

INTERNATIONAL HUMANITARIAN LAW (IHL)

Paper by the International Committee of the Red Cross

INTRODUCTION

1. International Humanitarian Law regulates armed conflict to limit adverse humanitarian effects on both combatants and civilians, and includes, *inter alia*, the 1949 Geneva Conventions and their 1977 Additional Protocols, weapons treaties, the International Criminal Court Statute, and the Child Soldiers Protocol.
2. This policy paper covers three aspects of IHL:
 - encouraging better IHL implementation through national implementation;
 - promoting Commonwealth work on controlling the transfer of small arms and light weapons to IHL violators;
 - announcing the Customary IHL Study.

ENCOURAGING IMPROVED IHL IMPLEMENTATION

3. Commonwealth States have a reasonably good record of treaty accession in matters of IHL.¹ For example, 52 of the 53 countries of the Commonwealth have ratified the 1949 Geneva Conventions,² and a number of other IHL treaties have over 40 accessions from among the 53 Commonwealth states.
4. However, recent years have shown that in many countries the legislation needed to implement the obligations arising from these Conventions is missing. While not all of the principal 25 IHL treaties require implementation, many do. This is all the more true in common law states, where treaties are not normally directly applicable in the domestic law of States Parties. However, even in states where direct applicability may be possible, the nature of many of the obligations which require implementation means that legislation is still necessary to give effect to these obligations. For example, to give effect to an obligation to enact criminal provisions that incorporate grave breaches of the Geneva Conventions it would be necessary to provide for the nature of the punishment to be imposed in the event of a breach.

(a) Treaty accession

5. The Advisory Service on IHL of the International Committee of the Red Cross (ICRC) was established in 1996. Its aim is not only to encourage and support states in ratifying or acceding to IHL treaties, but also to assist states in adopting appropriate national legislation in order to give effect to their IHL treaty obligations. The table that will be distributed to states gives an overview of treaty accession and legislative incorporation of the IHL obligations undertaken. Also highlighted is

¹ Including the 1949 Geneva Conventions and their Protocols, the Hague Cultural Property Convention and its Protocols, the International Criminal Court Statute, the Environmental Modification Convention, the Biological Weapons Convention and the 1925 Geneva Protocol, the Chemical Weapons Convention, the Convention on Certain Conventional Weapons and its Protocols, the Anti-Personnel Landmines Convention, and the Optional Protocol to the Convention on the Rights of the Child.

² Nauru is the only state that has not yet ratified the 1949 Geneva Conventions.

the progress that states have made since 1999, when the ICRC last presented an overview to Commonwealth Law Ministers, at their Port-of-Spain, Trinidad and Tobago Meeting.

6. As will be seen from the table to be presented, the 145 treaty accessions of the 53 Commonwealth states since 1999 is impressive. This represents 15 per cent of all treaty accessions ever undertaken by Commonwealth members.

(b) Legislative implementation

7. However, legislative action lags behind. Of the nine major legislative measures that may be taken by each state, there have been a total of only about 30 such laws adopted since 1999. Meanwhile, according to the ICRC's records, some 175 laws for which treaty obligations appear to require adopting legislation remain unadopted by Commonwealth states. Without such legislation, one consequence is that states may not be able effectively to punish or deter the commission of grave breaches of IHL. Following the publication of the ICRC's *Roots of Behaviour in War* study, it appears more important than ever to ensure that national laws and regulations reflect international obligations.³ We hope that recent efforts to adopt new model legislation⁴ in these areas, together with more direct work with states, will help improve these figures. Further, regional and Commonwealth meetings have been held, for example the July 2005 Nairobi Commonwealth Meeting of National IHL Committees, to help make states aware of the technical assistance available to support their consideration of existing legislation and their adoption of appropriate and effective laws.

(c) National Committees

8. Thirteen of the 53 states of the Commonwealth have National IHL Committees.⁵ The primary role of a National Committee is to help the government in carrying out its IHL obligations, in particular, in the areas of implementation and dissemination, and in its consideration of IHL treaties to which the state is not yet a party. Many government departments as well as the armed forces have a responsibility for applying IHL, and the National Committee can help to bring representatives together and provide a practical means for ensuring effective co-ordination and general oversight. The ICRC's Advisory Service therefore calls upon states to engage in more "TLC", or IHL Treaty accessions, Legislative implementation, and the establishment of National IHL Committees.

9. In doing so, the ICRC stands ready to assist all Commonwealth states in their work towards full implementation of IHL treaty obligations.

Action by Law Ministers:

10. Commonwealth Law Ministers, meeting in Accra, may be invited, in their final statement, to encourage member states to consider acceding further to IHL treaties, to ensure effective domestic implementation of those treaties adopted and to consider the establishment of National IHL Committees. Law Ministers may also wish to encourage follow-up to the 2003 Commonwealth Red

³ Available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/FC4181278BEE58FEC1256ECA00357055>, the conclusions of which included that IHL should be seen as a political and legal matter regulated by norms, rather than a moral one, and that training of bearers of weapons and the enforcement of sanctions for IHL lapses are essential.

