Report on the Questionnaire for the 20th Congress of
the International Society for Military Law and Law of War
April 2015, Prague

The Challenges in the Implementation of International Humanitarian Law

Introduction

The 20th Congress of the International Society for Military Law and the Law of War in the spring of 2015 in Prague, Czech Republic, will deal with the challenges in the implementation of international humanitarian law (IHL). On September 22nd 2013 the outlines for a questionnaire on this subject were discussed in a special workshop. The meaning of "Implementation" in this respect is not just the legal obligation to formally implement the Treaty law into national laws, but particularly the compliance to the rules. In the introduction of the workshop it was stressed that "*it does not matter how well the rules are written if there is no one to implement them and obey them*". The greatest problem with IHL does not lie in insufficient rules, but in the lacking or defectiveness of their implementation. During the workshop three facets to implementation were identified: prevention, control and repression. From these three angles a wide variety of derivative and related subjects were discussed, such as: imperfect implementation, international criminal law, lessons to be learned from other areas of law, the Swiss ICRC initiative, responsibilities for countries not directly involved in the armed conflict, non-state actors, and shaping of a '*legal conscience*' ('red light example'). The Workshop Report is attached as Annex A.

Imperfect Implementation; the questions

The questions of this questionnaire are derived from aforementioned workshop, and reflect the most, but not all, applicable subjects. The list of questions is deliberately kept limited to enhance participation. The overall aim of the questionnaire is to collect the views and information of and from Countries from around the world in contribution to the international dialogue, understanding and improvement of the implementation of IHL. The complete Questionnaire is also attached as Annex B.

Imperfect Implementation

1. 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.

2. 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?

3. 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?

4. 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?

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

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

Progress Through International Criminal Law

7. 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.

Lessons Learned from Other Areas of Law

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

9. 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.

10. 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?

Specific Responsibilities for States Not Directly Involved in an Ongoing Armed Conflict

11. 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 paragraph 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.

Non-State Actors

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

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

Overall summary of the findings

The respondents
The Secretary of the International Society for Military Law and Law of War (the Secretary) received contributions from the following (representatives of) 11 nations:

Austria
Belgium
Czech Republic
Germany
Ireland
Jordan
Morocco
The Netherlands
Paraguay
Switzerland
A nation not specified[1]

In this report they will be addressed to as 'contributing' or 'responding nation' or only as 'respondent'. The input received is limited, compared to the nations that were invited to respond (9,7% of 113 nations) and the nations represented at the Congress (50 % of 22 nations). The list of contributing nations also shows that most of the inputs (64%) came from European countries. No inputs were received from North America, Asia (except from the Middle-East), Australia and Oceania. This has to be taken into account when drawing conclusions, especially in terms of universally accepted views.

The overall findings
The Society benefited from a certain number of answers to its questionnaire, which were submitted by a combination of States and various national sections. The overall quality of the submissions indicates a genuine interest and understanding of the questions at stake. These submissions will undoubtedly bring highly valuable contributions to the debates and discussions to be held in Prague. Moreover, while there is general concurrence on some general orientations of IHL, the respondents' submissions can serve as baseline references that map original approaches to contemporary IHL problems and illustrate practical and conceptual nuances.

Most responding nations agree with the approach of the three facets to implementation, but the terminology lacks a general understanding and may lead to confusion. The importance of 'prevention' and 'repression' is generally understood, but the second facet, 'control' remains underexposed. All contributing nations and experts seem to understand why the IHL-mechanisms, such as the International Fact-Finding Commission, the Protecting Powers, and the Inquiry Procedure, haven't been used much or ever, and see various reasons for this fact. We would say that

[1] This nation provided its answers on a confidential basis, therefore it is not listed.

the most important thereof are the limited adaptability and flexibility of the systems. They seem to be drafted in and for the past world context. Most respondents also agree on the problem of not acknowledging a NIAC in a situation of conflict. There seems to be little trust in the application of domestic laws and (general) Human Rights Law principles in a given internal conflict. The determination of the status of the conflict (internal, NIAC or IAC) is a factual and legal virtue, to be dealt with by specialized legal authorities. Several political and legal bodies might play a role in this respect. Convincing states and parties engaged in a conflict is of a more political nature. Coordinated, international political pressure is seen as the best way to convince the states and parties involved. Many states have a National Committee on IHL, that mainly serves as an advisory body to the respective governments and is composed of multidisciplinary representatives and IHL experts. The added value of these National Committees is broadly confirmed, but a legal or 'soft law' obligation is by most nations not considered apparent nor necessary. Further encouragement to establish these National Committees is needed and the best we can do. In relation to the improvement of IHL, by State armed forces the respondents produced many worthwhile answers and ideas, many of which are related to education and training, dissemination and international consultations and exchange on IHL implementation issues. Most of the contributing nations also see the benefit of special IHL training for the national justice sector, although the circumstances of states may differ, and therefore training has to be adjudicated to those branches and sectors within a national justice sector, that really do engage in IHL cases. Training sessions and seminars on IHL will certainly help, but there can be done more, like offering (master)studies at universities, providing for specialized training in criminal investigation in IHL cases and participating in such investigations and participation of the national justice sector as a member in the National Committee on IHL. A common element in the reactions on the question relating to reparation and compensation is that many saw a very positive development in the enhancement of reparation tools for victims. It is in assessing the benefits and challenges of implementation at the national and at the international levels respectively that respondents have divergent views. There is great interest in this subject, but the responses were indicative that reparation and compensation is an area that deserves to be seriously examined by states and international law stakeholders. Many respondents recognized that International Human Rights Law (IHRL) benefits from a robust system of inquiry and adjudication mechanisms, which is seen as the result of a strong State involvement and support. The exercise of jurisdiction of IHRL adjudicative bodies on IHL issues has been reported to be limited and exercised inconsistently, but a comparable kind of human rights compliance mechanisms do, in the eyes of the respondents, not appear to be easily transferred to IHL realities. The need for regular dialogue on IHL issues is widely recognized but the ways in which it could be facilitated are very diverse. The ICRC has often been cited as an organization playing a key role in providing a forum for and a structure to those exchanges. Other bodies were also mentioned, such as the Assembly of States, parties to the Rome Statute and the UN. Responding nations have varying and often opposed views on whether the IHFFC and the HRC could play mutually complementary roles. The importance of the existence of both of them and the value of their respective contributions is recognized, but since they rely on distinct legal regimes and pursue different mandates, their complementarity seems limited if at all possible. On the question about an emerging norm that arms transfers should not be undertaken where there is a real risk that they will be used in the commission of violations of IHL, the contributing nations responded that there is no norm or obligation for States to ensure that aid in the form of weapons

and operational capabilities is employed in a manner that is compliant with IHL. It seems to them that ensuring IHL compliance by the recipient of weapons falls more within the realm of the aspirational goals rather than in that of emerging norms. The respondents recognize the importance to maintain communications open with any armed opposition group that could be brought to increase its compliance to IHL through enhanced awareness or otherwise. Because of the political nature of the engagement with such groups, the involvement of independent, impartial and credible NGOs is seen as a means that could achieve at least in part, some educational and dissemination functions. The political nature is on the other hand seen as a limiting factor to granting incentives to these groups and therefore as an added challenge to a broader IHL implementation. Most respondents concur that the designation of armed opposition groups as terrorists does have negative impacts on IHL awareness, compliance and enforcement, but there is an inherent degree of political and legal sensitivity associated with this issue. Respondents to the questionnaire seem to concur that states can, on a case-by-case basis, designate and treat armed opposition groups as terrorist.

