. The Meeting confirmed 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 IHL issues and, in particular, on improving respect for this body of law.

Subsequent to the first Informal Meeting of States, Switzerland and the ICRC continued discussions and consultations with a broad range of States, through bilateral meetings as well as in two rounds of discussion with a regionally balanced group of States, in order to identify the main substantive issues of relevance to moving the process forward. The discussions and consultations were 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 likewise discussions on the functions that such a system would need to have, regardless of what its eventual institutional structure might be. 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 frequently.

1.3.2. Second Meeting of States

On 17 and 18 June 2013, a Second Meeting of States on Strengthening Compliance with IHL was held. The purpose of the Meeting was to present all States with an overview of the discussions and consultations that had taken place and to seek guidance on the substantive questions that had arisen, as well as on possible next steps.

The Second Meeting of States dealt with:
- An overview and inadequacies of existing IHL compliance mechanisms;
- The possible functions of an IHL compliance system;
- The possible tasks and features of a Meeting of States.[5]

As regards the first issue, the Second Meeting of States acknowledged that, contrary to most other branches of international law, IHL has a limited number of mechanisms to ensure

[5] See Background Document for the Second Meeting of States on Strengthening Compliance with IHL, June 2013, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm.

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. It was likewise underlined that 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.

As regards the second issue, the Second Meeting of States also looked at the possible functions that an IHL compliance system could be endowed with. A range of possible functions outlined in the Background Document were discussed (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).[6] At the end of the Meeting, it was identified that: national reporting on compliance with IHL, thematic discussions on IHL issues, and fact-finding, 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.

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 be a forum for discussion on issues of IHL implementation and compliance, and could also serve as an anchor for other elements of an IHL compliance system. A range of aspects related to the Meeting of States were noted as meriting further consideration. Among the issues flagged were: the periodicity of the meetings; the possible means of initiating and institutionalising 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 inter-sessional 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 organisations, non-governmental organisations 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.[7]

Based on the discussions at the Second Meeting of States, Switzerland and the ICRC undertook to submit, 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 with IHL;
- 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.[8]

1.3.3. Preparatory Discussions since the Second Meeting of States

With a view to devising the features of the above-mentioned possible elements of an IHL compliance system and in preparation for the Third Meeting of States, two Preparatory Discussions open to all States were facilitated by Switzerland and the ICRC following the

[6] Idem, pp. 9-11 and Annex 4, pp. 22-45.
[7] See Chairs' Conclusions of the Second Meeting of States on Strengthening Compliance with IHL, June 2013, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm.
[8] Idem.

Second Meeting of States. The first meeting took place on 16 and 17 December 2013.[9] In this round of discussion, the primary focus of examination was: reporting on national compliance with IHL, and thematic discussions on IHL issues. It also served to examine, in overview form, the features and tasks of a regular Meeting of States. The aim of the next Preparatory Discussion, held on 3 and 4 April 2014[10] was, in turn, to enable a more detailed review of various aspects of the Meeting of States, and provide for a first, preliminary discussion on a possible fact-finding function. It also served to revisit select outstanding questions related to reporting on national compliance with IHL and to thematic discussions, carried over from the December 2013 meeting.

2. Overarching Issues

In the exchanges, particularly at the Preparatory Discussion held on 3 and 4 April 2014, several issues were raised that are of importance to moving the consultations forward and to the facilitators' ability to properly gauge the preference of States. These topics, some of which were also called "chicken or egg" dilemmas, generated divergent opinions. They are summarized below, along with corresponding questions, with a view to enabling continued discussions at the Third Meeting of States and allowing for more clarity after the Meeting. They have also been grouped here as "overarching issues", in order to avoid repetition under each heading in section 3 (further below), as they were variously brought up by certain delegations in discussions on the elements of a possible IHL compliance system.

2.1. Reforming Existing IHL Mechanisms

A small number of delegations reiterated the view that an examination of existing IHL mechanisms needs to take place before they are able to take part in discussions on the specific elements of a possible new IHL compliance system. In this context, it should be recalled that this topic was one of the main issues on the agenda of the Second Meeting of States held in June 2013. The Background Document for that meeting[11] outlined the three existing mechanisms, i.e. the Protecting Powers system and the Enquiry Procedure (provided for in the four Geneva Conventions of 1949), and the International Humanitarian Fact-Finding Commission (provided for in Article 90 of Additional Protocol I to the Geneva Conventions).

On that occasion, the facilitators invested their best efforts to outline the inadequacies of the three mechanisms, which are not repeated here. Two questions were posed to participants: i) whether they shared the view that, apart from the IHFFC, the other two mechanisms cannot be reformed, and ii) why the existing IHL compliance mechanisms have never or rarely been used. As regards the first question, the discussion at the Second Meeting of States confirmed the view that the existing mechanisms remain valid for States that may wish to resort to them in situations of international armed conflict. However, it was recognized that, apart from the IHFFC, the other two mechanisms cannot, and therefore should not be reformed, as they cannot adequately meet the current challenges of IHL

[9] See Preparatory Discussion on Strengthening Compliance with IHL, December 2013, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm.

