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How can existing IHL mechanisms be better used?

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There are many means, methods and bodies that are designed to ensure compliance with International Humanitarian Law (IHL). I will not be able to deal with all of these mechanisms here, so the focus will be on supervision mechanisms, i.e. those that are designed to ensure that *during* an armed conflict the provisions of IHL are properly observed.

While we are not lacking in such mechanisms, there is a huge gap between what is foreseen in International Law and the reality of armed conflicts. In fact, for many years the International Community has relied almost entirely on one supervision method -- the monitoring function of the International Committee of the Red Cross (ICRC). The specific reasons behind the reluctance of using other mechanisms differ from case to case, but there are at least two reasons of a more general nature. The first one is that the system as a whole has been devised for *international* armed conflicts, while most of the conflicts after the IInd World War were non-international armed conflicts in which no supervision mechanisms (except the right of the ICRC to offer its services) are applicable under IHL provisions. The second reason is that IHL belongs to traditional inter-state International Law; therefore its implementation is left to states and needs international cooperation and coordination. Apparently we are lacking this cooperation-oriented approach.

Of the many existing mechanisms, I intend only to cover those which deserve our further attention. A significant part of my exposé will be devoted to a discussion of the International Humanitarian Fact-Finding Commission.

Seven formal mechanisms are foreseen in the Geneva Conventions of 1949 and their Additional Protocols of 1977 in order to ensure respect for International Humanitarian Law. They are:

1. **Meetings of States Parties** (see the contribution by Prof. Dinstein).

2. The mechanism of **Protecting Powers** and their **Substitutes**. The Protecting Powers system was originally the main mechanism foreseen by provisions of International Humanitarian Law to ensure its implementation and enforcement. However, it has not been used for the last two decades, despite it being an obligatory mechanism. It is not up to states parties to decide whether they want to have recourse to it or not: they are required to do so by the provisions contained in the Geneva Conventions (common Article 8/8/8/9) and, particularly, in Additional Protocol I (Article 5).
   Nonetheless, these provisions are not applied in practice. There is room for debate on the question of why this is so, but in any case it is a pity because this is the only mechanism designed to ensure compliance on a continuous basis, i.e. throughout the whole duration of an armed conflict (as opposed to dealing only with specific problems at specific moments).
   The good offices function of the Protecting Powers could also be an effective mechanism if used.
   The possibility of using Substitutes of Protecting Powers has not formally come into being so far at all, the ICRC having only occasionally played this role on a *de facto* basis.
   On this point, one can ask whether the ICRC should indeed be called upon to play a monitoring role as a Substitute or a "Quasi-Substitute" for the Protecting Power giving the impression of representing only one state and not all the victims of an armed conflict.

3. Supervision by the **ICRC**. Apart from its role within the system of Protecting Powers and their Substitutes, the ICRC has a very broad mandate "to work for the faithful application of International Humanitarian Law applicable in armed conflicts and to take cognisance of any complaints based on alleged breaches of that law" (Article 5.2 c of the Statutes of the Movement and Article 4.1 c of the Statutes of the ICRC). There is no doubt that the ICRC does a great deal to monitor the application of IHL and in practice – as mentioned above – is the only body supervising the respect for IHL provisions, but this role is potentially in contradiction with its *modus operandi* of confiden-

tiality and neutrality and with its primary purpose of providing impartial assistance and protection to victims of armed conflicts.

4. Monitoring by **other impartial humanitarian organisations.** At present, I am not aware of any organisation other than the ICRC that meets the requirements set out by the Geneva Conventions and that could successfully work towards the faithful application of IHL as done by the ICRC.

5. Cooperation with the **United Nations** (Article 89, Protocol I). The scope of this Article is not very clear. It refers to the UN, which is not a strictly speaking "IHL body" and is definitely much more interested in *ius ad bellum* (legality of the use of force) than in *ius in bello* (rules that are to be respected in warfare), but this mechanism nevertheless has the potential to be effective.

6. The **enquiry procedure**. Common Article 52/53/132/149 of the Geneva Conventions contains a very general reference to enquiries into alleged violations, but this procedure has never been invoked.