The Results (Answers to the Questions)

Introduction

In this chapter we will discuss the questions and answers, one by one. After presenting the question, we will give a short introduction to that particular question, followed by the general outcome and specifics in the in the answers of all respondents. We also asked two experts on IHL to give their side-light appreciation to the questions[2]. Where applicable, their inputs are also reflected in the discussion of the questions and answers below. In Annex C to this report you will find a summarizing overview of the answers per nation and per expert. In Annex D all inputs – apart from one nation – are presented integrally.

Imperfect Implementation

Question 1

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

In the Workshop Report (see Annex A) these three facets to implementation were mentioned, without further explanation. This calls for a deeper inquiry into definitions and basis of the facets mentioned. Firstly about '*implementation'*. In an article in The Military Law and the Law of War Review, Nicolas Lang writes about ways to improve '*compliance'* with International Humanitarian Law[3]. Other related expressions he uses in relation to the (defective) practical utilization of International Humanitarian Law (IHL), are: '*respecting*', '*observing'* and '*applying'*. In the preamble of Additional Protocol I (AP I) the High Contracting Parties (HCP) are called to fully *apply* all provisions of the Geneva Conventions and the Protocol in all circumstances and in Article 1 of AP I the HCP's are obliged to *respect* and *ensure respect* for the Protocol. Part V of AP I deals with the *execution* of the Conventions and AP I and gives instructions for inter alia execution, dissemination and repression. Article 80 of AP I describes the obligations of the Parties with respect to taking all necessary measures for the execution of their obligations and to giving orders and instructions to ensure observance of the Conventions and AP I and to supervising their execution. With this in mind, one might conclude that the Workshop-participants in 2013 aimed particularly at Part V of AP I and used the word '*Implementation'* for all aspects referred to in Part V, that itself uses the umbrella '*Execution*'. On the other hand – as we will see in question 2 – the terms '*prevention'*, '*control'* and '*repression'* are not only related to the measures prescribed in Part V of AP I, but also to the provisions of Article 5 AP I and Articles 8/9 of the Geneva Conventions 1949 (Protecting Powers), 6 AP I (Qualified Persons), 7 AP I (Meetings) and 52/53/132/149 of the Geneva Conventions 1949 (Enquiry Procedure). Question 4 will deal with the National Committees. The establishment of National Committees on IHL is not obliged under the Geneva Conventions, nor under the Additional Protocols, but it certainly plays a role in the implementation of IHL. Thus, we can conclude that the

[2] Air Commodore (ret.) Dr. William Boothby (UK) and Commander (ret.) Barrister Christopher Griggs (NZL).
[3] "The Path to Better Compliance with International Humanitarian Law", H.E. Nicolas Lang; The Military Law and the Law of War Review 52, 2013, page 131-144.

Workshop-participants didn't look at the term '*Implementation'* in a limited way, but utilized the word for a whole range of measures and instruments to enhance the *compliance* with, *respect* for and/or *application* of IHL. Maybe the word '*Implementation'* to that end is too limited and somewhat confusing. The broader intentions of the Workshop-participants become more explicit when we take a closer look at the three facets that are related to the word '*Implementation'*.

To begin with '*prevention'*. Aspects that might be covered by the term '*prevention'* are fi.:

- Orders and instructions to ensure observance of IHL (Article 80, paragraph 2 AP I);
- Providing for legal advice and advisers for armed forces and military commanders (Article 82 AP I);
- Dissemination of the Geneva Conventions 1949 and the Protocols as widely as possible in the countries, within the military as well as within the civilian communities (Article 83 AP I and similar provisions in the Geneva Conventions 1949);
- Exchange of national translation of AP I, and laws and regulations that ensure its application (Article 84 AP I and similar provisions in the Geneva Conventions 1949);
- Train qualified persons to facilitate the application of IHL and the activities of the Protecting Powers (Article 6 AP I);
- Ensuring awareness of obligations under IHL with military/persons under command of a military commander (Article 87, paragraph 2 AP I);
- Establishment of National Committees and other National Bodies on IHL (facultative).

The second facet is '*control*'. This may refer to:

- Supervision of the execution of IHL in general, as meant in Article 80, paragraph 2 AP I.
- Preventing of and reporting about breaches of IHL by members of the armed forces or other persons under control of a military commander (Article 87, paragraph 1 AP I);
- Protecting Powers (Article 5 AP I and Articles 8/9 of the Geneva Conventions 1949);
- In relation to their service to Protecting Powers: qualified persons as meant in Article 6 AP I;
- Enquiry Procedure (Articles 52/53/132/149 of the Geneva Conventions 1949);
- International Humanitarian Fact Finding Commission (IHFFC, Article 90 AP I);
- Meetings of HCP's (Article 7 AP I).

The third facet that the Workshop identified under '*Implementation'* is '*repression'* that inter alia relates to:

- Repression of grave breaches and suppression of breaches of IHL (Article 86 AP I);
- Initiate disciplinary or penal action against violators of IHL by commanders (Article 87, paragraph 3 AP I);
- Mutual assistance in criminal matters (Article 88 AP I) and co-operation with the United Nations (Article 89 AP I);
- Responsibility for all acts committed by persons forming part of its armed forces and liability to pay compensation (Article 91 AP I).

In the IHL treaties a specific role is granted to the International Committee of the Red Cross (ICRC), especially in ongoing armed conflicts, but also in relation to preventing and controlling, the ICRC can play a significant role, as can do other humanitarian organizations.

Questionnaire Findings
Most reactions on question 1 showed a general agreement with the facets that were identified by the Workshop-participants, but we also discovered confusion or even disagreement on the terminology. Some contributing nations missed elements in relation to implementation, fi. 'dissemination' was mentioned as the fourth facet, or 'compensation for victims', linked to the third facet 'repression'. One nation was critical about the used terminology: there are many facets to implementation, which overlap and interlink and the language 'prevention, control and repression' may not reflect the terminology used in IHL more generally. Another nation pointed out that not all provisions can be framed in 'prevention, control, repression'. A perhaps more constructive input was the suggestion that the three facets, mentioned in the question, can be summarized in the term 'integration'. One expert stated that it is more complex than this; there are more relevant factors.

As regards content, we discovered that many contributors explicitly or implicitly see 'prevention' as the most important of the three facets. They especially emphasize the role of dissemination and education, and for one nation these even are the key to the other facets. Some, non-European nations point at the absence or defectiveness of 'repression'. To one nation 'compensation for victims', as a species of 'repression', is the central element for IHL. Only one nation comments on the second facet, 'control', but only with regard to terminology ('control' in fact means 'oversight'). As a side-light one expert identified as the first factor: 'willingness to implement'.