[10] See Preparatory Discussion on Strengthening Compliance with IHL, April 2014, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm.

[11] See Background Document for the Second Meeting of States on Strengthening Compliance with IHL, June 2013, pp. 5-8 and Annex 1, pp. 14-16, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm.

compliance.[12] Answers to the second question did not generate material that would have enabled the facilitators to further research this issue, as no responses beyond "lack of political will" as a reason were expressed. Since the June 2013 Second Meeting of States, no specific proposals on how existing IHL mechanisms could be resuscitated were received by the facilitators from any State.

Questions for discussion:

a) Do you share the views expressed at the Second Meeting of State as outlined above (i.e. that, apart from the HFFC, the other two existing IHL mechanisms cannot be reformed to adequately respond to the current needs of improving compliance with IHL)?

b) If not, what are your concrete proposals as to how these mechanisms may be reformed to meet the goal of effectively improving compliance with IHL?

2.2. Sequence of Discussions on the Elements of a Possible IHL Compliance System

The question of the sequence of discussions on the elements of a new IHL compliance system was raised by several States in the Preparatory Discussions, in particular that held on 3 and 4 April 2014. As regards this "chicken or egg" dilemma some were of the view that the consultations should first focus on all issues related to the institutional structure of a Meeting of States, including its features and tasks, before the discussion should move on to an examination of the envisaged specific compliance functions ("step by step" approach, concluding one item before moving on to another). Other States were, conversely, of the opinion that an overview of possible compliance functions - and what they would entail - was a prerequisite to discussions on what the institutional structure and the tasks and features of the Meeting of States should be. Still other delegations saw merit in addressing the pertinent topics in parallel, given their interdependence.

The facilitators have tried to steer a middle course on this question based on their desire, but also responsibility, to present States with the relevant issues in a way that would allow both the transparency and coherence of the process they have undertaken. It was anticipated that, if the focus was first put on the Meeting of States, questions would quickly arise as to what that Meeting would do, and vice versa, that if compliance functions had been the initial centerpiece of consultations, questions would quickly arise as to the body to which they would be attached. As a result, the research presented to States by the facilitators in the successive Background Documents, the issues identified for discussion at each meeting, and the options outlined each time for States' reflection and opinion aimed to ensure that States have the necessary understanding of all the relevant elements of the system at each stage.

It is submitted that this approach based on a middle course has also been necessitated by the need to present the next International Conference with a report, based on the current consultation process, on ways of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL, including options and recommendations. It is not certain that this task

[12] "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" [...]. See Chairs' Conclusions of the Second Meeting of States on Strengthening Compliance with IHL, June 2013, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm.

could be completed without an overview of States' positions on as many elements of a new IHL compliance system as possible within the relevant time-frame.

Questions for discussion:

a) What is your view on the current sequence of research and consultations on the elements of a possible new IHL compliance system?
   - Should the approach based on a middle course be pursued?
   - If not, how should the sequence be changed, having in mind the goal of the research and consultation process: should the discussions first focus on the institutional structure or first on the functions?

2.3. Foundational Issues Related to the Establishment of a Meeting of States

As mentioned above, any future IHL compliance system will not be legally binding, but be of a voluntary nature, given that amendments to the 1949 Geneva Conventions or the adoption of a new treaty that would create such a system have not generated State support within the current process. At the Preparatory Discussion of 3 and 4 April 2014, questions were posed by several delegations on the means of establishing a Meeting of States, which would be the central pillar of the possible IHL system, i.e. on the legal and procedural issues that this would engender. These delegations indicated that they were not ready and/or willing to take part in an examination of the specific elements of the future compliance system (to which the next section is devoted), until there was clarity on the foundational questions related to the Meeting of States. The question was also raised as to what the future forum should be called.

As regards the foundational questions, two broad positions were enunciated (keeping in mind that a significant number of delegations did not express a view on this issue in the Preparatory Discussion).[13]

According to the first position, the International Conference (whether of 2015 or a later one) does not, as such, have the legal authority to establish a Meeting of States. The process of