7. Recourse to the **International Humanitarian Fact-Finding Commission** (IHFFC).

In the time remaining, I will concentrate on the International Humanitarian Fact-Finding Commission, foreseen in Article 90 of Additional Protocol I. According to Article 90.2 c its purpose is to enquire into any facts alleged to be war crimes or other serious violations of the Geneva Conventions or Additional Protocol I and to facilitate, through its good offices, the respect for International Humanitarian Law.

The Commission was established in 1991 following the acceptance of its competence by 20 State parties as required by Article 90.1 b. The problem that this mechanism faces is that it relies very heavily on State consent, without which it cannot be activated. States have to accept, as a prior condition, its competence before being able to call upon it to investigate alleged cases of violations of IHL. Such a consent may be expressed either by an *a priori* declaration permanently recognising the Commission's competence, or by an *ad hoc* agreement on the Commission's competence for the purpose of a specific enquiry. At present, 65 State parties (35 from Europe) have accepted the Commission's authority on a permanent basis.

The advantages of using the services of the Commission are numerous: the Commission is based on firm treaty-Law and it already exists, while the setting up of *ad hoc* enquiry bodies implies many organizational and financial problems. It is a permanent and independent institution, not being linked to the United Nations, the International Red Cross and Red Crescent Movement, or any other existing organisation. It has also the advantage of not being a judicial body or a tribunal (although its investigative role can be complementary to that of a tribunal), its only function being to investigate the facts and to communicate the findings to the parties to the conflict. Its good offices role can contribute to a return to peace through increased respect for IHL. Its members are highly competent; among current members there are high-ranking military officers, medical doctors, experts in IHL and diplomats. The Commission has its rules and operational guidelines, but at the same time it is a flexible body that interprets its competence in a dynamic way. The potential of the Commission is recognised by the organised World community, for example in a number of resolutions adopted by the UN Security Council and General Assembly, within the Council of Europe, the International Red Cross and Red Crescent Movement and some others. The documents adopted by those organisations not only call upon states to recognise the Commission's competence, but also to make use of its services.

However, despite all the advantages mentioned above, up to now, States have not been willing to call upon Commission's services.

Several major reasons for this reluctance to call upon the Commission appear to be of importance:

1. **Financial factor** – this reason is invoked very often. Under Article 90.7 the costs of an investigation are borne by the States concerned, i.e. both the requesting State(s) and the State(s) against which allegations are made. This rule may be a deterrent factor for States wishing to call upon the Commission, particularly for developing countries. However, in practice, in the cases where the question of using the Commission has arisen, it has been possible to identify developed States willing to finance its work.
   In more general terms it has to be pointed out that the costs of investigation by the Commission – investigation that might bring the end of hostilities nearer – are very low compared to those incurred in fighting an armed conflict.

2. The **procedure** required to launch and carry out an investigation, which is very heavy and which relies very much on State consent. Nevertheless, full scope for

adjustments is foreseen by Article 90 and by the Rules of the Commission, which provide that the States concerned can agree on alternative procedures.

3. The Commission was originally foreseen for **international armed conflicts**, while many today's armed conflicts are non-international by their nature. However, the Commission has declared its readiness to carry out investigations in cases of non-international armed conflict, provided the consent of the parties concerned is forthcoming.

4. The Commission lacks **experience** – the Commission has never carried out a mission, although such a mission came close to taking place recently. However, this situation is a vicious circle, because as long as States do not call upon the services of the Commission, there is no way for it to gain the experience that States would wish it to have. It should be pointed out that, even without experience, the Commission attaches great importance to practical matters such as the availability of equipment for enquiries *in loco*, setting up lists of experts, networking with the most relevant international organisations, etc. It can also count on practical support by the Swiss Government that provides the Commission with all the necessary facilities.

5. Lack of **awareness** of the existence of the Commission despite the Commission's efforts to promote its role through different activities, including advocating for its role with parties to existing conflicts and with international organisations involved in such conflicts.