In conclusion to question 1 most nations agree with the approach of the three facets to implementation, but the terminology lacks a general understanding and may lead to confusion. The importance of 'prevention' and 'repression' is generally understood, but the second facet, 'control' remains underexposed.

Question 2
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
The Background Document in preparation of the Second Meeting of States on Strengthening Compliance with International Humanitarian Law (Swiss-ICRC initiative), held on June 17/18, 2013, elaborates on the mechanisms in current IHL and points at the non or rare utilization of them[4].

[4] Background Document for the Second Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL) on June 17/18, 2013 in Geneva, May 2013, page 5-6.

Three mechanisms *stricto sensu* are provided for in the 1949 Geneva Conventions and Additional Protocol 1 thereto of 1977:

The Protecting Powers (PP) mechanism is provided for in common Articles 8/8/8/9 of the 1949 Geneva Conventions and Article 5 of Additional Protocol I. It obliges each Party to the conflict to designate a neutral State, with the agreement of the other side, to safeguard its humanitarian interests, and to thus monitor compliance with IHL. In practice, the Protecting Powers system has been used on very few occasions since World War II (in five instances), the last reported instance having occurred three decades ago in the Falklands-Malvinas conflict (1982).

The formal Enquiry Procedure was first provided for in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Article 30). It was later repeated, with additional details, in the 1949 Geneva Conventions (common Articles 52/53/132/149). Pursuant to this mechanism, an enquiry into an alleged violation of the Geneva Conventions must take place at the request of a party to the conflict. Very few attempts to use the Enquiry Procedure have been made since the 1929 Convention was adopted, and none resulted in its actual launching.

The International Humanitarian Fact-Finding Commission (IHFFC) was created in 1991 pursuant to Article 90 of Additional Protocol I. It is competent to enquire into any facts alleged to be a grave breach or other serious violation of the 1949 Geneva Conventions or Additional Protocol I, or to facilitate, through its good offices, the restoration of an attitude of respect for these instruments. The competence of the IHFFC is mandatory if the relevant States are Parties to the Protocol and have made a formal declaration accepting such competence, and one of them requests its services. The parties to an international armed conflict may also use the services of the Commission on an *ad hoc* basis. The IHFFC has not been triggered to date. Regardless of this, and in contrast to the Protecting Powers and Enquiry Procedure mechanisms, the IHFFC's potential as a tool for improving compliance with IHL has been emphasized on various occasions. In 2009, many participants of the 60th anniversary Geneva Conventions' Conference were of the view that the IHFFC was a useful institution, the potential of which has to be used in order to promote compliance with IHL. Participants of the 2011 International Conference of the Red Cross and Red Crescent, while recognizing that all options should be studied with a view to strengthening the international system for monitoring respect for IHL, expressed a desire to find ways of making the IHFFC efficient. Similar views were expressed during the discussions and consultations held since the Swiss-ICRC initiative was launched. It was noted that the Commission is already in existence as a fact-finding mechanism, with members elected and available to carry out its mandate. It was recalled that the Commission has expressed its readiness to be engaged in fact-finding in situations of non-international armed conflicts, in addition to international armed conflicts. Many States were of the view that ways should be examined to revitalize the IHFFC, having in mind the usefulness of a fact-finding function within an IHL compliance system. It was likewise observed that additional efforts should be made to promote awareness of the Commission, both domestically and internationally.

In addition to the three mechanisms outlined above, *Additional Protocol I (Article 7)* provides that the Depositary shall convene a *meeting of the High Contracting Parties thereto* "to consider general

problems concerning the application of the Conventions and of the Protocol" if requested to do so by one or more Parties to the Protocol and agreed to by the majority of States Parties to that treaty. It must be noted that an Article 7 meeting is limited to an examination of "general problems" only and not of compliance more broadly. Moreover, not all States are party to the Protocol. Such a meeting has never been convened.

The analysis of the Meeting of States on Strengthening Compliance with International Humanitarian Law on the defectiveness of the current mechanisms pointed at the following factors:

1. Contrary to other international law systems, IHL has a limited number of mechanisms to ensure compliance with its norms;
2. The current mechanisms are self-contained instruments, not embedded in a coherent, and broader (comprehensive) system;
3. The mechanisms lack an appropriate institutional anchorage (fi. States' Meetings on a regular base);
4. The mandates for the instruments are rigid and narrow (fi. only for IAC);
5. The requirement of consent of the Parties engaged in conflict.

Questionnaire Findings

The Questionnaire for the ISMLLW Congress 2015 showed that the attitudes of the parties, especially the lack of political will to recognize the competence of the mechanisms, as one contributing nation formulated it, is an important factor. Also the limited scope – only IAC, while most current conflicts are NIACs – and the requirement of consent of the parties ('no sovereignty', as one contributing nation stated it) are often called a major problem in relation to the effectiveness of the mechanisms. Other factors that are mentioned are lack of necessary resources and institutional support, and difficult or complicated practices. History shows that states prefer the services of the ICRC instead of Protecting Powers.

Some nations came up with fresh food for thought and more controversial insights on the failing functioning of the current IHL mechanisms. Reluctance to utilize the enquiry and fact-finding mechanisms is caused by the limited influence states have on the composition of these mechanisms. An argument that was already distinguished during the process and meetings of states on strengthening compliance, is that the IHFFC, PP and the Enquiry Procedure in fact act contrary to the interests of states engaged in NIACs, because their utilization in such a conflict might be seen as a (step towards) formal conformation and legalization of the status of the opposing armed group. Therefore states are reluctant to make use of these mechanisms in NIACs. Other nations pointed at the changed global environment in which the IHL-mechanisms have to operate: a fast moving, information driven and coalition seeking world for which the current mechanisms lack the adaptability. Military coalitions seek their own, separate enquiry procedures and other institutions take over the functions dedicated to the (formal) IHL-mechanisms, such as states themselves, Human Rights bodies (NGO's) and the UNSC on an ad hoc basis. Especially for investigation purposes these bodies are quicker, have enough resources and are better structured to disseminate reports, fi. through the social media. An expert-view pointed at the lack of methods whereby individuals can seek compensation for IHL breaches.

In conclusion, all contributing nations and experts seem to understand why these IHL-mechanisms haven't been used much or ever, and see various reasons for this fact. We would say that the most important thereof are the limited adaptability and flexibility of the systems. They seem to be drafted in and for the past world context.

