

Safeguards to Ensure Non-Politicized State Dialogue on International Humanitarian Law (IHL)

IHL and the principle of non-politicization

1. The principle of non-politicization is woven throughout the fabric of IHL and is fundamental to its effective implementation.
2. As recognized in its preamble, the 1977 Additional Protocol I to the 1949 Geneva Conventions applies “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.” Showing restraint and mercy in armed conflict requires that opposing combatants ignore the political context that made them enemies, and instead recognize their common humanity. Thus, the law that constrains war must be above politics.
3. The 1949 Geneva Conventions recognize the special role of impartial humanitarian organizations and neutral Protecting Powers in helping to implement the law and to ameliorate suffering in war.
4. The fundamental principles of the Red Cross and Red Crescent Movement recognize that non-politicization is essential for impartial humanitarian organizations to be effective in reducing human suffering during war.
5. An outcome to this intergovernmental process that embraces the fundamentally non-political character of IHL and that promotes truly non-politicized State dialogue would play an important role in enhancing respect for IHL.

Introduction and Overview

6. The United States sees great potential for regular discussions between States to strengthen respect for and implementation of IHL. States are responsible for implementing IHL and, to fulfill these responsibilities, have personnel working to address the practical issues necessary to ensure that IHL is respected and effectively implemented. Intergovernmental meetings that are open to all States could promote the sharing of good practices and lessons learned among diverse countries that otherwise do not regularly engage in dialogue with one another on IHL issues.
7. However, potential State dialogue on IHL issues must not be subject to politicization. The effectiveness of State dialogue in strengthening respect for IHL depends on creating a “safe space” – a non-confrontational and respectful environment that avoids politicization. On the other hand, taking advantage of IHL discussions to discredit or promote a State party to a conflict would weaken IHL, which applies without regard to the bilateral and regional politics of an armed conflict. Politicizing discussions would make States reluctant to participate substantively in the dialogue. Heightened attention to the politicization of dialogue would divert attention away from a focus on good practices in the field and toward political perceptions and so-called “point scoring.” In addition, measures to reduce the risks of politicization must be considered and agreed to in order to achieve consensus on new opportunities for State dialogue on IHL issues.

8. The risks of politicization must be addressed by detailed and objective safeguards. States may interpret the general principle differently and have different perspectives about what conduct qualifies as politicized. To ensure that dialogue is not taken in politicized directions, it is necessary to go beyond a general endorsement of the principle of non-politicization and to develop specific safeguards that can be applied objectively. Particularly if States are to establish a regular, intergovernmental dialogue on IHL issues, having clear, written safeguards to address the risks of politicization is necessary to provide assurances to all participating States and to ensure continuity over time.
9. This paper proposes seven specific safeguards to ensure non-politicized meetings: (i) endorsing the principle of non-politicization; (ii) focusing on thematic, non-contextual issues; (iii) participation by IHL practitioners involved in the State's implementation of IHL; (iv) each State addressing its own practice and not criticizing the practice of other States; (v) focusing on good practices rather than non-compliance; (vi) meetings for discussion and exchange of information and not to negotiate text; and (vii) closed meetings to facilitate detailed, substantive discussions.
10. The safeguards in this paper draw from the guiding principles in Resolution 2. The safeguards reflect existing practices in holding non-politicized discussions that we have observed. We have also sought to incorporate in this paper many constructive ideas that we have heard from other States in this intergovernmental process.
11. These safeguards are complementary and reinforcing. Each alone is insufficient to ensure non-politicization, but together they could form effective modalities that should be incorporated in the documents establishing the mandate or procedures for regular State dialogue on IHL issues. States could also agree, by consensus, to identify additional safeguards or improvements to these safeguards.

Seven Specific Safeguards

(I) Endorsing the principle of non-politicization.

12. Resolution 2 emphasizes the importance of avoiding politicization. Endorsing this principle and understanding its importance to IHL should be a key part of the establishment and conduct of further State dialogue on IHL issues.
13. Documents that provide the mandate or procedures for the State dialogue should reflect the importance of this principle. Participating State representatives and practitioners should accept that their conduct during the meeting should comport with the principle of non-politicization. Chairpersons or facilitators of the discussions should also agree to abide by this principle in their roles and to use their roles to ensure that the safeguards are applied in the discussion.