To overcome the reluctance to use its services, the challenge for the Commission is therefore to increase its visibility for States and to make its mechanisms better understood. The second challenge for the Commission is to increase its accessibility to States, through a dynamic, imaginative approach towards its mandate, its competencies and its procedures. This is exactly what the Commission is trying to achieve in practice, through the invocation of a right of initiative, the relaxation of certain procedures, and generally by trying to be as pragmatic and flexible as possible.

The task for States that have not accepted the competence of the Commission yet, is to recognise it – preferably in advance and during peacetime, when emotions do not run as high as during an existing armed conflict. Secondly, those States that have recognised its competence should start using it. It is to be noted that any state having accepted the Commission's competence, whether party to

a conflict or not, can ask it to undertake an enquiry. In ideal cases the State accused of committing violations will also have recognised the Commission's competence, but even where this is not the case, we should not be discouraged because it may be possible to persuade the State in question to accept its competence on an *ad hoc* basis. Under the provisions of common Article 1 of the Geneva Conventions and Additional Protocol I, and in view of the arguments put forward by Prof. Momtaz, we could consider that States having accepted the competence of the Commission have even an obligation to call upon it in all cases of alleged violations by another State party.

In conclusion it should be emphasized that the potential "revitalization" of the International Humanitarian Fact-Finding Commission is not only the matter of the recognition of the usefulness of the Commission as one of many IHL mechanisms, but first and foremost it is the matter of sufficient political will of States to establish the truth, to accept scrutiny by external entities and of basic international solidarity in the face of violations.

Résumé

Plusieurs mécanismes sont prévus par le Droit international humanitaire (DIH) pour assurer son respect. La présente intervention portera sur les mécanismes de supervision, dont le rôle est de veiller au respect du DIH pendant les conflits armés. Bien que les mécanismes de ce type soient nombreux, le fossé demeure important entre ce qui est prévu par le Droit international et la réalité des conflits armés. Et force est de constater que la communauté internationale s'est longtemps raccrochée à la fonction de surveillance du CICR comme unique moyen d'assurer le respect du DIH. Globalement, les raisons pour lesquelles il n'a pas été fait recours à d'autres mécanismes sont d'une double nature. Premièrement, le système dans son ensemble avait été envisagé pour les conflits armés internationaux. Or, la plupart des conflits post-Seconde Guerre Mondiale ont été non-internationaux, pour lesquels aucun mécanisme de surveillance (hormis le droit du CICR de proposer ses services) n'est applicable d'après les dispositions du DIH. Deuxièmement, le DIH s'inscrit dans le traditionnel droit international inter-étatique; dès lors, sa mise en œuvre dépend des États et requiert coopération et coordination. Visiblement, nous pêchons dans cette approche coopérative.

Sept mécanismes sont prévus par les Conventions de Genève de 1949 et leurs Protocoles additionnels de 1977, afin d'assurer le respect du DIH.

Premièrement, les réunions des États parties. Deuxièmement, le système des Puissances protectrices et leurs substituts. Bien qu'il s'agisse d'un mécanisme obligatoire, il n'y a pas été fait appel au cours de ces vingt dernières années. Troisièmement, l'intervention du CICR. Les statuts du CICR lui imposent de travailler pour la pleine application du DIH. Mais son *modus operandi* basé sur la confidentialité et la neutralité, ainsi que son impératif d'avoir accès aux victimes peuvent créer une contradiction avec un rôle de superviseur. Quatrièmement, l'intervention d'autres organisations humanitaires impartiales. Cinquièmement, la coopération avec les Nations Unies (article 89, Protocole 1). Sixièmement, la procédure d'enquête et septièmement, le recours à la Commission internationale d'établissement des faits.