Question 3

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

Mohammed bin Ghanem Al-Ali Al-Maadheed, Chairman of the Qatar Red Crescent, gave a presentation on "The Arab Spring and the observance of IHL in recent conflicts" during the 36th Round Table on Current Issues of International Humanitarian Law in San Remo in 2013, to provide the necessary background information on international humanitarian law (IHL) and its relevance during non-international armed conflicts. He clearly explains the reluctance of states in classifying a conflict being (just) an internal conflict or a NIAC: "The distinction made by humanitarian law between international and non-international armed conflicts has a political basis. Many were opposed to any international regulation of non-international armed conflicts, despite the humanitarian imperatives. Traditionally, States were reluctant to grant any international legal status to rebels, to recognize rebel movements or to legitimize warfare by anyone other than its armed forces. When rebels took up arms against States, States preferred to deal with them under their national law, trying them as common criminals. In this case, the resort to force itself would be illegal and the rebels would be tried for war crimes even without any other violation of international humanitarian law. International law precluded interference by other States in the internal affairs of other States, and States were allowed to use necessary means to suppress rebellions and preserve the territorial integrity of the State. Further, only States were considered as subjects of international law, and it was not conceived how non-state actors, such as rebels, could derive rights and duties under international law. At the same time, it was clear that the humanitarian problems created by internal armed conflict demanded some sort of an international response."[5] The latter observation resulted in a common article 3 to the Geneva Conventions, Additional Protocol II of 1977, that was adopted to address some of the deficiencies in the law regarding non-international armed conflicts, and customary international law, that largely fills the gaps in the regulation of the conduct of hostilities in Additional Protocol II regulating non-international armed conflict. In order to be classified as a NIAC - and not simply as a case of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence' - the International Criminal Tribunal for the Former Yugoslavia has indicated that two factual criteria must be satisfied:

[5] International Institute of Humanitarian Law, Respecting International Humanitarian Law: Challenges and Responses, 36th Round Table on Current Issues of International Humanitarian Law (Sanremo, 5th-7th September 2013), page 65-66.

- The violence must reach a certain level of intensity that distinguishes it from situations of internal disturbances such as riots and isolated acts of violence;
- The parties involved must demonstrate a certain level of organization.[6]

These criteria are were set in the well-known Tadic-case.[7]

Questionnaire Findings

With regard to the answers by the contributing nations we discovered that most nations acknowledge the problem of classification and application of IHL in conflicts. As a recent example of this problem, one nation points at Syria. The nations also explicitly or implicitly share the opinion that the classification issue is rather a factual and legal determination than a political opinion. Judicial bodies are the only authoritative and binding bodies in respect of proper legal classification, although usually *ex post* a conflict, one nation concludes. Nevertheless one will need an instrument to make this assessment and decide upon the classification. Some 'instruments' to that end are proposed, like the UNSC (investigation conform article 34 UN Charter), the International Court of Justice (advisory opinion conform article 96 UN Charter), the IHFFC, the ICRC and independent advisory committees with a binding advise (international and national). One nation refers to a useful website of the Geneva Academy of International Humanitarian Law and Human Rights, that provides country-specific advice on whether or not an armed conflict exists in a given situation (http://www.rulac.org/). Determination of the status of a conflict is one thing, but the acknowledgement by the states and parties concerned is another thing. In that respect, most contributing nations feel that this problem needs to be tackled by coordinated political pressure, especially from (mobilized) international institutions and other states. The EU in relation to Syria was mentioned, and more generally, UN bodies, ICRC, NGO's and other states. At least these international actors can help remind the states and parties concerned of their situation and obligations. Interstate dialogue might be stimulated by diplomatic engagement, conferences and round tables on specific situations. A mere deviant view is that of one nation that asks itself the question whether the non-acknowledgement of a NIAC is a problem at all. The consequence of denial of the application of IHL, leaves a state with its responsibilities under domestic and Human Rights law, that are often more restrictive. One independent expert more or less supports this view. He points out that not acknowledging an IAC is a more important challenge, with respect to the protection of their own combatants. By not acknowledging a NIAC – and that is primarily a decision by the state itself – a state restricts its own options in the conflict.

As an overall conclusion on the responses on the third question we may say that most nations agree on the problem of not acknowledging a NIAC in a situation of conflict. There seems to be little trust in the application of domestic laws and (general) Human Rights Law principles in a given internal conflict. The determination of the status of the conflict (internal, NIAC or IAC) is a factual and legal virtue, to be dealt with by specialized legal authorities. Several political and legal bodies might play a role in this respect. Convincing states and parties engaged in a conflict is of a more political nature.

[6] Ibid, page 67.
[7] ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para. 561-568.

Coordinated, international political pressure amounts for the best chance to succeed in convincing the states and parties involved.

Question 4
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
National Committees have been advocated by the ICRC, the Intergovernmental Group of Experts for the Protection of War Victims and the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995). In a separate ICRC Advisory Service document – available through internet – one can read about these National Committees, their purpose and the establishment of such committees. There is also a document with a table of all the National Committees and other national bodies on international humanitarian law per State in place today. Below we provide for a short extraction of the ICRC documents.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 are the principal treaties governing aid to and protection of the victims of armed conflict. In order to secure the guarantees provided by these instruments, it is essential that the States implement their provisions to the fullest possible extent. Implementation requires the States to adopt a number of internal laws and regulations. They must, for example, establish rules on the punishment of violations, the use and protection of the red cross and red crescent emblems and the fundamental rights for protected persons. In addition, the States are obliged to spread knowledge of the Conventions and Protocols as widely as possible. Owing to the broad range of issues associated with these responsibilities, comprehensive implementation of the rules of international humanitarian law (IHL) requires coordination and support from all the government departments and other entities concerned.

To facilitate this process, some States have created either national inter-ministerial working groups, often called committees for the implementation of IHL or national humanitarian law committees. Their purpose is to advise and assist the government in implementing and spreading knowledge of IHL. Setting up such committees is recognized as an important step in ensuring the effective application of IHL. Such a committee should have the following characteristics:

- It should be able to evaluate existing national law in the light of the obligations created by the Conventions, Protocols, and other instruments of IHL;
- It should be in a position to make recommendations for further implementation, to monitor the law and ensure it is applied. This may involve proposing new legislation or amendments to existing law, coordinating the adoption and content of administrative regulations, or providing guidance on the interpretation and application of humanitarian rules;
- The committee should play an important role in promoting activities to spread knowledge of IHL. It should have the authority to conduct studies, propose activities, and assist in making IHL more widely known. The committee should therefore be involved in instructing the armed forces in

this domain, teaching it at various levels of the public education system and promoting the basic principles of IHL among the general population.

Given its functions, a national humanitarian law committee requires a wide range of expertise. The committee must include representatives of the government ministries concerned with implementing IHL. Precisely which ministries are relevant will depend on the committee's mandate, but they are likely to include Defence, Foreign Affairs, Internal Affairs, Justice, Finance, Education and Culture. It may also be useful to have representatives of legislative committees, members of the judiciary and personnel from the headquarters of the armed forces. It is important that such a committee include other *qualified persons.* These may be individuals not associated with government ministries but who are appointed for their legal, educational, communications or other expertise.

Neither the Geneva Conventions nor their Additional Protocols require such a committee to be set up. It is therefore entirely up to the State concerned to determine how it is created, how it functions, and who are its members. The process by which it is set up will depend on the structure and procedures of the State concerned.

