



**Power of humanity**

Council of Delegates of the International  
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**COUNCIL OF DELEGATES  
OF THE INTERNATIONAL RED CROSS  
AND RED CRESCENT MOVEMENT**

Antalya, Turkey  
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**International Humanitarian Law**

**BACKGROUND REPORT  
(PART I – RESOLUTIONS 1 AND 2 ADOPTED BY THE 32ND INTERNATIONAL  
CONFERENCE OF THE RED CROSS AND RED CRESCENT)**

**Document prepared by the International Committee of the Red Cross**

Geneva, September 2017

## EXECUTIVE SUMMARY

This background report is submitted in support of a draft Council of Delegates resolution entitled “International humanitarian law”. The proposed resolution has two main parts: (I) an update on the work being undertaken to implement Resolution 1 (“Strengthening international humanitarian law protecting persons deprived of their liberty”) and Resolution 2 (“Strengthening compliance with international humanitarian law”) of the 32nd International Conference of the Red Cross and Red Crescent (International Conference); and (II) an update on the work being carried out on customary international humanitarian law (IHL).

Part I of the background report aims to inform the Council of Delegates about the work the International Committee of the Red Cross (ICRC) has undertaken in respect to Resolutions 1 and 2, the challenges it encountered and the next steps envisaged. It invites the International Red Cross and Red Crescent Movement (Movement) to support these efforts.

Regarding the implementation of Resolution 1, the report outlines the various informal and formal meetings the ICRC has organized so as to permit States to find agreement on the modalities of work and a work plan related to strengthening legal protection for persons deprived of their liberty. Given that States were, regrettably, not able to find common ground on the relevant organizational matters during an April 2017 formal meeting of States, the ICRC is reflecting – and consulting with States – on the best way to move forward on this issue.

Regarding the implementation of Resolution 2, the ICRC and Switzerland, as co-facilitators of the intergovernmental process on strengthening respect for IHL, convened two formal meetings, each preceded by an informal consultation process. A First Formal Meeting agreed on organizational modalities and a preliminary work plan for 2017, while the Second Formal Meeting discussed an ICRC report entitled *Existing Mechanisms, Initiatives and Processes Dealing with IHL*, as well as the features and functions of a potential forum of States. A Third Formal Meeting, scheduled for December 2017, will focus on ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums.

In addition to reflecting the work being done to implement the two resolutions of the 32nd International Conference, the proposed Council of Delegates resolution invites and encourages National Societies to support further work within the respective processes. It also highlights the important contribution being made by members of the Movement to the process of strengthening respect for IHL through the ICRC-facilitated Open-Ended Reference Group of Movement members.

## 1) INTRODUCTION

In 2011 and 2015, the International Conference of the Red Cross and Red Crescent (International Conference) identified two issues requiring international humanitarian law (IHL) to be strengthened. First, IHL provides very limited protection for persons deprived of their liberty in relation to non-international armed conflict. Thus, following the 2011–2015 consultation process, in 2015 the 32nd International Conference adopted Resolution 1, “Strengthening international humanitarian law protecting persons deprived of their liberty”. Second, in today’s armed conflicts the main problem is not a lack of rules, but rather lack of respect for the existing law. Indeed, the imperative need to improve compliance with IHL has been recognized by all States. Accordingly, in 2015 the 32nd International Conference adopted Resolution 2, “Strengthening compliance with international humanitarian law”.

Through the draft resolution entitled “International humanitarian law”, the Council of Delegates supports the two processes to strengthen IHL. It welcomes the work the International Committee of the Red Cross (ICRC) has done to implement Resolution 1, and the work done by the ICRC and Switzerland to implement Resolution 2. Moreover, the resolution encourages National Societies to support further work on the process to strengthen respect for IHL in particular. It further recognizes the important contributions of members of the International Red Cross and Red Crescent Movement (Movement) to that process, in particular through the ICRC-facilitated Open-Ended Reference Group.

This background document informs the Council of Delegates about the work the ICRC has carried out in respect to Resolutions 1 and 2, the challenges it encountered, and the next steps envisaged, and sets out options for how the Movement could support these efforts.

