



XXth Congress of the ISMLLW - Prague

Report to the ISMLLW – Findings from the ISMLLW Questionnaire on the Challenges in the Implementation of IHL

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Ministry of Defence

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Overview



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- Preliminary Remarks
 - Rapporteur's Findings
 - Conclusions
 - Questions to the panel
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Preliminary Remarks



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- ❑ **Starting point: Workshop September 2013**
 - ❑ **13 Questions**
 - ❑ **113 Invited Nations**
 - ❑ **12 Responding Nations → 11%**
 - **AUT, BEL, CZE, DEU, GBR, IRL, JOR, MAR, NLD, PRY, CHE, XXX**
 - ❑ **28 Nations present of which 7 responding → 25%**
 - ❑ **67% of the Responses from European Nations**
 - ❑ **Not necessarily the official nation's position**
 - ❑ **Two expert views: W. Boothby (UK) and C. Griggs (NZL)**
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Preliminary Remarks



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- **Set-up:**
 - **Question**
 - **Starting Point of the Reflection**
 - **Questionnaire findings**
 - **Notable Remark(s)**
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Question 1



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Do you agree that there are three facets to implementation: prevention, control, and repression? Please explain if you disagree or would like to comment on this statement.

- Starting Point of the Reflection
 - Terminology: “Implementation” → Compliance, Respect, Observance, Application, Execution
 - Facets: Prevention, Control, Repression; what do they comprise of?
 - Questionnaire findings
 - Agreement on approach
 - No general understanding of the Terminology: “Implementation, Prevention, Control and Repression”
 - Emphasis on Prevention and Repression
 - Notable Remark(s): Willingness to Implement as first factor?
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Question 2



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Even though several mechanisms such as the International Fact-Finding Commission, the Protecting Powers, and the inquiry procedure are available, most of them have not been used recently, and some of them never at all. Why is this the case in your view?

□ Starting Point of the Reflection

- Swiss-ICRC Analysis on the use of IHL mechanisms: Protecting Powers (PP), Enquiry Procedure (EP), International Humanitarian Fact Finding Committee (IHFFC) and Meeting of the High Contracting Parties (MoHCP)

□ Questionnaire Findings

- General understanding why the mechanisms don't work, given the narrow scope and weak positioning of the IHL mechanisms
- Many reasons for this are presented: political will, consent, limited scope and institutional support and resources, ICRC as the better alternative
- Notable Remark(s): not suited for NIACs; more flexible mechanisms take over.



Question 3



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States frequently claim that what is occurring is not an armed conflict, but merely a police operation, riot control, or a domestic counter-terrorism operation. What should be done to tackle the challenge which arises when States deny that IHL is applicable to a particular situation, in particular in the case of a non-international armed conflict?

□ Starting Point of the Reflection

- The political deliberations on the distinction between IAC and NIAC
- Common Art. 3, AP II and Customary International Law
- The ICTY-criteria for a NIAC (Tadic case)

□ Questionnaire Findings

- Most nations agree on the problem of not acknowledging a NIAC by Parties
- Determination of NIAC is factual and legal; who to determine? UNSC, ICJ, IHFFC, ICRC, Independent committees, Rulac website?



Question 3



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- Pressure on Parties to acknowledge = co-ordinated political effort →
UN bodies, EU, ICRC, NGO's, other States
 - Notable Remark(s): Is non-acknowledgement really a challenge?
 - Applicability of Domestic and Human Rights Law
 - Restriction of options
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Question 4



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Currently there are a little more than 100 national committees set up to advise and assist governments in the implementation of IHL. Should the international community consider making the establishment of such a national committee a legal or soft law obligation? What role and composition should such national committees have in your opinion?

Starting Point of the Reflection

- Advocated by ICRC; Advisory Service Document
- Tasks related to implementation; composition (liberty of the States)
- 107 NC's in 2014 (Bangladesh, Bahrein and Iraq most recently)

Questionnaire Findings

- Most of Responding Nations have a NC, that has an advisory and promoting role
 - Common agreement on the value of the NC to enhance implementation of IHL
 - Legal of 'soft law' obligation is not necessary, but further promoting is needed
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Question 4



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- Notable Remark(s):
 - NC as the competent and monitoring national authority
 - Proper funding would enhance effectiveness
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Question 5



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How could the implementation of IHL by State armed forces be improved in your view?