As of 31 August 2014 there are 107 National Committees or other national bodies on IHL. France established such a committee already in 1947 and the most recent establishments of a National Committee took place in 2014 in Bangladesh, Bahrein and Iraq.

Questionnaire Findings
Apart from one, all contributing nations to the Questionnaire have a National Committee in place. Many of the answers given, provide for extensive overviews of the respective National Committees in relation to tasks, composition and influence. They unanimously do perceive a National Committee as a valuable national instrument to enhance the implementation of IHL. The importance of direct access to Governmental bodies is widely acknowledged. Some nations explicitly point at the importance of political influence of the National Committee. Contrary to this more general government-embedded view, one nation suggests that a National Committee better be established as an autonomous and independent institution of the powers of the State or Government, so that the mandate, composition and powers of the National Committee cannot be modified by them.

The idea that a multidisciplinary composition of the National Committee is required, is broadly confirmed. A National Committee should not only consist of Governmental representatives, but also of judiciary, academic and information (media) representatives (experts).

Most nations attribute an advisory and promotional role on all issues related with IHL to the National Committee. One nation seems to go further by proposing that all IHL activities by a state should be decided through a National Committee as the competent authority, in coordination with the relevant authorities. The National Committee should, in its view, also be the monitoring authority over the implementation of IHL on the national level. And proper funding would help its National Committee to be more effective.

On the issue of obligatory National Committees we see different opinions. One contributing nation is of the opinion that a 'soft law' obligation already exists, since its establishment was recommended by Annex I to Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995). Another contributing nation explicitly argues whether such a 'soft law' obligation already exists. Again another nation thinks it should be a legally binding obligation. But most nations do not perceive a legal obligation, nor a 'soft law' obligation. One nation thinks that such an obligation will not have added value, nor will be necessary. Some also point at the difficult process to make it an obligation under international law. Nevertheless, all nations confirm the importance of encouraging states to create a National Committee. To that end ICRC and current National Committees might do a better effort, one nation 'complains'.

The consulted expert puts a question mark on the advisory role of National Committees and emphasizes, with regard to an obligation to create a National Committee, that one should look at states that have no National Committee and where application of IHL is more than a theoretical prospect.

In conclusion we can say that many states have a National Committee on IHL, that mainly serves as an advisory body to the respective governments and is composed of multidisciplinary representatives and IHL experts. The added value of these National Committees is broadly confirmed, but a legal or 'soft law' obligation is by most nations not considered apparent nor necessary. Further encouragement to establish these National Committees is needed and the best we can do.

Question 5
How could the implementation of IHL, by State armed forces be improved in your view?

Starting Point of the Reflection
The consultation process based on resolution 1 of the 31st International Conference of the Red Cross and Red Crescent in 2011 (also called the Swiss-ICRC facilitated initiative), and consisting of Meetings of States on Strengthening Compliance with International Humanitarian Law (IHL) is still going on and will finally result in a fourth Meeting of States in April 2015 and a concluding report to the 32nd International Conference in December 2015. During this process various options for improving compliance were discussed, and the following procedures, created within other compliance frameworks, received the broadest support:

- A periodic reporting system on national compliance with IHL;
- Regular thematic discussions on IHL issues, including on policy-related concerns common to States;
- A fact-finding mechanism.

It was furthermore widely recognized that a regular Meeting of States should be established as a forum for regular dialogue on IHL, one which could also serve as an institutional anchor for other elements of a possible IHL compliance system.

These findings however, relate to the more strategic and political level of improving compliance. The improvement of IHL compliance within or by Armed Forces is different and more practical issue. Proposals to that end can be very important in the IHL practice of nowadays warfare.

One consulted expert for this Questionnaire has a very comprehensive view on this subject. He considers that while war crimes and crimes against humanity can and often are ordered by superior officers, they are generally carried out by low-ranking soldiers and individual fighters. They are therefore the target audience for any truly effective program to enhance implementation. If this is done well, war crimes and crimes against humanity may not actually be committed, even if they are ordered. As was indicated in the September 2013 workshop held by the Society on this topic, the key is to develop a culture among individual soldiers and fighters whereby the core principles of IHL are internalized as part of their moral code. This represents a real challenge. My experience suggests that it is most likely to occur when:

- IHL is incorporated into the basic training of the soldier or fighter.
- The training is delivered in a language he or she understands. This encapsulates the level of language used.
- The training is delivered by someone who the soldier/fighter respects. This suggests that Senior NCOs should be trained to deliver the training. They can be assisted by experts, but it should be platoon sergeants who tell the privates to comply with IHL. It is no good if the IHL disseminator tells them one thing, and the sergeant tells them another – experience suggests they will usually do what the sergeant tells them to do.
- The training is "real", in the sense that it reflects the practical realities for the soldier/fighter on the ground. The trainer should be able to clearly and simply explain why it is in the interests of the soldier/fighter and his immediate group to comply with IHL, even if they are ordered to breach it.
- Field and operational training incorporates practical IHL scenarios. There should be careful de-briefing by military legal advisors, so that soldiers/fighters learn the right lessons before deployment.
- Units are evaluated against their soldiers' compliance with IHL. Ideally, a unit should not be authorized to deploy unless it has passed the IHL evaluation to the satisfaction of the relevant national military legal advisor. It would be useful if there were a way for international organizations to monitor this – it would be a way of seeing trouble "coming down the tracks".

States and non-State actors should, in his view, be encouraged to train their personnel to comply with IHL core principles as a basic fundamental; whether or not the Geneva Conventions or Additional Protocols strictly apply in a particular situation. This has been done by a number of States already. It has the advantage of simplicity and making sure that the State's armed forces (or non-State actor's fighters) do not violate IHL unwittingly, because they thought it did not apply.

With regard to non-State actors he states that the foregoing measures are more difficult to implement, but they can be adapted given time and appropriate commitment. He envisages a real role here for international organizations, as is reflected in the report of the September 2013 workshop. It would be worthwhile for the Society to do what it can to facilitate such efforts – there is

real potential to make a difference. It certainly does not help when such non-State actors are designated terrorists, but that has been the history of internal conflict and it is unlikely to change. We need to devise ways of working within that construct.

Questionnaire Findings
Overseeing the results of the Questionnaire on this question, the majority – if not all – of the contributing nations emphasize the importance of education and training in IHL, not only at military schools, but also during exercises and pre-deployment training and throughout the services, from soldier to staff officer and (superior) commander. Some nations add to this feature the need of integration of IHL in the military doctrine, Rules of Engagement, and apparently somewhat pathetically, the ethos of the armed forces, but meant to attribute responsibility at the highest military and political level. Dissemination of IHL, in the meaning of promoting knowledge and understanding of IHL is mentioned by some nations as a separate activity.

A couple of nations – in one way or another – underline the benefits and importance of exchange on IHL issues by states, especially when working together with other states in a military mission. Exchange on practical experiences, needs to meet the standards (capacity-building), challenges, and best practices between states and in cooperation with international organizations is also advocated by some nations. There should be an international forum to discuss IHL implementation and that facilitates such exchanges. The Meeting of States conferences could serve in that respect. Related to this international engagement of states and organizations is the idea of a circular reporting system on IHL to further enhance compliance with and implementation of IHL from the international level.