## 2) BACKGROUND

It should be borne in mind that the work carried out on these two processes in 2016 and 2017 builds on the consultations conducted between 2011 and 2015. In 2011, the 31st International Conference invited the ICRC, in cooperation with States and other actors if relevant, to pursue research, consultation and discussion on these two areas, and to submit reports to the 2015 International Conference, with options and recommendations for strengthening legal protection in these two areas. Thus, this report adds to, and should be read together with, the progress report submitted by the ICRC to the 2013 Council of Delegates (*Implementation of Resolution 1 of the 31st International Conference, “Strengthening legal protection for victims of armed conflict”*) and the two concluding reports submitted by the ICRC to the 32nd International Conference in 2015 (*Strengthening international humanitarian law protecting persons deprived of their liberty*, 32IC/15/19.1; and *Strengthening compliance with international humanitarian law*, 32IC/15/19.2, the latter in collaboration with the government of Switzerland).

## 3) ANALYSIS / PROGRESS

### **Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty**

Resolution 1 of the 32nd International Conference provides the framework for the work done by the ICRC in 2016–2017 to strengthen the protection of detainees held in relation to armed conflict. In operative paragraph 8, the International Conference “*recommends* the pursuit of further in-depth work, in accordance with this Resolution, with the goal of producing one or

more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC [non-international armed conflict]”.

Resolution 1 also invites the ICRC “to facilitate the work of States and to contribute its humanitarian and legal expertise” (operative paragraph 10). At the same time, and as a procedural step before engaging in substantive work towards the agreed objective, Resolution 1 requires States and the ICRC to collaborate in determining “the modalities of further work in order to ensure its State-led, collaborative and non-politicized nature in accordance with this Resolution” (para. 9). Accordingly, in 2016 and 2017, the ICRC worked with States to find agreement on the modalities of further work and to develop a preliminary work plan.

#### *Consultations on modalities of work and preparation of ICRC draft modalities*

In order to find agreement on the modalities of work, the ICRC engaged with States in 2016 in various formats, including regional group meetings, written exchanges of views, and an open-ended consultation. Upon the invitation of States, and taking into account the views of States, the ICRC prepared a proposal of draft modalities of further work and draft elements of a work plan, which States discussed during an informal open-ended discussion on 20 January 2017. The proposal suggested, *inter alia*, that the ICRC and two States, from different geographical regions, co-facilitate further work. While there was convergence on a number of aspects of the proposal, the main point of debate was the question of who would facilitate further work. A number of States supported the ICRC’s proposal that two States and the ICRC should co-facilitate. However, other States raised doubts about the proposal.

All Permanent Missions were therefore invited to another informal consultation in Geneva on 24 February 2017 to discuss a revised proposal of modalities as well as a draft work plan. Prior to the 24 February discussion, Australia and Colombia expressed an interest in co-facilitating further work jointly with the ICRC. In the 24 February consultation, once again some States supported the proposal of having the ICRC, Australia and Colombia co-facilitating further work, while other States preferred the ICRC alone to facilitate further work and did not wish to have States involved in the facilitation.

#### *The first formal meeting of States, 6–7 April 2017*

Taking into account the views of States expressed during the January and February informal discussions, the ICRC prepared, and submitted to all States in March 2017, draft modalities of further work and a draft preliminary work plan. On 6–7 April 2017, the ICRC organized the first formal meeting of States on this track of work. The first formal meeting was attended by 91 States.

Regrettably, it was not possible to find agreement on the modalities of work and a provisional work plan during the two-day meeting. Despite extensive outreach work by the ICRC, significant diplomatic efforts by States to find agreement, the production of an ICRC compromise proposal for modalities during the April meeting, and discussions until late evening, the positions of States did not converge sufficiently for an agreement to be reached.

States’ views diverged particularly on the following questions: whether all decisions in the process – including procedural questions and decisions on possible outcomes – should be taken by consensus; whether the entire process, including all possible outcomes, should be

based on the principle of “nothing is agreed until everything is agreed”; and who should facilitate further work and how. While there was general agreement that the ICRC should facilitate further work, States could not agree on whether States should co-facilitate, whether the ICRC could ask States for support in the facilitation on a case-by-case basis, or whether the ICRC alone should facilitate further work. The ICRC would have appreciated the possibility to share with States the heavy burden of facilitating further work.