[13] In order to facilitate discussion at the Third Meeting of States the following provisions of the Statutes of the International Red Cross and Red Crescent Movement are recalled:
Article 8 ("Definition") provides that the International Conference is the "supreme deliberative body for the Movement". At the International Conference "representatives of the components of the Movement meet with representatives of the States Parties to the Geneva Conventions, the latter in the exercise of their responsibilities under those Conventions and in support of the overall work of the Movement in terms of Article 2. Together they examine and decide upon humanitarian matters of common interest and any other related matter."
Article 10 ("Functions") provides in para. 2 that: "The International Conference contributes to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement". Article 10 provides in para. 5 that: "Within the limits of the present Statutes and of the Rules of Procedure, the International Conference shall adopt its decisions, recommendations or declarations in the form of resolutions".
It is also recalled that the 26th International Conference of the Red Cross and Red Crescent of 1995 endorsed a series of recommendations elaborated by the Intergovernmental Group of Experts for the Protection of War Victims. Among others, the recommendations included a procedure for the organization of periodical meetings of the States parties to the 1949 Geneva Conventions to consider general problems regarding the application of IHL (see para. 4 of Resolution 1 of the 26th International Conference of 1995 and Recommendation VII of the Recommendations of the Intergovernmental Group of Experts for the Protection of War Victims). Acting on that basis and in its capacity as the Depository of the Geneva Conventions, Switzerland convened in January 1998 the "First Periodical Meeting of States Party to the Geneva Conventions" (see "First Periodical Meeting on International Humanitarian Law", *International Review of the Red Cross,* No. 323, 1998, available at: http://www.icrc.org/eng/resources/documents/misc/57jpcn.htm).

establishment should be kept out of the International Conference; the Conference could, however, by means of a resolution, call on Switzerland as the Depositary of the 1949 Geneva Conventions to convene a conference of the contracting Parties to the Conventions which would, in turn, establish the Meeting of States.

According to the second position, the International Conference could create the Meeting of States given that participation in the latter will be voluntary, i.e. not be of a legally binding nature. A resolution of the next International Conference in 2015 would thus be necessary, but also sufficient, as its adoption could express the consensus of States and the other actors at the International Conference. Under this view, there is no need for the convening of a conference of the contracting Parties to the 1949 Geneva Conventions. It was additionally thought useful that the International Conference should establish the Meeting of States, as a way of ensuring future input and links between the two bodies.

It should also be noted that several delegations expressed a strong interest in further exploring the questions outlined above, with a view to avoiding that legal and procedural ambiguities impede the advancement of endeavors aimed at strengthening respect for IHL.

As regards the issue of how the future forum should be called, some participants preferred the designation “Meeting of States”, while others were in favour of “Meeting of States Parties to the Geneva Conventions”. It was not clearly specified in either case what the precise difference would be (given the voluntary nature of the future system).

Questions for discussion:

a) What is your view on how a Meeting of States, as the central pillar of a future IHL compliance system, could be established?

b) What should the forum in which States would regularly meet be called? What are the specific legal or other consequences of any designation that is preferred, given that the IHL compliance system will be voluntary?

3. Elements of a Possible IHL Compliance System

This section of the Background Document aims to outline the discussions held over the past year within the Swiss-ICRC process related to the elements of a possible IHL compliance system. Given the rather detailed nature of some of the exchanges that have taken place, the text below can only provide an overview of the salient points, followed by questions to facilitate States’ preparation for the Third Meeting of States in June 2014.

It has been written with the caveat that certain States did not opine on some of the specific elements, due to the overarching issues indicated above. Thus, when the text in this section summarizes convergent views and the open issues, it does not purport to reflect the positions of the States who did not participate for that reason.

3.1. Periodic Reporting

The points below are provided in an attempt to outline what appears to have been the view of a wide number of participants on the periodic reporting function, which are set out in random order. They are followed by some specific issues, on which further discussion is necessary. A very small number of delegations were of the view that further examination of periodic reporting as such would be necessary in order to assess whether this function is a useful means to strengthen IHL compliance.

3.1.1. Points of a General Nature on Periodic Reporting

There was broad recognition that a periodic reporting function is an essential tool for improving compliance with IHL at the national level. Reporting provides an opportunity for self-assessment by States in the process of the preparation of reports and allows for the provision of information on measures taken at the national level which could allow States to engage with each other in order to achieve the common goal of enhancing IHL compliance.

There was a convergence of views about the need for a reporting system to also enable exchanges among States on their practical experiences in IHL implementation, the sharing of best practices, the identification of possible capacity building needs, as well as the identification of challenges in IHL implementation.

It was emphasized that a reporting function must be linked to the Meeting of States and that it could serve to also inform the choice of topics for thematic discussions on IHL issues.

There was general agreement that a reporting function should be limited to States' obligations under the universally ratified 1949 Geneva Conventions, and of their three Additional Protocols (of 1977 and 2005, respectively), for States that are parties to the latter.

It was stated that States not party to the Protocols could also report on specific provisions of the Protocols which they apply in practice.

In this context, there was general agreement that periodic reporting should not involve an article-by-article review of the relevant IHL treaties.

The role of customary IHL in a reporting process generated different views, but an unchallenged opinion is that States should feel free to refer to customary IHL in their reports if they so wish.

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, whatever format may be adopted.

The periodicity of reporting will depend on a previous determination of other modalities, such as the type of report which is eventually agreed on (see below).