Some nations also point at the relevance of suppression and an effective penal and disciplinary system. Violations of IHL by the military should be dealt with in accordance with primarily domestic laws that implement the international obligations under IHL. A consulted expert adds to this issue that most war criminals will continue to be prosecuted through national courts, such as courts martial or civilian tribunals where courts martial have been abolished. That is reflected in the principle of complementarity under the *Rome Statute of the International Criminal Court*. It is also the most effective way of sanctioning such crimes, provided that the local law is adequate and the organs of justice are properly equipped and prepared for the task. A useful area of activity for the Society would be to assess national jurisdictions in this respect and provide assistance where necessary. We have accumulated a lot of expertise in military justice.

Other interesting remarks related to this question are the improvement of IHL by the formation of legal advisers in the armed forces (according to article 82 of Additional Protocol I), the active verification of the correct implementation of IHL (as a complementary facet to education, training and understanding of IHL) and the support of or participation in the implementation of IHL by other states. The latter is not just favorable for the supported state, but also for the supporting state itself.

In conclusion we received many worthwhile answers and ideas on this question, most of which are related to education and training, dissemination and international consultations and exchange on IHL implementation issues.

Question 6
To what extent and how should the national justice sector be trained in IHL?

Starting Point of the Reflection
During the General Assembly of the United Nations on 9 October 2014 the ICRC was invited to make a statement on "The rule of law at the national and international levels". The statement expressed inter alia the following:
"The rule of law encompasses judicial institutions and normative frameworks that should be implemented at all times. In armed conflict, upholding the rule of law strengthens the effectiveness of international humanitarian law (IHL), which governs such situations. Respect for IHL not only has an impact on saving lives and reducing suffering, but also gives authorities the necessary platform on which to rebuild communities shattered by violence following the end of hostilities.

States have the primary responsibility to respect and ensure respect for IHL. This requires them to develop clear normative frameworks and strong judicial mechanisms that include accountability measures, so as to prevent and punish serious violations of IHL. As this forum is aware, to have greater impact, such action needs to be undertaken already in peacetime. Based on State practice that the ICRC has collected, compiled and shared, through its publicly available databases on national implementation and customary IHL, it is encouraging to note the continuous progress made towards this objective. States have taken a number of measures to ensure that national legislation and civilian and military judicial systems remain aligned with IHL and related norms that protect those affected by armed conflict.

In this regard, it is important to include a range of safeguards to ensure that all persons deprived of their liberty are protected from arbitrary detention and denial of their fundamental rights and freedoms. Such safeguards include regulatory frameworks, such as inspection and complaint mechanisms, as well as judicial guarantees in conformity with IHL and relevant international law. While the adoption of domestic legislation and related measures is an important first step towards upholding the rule of law, it must be followed by extensive awareness-raising efforts to translate knowledge into appropriate behaviour. Therefore, the ICRC, at the invitation of States, organizes and participates in programmes aimed at audiences with a direct bearing on ensuring respect for IHL and other applicable norms, such as the armed forces, law-enforcement agencies, civil servants, the judiciary and parliamentarians. The ICRC specifically recognizes the important contribution made by judges in this context and is planning to organize an expert consultation to further support their role."[8]

From this statement it is clear that ICRC highly values the education of the law-enforcement agencies and the judiciary, and assign a special role in this respect to judges.

[8] General Assembly of the United Nations, 69th session, Sixth Committee, items 82 of the agenda, New York, 9 October 2014.

Late 2015, the UN General Assembly adopted a Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[9] The Basic Principles and Guidelines are led down in an Annex to the resolution. One of the obligations in this annex is that of providing *Guarantees of non-repetition*. These guarantees should include, where applicable, any or all of the listed measures (in total 8), which will also contribute to prevention. In subparagraph (e) the following measure is formulated: 'Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces.' These statements emphasize that the UN and ICRC find it important that (also) the national justice sectors are well educated and trained in IHL.

Questionnaire Findings

The responses on the Questionnaire gave the following output. While most nations fully agree that the national justice sector should be trained in IHL, some nations have a more differentiated approach. It depends on the nature of the legal system in a state whether training in IHL, and to what extent, is needed. One nation explains that the national justice sector of that particular country is normally not involved in IHL matters, since this is the prerogative of the military courts and prosecutors. If civilian prosecutors and courts have to deal with IHL issues, a flexible training system should provide for the adequate training in time. In another nation, the military justice is fully incorporated in the civilian criminal courts procedure, and therefore IHL knowledge should be present in these civilian courts and prosecuting offices. A third nation states that there are specialized branches within the national justice sector that deal with military justice and hence may deal with IHL matters. Training in IHL for these specialized branches is paramount, but not for the national justice sector as a whole. A recent development, that this responding nation also points at, is the departure of civilians to war areas in order to fight with armed groups and their return to their homeland. They will be tried by civilian courts, that will need to have knowledge of IHL too. This development requires the dissemination of IHL knowledge to a broader national justice audience. One nation is of the opinion that the national justice sector is lacking training in IHL. A consulted expert seems to implicitly share this opinion for judges and personnel of international human rights courts and institutions, when he says that in his view, training in IHL should be extended to this category as well. Anyhow, and as said before, many responding nations confirm the necessity of IHL training for the national justice sector. IHL should be integrated in the training programs of (relevant sectors of) the national security sector, or at least should this sector be equipped with IHL knowledge.

On the question of how this training should be organized, many answers are given, such as seminars, workshops, special literature on IHL, theoretical and practical sessions on the national and international laws, and education on universities (fi. a special master study on IHL and Moot Courts training). Some nations point at the participation of the national justice sector in relevant IHL communities, like the National Committees on IHL, and in the training programs of the military. Special attendance is asked by one nation to specific IHL-knowledge enhancing activities, like taking

[9] Resolution 60/147 of 16 December 2005, General Assembly A/RES/60/147, published 21 March 2006.

part in the training at the Institute for International Criminal Investigations in The Hague or participation in UN or ICC criminal investigation missions. The EU is drafting a special training program for investigators in cases of genocide, crimes against humanity and war crimes. The establishment of specialized courts for IHL cases might, according to one responding nation, also have a positive impact on the increase of knowledge and experience in IHL among the members of the national justice sector.

In conclusion, most nations see the benefit of special IHL training for the national justice sector, although the circumstances of states may differ, and therefore training has to be adjudicated to those branches and sectors within a national justice sector, that really do engage in IHL cases. Training sessions and seminars on IHL will certainly help, but there can be done more, like offering (master)studies at universities, providing for specialized training in criminal investigation in IHL cases and participating in such investigations and membership by the national justice sector of the National Committee on IHL.