#### *Other consultations and engagement*

The ICRC Legal Division gave presentations on the detention track to National Society legal advisers in September 2016 and May 2017, as part of the Annual Meeting of National Society Legal Advisers. The ICRC also sent all National Societies two briefing notes – one in March 2017 and one in July 2017 – informing National Societies about the above-described consultation process. The ICRC will continue these efforts in the lead-up to the 33rd International Conference.

#### *Next steps*

Following the lack of agreement among States during the 6-7 April 2017 meeting, in May 2017 the ICRC sent a letter to all States. In the letter, the ICRC enquired whether States believed that the impasse reached in April 2017 could be overcome, and invited States to submit to the ICRC concrete suggestions on how the prevailing disagreement on modalities could be surmounted. At the same time, the ICRC is reflecting on the best way to proceed in order to strengthen the protection of detainees held in relation to armed conflict. Possible ways to move forward with the process established by Resolution 1 will be assessed, taking into account the views of States as expressed in reply to the letter sent in May 2017, with a view to effectively addressing the need to strengthen IHL protecting persons deprived of their liberty, in particular in relation to NIAC.

### **Resolution 2: Strengthening compliance with international humanitarian law**

Resolution 2 of the 32nd International Conference provides the framework for the intergovernmental process on strengthening respect for IHL, which is co-facilitated by the ICRC and Switzerland. Resolution 2 “[r]ecommends the continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd International Conference and in line with the guiding principles enumerated in operative paragraph 1 to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums in order to submit the outcome of this intergovernmental process to the 33rd International Conference” (operative paragraph 2).

With the adoption of Resolution 2, a new phase of this initiative commenced. As set out in the resolution, the current intergovernmental process is meant to focus on three main tasks: first, on providing a space for States to exchange views with the goal of achieving possible agreement on the features and functions of a potential new IHL forum of States; second, on ensuring that States engage in a discussion on ways to enhance IHL implementation using the potential of the International Conference; and third, on providing an opportunity for States to examine ways of enhancing IHL implementation using the potential of IHL regional forums.

*First Formal Meeting: Agreement on organizational questions and a work plan*

As a first main step to recommence work on this process, Switzerland and the ICRC convened a First Formal Meeting in order to find agreement on the organizational issues and a work plan for the future intergovernmental process. The First Formal Meeting took place in November 2016, having been preceded by two preliminary discussions among States. It was attended by over 100 States, and an agreement was reached on organizational modalities and a work plan. Regarding work modalities, States agreed that Switzerland and the ICRC should continue to act as co-facilitators of the intergovernmental process. States also reaffirmed the guiding principles as set out in Resolution 2. Moreover, they agreed that there should be two formal meetings per year until the next International Conference and that in between the formal meetings a preparatory process would take place. According to the agreed work plan, the substantive issues arising from Resolution 2 would be addressed in the course of the two formal meetings scheduled to take place in 2017: the first should comprise a presentation of a detailed report on existing mechanisms of IHL, as well as a discussion of the features and functions of a potential forum of States; the second would focus on ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums.

*Second Formal Meeting of States: Existing mechanisms and discussion of the features and functions of a potential forum of States*

The Second Formal Meeting took place on 10–12 April 2017. The meeting was attended by 102 delegations, and preceded by an informal consultation and an informal discussion among States. In preparation for the meeting, and in line with a request made by States at the First Formal Meeting, the ICRC prepared a report entitled *Existing Mechanisms, Initiatives and Processes Dealing with IHL*, and the ICRC and Switzerland submitted a background document entitled *Features and Functions of a Potential Forum of States*.

The ICRC report on existing mechanisms dealing with IHL was requested by some States as a means of mapping existing mechanisms in order to inform further work and help in identifying possible gaps in IHL implementation by surveying a wide range of mechanisms, processes and bodies that deal in some way with IHL. States' reactions to this report, as well as their positions vis-à-vis a potential forum of States on IHL, were divided. On the one hand, a number of States argued that existing IHL mechanisms were insufficient. *Inter alia*, they argued that there was no existing mechanism or forum of global reach that: (i) brought together those responsible at the national level for implementing IHL; (ii) focused specifically on IHL / had a specific mandate for IHL; (iii) was strictly in line with the guiding principles of the process, in particular the principles of non-politicization and non-contextualization, and voluntariness; and (iv) addressed IHL issues regularly and could over time increase trust among States as a means of facilitating better cooperation in this field. These States expressed support for the idea of creating a new voluntary forum of States on IHL as a safe place for States to engage in dialogue and cooperation on IHL. On the other hand, a number of States expressed strong reservations or opposition to a potential new forum of States, and argued that they would prefer to strengthen existing IHL mechanisms. Some of these States argued that there was no gap in IHL compliance mechanisms when one considered all the existing IHL mechanisms and processes dealing with IHL together, i.e. those that occasionally dealt with IHL but belonged to other international legal frameworks.

At the end of the meeting, States agreed on a short "Main Elements" document, essentially noting the discussions and the willingness of States to continue the intergovernmental process.

Regrettably, States' positions did not converge sufficiently for agreement to be reached on a more substantive outcome, including in relation to a potential forum of States.

#### *Other consultations and engagement*

The ICRC Legal Division briefed National Society legal advisers on this process in September 2016, and facilitated a workshop on the subject at the Annual Meeting of National Society Legal Advisers in May 2017. The ICRC also sent all National Societies three briefing notes – in July 2016, January 2017 and July 2017 – informing them about the above-described consultation process. Moreover, in order to consult with the Movement in more depth, especially on ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums, the ICRC invited National Societies and the International Federation of Red Cross and Red Crescent Societies to participate in an open-ended reference group (OERG). 18 National Societies currently participate in the OERG.

#### *Next steps*

In line with the agreed work plan, a Third Formal Meeting within the intergovernmental process will take place in December 2017, to discuss ways to enhance IHL implementation by using the potential of the International Conference and regional forums. This will be preceded by an open-ended consultation and an informal consultation among States. At the Third Formal Meeting, States will also need to agree on a provisional work plan for 2018, which should include a review of outstanding issues.

## **4) CONCLUSION AND RECOMMENDATIONS**

In light of the complex discussions among States on both subjects, the ICRC invites the Movement to support its work in relation to Resolutions 1 and 2 of the 32nd International Conference.

There is an important humanitarian and legal need to strengthen IHL protecting persons deprived of their liberty. The ICRC continues to reflect and consult on how best to achieve this. However, in light of the inability of States to find agreement on the modalities of work and a work plan at the April 2017 meeting, it is currently unclear whether and how Resolution 1 can be implemented. The ICRC is committed to presenting a report on the work done pursuant to this Resolution to the 33rd International Conference. In light of the procedural challenges encountered in this process, on the one hand, and, on the other, the importance of strengthening IHL protecting detainees in armed conflicts, the ICRC would appreciate the continued support of the Movement for its work on this subject.

The ICRC and Switzerland are committed to continuing to facilitate the intergovernmental process on strengthening respect for IHL. Given the imperative need to improve compliance with IHL as recognized by States during this process, creative ways need to be envisaged if agreement is to be reached on the features and functions of a potential forum of States and to identify ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums. In this context, the various elements of Resolution 2 should be seen as complementary – and not mutually exclusive – tracks for strengthening respect for IHL. Progress on all the elements can and should be made, so that the 33rd International Conference can be presented with an outcome of this track of work reflecting diverse but concrete ways in which respect for IHL could be strengthened.

Through the draft resolution submitted alongside this report, the Council of Delegates would express support for the ICRC and Switzerland's ongoing work in the intergovernmental process pursuant to Resolution 2, while recognizing its State-driven nature. In particular, National Societies could support the process by briefing their governments about it and encouraging them to participate in the meetings. The Council of Delegates would also recognize the important work being done by Movement members who participate in the ICRC-facilitated OERG related to the intergovernmental process under Resolution 2, and encourage the Movement to participate in and support the OERG's work.