Reports should not fall in a "black hole" and appropriate non-contextual follow-up procedures should be established. This includes the public nature of the reports, for example by making the reports available on a dedicated website.

The reporting system should not at this stage include a review of State reports on an individual basis, due to the risk of politicization.

Questions for discussion:

a) Do the points indicated above adequately reflect the current state of the consultations on the periodic reporting function?

b) Should any points been added? If so, which?

3.1.2. Type of Periodic Report

The issue of type of periodic reports on national compliance with IHL was discussed in some detail at the Preparatory Discussions held in both December 2013 and April 2014. While

State opinions seem to be coming together, it may be said that a majority view stills remains to be discerned.

There seems to be a preference for a combination of two kinds of reports. An initial report would focus on the variety of measures that States take to implement IHL in their domestic legal system and armed forces. It would provide fairly detailed information on the legal framework a State has put in place in order to carry out its treaty obligations. At certain intervals, the information provided in the initial report would need to be updated, so as to ensure its relevance. Subsequent reports would focus on thematic issues and also address recent State practice in the relevant thematic area.

With a view to reducing the reporting burden on States, other States, albeit smaller in number, favor the submission of focused thematic reports from the start. This type of report would outline the implementation of a specific group of IHL obligations in every reporting cycle.

A suggestion that was made at the April 2014 Preparatory Discussion also garnered considerable interest. Pursuant to this approach, a "basic report" would outline a State's relevant obligations under IHL and how they are implemented in its domestic legal framework; the basic report would be presented initially and updated every five years, or after a comparable interval. Recent developments, such as judicial decisions and other relevant State practice, as well as specific issues encountered in IHL implementation would be presented on a more regular basis, e.g. every two years, in "current developments reports".

Questions for discussion:

a) Which type of periodic report outlined above would, in your view, most adequately contribute to the goal of strengthening compliance with IHL?

b) Is there any other type of periodic report that should be considered? If so, what would it be?

3.1.3. Follow-up to Periodic Reports

As regards the follow-up to periodic reports, several options are still under examination and no majority view has emerged. Many States favor the view that the Meeting of States should be able, in a non-contextual manner and according to procedures that require further examination, to discuss national compliance reports. Under this view, a single document should be prepared, based on national reports, for discussion in a plenary session of the Meeting of States. The single document referred to would either be a generic or an analytical report. The discussion of such a report at the Meeting of States would result in an outcome text, i.e., at least a summary, or conclusions, that could be prepared by the Chair.

A *generic* report would synthesize, in a non-context specific way, measures taken by States in order to ensure compliance with IHL and generically identify practical experiences and challenges in IHL implementation, best practices and capacity building needs. An *analytical* report, which garnered moderate preference over generic reports, would assess in a non-context specific manner 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 globally and contain an analysis of the issues and trends observed, as well as recommendations for improvement.

A further option, based on the suggestion introduced at the April 2014 Preparatory Discussion (mentioned above), could actually be regarded as a *variant of an analytical report*. Under this proposal, States' "current development" reports could be amalgamated into

a “principal issues report”. This single document would be non-contextual and would highlight issues which, in light of the current developments reports, appear to be widespread, important and topical, and could also possibly make recommendations thereon. The principal issues report would also be discussed in the plenary of the Meeting of States.

It must be observed that the preparation of a generic or analytical report (or any variant thereof), as well as of any outcome text to a discussion at the Meeting of States, would require specific expertise in IHL. In the discussions thus far, a relatively small number of delegations were of the view that an expert body, constituted either of individual experts or of government experts, should be established and entrusted with these tasks. The majority of delegations did not, however, support the creation of such a body, noting that it could increase the costs of the system as a whole and that other sources of IHL expertise should be examined first. Many participants stated that the ICRC could possibly play an important role in this regard, if the organization were willing to do so, and provided it could do so without impinging on its mandate, operational activity and standard working modalities. A few delegations expressed doubt whether the latter would be possible.

In relation to the issue of follow-up, it should finally be mentioned that a small minority of States believe that there is no need for follow-up in the form of a single non-contextual document that would be discussed at a Meeting of States. Pursuant to this position States could, on a voluntary basis, simply make brief presentations of their national compliance reports at such a Meeting.

Questions for discussion:

a) Should the Meeting of States be able to consider general matters arising from national compliance reports?

b) Should the Meeting of States discuss national compliance reports based on a single non-contextual report? If so, which of the options outlined above is preferred: a generic or analytical report (or some variant of the latter, to be determined in further consultations)?

c) What should be the outcome of the discussion at the Meeting of States?