Progress Through International Criminal Law

Question 7
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 Reflection
At the Society's Workshop of September 2013, the progress made in terms of repression has been discussed, particularly in the area of international criminal law. It was noted that the ICTY, ICTR and ICC have done a good job, but areas of concern remain. One problem with international criminal law is that it operates very slowly. The facts of the case, which happened on the battlefield, need to be proven beyond a reasonable doubt, and this takes time. As one participant pointed out, the criminal court system is slow and deliberate—as it well should be to ensure proper carriage of justice. It was therefore understandable that the ICC started off with the Lubanga case on child soldiers, since this was relatively easy to prove. When the Court then tried to go get the "big guys" in other African countries, it was confronted with massive political resistance. Another downside is that the ICC appears to be a selective African court, which upsets many in Africa and harms the Court's credibility. Many felt it is nonetheless very important to signal that violations of IHL will not be tolerated, and that there is an effective criminal mechanism in place to hold perpetrators to account. Additionally, one participant argued that criminal law does not necessarily deter, and therefore the greatest value of the ICTY can be said to be its contribution to the shaping of an international legal conscience.

The aforementioned Annex to the UN General Assembly Resolution of 2005 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see Question 6) provides for a more comprehensive framework for reparation measures (see in

particular chapter IX: Reparation for harm suffered). The resolution in this respect is not obligatory, but a recommendation, that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general. It could be of interest to investigate to what end states have followed this recommendation.

Questionnaire Findings
This question raised a great deal of interest amongst the respondents. A wide variety of views were expressed, and there was no consensus on the best means of implementation for reparative jurisdiction. One common element to most responses is that many saw a very positive development in the enhancement of reparation tools for victims. It is in assessing the benefits and challenges of implementation at the national and at the international levels respectively that respondents have divergent views.

Some respondents favored an implementation at the international level, which was seen as posing less practical difficulties than if it was implemented at the national level. Other posited that an international implementation might result in State disempowerment. The idea to entrust the ICC with a compensation jurisdiction has also been proposed, which is believed to offer this court system additional tools to counter impunity and IHL non-compliance. It is noted that the ICTY and the ICTR do not have competence to adjudicate reparations and that international law does not presently offer wide basis for reparation based on individual responsibility. Historically, compensation for war damages was rather the result of settlement negotiation between states.

It has been observed that reparation can take many forms, which may not equate to material compensation. The recognition of victims' suffering is also part of a process that provides a form of reparation, which is also empirically associated to the restoration of justice.

The interest shown by respondents is clearly indicative that reparation is an area that deserves to be seriously examined by states and international law stakeholders.

Lessons Learned from Other Areas of Law

Question 8
How could IHL benefit from what international human rights law compliance mechanisms have accomplished?

Starting Point of the Reflection
During the Society's Workshop of 2013, there was significant discussion on how IHL could benefit from what was seen as human rights law accomplishments. For example, it was considered that IHL might adopt similar procedures to those used by human rights tribunals and jurisdiction. Caution was nonetheless issued that IHL should be preserved from shortcomings associated with the Human

Rights Council, including the perceived problem of political selectivity. The recent events in Libya were cited as a very good account of how IHRL standards could be useful in the context of an armed conflict. In this particular situation, the inquiry commission established by the Human Rights Council had the cooperation of the authorities on the ground, which had political incentives to cooperate. These incentives are not always present. Therefore, the IHRL standards and practice are not always easily transposed in IHL situations.

Questionnaire Findings
Many respondents recognized that IHRL benefits from a robust system of inquiry and adjudication mechanisms, which is seen as the result of a strong State involvement and support. For European States, the European Convention on Human Rights and its Court constitute key factors in achieving greater human rights compliance amongst the states party to the Convention.

A prevalent dimension in the answers is the importance of the role of states. For example, in the context of non-international armed conflicts, the state is seen as holding the dual responsibility to implement IHL and protect HR. It has also been observed that political consideration would likely impede state support to reporting mechanisms that would assess state compliance. Lastly, states are more likely to take corrective actions following IHRL abuses in response to an international inquiry or decision. However, there is no jurisdiction that could adjudicate on such abuses, except perhaps in the European context, where the European Court of Human Rights is partially fulfilling this role.

While developments that have occurred in the realm of IHRL are seen as positive, human rights compliance mechanisms do not appear to be easily transferred to IHL realities. The exercise of jurisdiction of IHRL adjudicative bodies on IHL issues has been reported to be limited and exercised inconsistently. These bodies have also been described as lacking IHL expertise. For instance, it has been suggested in various responses that an independent fact finding body that would review periodic state reports and issue IHL interpretations might be a desirable option, although some pointed that it might be an unrealistic one at this time.

Question 9
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
During the Society's Workshop of 2013, the participants explored the suitability of using modern international treaties institutional development processes in the context of the Geneva Conventions legal regime. Some treaty regimes have a build-in system of conference of the parties (COP) which regularly reviews the functioning of the treaty system, and which has the power to establish bodies responsible for the better implementation of the treaty. For example, environmental treaties, the Chemical Weapons Convention, or the Convention on the Protection of Cultural Property in Armed

Conflict operate in this manner. The question that was debated was whether the treaty regime of the Geneva Conventions would benefit from having a similar, regularly organized COP.

In the aforementioned Swiss-ICRC initiative (see Questions 2 and 5), four options – more or less copied from other legal regimes – for institutionally improving adherence to IHL were proposed: a periodic reporting system, regular thematic discussions, a fact-finding mechanism and regular Meetings of States. Following these proposals, IHL might in future become more effective.

Questionnaire Findings
On this question, the respondents to the Questionnaire express in various ways the necessity to establish a constant dialogue and to revisit periodically issues of common interest. The Geneva Conventions do not include or contemplate a formal structure for the State Parties to meet on a regular basis and suggestions differ on the means that could be employed to facilitate an ongoing dialogue between the States. It has also been observed that such mechanism have been discussed since the moment the Geneva Conventions were adopted, but never resulted in a tangible system. Consequently, the Geneva Conventions stand out more or less as an exception system which lacks a Conference of the Parties. This might result from historical reasons and the context that prevailed in the years when the conventions were adopted.

The ICRC has often been cited as an organization playing a key role in providing a forum for and a structure to those exchanges. Other bodies were also mentioned, such as the Assembly of States, parties to the Rome Statute and the UN. The need for dialogue is widely recognized but the ways in which it could be facilitated are very diverse.

Question 10
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 Reflection
The International Humanitarian Fact Finding Commission (IHFFC) is a body rooted in the commitment of States Parties to the Geneva Conventions (and to their Protocols) to respect and to ensure respect for these treaties. Thus, by recognizing the competence of the IHFFC, States contribute to the implementation of IHL and to the protection of victims of armed conflicts. By accepting the Commission's competence by declaration, a State consents to an enquiry on an ongoing basis, and in return obtains the right to request an enquiry in conflicts between other declaring States.

The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva. The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly.

A number of participants to the Society's Workshop of September 2013 seemed to agree that the problem regarding the IHFFC is that the members of the commission (who were referred to as "15 poor guys") do not have enough political support from States to impact as meaningfully as desirable in post-conflict contexts. It was suggested that this may be the reason the Human Rights Council (HRC) has shown resistance in the past to work with the IHFFC, despite the potential complementary roles of the two institutions. However, the integration of the IHFFC into a conference of the parties could give it the necessary political support and legitimacy.