Starting Point of the Reflection

- Swiss-ICRC initiative: more high level proposals (report ultimo 2015)
- Comprehensive view of consulted expert: practical, down to earth advise for developing an IHL-conform culture among individual soldiers; indoctrinating non-State actors will be a challenge to face and confront

Questionnaire Findings

- All agree on the importance of IHL dissemination, education and training
 - Some also: integration in military doctrine and ethos
 - Inter-state exchange on IHL-issues and coupled with a reporting system
 - Relevance of suppression of violations; requires an adequate penal and disciplinary system (assessment of national jurisdictions by ISMILLW?)
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Question 5



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- Notable Remark(s):
 - Formation of Legal Advisers in Armed Forces
 - Support of and/or participation in IHL implementation programs of other states
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Question 6



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To what extent and how should the national justice sector be trained in IHL?

□ Starting Point of the of the Reflections

- ICRC IHL awareness-raising efforts, also aimed at law-enforcement agencies and the judiciary (speech General Assembly UN, 2014)
- Resolution UNGA (2005): on priority and continued basis Human Rights Law and IHL education to ... law enforcement officials

□ Questionnaire Findings

- Agreement on educating national justice sector, but the scale of audience depends on the organization of the justice sector per nation.
- Flexible training programs for national justice sector; tailored and in time
- How to disseminate/organize training? Seminars, literature, studies at universities, participation in NC, in military training programs and in criminal investigation training and missions. Establishment of special courts.
- Notable Remark(s):



Question 6



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- Notable Remark(s):
 - National justice sector lacks training in IHL
 - Judges and personnel of International Human Rights Courts lack knowledge in IHL and should therefore be educated (expert view)
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Question 7



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While some might say that the fight against impunity with the activities of the ICC, ICTY, ICTR and other specialized tribunals is proving to be quite successful, in the field of reparation and compensation not much progress has been made. Should reparation for victims be implemented at the national and/or international level? Please explain.

Starting Point of the Reflections

- Criminal court system is slow and deliberate
 - ICC a selective 'African court'?
 - Greatest value ICTY: Shaping of an international legal conscience?
 - Recommendations UNGA Resolution of 2005 on Reparation (Chapter IX)
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Question 7



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- Questionnaire Findings
 - Raised a lot of interest and lengthy responses
 - Consensus on the view that reparation is as an important aspect of a complete justice
 - Divergent views on the most effective means of implementation (national or international levels)
 - Some point at already existing international mechanisms, such as Trust Fund of ICC (Art. 79 Rome Statute), UNGA Resolutions (1985 and 2005) and at an interesting recent ICC-case (Lubanga, 7-8-2012, that has been appealed)
 - One nation states that IHL is not equipped for reparation; HRL is
 - Others emphasize the national responsibility in this respect (fi. Srebrenica-case)
 - The issue deserves serious examination by states and stakeholders
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Question 7



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- Notable Remark(s):
 - Extension of provisions under International Law on individual compensation will:
 - Deter participation in International Treaties (Rome Statute); and
 - Disorient the historical/current reparation negotiation process between states
 - Legal recognition of *ex gratia* payments for humanitarian reasons?
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Question 8



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How could IHL benefit from what international human rights law compliance mechanisms have accomplished?

Starting Point of the Reflections

- Workshop Report (2013) aims at beneficial HRL accomplishments, but also warns for the shortcomings associated with the Human Rights Council
- The Libya conflict offers a good example of the benefits of the HRL system, fi. the inquiry commission established by the Human Rights Council
- Political incentives played an important role for the acceptance, but these aren't always present in IHL situations.

Questionnaire Findings

- There are several differences between IHL and HRL's respective adjudicative systems; fi. on direct individual application for compensation
 - HRL is seen as benefiting from a more robust enforcement and court system
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Question 8



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- Swiss-ICRC initiative: emphasis on Meeting of States, Periodical Reporting, Fact-finding Function (more or less copied from HRL mechanisms)
 - Political considerations limit states' interest in subjecting themselves to reporting systems → no state reports, but on general IHL issues
 - The European Court of Human Rights is seen as partially playing the role of adjudicating on IHL abuses in the context of armed conflicts, especially in individual claims, but not always satisfactory
 - Prevalent views that HRL mechanisms are not automatically transposable into situations ruled by IHL
 - Notable Remark(s): solution could be an independent body, like IHFFC, that evaluates periodic state-reports and issues 'General Comments' on the interpretation of IHL (like HR Committee). Realistic?
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Question 9



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How could the Geneva Conventions legal regime learn from other international treaties on the subject of institutional development, like conferences/assemblies of States Parties to conduct periodic reviews? For example, from environmental treaties, the Chemical Weapons Convention, the Convention on the Protection of Cultural Property in Armed Conflict, etc.

