INTERNATIONAL HUMANITARIAN
FACT-FINDING COMMISSION (IHFFC)
THE PRESIDENT

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COMMISSION INTERNATIONALE HUMANITAIRE
D'ÉTABLISSEMENT DES FAITS (CIHEF)
LE PRESIDENT

Statement by the President of the International Humanitarian Fact-finding Commission
October 23, 2008

Distinguished delegates, colleagues, ladies and gentlemen,

The occasion for this presentation of the International Humanitarian Fact-finding Commission is the fact that the 6th Committee of the United Nations General Assembly is dealing once again with the status of the Protocols additional to the Geneva Conventions. We are extremely grateful for having the opportunity to present, on this occasion, the case of the Commission.

The text adopted by the General Assembly two years ago called upon States to make the declaration under Art. 90 of AP I recognizing the competence of the Commission and to consider making use, where appropriate, of the services of the Commission. The Commission has greatly appreciated the support and encouragement it thus received from the UNGA.

On this occasion, the Commission would like to update information which the delegations possess on the Commission, to summarise its particular position as a means to ensure the application of international humanitarian law and to recall the potential and value of the Commission in the current legal and political framework.

As you know, the Commission has been established pursuant to Art. 90 AP I adopted in 1977. A major aim of the Diplomatic Conference which negotiated the Protocols was to improve the mechanisms designed to ensure to application of international humanitarian law, and the provision on the Commission was considered to be one of its major achievements in this respect. Ascertaining facts, "inquiry", is a traditional means of international dispute settlement and as such contained in the Geneva Convention since 1929. The drafters of the AP wanted to improve this instrument. Therefore, they created a permanent body, consisting of 15 personalities of high professional and personal standing, elected by the States having recognised the competence of this body. They, thus, eliminated the need to negotiate an *ad hoc* agreement on such an inquiry procedure. In the light of a fear, as it existed at that time, that this would go too far, the competence of this body would not automatically follow from the ratification of the Protocol, but would need an additional declaration of acceptance, pursuant to the model of the optional clause of the ICJ Statute. 20 such declarations were the threshold for the actual establishment of the Commission, a number reached in 1990, when a little over 90 States had ratified AP I. The first election took place in 1991, and the Commission was actually constituted in 1992. As of today, 70 of the 168 States parties to the AP I, from all continents, have accepted the competence of the IHFFC. This is slightly more than the 66 States which have recognized the competence of the ICJ pursuant to the "optional clause" of Art. 36 para. 2 ICJ Statute.

However, in the first 17 years of its existence, States have not had recourse to the Commission. This invites a number of questions:

- What are the reasons for this lack of cases?

- What is the current potential of the Commission?
- What can be done so that a better use can be made of this potential?

As to the first question, the reasons for the lack of cases: The jurisdictional web of the Commission still is too loosely knit. So far, there have been very few conflicts, if any, where indeed both parties had accepted the competence of the Commission. Thus, up to this day, an inquiry would only take place on the basis of an *ad hoc* agreement between the parties. In recent years, however, the recognition of the Commission has spread into certain conflict prone regions.

In addition, a certain reluctance of States can be observed to use interstate procedures in the case of alleged violations of human rights law and international humanitarian law. This situation has, however, changed in recent years. Cases relating to violations of human rights and international humanitarian law have indeed been brought by States before the International Court of Justice, arbitral tribunals and human rights bodies. The Commission might benefit from this trend.

Finally, there is the problem of the multitude of fora. In 1977, the Commission was considered as the only realistic approach to dispute settlement in case of alleged violations of international humanitarian law. This is no longer so. As already indicated, alleged violations can be brought, and have been brought before the ICJ, arbitral commissions, human rights bodies and international or mixed criminal tribunals. Non-governmental organisations also play an increasing role in ascertaining facts concerning such violations. These new developments raise in particular the question which is, under current conditions, the added value of the Commission where international humanitarian law is allegedly violated.

Let me therefore turn to the question of the usefulness of the Commission in the present systems of means and methods to ensure compliance with international humanitarian law. The added value of the Commission consists of a combination of elements which distinguish it from other bodies or procedures:

- its low key approach to alleged violations;
- its impartiality which is institutionally guaranteed;
- its official character as a treaty organ.

Low key approach: The Commission offers a procedure which is very much in the hands of the parties, in particular where an inquiry is based on an *ad hoc* agreement. It does not pronounce itself on question of law, i.e. does not state whether a violation has actually occurred. It states the relevant facts, leaving it to the parties to draw their own conclusions. Its procedures and reports are confidential. Any publication of the results will require the consent of the parties. It is not an organisation which, in order to achieve its purposes, has to go public. There is no naming and shaming. It is not a public prosecutor threatening criminal prosecution, it is not the Security Council threatening sanctions. Its fact-finding is a technique which facilitates that the parties themselves can do what is necessary as a reaction to violations of international humanitarian law and thereby return to a situation of respect for international humanitarian law.

Impartiality: This is a quality which the Commission shares with Courts and arbitral bodies. “Acknowledged impartiality” is a precondition for the election of the members. Once elected, the members are independent. No member of a chamber of inquiry may have the nationality of a party to the conflict. There are procedural guarantees for the parties in matters of taking

and evaluating evidence. The acceptance of the Commission will also be promoted by the fact that with the increasing number of declarations under Art. 90, its composition corresponds more and more to the requirements of equitable geographical distribution.

Official character: The Commission is not a non-governmental organisation, it is a treaty organ of the Geneva Conventions, established and elected by States. As such, it is an intergovernmental institution whose acts are, in this sense, official. They carry with them a weight which derives from the Geneva Convention and their Additional Protocols.

Each of these characteristics may be found in other institutions as well. But it is their combination and cumulative effect which establishes the particular usefulness, the added value of the Commission.

How can this added value be brought to bear? Being elected by a community of States which keeps increasing in numbers, the members of the Commission feel a responsibility towards this Community, beyond that also towards this universal community which is constituted by the parties to the Geneva Conventions. Therefore, the Commission has felt that it could not stand idle and wait until one or the other State appeal to the Commission. Thus, the Commission has taken certain initiatives, which have been supported by the States having recognised its competence by providing the funds for the respective budget items.

The Commission has undertaken various general outreach activities to increase the States' awareness of its potential. In addition, it has decided to adopt a proactive approach in relation to armed conflicts by offering its good offices to the parties to a given conflict, a possibility expressly mentioned in Art. 90 AP I, or at least to unofficially draw the attention of parties to a conflict to the very potential the Commission might present in the particular case. In a limited number of cases, this has led to unofficial consultations.

The Commission is prepared to engage in an inquiry at any time. It develops a contingency planning for this purpose. It has established a network of contacts which enable it to have the required expertise available at relatively short notice. These practical issues remain a matter of constant concern for the Commission.

Let me conclude on some perspectives of the immediate future. If the Commission is to effectively fulfil the functions which have been assigned to it by the international community, it needs political support. A number of measures are being discussed for this purpose. There are moves to create a group of friends of the Commission. We are particularly grateful to the Foreign Minister of Switzerland for personally having taken initiatives in this direction. The proactive approach could be greatly enhanced by a better presence of the Commission in international decision-making processes. This could be achieved in various ways. Last not least, we hope for support and encouragement by a new resolution of the General Assembly.

I thank you for your attention and I am at your disposal for any further information you might want to obtain.