Questionnaire Findings
The respondents to the 2015 Questionnaire seem to have varying and often opposed views on whether the IHFFC and the HRC could play mutually complementary roles. The importance of the existence of both of them and the value of their respective contributions is recognized. There is a prevalent view that these bodies suffer from perceived lack of legitimacy amongst states and stakeholders. Consequently, it is difficult to enforce the recommendations driven by their findings. However, while it is recognized that there is a degree of interaction between the two bodies and that cooperation is desirable where possible, they rely on distinct legal regimes and pursue different mandates making their complementarity limited if at all possible.

Specific Responsibilities for States Not Directly Involved in an Ongoing Armed Conflict

Question 11
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
During the Society's workshop of 23 September 2013, one of the participants quoted Ms. Carla Del Ponte, who as a member of the Independent International Commission of Inquiry au the Syrian Arab Republic, said that she "believes there is an emerging norm that arms transfers should not be undertaken where there is a real risk that they will be used in the commission of violations of IHL".

The question remained: is there indeed such an emerging norm? We can refer here to Art. 6 § 3 of the Arms Trade Treaty, recently adopted by the UN General Assembly in April 2013, which states that "a State Party shall not authorize any transfer of conventional arms covered under the treaty if it has knowledge at the time of authorization that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks directed against civilian objects or civilians protected as such, or other war crimes" and Art. 7 of that same treaty, stating "if export is not prohibited under article 6, each exporting State Party shall assess inter alia the potential that the arms could be used to commit or facilitate a serious violation of IHL and consider whether measures could be undertaken to mitigate the risks and if an overriding risk remains at stake the State Party shall not authorize the export."

Ms. Del Ponte also reportedly said that States that fund and support the Syrian armed opposition must ensure that those armed groups that benefit from their money and their arms, conduct their hostilities in line with IHL, and she explained that in practice it means that they do not use those arms to target civilians, that they do not torture when they detain, and that they do not execute those they capture. Similarly, she said, Russia and Iran must use their leverage to pressure the Syrian government to conduct their attacks proportionally and observe the distinction between civilians and those who are directly participating in hostilities. Civilians who are in areas that the government views as sympathetic to the opposition should not be targeted for their geographic proximity, their sectarian affiliation, or their political beliefs. But IHL compliance does not only apply to States: it is also necessary to address the issue of compliance by non-state actors!

Questionnaire Findings
The approach taken by the respondents is generally aligned on the idea that there is no norm or obligation for States to ensure that aid in the form of weapons and operational capabilities is employed in a manner that is compliant with IHL. There is an acknowledgement however that this is an important issue and that States providing such aid should exert influence on the recipients of their military aid, who can be States or Non-State Actors, do comply with IHL to the maximum extent possible.

Interestingly, some States may be party to the European Union Code of Conduct on Arms Exportations, which have provisions on exporting States obligations. There are also domestic legal provisions that will deny issuing export licenses of military weapons or technology in situations where there exist sufficient indicia that these weapons or technologies might contribute to human rights violations, and other illegal or reprehensible activities. While these legal constructs makes no specific reference to IHL, it seems to be indicative, at a minimum, of an aspirational goal that should guide some States' policies and practice.

Still, according to many respondents, most States are likely to emphasize on the distinction between the responsibility engaged by their own conduct and the responsibility engaged by another State or organization. Consequently, based on respondents answers, it seems that ensuring IHL compliance by the recipient of weapons falls more within the realm of the aspirational goals rather than in that of emerging norms.

Non-State Actors

Question 12
How should one deal with armed opposition groups which are ignorant of the law?

Starting Point of the Reflection
How do we deal with armed opposition groups unknowing about the law? Ignorance might not be an excuse, but it definitely is a real problem, as the majority of the current conflicts in the world are intra-state conflicts. This does not mean that there are no non-state actors who respect IHL. Some larger and better-organized groups such as the FARC and the Taliban have their own

military manuals, which they expect their members to obey (although these manuals do not always reflect IHL properly). However when the groups get smaller or more fragmented, such as for example the current situation in Syria with several independent groups, this instantly becomes significantly more difficult. The ICRC did have some dissemination activities with these groups, in an attempt to make them realize the importance of respecting IHL, but there's still a large disregard to it. There is also the work of the organization Geneva Call, which educates approximately 80 armed groups on IHL, and encourages them to sign a so-called deed of commitment. For example they have had significant success regarding the non-use of antipersonnel mines.

Questionnaire Findings
The respondents recognize the importance to maintain communications open with any group that could be brought to increase its compliance to IHL through enhanced awareness or otherwise. An interesting avenue that has been explored is to identify the political wing of armed opposition groups when feasible or appropriate as a first step. These negotiations are assessed to have the potential to facilitated reconciliation.

The political nature of the interaction with armed opposition group has also been identified. A such, the involvement of independent, impartial and credible NGOs is seen as a means that could achieve at least in part, some educational and dissemination functions.

The questions of incentives for armed opposition groups to comply with IHL norms and potential amnesties granted to their combatants have also been explored by a number of respondents. Again, the political nature of these questions has been identified as a limiting factor to granting incentives to these groups and as an added challenge to a broader IHL implementation.

Question 13
Is it a problem that some armed opposition groups are designated as terrorist organizations? Please explain.

Starting Point of the Reflection
An additional problem is presented by the fact that some of these groups are designated as terrorist organizations. The panel and participants of the Workshop of September 2013 did seem to generally agree on the fact that labeling a group as terrorists, which is also impliedly a political decision, runs counter to the goal of increasing compliance with IHL.

Referring to the 2010 Holder case in the US, it was noted that there is a difference between the EU style of branding groups as terrorists and the US style. In this case, an organization was convicted under the US Patriot Act for providing material support to terrorist groups because they wanted to advise them on humanitarian law matters. The finding in the case was based on the principle that any assistance could help to legitimate the terrorist organization and free up its resources for terrorist activities. In the EU, on the other hand, the designation of a group as a terrorist organization has implications for the members' movement and assets but does not apply to the dissemination of

IHL to that group. A number of participants indicated that the US terrorist designation had not affected their work because they had not planned to engage in IHL training with any of these groups. However one participant pointed out that the US legislation also affects the dissemination of humanitarian aid particularly in cooperative efforts between the American Red Cross and other Red Cross organizations.

Questionnaire Findings
Most respondents concur that the designation of armed opposition groups as terrorists does have negative impacts on IHL awareness, compliance and enforcement. States may nonetheless be justified to designate those groups as terrorists and treat them accordingly.

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. Respondents to the questionnaire seem to concur that states can, on a case-by-case basis, legitimately and appropriately designate armed opposition groups as terrorist and treat them as such.

Annexes

A – Workshop Report: The Challenges in the Implementation of International Humanitarian Law, 23 September 2013.
B – Questionnaire for the Prague Congress
C – Summarizing overview of the responses
D – Responses of the contributing nations (integral)