3.1.4. Effectiveness of Periodic Reporting

Given the non-binding nature of a periodic reporting function on national compliance with IHL, the issue of how to make it effective, i.e. how to ensure that States will actually submit reports and do so within the eventually prescribed time limits, was discussed at the April 2014 Preparatory Discussion. At this stage of the discussion, no clear points of converging views have emerged. It was recognized that the function should be set up in a way that will encourage State to participate. It was also mentioned that maintaining a list of States that have submitted their reports within agreed time limits, or otherwise making the reports publicly available, such as on a dedicated website, could be an incentive for governments to engage with the reporting function. A considerable number of delegations were of the view that no other measures are required, as such procedures could run counter to the voluntariness, legally speaking, of the system. Others found merit in other options, such as the establishment of a dedicated committee of the Meeting of States or the appointment of a Reporting Coordinator whose task it would be to enter into a dialogue with States that might have difficulties in drafting reports and to make appropriate recommendations. Given the acknowledged importance of this question, it is submitted that further reflection on possible ways of promoting the effectiveness of the reporting system deserves further consideration.

Questions for discussion:

a) What specific measures in addition to those noted above, may be envisaged in order to ensure the effectiveness of the reporting function?

3.2. Thematic Discussions on IHL Issues

Thematic discussions on IHL issues is a function that was proposed by some States themselves at the Second Meeting of States in June 2013. The function as such has generated a wide convergence of views within the consultations held since then, with no doubts having been expressed, from what the facilitators can gauge, about the usefulness of its inclusion in the elements of a possible IHL compliance system. Provided below is a brief outline of the salient points, on the understanding that certain details will need to be further elaborated.

There was broad agreement that thematic discussions on IHL would be an important function of a new IHL compliance system.

It was indicated that thematic discussions could serve 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.

Specific sessions of the Meeting of States should be devoted to thematic discussions.

Linkages with the periodic reporting system on national IHL compliance should be considered, including in the identification of topics of common concern.

Thematic discussions should not aim at codification of new rules, but should focus on IHL issues related to the application and interpretation of the law.

Different views were expressed as to whether policy-related issues should be examined in thematic discussions, but many States held that thematic discussions should at least allow for an exchange on policy positions adopted by States on how to interpret and apply particular IHL obligations in practice.

Flexibility is needed with regard to the format of thematic discussions, as there is no pre-set template, and much will depend on the theme that is specifically addressed. It was suggested that such discussions should be interactive, preceded by a panel presentation of experts on the relevant topic, and informed by a background document circulated in advance of a session.

Flexibility is also needed with regard to the outcome of thematic discussions. 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 entities that could propose topics for thematic discussions to the Meeting of States should include at least a State, a group of States, the Bureau of the Meeting of States, the ICRC and the International Conference of the Red Cross and Red Crescent.

The plenary of the Meeting of States would have a central role to play in the selection of topics for thematic discussions; the Bureau should be able to make recommendations in this regard to the Meeting of States.

There is no majority view on whether the Meeting of States should be able to approve the selection of a topic for thematic discussion. Most delegations expressed a preference for the Meeting of States to be able to take such a decision, either by a majority (still to be determined), or by consensus of the Meeting of States.

A few delegations were of the view that a Meeting of States should not have any decision-making power and that the Bureau should ensure that a proposed topic is acceptable to all States.

Questions for discussion:

a) Do the points indicated above adequately reflect the current state of the consultations on the function of thematic discussions on IHL issues?

b) What points should be the subject of consultations going forward?

3.3. Fact-Finding

Among the several possible compliance functions that were initially reviewed at the Second Meeting of States in June 2013, fact-finding was believed by some States to be a useful element of a possible IHL compliance system. It was indicated at this Meeting that the modalities for such a function, including possible ways to make use of the IHFFC, deserved further examination. A first discussion on a fact-finding function took place at the Preparatory Discussion of 3-4 April 2014 and generated widely divergent views.

A number of delegations expressed support for a fact-finding function. In their view, establishing a fact-finding function within an IHL-specific framework would be useful and necessary, given that fact-finding in situations of armed conflict is already being mandated by and carried out in other international fora that may not have a specific mandate and expertise in IHL. The majority view among this group was that any fact-finding function that may be established should operate on a consensual basis. It was pointed out that the question of consent is also of crucial practical importance, as cooperation by the parties to a conflict with an enquiry is key to its success. A small number of States thought, conversely, that such a precondition would not be necessary.

A second group of States were of the opinion that a fact-finding function should not be part of a future IHL compliance system, as it would be contrary to some of the guiding principles of the current process and would, in particular, risk politicization of the IHL compliance system. As a consequence, they did not engage in a discussion of the possible features of a fact-finding function.

A third group of delegations, while skeptical about such a function - in particular about any non-consensual fact-finding mechanism and its compatibility with some of the guiding principles of the process - expressed an openness to continue discussions on this topic. They also suggested that fact-finding at the domestic level and national practice in that regard could be a possible topic for a thematic discussion at the Meeting of States.

Among the delegations who shared their views on the possible purposes of a fact-finding function, most supported the idea that an enquiry should serve to establish the facts of alleged violations of IHL and be able to make recommendations to the parties involved in the armed conflict at hand with a view to facilitating their return to respect for IHL. Some

participants were of the opinion that the relevant body should, in addition, be competent to make a legal appreciation of the facts.