⁴ Such as the 1949 Geneva Conventions and their Additional Protocols, the International Criminal Court Statute, the Anti-Personnel Landmines Treaty, the Chemical Weapons Convention, and the Biological Weapons Convention.

⁵ Worldwide, 73 of 192 states have such committees. The Commonwealth states with committees are Australia, Canada, The Gambia, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Sri Lanka, Seychelles, Trinidad and Tobago, and the United Kingdom.

Cross and Red Crescent Conference on IHL, including the measures contained in the summary report, and the holding of a second such Conference in 2007.

Action by the Commonwealth Secretariat:

11. The Commonwealth Secretariat could be invited, in co-operation with the ICRC, to assist states in drafting model provisions, for example with respect to the Hague Cultural Property Convention and its 1954 and 1999 Protocols, the latter of which makes explicit reference to criminal provisions which need to be adopted.

PROMOTING COMMONWEALTH WORK ON CONTROLLING THE TRANSFER OF SMALL ARMS AND LIGHT WEAPONS (SALW) TO VIOLATORS OF IHL

12. In order to enhance the protection of civilians during and after armed conflicts, the ICRC promotes measures aimed at achieving a long-term reduction in the availability of arms to violators of IHL and in the misuse of weapons by arms bearers.

13. Article 1, common to the four 1949 Geneva Conventions, requires Parties not only to respect the rules of international humanitarian law, but also to ensure respect for these rules. As affirmed by States Parties to the Geneva Conventions at the International Conference of the Red Cross and Red Crescent in 2003, this requires strict controls on the availability of weapons and ammunition to ensure that they do not end up in the hands of those who will use them to violate international humanitarian law (Agenda for Humanitarian Action, Final Goal 2.3).

14. Small arms and light weapons are a particular concern, as their availability is subject to much fewer controls than larger conventional weapons. The adoption of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in 2001 was a first step by states towards addressing this issue at the global level.

15. The ICRC has been working with states and regional organisations in order to have states strengthen their arms transfer regulations. In particular, it has urged the inclusion in regional arms transfer documents, as well as national laws and policies, of requirements to assess the recipient's respect for international humanitarian law and to deny transfers when there is a clear risk that the proposed transfer will be used for serious violations of this law. This is consistent with the commitment in the UN Programme of Action that states should "assess applications for SALW export authorizations according to strict national regulations and procedures (...) consistent with the existing responsibilities of States under international law (...)" (Section II, paragraph 11 of the Programme of Action).

16. Several regional organisations (e.g. the OAS, EU, ECOWAS, as well as the East African States party to the Nairobi Protocol) have adopted legally binding agreements, codes of conduct or model regulations in the area of small arms control. Requirements to consider the recipient's respect for humanitarian law when transferring small arms has been incorporated into several of these. Yet only a handful of countries have to date included criteria based on humanitarian law in their *national* arms transfer laws or policies. In addition, the humanitarian law references included in various regional documents differ and not all regions have adopted such documents.

17. At the global level, the ICRC has encouraged:

- the implementation of the UN Programme of Action;
- the development of an international agreement on the marking and tracing of such weapons;
- further work on controls on brokers and agreed standards for international arms transfers.

Action by Law Ministers:

18. Commonwealth Law Ministers may wish to consider the need for further work to implement the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons, including the development of global arrangements to regulate the activities of arms brokers and to establish common standards for arms transfers based on states' responsibilities under international law, including international humanitarian law.

19. Commonwealth Law Ministers are also invited to consider including, in all national and regional norms regulating arms transfers, a requirement to assess the recipient's likely respect for international humanitarian law and a requirement not to authorize transfers if there is a clear risk that these arms would be used for serious violations of international humanitarian law.

Action by the Commonwealth Secretariat:

20. Law Ministers may consider mandating the Commonwealth Secretariat to draft Commonwealth guidelines on national regulations and procedures for applications for export of small arms and light weapons.

ANNOUNCING THE CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY

21. Treaty and custom are both sources of international law which bind states. While many treaty rules of international humanitarian law are binding on almost all states, such as the four Geneva Conventions of 1949, others, such as the two Additional Protocols to the Geneva Conventions of 1977, are not binding on all states (163 and 159 respectively of 192), including some countries which are or have been involved in armed conflict. Therefore, in order to have a comprehensive view of the rules applicable in times of war, it was necessary to try to uncover those rules which, by virtue of state practice, have become part of customary international law and are therefore binding on all states.

22. The ICRC was requested by states in 1995 to produce a study on the rules that had developed into customary international humanitarian law, and the Study, the three volumes of which include some 5000 pages, was launched this year. The 161 rules in the Study⁶ cover all major areas of IHL, and will be used by the ICRC in its discussions with states on aspects of IHL. It may prove useful for armed forces in their training on IHL, and may also have an impact on legislation adopted in order to implement international humanitarian law obligations.

⁶ An overview of the study is available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf).