40th Round Table on Current Issues of International Humanitarian Law

"The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives"

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Reinforcing Respect for the Additional Protocols: The 40th Anniversary as an Opportunity?

1. Advantages and disadvantages of existing international procedures aimed at ensuring respect for international humanitarian law (IHL)

Regrettably, violations of IHL occur frequently in our days, and there is a tendency today to address legal issues and questions related to interpretation of IHL rules through inter-governmental and expert processes and adopt soft law documents. This is understandable, since there is a strong reluctance by states to adopt new treaties, and, according to the opinion expressed by many, it is not the existing rules that are inadequate but the major challenge IHL is facing today is the lack of respect. In addition, new kinds of conflicts and new types of security challenges trigger further considerations. Therefore, through our intergovernmental or expert discussions related to questions of interpretation and best practices we often end up with soft law documents when seeking answers to these challenges.

At the same time, as many dialogues as we may have, it still appears that there is a need for more interaction between different circles: lawyers and non-lawyers, representatives of different regions or legal systems and experts in different disciplines. There are some conferences and initiatives which attempt to bridge this gap, however, there seems to be a feeling of necessity for more global and interdisciplinary discussions.

This is why the Compliance initiative, led by the Swiss government and the ICRC is of utmost importance: it would serve as a forum for discussions with a universal focus. During the discussions devoted to the Compliance mechanism, one pertinent concept was that the future mechanism should have a reporting function as well. However, despite all deliberations, it soon became clear that states were not ready to accept a reporting function due to their fear that introducing such a mechanism would lead to naming and shaming.

Decisions of national authorities on certain issues, including the Compliance process, are often taken through a political lens. This is customary, however, this decision-making determines how multilateral mechanisms work and to what extent they support compliance with IHL. This is perhaps why a suggested mechanism, such as a regular meeting of states, which would be voluntary, non-politicized and non-contextualized, is such a sensitive topic. It would be therefore important that states exercise a certain self-criticism when they accept the need for better compliance with IHL but fail to agree on a related mechanism.

Another question that needs serious consideration is how to include armed groups into such discussions. Obviously, there is no receptivity to include armed groups in any mechanism intended for states. At the same time, in many cases armed groups are parties to the conflicts and indeed play an important role in how victims of these conflicts are affected. Although some organizations have established a structure of dialogue with armed groups, in general this topic is highly sensitive and controversial. At the same time, if we want our discussions to have an actual effect, we need to listen to the opinions and problems of armed groups and engage in a two-way discussion with them.

Another interesting phenomenon is the relative absence of civil society in the domain of IHL, as opposed to the numerous civil society organizations active in the field of human rights law (HRL). The number of civil society organizations dealing with IHL is a very small portion compared to those active in the HRL field, consequently, there seems to be much less public pressure on governments or armed groups from the civil society. In many cases, partially responding to this lacuna, human rights law NGOs tackle IHL issues as well. This is also true for enquiry or fact-finding procedures, where a human rights law mandate is often much more present than an IHL mandate. This frequently results in a self-extension of the mandate, whereby IHL issues are also considered. We will have to see whether this has an advantageous effect from the perspective of protection of victims of armed conflicts.

There are many reasons why IHL rules are not respected. Reaction to non-compliance should therefore be adjusted to these specific causes, and a wider perspective on how to approach individual cases could further assist better compliance.

Given the fact that reasons for non-compliance vary, finding alternative ways to respond is very important. In each case, the mechanism aimed at ensuring better respect must be custom-tailored to the particular situation. We talk to armed groups about respect for IHL differently from the manner we address this issue with states. Differences in approach similarly apply when it comes to dialogue with states: some states are engaged in an asymmetric warfare where the enemy is not respecting IHL on purpose and some have less means at their disposal than others.

I would also like to mention the importance of non-legal measures in addressing compliance with IHL. Recent findings in the field of psychology and behavior studies may be used to develop new strategies both in the field of engaging with certain actors and making compliance more effective. Finding specific solutions to individual problems of warring parties – a bit similar to counselling – might signify a breakthrough in cases where traditional approaches fail.

It is important to use social media. ISIS reaches its members or to-be members through social media, so this effective channel has to be used by humanitarians as well. Sometimes it is the only way to reach those who are in control of a certain territory and its population.

How religious leaders could be involved in the process should also be explored. Sometimes this is the only way to reach out to members of armed groups. If fighters are approached by people from the same cultural/religious background, they may be more open to discussion.

Thus, a multidisciplinary approach is necessary: we need to rely more on experts, such as psychologists, anthropologists, sociologists so that we can properly address questions related to the problem of non-respect. Although there are some initiatives on the table already, it could be useful to include in our conferences, regional discussions and negotiation processes representatives of other disciplines as well.

2. Potentials of existing legal frameworks and mechanisms

There is a lot of potential in universal jurisdiction. However, it should be looked at from a wider perspective. This obligation exists since 1949 and is only sporadically applied. Within the system of international criminal justice, both international and domestic courts have a role to play. For decades, the international criminal justice system was the centre of attention, and these courts and tribunals were seen as a global salvation to our problems of bringing perpetrators to justice. It has become clear, however, that international courts and tribunals also have their constraints. They are not able to deal with a big number of cases, they are often the centre of political attention and there is now a fatigue in establishing new tribunals. The ICC faces similar problems, both in terms of political attention and workload. As we all know, the Court is only a last resort and will best reach its ultimate goal if it has few or no cases at all.

Hence, the dynamism seems to be that more attention should be paid to the role of domestic courts. Recognizing that exercising universal jurisdiction can also sometimes be politically sensitive and has many practical difficulties, we must realize that it is in the first place the responsibility of domestic courts to bring perpetrators to justice. This is enhanced by migration: in many states, the exercise of universal jurisdiction is limited to cases where the offender is present on the territory. Given that migration may just naturally result in

situations where potential suspects are present on the territories, even in case certain states have not really exercised universal jurisdiction earlier, they may be confronted with a situation where they simply must proceed. This puts more pressure on national authorities.

Some states are already quite active in proceeding based on universal jurisdiction. However, looking at the overall number of cases, there is still a long way to go. Discussions and practical arrangements are necessary to make prosecutors and judges ready for the task, including training, material support for the specific requirements of universal jurisdiction cases (where the crime may have been committed far away, a long time ago), cooperation and coordination among relevant domestic authorities, such as immigration office, police, prosecutors and judges. Here, governments, NGOs and IOs may also have a role in raising attention to this problem, engaging in discussions, providing training opportunities, fostering international cooperation and dialogue.

National judicial bodies need to be better prepared for the exercise of universal jurisdiction. National courts might face the challenge of gathering evidence that reaches the required standard according to criminal procedure laws in force. In this respect, it is essential to consider ways of cooperation between states, or within international organizations. A good example was the adoption of General Assembly resolution 71/248 on 21 December 2016, establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. Another instrument that could facilitate cooperation between states is the Mutual Legal Assistance Initiative, which aims to start discussions on a future multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes.

Some initiatives within the UN system, directly or indirectly, also aim at ensuring better respect for IHL. However, the role the UN itself can play is constrained. First, the UN is a political body; second, there are many instances in the operation of the UN where it clearly cannot exercise its role (i.e. use of veto). There are many initiatives that aim at eliminating these constraints, such as the Accountability, Coherence and Transparency Initiative, which requires states not to use their veto in the case of serious UN resolutions aimed at preventing crimes against humanity, genocide or war crimes being committed. In respect of the UN, the Responsibility to Protect concept also has to be mentioned, especially its prevention pillar. The 9th Secretary-General report on Responsibility to Protect proposes a holistic approach to achieve better compliance.

The International Humanitarian Fact-Finding Commission (IHFFC) is an example of existing mechanisms whose potentials have not yet been explored. As it is known, the IHFFC has not received a mandate for decades, partially due to constraints inbuilt in Article 90. However, the IHFFC received its first mandate this year.

According to Article 90, para. 2 lit. c subpara. ii of Additional Protocol I, the IHFFC is competent to "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol". On this basis, the IHFFC and the Organization for Security and Cooperation in Europe (OSCE) have entered into a Memorandum of Understanding (MOU) this year, bearing in mind the Memorandum of Understanding concluded between the Organization of American States and the IHFFC in 2012.

The MOU concluded with the OSCE, discussions about which had already started in 2016, was signed on 18 May 2017 by the Secretary General of the OSCE Lamberto Zannier, and the President of the IHFFC, Thilo Marauhn, in light of the incident of 23 April 2017 that occurred in Pryshyb (Luhansk Province) and caused the death of a paramedic and the injury of two monitors of its Special Monitoring Mission to Ukraine (SMM). The IHFFC and the OSCE agreed to set up an independent forensic investigation (IFI) into the incident.

The purpose of the independent forensic investigation was to establish the facts of the incident by conducting a post-blast scene forensic and technical assessment against the background of international humanitarian law. While the investigation was guided by the applicable rules of international humanitarian law, criminal responsibility and accountability for the explosion were outside its scope.

The IFI was led by Amb Alfredo Labbé (Chile), and team members included two additional IHFFC members. The IFI employed an operational manager and forensic, medical, blast experts. The investigation included on-site investigation, analyzing documents, hearing witnesses, examination of the affected car.

The report was submitted to the OSCE Secretary General on 27 August. Pursuant to the decision of the OSCE Secretary General, the report (a blackened version of the report to ensure data protection) was shared with all OSCE member states, and presented to the Permanent Council of the OSCE on 7 September by Alfredo Labbé, with an introduction by Thilo Marauhn.

The report was received very positively by member states, many stating that the report exceeded their expectations. An executive summary of the report is public and available on the OSCE and IHFFC websites. All evidence reached during the investigation was handed over to OSCE.

The report's main conclusion is that the incident was caused by a mine that had most likely been recently laid on that road. According to the findings, the attack was not directed against the OSCE. The report also mentions that the laying of mines was a violation of IHL, because it was laid on a road that was known to have been used by civilians as well. The

report does not identify any state, party or individual that could be held responsible, but contains a lot of evidence.

It is important to emphasize that the investigation was conducted against the background of IHL, and not international criminal law. Therefore, it was not the IFI's aim to look into state responsibility or individual criminal responsibility, as this was also reflected in the OSCE-IHFFC agreement. The report facilitates the restoration of an attitude of respect for IHL by stressing the need to respect the principle of distinction.

This mission was a novelty for the IHFFC, not only since it was its first mandate, but also because its "good offices" have always been ignored by commentators. Taking into consideration that a formal inquiry as provided for in Article 90.2.c. (i) is less probable to happen, because the threshold formulated in Article 90 is very strict, offering the Commission's good offices might be the way ahead for the Commission to become operational, simply because giving a mandate to IHFFC based on good offices is a much easier trigger mechanism. Therefore, the aim of IHFFC is to conclude agreements with international organizations and regional organizations. This would be a welcome development, as it would add another layer to mechanisms aiming at better compliance with IHL. An additional important virtue of the IHFFC is that any future investigation can be tailor-made, designed specifically for the case, while still keeping the basic principles of the Commission. The mandate given by the OSCE was a perfect example for the flexible nature of any future IHFFC activity, and for the availability of the IHFFC based on "good offices".