As regards the scope of a possible fact-finding function, a relatively small number of delegations expressed their view. Some were of the opinion that the scope of a fact-finding function should relate to facts that are alleged to constitute serious violations or grave breaches of the Geneva Conventions of 1949 and their Additional Protocols, in situations where the latter are applicable. Other delegations considered that there would, to some degree and under some conditions, also be room for enquiring into facts that are alleged to constitute violations of customary IHL.

An important part of the discussions was also devoted to the possibility of making use of the IHFFC in the context of a future IHL compliance system. Some delegations that were in favor of establishing a fact-finding function considered that the IHFFC could be entrusted with this role, given that it is already in existence and offers guarantees of impartiality and neutrality. Others simply expressed an interest in the possibility for the IHFFC to participate in the Meeting of States in order to raise awareness of its services on the basis of its existing mandate, and said it would be useful to find other creative ways of engaging with the IHFFC.

A general question was raised about whether and how the IHFFC could be recognized to carry out its functions in situations of non-international armed conflicts, given that its current mandate is explicitly linked only to international armed conflicts. While some delegations expressed caution in this regard, other delegations indicated that further discussion on this issue could be beneficial for the purpose of strengthening compliance with IHL. In both cases, delegations who took the floor confirmed the view, already expressed in previous meetings, that an amendment of Article 90 of Additional Protocol I, on the basis of which the IHFFC was established, should not be contemplated.

Questions for discussion:

a) As noted in the Background Document for the April 2014 Preparatory Discussion, fact-finding in situations of armed conflict is being increasingly mandated by international fora linked to other branches of international law. Having this in mind, can a dedicated IHL compliance system serve its purpose and be credible without such a function? What would be the possible consequences for this body of norms?

b) Would some States' concerns about a possible fact-finding function be alleviated if it were provided that such a function would operate only on a consensual basis? If not, why?

c) Should the establishment and modalities of a fact-finding function be included as a task for examination by a future Meeting of States?

3.4. Meeting of States as Part of a Future IHL Compliance System

The first Informal Meeting of States held within the Initiative on Strengthening Compliance with IHL which launched the current process in 2012 confirmed States' general concern about the lack of compliance with IHL, and indicated broad agreement on the need for a regular dialogue among States on IHL issues and, in particular, on the necessity to improve respect for this body of law. The need for a regular dialogue that would take place within a dedicated forum, i.e., a Meeting of States (or a body with a different name), has been widely reiterated in the consultations held ever since. An overview of the possible structure, as well as of the features and tasks of a Meeting of States, was also on the agenda of both the Preparatory Discussions held over the past year. These issues were examined in more depth at the April 2014 meeting.

Outlined below are points that appeared to enjoy broad support, along with issues that require further deliberation.

3.4.1. Points of a General Nature on the Meeting of States

A regular Meeting of States would be a useful tool for strengthening compliance with IHL, and should be established.

The general purposes of a Meeting of States should be:
- 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 this body of law;
- To serve as an institutional anchor for the other elements of the future IHL compliance system.

The Meeting of States should not be competent to develop new law or to adopt amendments to existing IHL treaties. It should rather aim at providing a platform for States to exchange views, in a flexible and voluntary framework and with a focus on dialogue and cooperation, on issues related to compliance with IHL, as well as on their practical experiences in IHL implementation, the sharing of best practices, the identification of possible capacity building needs, as well as the identification of challenges in IHL implementation.

The structure of a Meeting of States should be as lean and as efficient as possible, with a view to keeping down the costs and to avoiding cumbersome procedures.

The structure should be strictly limited to what is necessary to perform the possible functions of the Meeting of States, but the possibility of readjustments should exist if a need becomes apparent over time. There should also be flexibility for States to reconsider the structure of the Meeting of States if they wish to do so in the future.

Plenary sessions should form the principal body of the Meeting of States.

Apart from procedural tasks[14] that should be performed in plenary, such sessions should serve to consider national reports on compliance with IHL, and to hold thematic discussions on IHL issues, as outlined above. Related to this point, it should be noted that many delegations were favorable to States being able to decide in plenary sessions on actions, as may be necessary, with respect to general matters concerning compliance with and implementation of IHL, given that such a competence is provided for in many other legal frameworks. A few delegations expressed caution, stressing that the mandate of the Meeting of States should be formulated in clear terms.

Questions for discussion:

a) Do the points indicated above adequately reflect the current state of consultations on the Meeting of States?

b) Have any relevant issues been omitted? If so, which?

[14] The following procedural tasks were outlined in the Background Document for the Preparatory Discussion of April 2014, at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm:
- Adopt the Rules of Procedure for the Meeting of States;
- Adopt the budget of the Meeting of States;
- Elect officers, such as the Chair, Vice-Chairs and the members of the Bureau;
- Establish subsidiary bodies, as may be necessary, and elect the members of such bodies;
- Oversee and consider the work done by a subsidiary body or another organ, such as the Secretariat.