Starting Point of the Reflection

- Modern international treaties have a build-in system of conference of the parties, that reviews the functioning and can establish bodies for improvement
- Swiss-ICRC initiative proposes a periodic reporting system, regular thematic discussions, a fact-finding mechanism and regular meetings of states.

Questionnaire Findings

- Geneva Convention system has no regular Conference of the Parties
- Prevalent view to establish a regular dialogue on IHL issues and compliance



Question 9



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- The ways in which this could be facilitated are diverse:
 - Many point at Swiss-ICRC initiative on strengthening IHL (Meeting of States, Periodical Reporting, Fact-finding Function),
 - Others on existing ICRC- and UN-fora,
 - Some on the Assembly of States parties to the Rome Statute,
 - The system of the Chemical Weapons Convention, and
 - The Universal Periodic Review of UN HRC
 - Notable Remark(s): One doubts that States are prepared to implement such arrangements and a challenge remains the incorporation of non-state armed groups.
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Question 10



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What (if any) are the potential complementary roles of the International Fact-Finding Commission on the one hand and the Human Rights Council on the other hand?

Starting Point of the Reflections

- IHFFC is rooted in the commitment of States Parties to the Geneva Conventions: consent; “15 poor guys”, insufficient political support?
- HRC is an inter-governmental body within UN, 47 members, ability to discuss all human rights issues.
- No cooperation between HRC and IHFFC.

Questionnaire Findings

- Importance of the two system’s role and mandate is recognized, but IHFFC is never utilized and HRC (Commission of Inquiry) more or less took over
 - Some nations think that HRC can also or even better address IHL issues, but
...
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Question 10



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- Most nations favor their complementarity: HRC for HRL compliance and IHFFC for IHL compliance
 - One adds that requirement of consent for IHFFC is an advantage for acceptance compared with HRC, and thus plays a complementary role
 - One clear response insists on the distinct roles and mandates (HRL vs. IHL), making complementarity limited if not existing at all
 - They are both seen to suffer from a lack of legitimacy by states and stakeholders
 - Notable Remark(s): cooperation is necessary, i.a. for reference to the proper norms applicable in armed conflict. This could help rectify the apparent unwillingness of certain international human rights courts to specifically refer to IHL norms where they have relevance.
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Question 11



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Is there an (emerging) norm that States that fund and support armed opposition must ensure that those armed groups that benefit from their money and their arms, conduct their hostilities in line with IHL? Compare for instance art. 6 para 3 and art. 7 of the Arms Trade Treaty adopted by the UN General Assembly in April 2013 on arms transfers and the risk of arms being used in violation of IHL.

Starting Point of the Reflection

- Statements made by Ms. Carla Del Ponte as member of Independent International Commission of Inquiry on the Syrian Arab Republic with reference to Art. 6 and 7 of the Arms Trade Treaty (April 2013).

Questionnaire Findings

- Divergent positions:
 - a strict view that there is no such (emerging) norm (states only responsible for their own conduct; not even Customary Int. Law)
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Question 11



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- a more progressive view that such a norm (to a certain extent) already exists → Common Art. 1 GC, Art. 16 draft Articles on Responsibility of States for Int. Wrongful Acts, ATT 2013, EU Code on Arms Export, Rule 144 ICRC's customary IHL Study.
 - Notable Remark(s): assuring compliance of IHL by armed groups should be the norm that, if violated by the supporting state, constitutes a violation of IHL by that state itself.
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Question 12



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How should one deal with armed opposition groups which are ignorant of the law?