La Commission d'établissement des faits est prévue par l'article 90, Protocole 1. D'après l'Article 90.2, sa tâche est d'enquêter sur des faits susceptibles d'être des crimes de guerre ou des violations graves des Conventions de Genève et du Premier Protocole, et de faciliter à travers ses Bons Offices, le respect du DIH. Elle fut créée en 1991 après acceptation de son autorité par 20 États parties. Le problème du mécanisme de la Commission est qu'il dépend largement du consentement des États, sans lequel il ne peut être activé. Ce n'est qu'une fois que les États ont déclaré accepter sa compétence qu'ils peuvent y recourir pour enquêter sur des cas de violations présumées du DIH. Plus particulièrement, l'État mis en cause doit donner son accord à l'enquête de la Commission. A l'heure actuelle, seulement 65 États parties (dont 35 d'Europe) ont accepté l'autorité de la Commission sur une base permanente.

Le recours à la Commission présente un certain nombre d'avantages. La Commission existe déjà, elle a une base conventionnelle, alors que de créer des structures d'enquêtes *ad hoc* peut impliquer des inconvénients organisationnels et financiers. La Commission est une structure permanente et indépendante. Elle a également l'avantage de ne pas être un organe judiciaire, sa seule fonction étant d'enquêter sur des faits et de communiquer ses conclusions aux États Parties. Son rôle de Bons Offices peut contribuer à un retour à la paix à travers un meilleur respect du DIH. Ses membres sont compétents et comptent parmi eux des officiers de haut rang, des médecins, des experts en DIH etc. Bien qu'ayant ses propres règles et lignes de conduite opérationnelles, la Commission est un organe flexible qui interprète sa compétence de manière dynamique. Le potentiel de la Commission est reconnu par la Communauté internationale, comme en témoignent certaines résolutions du Conseil de Sécurité et de l'Assemblée Générale des Nations Unies, ou encore certains documents du Conseil de l'Europe et du Mouvement international de la Croix-Rouge et du Croissant-Rouge.

Dès lors pourquoi les États sont-ils si hésitants à faire appel à la Commission ? Plusieurs raisons sont à souligner.

La question financière est la raison la plus souvent invoquée. En effet, d'après l'article 90 paragraphe 7, les coûts d'une enquête sont supportés par les États concernés, aussi bien les États à l'origine de la requête que les États incriminés. Deuxième raison, la procédure pour lancer et mener une enquête est relativement lourde et dépend du consentement des Etats. D'autre part, la Commission était prévue à l'origine pour les conflits armés internationaux. Cela étant dit, elle s'est dite prête à conduire des enquêtes dans le cas de conflits armés non-internationaux, dès lors que les États parties concernés y consentent. La Commission manque également d'expérience (elle n'a jamais conduit de mission). Enfin, dernière raison, peu de gens ont conscience de l'existence de la Commission, en dépit de ses efforts pour promouvoir son rôle.

Afin de dépasser l'hésitation à recourir à ses services, le défi pour la Commission est d'accroître sa visibilité vis-à-vis des États et de faire que ses mécanismes soient mieux compris. Elle doit aussi améliorer son accessibilité aux États, notamment en adoptant une approche dynamique et imaginative vis-à-vis de son mandat, ses compétences et ses procédures.

Les États qui n'ont pas encore accepté la compétence de la Commission doivent le faire, et ceux qui l'ont fait devraient y faire appel. Il est à noter que chaque État partie ayant accepté l'autorité de la Commission peut lui demander d'entreprendre une enquête, qu'il soit partie ou non au conflit. Idéalement, l'État accusé de commettre des violations du DIH aura également reconnu la compétence de la Commission. Mais, même lorsque ce n'est pas le cas, il est possible de persuader l'État en question d'accepter sa compétence sur une base ad hoc. Elle pourrait également l'être pour pousser les États qui n'ont pas encore accepté l'autorité de la Commission à le faire, au moins sur une base *ad hoc*. D'après les dispositions de l'article 1er commun, les États ayant accepté l'autorité de la Commission ont l'obligation d'y faire appel dans les cas de violations présumées du DIH par un État partie.

En conclusion, la "revitalisation" de la Commission internationale d'établissement des faits n'est pas seulement une question de reconnaissance de l'utilité de la Commission comme beaucoup de mécanismes du DIH. C'est avant tout une question de volonté politique suffisante des États pour établir la vérité et accepter une enquête de la part d'une entité extérieure, mais c'est aussi une question de solidarité internationale face aux violations.