3.4.2. Organs of the Meeting of States

The points provided below, which relate to the other organs of a Meeting of States, reflect the view of most of the States who opined; some said they had not prepared for a more detailed discussion at the April 2014 meeting.

Most delegations supported the idea of entrusting a Chair with the performance of the relevant procedural and organizational tasks. In particular, the Chair would preside over the plenary sessions and head the meetings of the Bureau. Equitable geographic representation should be taken into account in the election/rotation of the Chair. Certain issues, such as the election of the Chair, were identified for further discussion.

There was broad agreement that a Bureau would be a useful organ. It should ensure the effective conduct of the Meeting of States and be responsible for the substantive and organizational preparation of the plenary sessions. Equitable geographic distribution should be taken into account in elections of members to the Bureau. A range of issues related to the Bureau were identified for further discussion.[15]

The establishment of a Secretariat to provide administrative and logistical support to the Meeting of States, as well as the Bureau and the Chair, was supported by many delegations. In general, the size and structure of the Secretariat should be as small and cost-effective as possible. An important number of delegations stressed that a detailed discussion of its set up should take place when its possible tasks are better known. A range of issues related to the Secretariat were thus identified for further consultation.[16]

Questions for discussion:

a) Do the points indicated above adequately reflect the current state of consultations related to the organs of the Meeting of States?

b) Have any relevant issues been omitted? If so, which?

c) What issues related to the organs of the Meeting of States should be the focus of further consultations?

3.4.3. Further Issues Linked to the Meeting of States

The preparation and work of the Meeting of States, in particular in relation to discussions of national reports on compliance with IHL and to thematic discussions on IHL issues, will likely require substantive expert input. As mentioned above, the possibility of establishing an expert body did not garner majority support. A few delegations suggested that drawing on the expert support of the IHFFC could be considered. Many delegations saw, in this context, an important role to be played by the ICRC, if it is willing and able to do so. It was also underlined that it must be ensured that this role does not impinge on the organization's

[15] These include whether the Bureau should meet in between two plenary sessions of the Meeting of States, how members should be elected, the length of terms, and others. As regards the composition of the Bureau, a proposal was submitted that provides for a permanent seat on the Bureau to be attributed to Switzerland, including possibly the role of the Chair, with five additional seats being attributed to other States on the basis of equitable geographic representation.

[16] Most delegations were of the view that the Secretariat should perform primarily logistical and administrative functions; a few delegations also considered that the Secretariat could perform a limited role in the preparation of documents, such as financial reports, summaries of the proceedings during the plenary sessions or non-analytical compilations of national reports on compliance with IHL. It was also stressed that attention should be paid to ensuring that the Secretariat is staffed with personnel that have the requisite expertise. In order to reduce costs, some delegations were of the view that possibilities should be explored for the Secretariat to be hosted by an existing institution.

operational activities, mandate, and working methods, and that its humanitarian activities are not jeopardized. In particular, the ICRC could be invited to regularly submit its views, in a non-context specific manner, on the state of IHL compliance globally, it could be called upon to draft the generic or analytical report, on the basis of the national reports, to be discussed in plenary at the Meeting of States, it could support the relevant body in the identification of current or emerging issues that would merit discussion and prepare a Background Document providing guidance for the thematic discussions on IHL issues, or, in a more general sense, it could be called upon to act in a consultative capacity to the Meeting of States and the Bureau. As also mentioned above, several States expressed caution about whether the ICRC could take on some of these roles without this affecting its current institutional mandate.

As regards the possible membership of the Meeting of States, discussions thus far indicated that members of the Meeting of States should be the States Parties to the Geneva Conventions of 1949.

On the issue of the participation of observers, many delegations said that actors other than States should be allowed to participate, in accordance with modalities that still need to be defined by the Meeting of States. A small number of delegations expressed concern in this regard and indicated that the question should be examined after the tasks and structure of the Meeting of States have become clearer.

A few delegations noted that it would be important to find ways of bringing the experience of the other components of the International Red Cross and Red Crescent Movement (in addition to the ICRC) into the discussions of the Meeting of States, depending on the topics being examined. There is a general acknowledgment that a mutually reinforcing relationship and linkages should be established between the Meeting of States and the International Conference of the Red Cross and Red Crescent. This topic was not addressed at the April meeting due to lack of time and will be examined going forward.

It was widely recognized that intergovernmental organizations and entities could be able to significantly contribute to the work of the Meeting of States, in particular those that have a direct responsibility, role or influence on enhancing compliance with IHL, and that modalities should be found for their participation as observers. It was suggested that intergovernmental organizations could be systematically invited, as is the practice in a number of Meetings of States established under other legal frameworks.