□ Starting Point of the Reflections

- Real problem with majority of conflicts being intra-state conflicts
- Some non-state actors do respect in one way or another IHL (FARC, Taliban)
- Dissemination activities by ICRC and Geneva Call ('deed of commitment')

□ Questionnaire Findings

- Many responses stressed the importance of maintaining channels of communication and enhance awareness and knowledge ('mediation')
- There is a requirement for credible, independent and impartial organizations to achieve, at least in part, dissemination and education functions
- The political dimension of interacting with those groups has been identified and one nation suggests to first target the political wings of the armed groups (an AOG may wish to become the legal power of the nation)



Question 12



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- Counter-terrorism laws may have an adverse effect; AOG's should at some time be acknowledged and granted an IHL status
 - Importance of positive and negative incentives (like amnesty and imprisonment/detention as POW or being tried for war crimes)
 - Notable Remark(s): role for the media to reveal crimes committed by AOG's to pressure them to adhere to IHL.
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Question 13



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Is it a problem that some armed opposition groups are designated as terrorist organizations? Please explain.

□ Starting Point of the Reflections

- Workshop of 2013: labeling a group as terrorists runs counter to the goal of increasing compliance with IHL
- Holder case (2010) in US (any assistance, also advise on IHL, helps legitimate a terrorist organization, thus is unlawful) vs. European approach
- Position American Red Cross in relation to other national committees of ICRC

□ Questionnaire Findings

- There is an inherent degree of sensitivity associated with this issue and the designation is rooted in political considerations as well as in legal ones
 - States may nonetheless be justified to designate those groups on a case-by-case basis as terrorists and treat them accordingly (under national laws)
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Question 13



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- Many nations state that both regimes (IHL and national laws on terrorism) can be applicable (Tamil vs. Council Case of General Court of the EU)
 - Most respondents concur that the designation as terrorist group does have negative impact on IHL awareness, compliance and enforcement (options of AP II, humanitarian dialogue and cooperation, access to civilians, peace negotiations and reconciliation and denial of IHL by states that fight the terrorist group)
 - Notable Remark(s): one nation points at the confusing terms 'Armed Opposition Group' and 'Terrorist Group' in relation to 'Organized Armed Group' of AP II. Both parties take advantage of this apparent 'confusion': terrorists vs. freedom fighters.
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Conclusion



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- ❑ Although questions were limited and more opinion-type, not too many responses (11 out of 113)
 - ❑ Discussion runs parallel to the Swiss-ICRC initiative
 - ❑ The received responses witnessed a great engagement and knowledge
 - ❑ Broad consensus that IHL faces many challenges regarding the implementation and shared concern about that situation
 - ❑ Many ideas for improvement
 - ❑ HRL instruments are worth looking at, but cannot be directly imported in IHL
 - ❑ Great openness to discuss further improving IHL
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Questions?



Panel



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- Frederik Naert (BEL)**
 - COL Carl Marchand (CHE)**
 - CDR (ret.) Christopher Griggs (NZL)**
 - Jeroen van den Boogaard (NLD)**
 - LTC Tammy Tremblay (CAN)**
 - Air CDRE Peter Hebly (NLD)**
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Questions for the Panel



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1. Willingness to implement as first factor for implementation?
2. IHL mechanisms aren't suited for NIACs; more flexible mechanisms take over.
3. Is non-acknowledgement of a NIAC really a challenge?
4. National Committee as the competent and monitoring national authority?
5. The benefit for Armed Forces of support of and/or participation in IHL implementation programs of other states?
6. Judges and personnel of International Human Rights Courts lack knowledge in IHL and should therefore be educated.
7. Extension of provisions under International Law on individual compensation will deter participation in International Treaties (Rome Statute).



Questions for the Panel



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8. Is an independent body, like IHFFC, that evaluates periodic state-reports and issues 'General Comments' on the interpretation of IHL (like HRC) realistic?
 9. Will states be prepared to implement arrangements for IHL like that for HRL, CWC, and the Universal Periodic Review of the HRC?
 10. Cooperation between HRC (CoI) and IHFFC is necessary, i.a. for reference to the proper norms applicable in armed conflict. Could this help rectify the apparent unwillingness of certain international human rights courts to specifically refer to IHL norms where they have relevance?
 11. Should assuring compliance of IHL by armed groups be the norm that, if violated by the supporting state, constitutes a violation of IHL by that state itself?
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Questions for the Panel



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12. Is a supportive and successful role for the media feasible with respect to Armed Opposition Groups (AOG), to reveal crimes committed by AOG's and to pressure them to adhere to IHL?
 13. Are the terms 'Armed Opposition Group' and 'Terrorist Group' confusing from a legal point of view and in relation to 'Organized Armed Group' of AP II. Parties might take advantage of this apparent 'confusion': terrorists vs. freedom fighters.
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