(II) Focusing on thematic, non-contextual issues.

14. As suggested in Resolution 2, the dialogue should be “non-contextualized.” The focus of the State dialogue should be on thematic issues of practical relevance to a significant number of States. For example, the meetings would not be focused on particular States or contexts.

Moreover, States should not seek to use thematic, non-contextual topics as a proxy to single out particular States or specific incidents for criticism, even if such States are not mentioned by name.

15. A focus on thematic, non-contextual issues would not, however, preclude States from bringing their own experiences and practices to a discussion of a thematic topic.
16. Selecting issues for discussion by consensus, among issues nominated by States, would also help ensure the discussion remains non-politicized.

(III) Participation by IHL practitioners involved in the State's implementation of IHL.

17. Although it is up to each State to decide on the composition of its delegation to an intergovernmental meeting, States are encouraged to send their practitioners in IHL – particularly military and legal experts – who have been involved in their State's practice in IHL to participate in meetings.¹ The participation of practitioners could also help avoid controversies of a political or ideological nature and ensure a focus on practical issues of IHL implementation.
18. Participation by the State's IHL practitioners will also help ensure that the meeting's discussion is heard directly by those who can use the information from the meeting to help improve their respective State's continued implementation of IHL.

(IV) Each State addressing only its own practice and not criticizing the practice of other States.

19. Resolution 2 provides that States should “address the implementation of IHL only within their own sphere of competence and responsibility.” Accordingly, States should address only their own practice and not criticize the practices of other States. “Naming and shaming” practices and similar criticism of other States should specifically be prohibited.²
20. This will promote a substantive and constructive discussion focused on actual practice because each State is in the best position to explain its own practices accurately. States could invite experts from other States to engage in dialogue on that practice.

(V) Focusing on good practices rather than non-compliance.

21. The discussion should focus on good practices and effective implementation of a State's obligations,³ and avoid devolving into a debate about compliance and non-compliance, which could easily lead to political statements.
22. States engage in many practices that are relevant to the effective implementation of IHL obligations but that are not necessarily legally required and thus not strictly part of

¹ See Discussion paper for the 5th Formal Meeting, p. 12.

² See also Discussion paper for the 5th Formal Meeting, p. 11.

³ Id.

“compliance.” Discussing good practices outside of a compliance framework would allow discussion to expand to areas that are highly relevant for States, without legalistic concern about “putting on the record” conclusions about compliance or non-compliance with IHL.

(VI) Meetings for discussion and exchange of information and not to negotiate text

23. The State dialogue should be devoted solely to discussion, not to the negotiation of outcome documents or resolutions. Similarly, the discussion would be devoted to facilitating the good implementation of existing IHL obligations; there would be no mandate to develop new law.
24. Clearly specifying the limits of the mandate of the State dialogue will mitigate concerns that the meetings could go in unanticipated directions.
25. A factual summary of the discussion and the views expressed in the meeting could be prepared by and issued on the responsibility of the Chair or other facilitator. Individual State participants could choose to release their statements or other contribution to the meeting, which could be annexed to such a factual summary. (As is often done, the Chair or facilitator could circulate a draft of the factual summary for comment by meeting participants before finalizing the draft.)
26. However, it would be important that a factual summary and any statements that were annexed to the factual summary respect the principle of non-politicization. Aspects of the discussion could also be omitted from the factual summary in order to build trust and encourage frank discussion. “Off the record” sessions or comments could facilitate greater substantive dialogue as there would not be a concern that comments would be used for so-called “point scoring.”

(VII) Closed meetings to facilitate detailed, substantive discussions.

27. To facilitate a robust and practical discussion of substantive IHL issues, attendance at meetings should be limited, as, for example, attendance is limited in the current intergovernmental process. Meetings that are open to the press or public could dissuade States from engaging substantively and encourage the exchange of political statements.
28. Regular dialogue, therefore, should be conducted only among States. However, there could be thematic issues where States would agree to invite specific experts or organizations with particular experience to participate on an ad hoc basis, as deemed appropriate and helpful. Such participation would also be conducted in accordance with these safeguards against politicization.