The question of the participation of civil society actors garnered different views. A small number of delegations expressed reservations to their involvement as observers at the Meeting of States, stating that this forum should primarily serve as a platform for non-politicized dialogue and cooperation among States. Some other delegations were generally open to their participation as observers, but cautious to ensure that their participation would not contribute to a politicization of the Meeting of States. It was thus suggested that their participation could be limited to public sessions of the Meeting of States, that observer status might be granted on an ad hoc basis and not be conferred automatically, or that their observer status might not include the right to make oral interventions during the Meeting of States. Most delegations that expressed their views on the topic were, however, open to giving civil society actors a broad possibility to participate as observers, including the option of making oral statements and other forms of contributions, such as organizing side-events or distributing written statements. It was mentioned by these delegations that organizations with ECOSOC consultative status should as a general rule be eligible as observers. It was also suggested that the participation of other organizations could be approved by the Meeting of States.

A number of other topics, including the resourcing of the Meeting of States, were not addressed at the Preparatory Discussion of April 2014 due to time constraints.

Questions for discussion:

a) Have the issues for further deliberation related to the Meeting of States been adequately summarized above?

b) Have any relevant issues been omitted? If so, which?

c) What other issues should be the focus of further consultations?

4. Remarks and Next Steps

As indicated above, the purpose of this Background Document is to summarize the discussions within the Swiss-ICRC initiative that have taken place since the Second Meeting of States in June 2013.

The facilitators have invested their best efforts to provide an overview of the main issues that have been examined over the past year, while also attempting to reflect the convergence and divergence of views on particular issues expressed in the discussions.

The questions that have been posed in this Document are meant to enable States' preparation for the Third Meeting of States, by providing a structured basis for their reflection. It is hoped that discussions at the June meeting will both enable further progress in terms of clarity on States' views regarding the issues included, but also provide the facilitators with guidance as to the direction of further consultations. This includes the possible identification of points on which States' views may be converging, as well as those that will require further deliberations going forward.

The discussions of the Third Meeting of States, which will be reflected faithfully in the Chairs' Conclusions, will thus serve to inform the issues to be examined in further Preparatory Discussions in the year ahead and at the Fourth Meeting of States in mid-2015. That Meeting will permit to take stock of the deliberations conducted on the basis of Resolution 1 of the 31st International Conference and to wrap up the consultation process facilitated by Switzerland and the ICRC in accordance with the mandate outlined in Resolution 1.

Resolution 1 of the 31st International Conference provides for a report to be submitted to the 32nd International Conference. The facilitators will draft that report on the basis of the discussions taking place within the framework of the current process, drawing on the Background Documents as well as the Chairs' Conclusions that have been prepared in this context. That report, in which options and recommendations will be presented pursuant to the request made in Resolution 1, will be the responsibility of the facilitators.

Resolution 1 of the 31st International Conference furthermore calls on the 32nd International Conference to consider the results of the discussions facilitated by Switzerland and the ICRC and to take appropriate action.[17] The current research and consultation process, mandated by the 31st International Conference, may thus feed into a corresponding resolution to be adopted at the next International Conference in 2015. That text will, according to the usual procedures, be the subject of negotiations by the components of the International Red Cross and Red Crescent Movement[18] and States, who together constitute the International Conference.[19] Draft resolutions are prepared and circulated to the members of the

[17] Para. 8 of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.
[18] Components of the Movement are: National Red Cross and Red Crescent Societies, the ICRC, and the International Federation of Red Cross and Red Crescent Societies (Statutes of the International Red Cross and Red Crescent Movement, article 1.)
[19] Idem (article 8).

International Conference sufficiently ahead of time so as to permit the necessary agreements to be reached before the Conference takes place.

In this context it seems useful to clarify that the meetings being held within the Swiss-ICRC initiative are not the venue for *negotiations* on a resolution of the International Conference due, among other things, to the different composition of the latter. The question may nevertheless be asked how the conclusions resulting from the current process could adequately inform a resolution, if there is support by States for doing so. It could be envisaged that the report of the facilitators to the 32nd International Conference highlights the points on which views are converging by the end of the consultation. These points could inspire the drafting and negotiation of a resolution of the 32nd International Conference.

That approach would necessarily take into consideration States' views on the foundational issues related to the establishment of a Meeting of States (outlined above). Furthermore, it would build on the degree of convergence on the issues being currently examined that will be achieved by mid-2015. With a view to guaranteeing adherence to the guiding principles of the consultation process, in particular transparency and inclusivity, States will be given the opportunity to be apprised of and to opine on the substantive elements that may be included in a future resolution.

Questions for discussion:

a) Based on the course of discussions that will be held at the Third Meeting of States, what issues others than those outlined in this Background Document should be the subject of further examination within the current process?

b) What are your views on the next steps to be undertaken within the current consultation process? Are there any other proposals that have been omitted above?