

40th Round Table on Current Issues of International Humanitarian Law

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

Sanremo, 7-9 September 2017

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

Thank you to the Institute and President Pocar for inviting me to this Round Table. It is a great honor and my pleasure to be here with you today to mark the 40th anniversary of the 1977 Additional Protocols (APs).

Disclaimer: Today, I represent Switzerland as a State Party to the GCs and their APs, and not Switzerland as the Depositary of these instruments.

Content of my presentation:

1. Key achievements and
2. Continued relevance of the APs,
3. Some current initiatives to strengthen respect for IHL in general,
4. Ratification record of the APs,
5. Efforts Switzerland has undertaken to encourage States not yet parties to accede to the APs.

1. Key achievements

Let me begin by highlighting some key achievements of the APs:

First success: The wide participation in the negotiations. One of the biggest successes of the APs is indeed that participation in their negotiation was universal. All States Parties to the GCs or Members of the UN were invited to attend the Diplomatic Conference. Among other reasons, this may explain why the APs took four years, and the GCs only four months, to negotiate. Tellingly, although the authentic texts of the GCs are in English and French, the APs are authentic in English, Arabic, Chinese, Spanish, French and Russian. **This allowed new States to gain a greater ownership of IHL which was an important goal in itself, to create a new sense of ownership.**

Second success: The APs are a catalyzer of the development of international law. As

Ambassador Peter Maurer has said in the video projected on Thursday, the APs inspired the elaboration of multiple weapons treaties. We can think here of the 1980 Convention on certain conventional weapons but also the Ottawa Convention on antipersonnel mines, the Oslo Convention on cluster munitions and more recently the Treaty on the prohibition of nuclear weapons.

Third success: The contribution of the APs to the fight against impunity. As we have seen during this Round Table, API expanded the list of grave breaches of IHL in IAC and APII blazed a trail for international criminal law in the realm of NIAC.

2. Continued relevance

The main critics we hear today with regard to IHL are mainly the following ones:

1. The law is not adequate to the nature of armed conflicts.
2. The law is not applicable in the context of fighting terrorism.
3. The law imposes unfair symmetric obligations on parties involved in NIAC.

These critics are absolutely not new. In fact, these challenges were precisely issues that the APs sought to address.

States have again very recently confirmed the adequacy of existing rules of IHL. Let me quote Resolution 2 of the 32nd IC RC/RC adopted in December 2015: “Stressing the importance and continued relevance of IHL for regulating the conduct of parties to armed conflicts, both international and non-international, and providing protection and assistance for the victims of armed conflicts”.

At the same time, we observe a trend to be pessimistic when discussing respect of IHL which is notably due to the ever-presence of IHL violations in the media. Some, including humanitarian organizations, have begun to speak of the “erosion of IHL”. This may represent a risk to its credibility, as it can discourage parties to conflicts to respect the law. This may actually contribute to the misconception that IHL does not serve its purpose and may therefore be counterproductive.

The ICRC has recently launched a conference cycle on generating respect for the law in order to change this narrative and to focus also on instances of respect. I also know how much this positivist approach is dear to Professor Sassòli.

At the risk of being repetitive: the main challenge is therefore not the relevance of the existing rules but strengthening respect for them.

3. Current initiatives

Let me now say a few words on two initiatives Switzerland is co-facilitating together with the ICRC with a view to generating political will to strengthen respect for the IHL.

The first is the **Montreux Document** on Private Military and Security Companies (PMSCs) which is the result of an intergovernmental process launched in 2006 by CH and the ICRC. The Montreux Document Forum (MDF) was established in December 2014 to push further the implementation of the obligations contained in the Montreux Document. The MDF is a positive example of a forum where States are able to share challenges they face, as well as good practices, on the implementation of their obligations relating to the activities of PMSCs. Its 3rd Plenary Meeting was held in late April.

The second is the **intergovernmental process on strengthening respect for IHL**, which is being jointly facilitated by Switzerland and the ICRC. In the first consultative phase, which took place from 2011-2015, it became clear that the GCs and their APs are an exception in the galaxy of multilateral treaties: so far, States parties do not gather at regular intervals to exchange experiences and views on their implementation. In the current phase, based on a mandate of the International Conference of the Red Cross and Red Crescent of December 2015, States are revisiting the idea of a potential forum of States, and how the International Conference of the Red Cross and Red Crescent and regional forums could also be better utilized to enhance implementation of IHL. These avenues are to be considered as complementary. I seize the opportunity to invite States to take an active part in this inter-governmental process, to share their views, and to invest the necessary political will to achieve a common understanding on what would be an effective way forward. The result of these discussions will be submitted to the next International Conference of the Red Cross and Red Crescent in 2019.

4. Ratification record

Let me now turn to the ratification record of the APs.

Let me firstly say that the ratification record of the APs is also one of the key achievements of the APs. The APs are indeed among the most widely ratified international instruments.

What is the exact state of ratification of the APs 40 years after their adoption?

174 States are Parties to API and 168 to APII meaning that 22 States are not Parties to API and 28 are not Parties to APII. Approximately 15 percent of States parties to the GCs (196)

are not yet Parties to the APs.

We often focus on the same States when we speak of the ratification record of the APs, but it is interesting to have a more precise look at the facts and figures. Let's have a look region by region:

Western European and Others Group (WEOG): very satisfactory on the whole, though four absentees, namely Andorra, Israel, Turkey, United States of America.

Africa: Very few absentees (Angola (AP II), Eritrea, Somalia).

Eastern European Group: very satisfactory, only one absentee (Azerbaijan).

Latin American and Caribbean Group (GRULAC): Only Mexico has not ratified AP II.

Asia-Pacific Group: this is the region with the highest number of non-participating countries (four States have ratified API but not AP II (Iraq, DPRK, Syria and Vietnam); 15 have ratified neither API nor AP II: Bhutan, India, Indonesia, Iran, Kiribati, Malaysia, Marshall Islands, Myanmar, Nepal, Pakistan, Papua New Guinea, Singapore, Sri Lanka, Thailand, Tuvalu.

To be complete, I should add that: Iran, Pakistan and the US have signed the APs.

Therefore, despite the universal participation of States during the negotiations of the APs, they are not yet universally ratified.

The principal concerns of most States not ratifying AP I were :

- Firstly: The inclusion of wars of national liberation in the definition of international armed conflict under Art. 1(4) (which applied AP I and all provisions of the four GCs to conflicts in which peoples were fighting against colonial domination, alien occupation and racist regimes),
→ Despite the case of Polisario with regard to Western Sahara in 2015, I would say that it is no longer a concern today.
- Secondly: The possibility that AP I would apply to cases of terrorism linked to the definition of armed forces of a Party to the conflict under Art. 43 and of combatant under Art. 44.
→ Some doubts may still exist today for some with regard to articles 43-44 of API, with respect to the definition of armed forces of a Party to the conflict and to the definition of combatant.
- Thirdly: The provisions on means and methods of warfare that would limit the use of

certain weapons, including, it was believed, nuclear weapons.

➔ For AP II, the fear of some was that extending the essential rules of IHL to NIACs might affect State sovereignty and prevent governments from effectively maintaining law and order within their borders.

Despite these concerns, most of the States in the world finally joined API and II, including States that had at first voiced reservations regarding their content (and indeed joined in the end, subject to a number of reservations and important interpretive declarations).

5. Swiss's efforts for further ratification

Switzerland believes that the fact that 40 years have now passed since the APs were adopted is in itself a good reason for States not yet parties to examine if the considerations raised at the time for not joining the APs are still relevant. The context has changed since 1977.

In most cases, we are confident that most of the reasons for not joining the APs at the time they were drafted will appear to no longer constitute an obstacle to joining them today.

We have therefore seized the occasion of the 40th anniversary of the two APs to ask States not yet parties to reconsider joining them. At the beginning of June this year we established bilateral contacts with States not yet parties to API and/or II to encourage them to accede.

Some States are considering acceding to the APs (Andorra, Angola (for APII), Kiribati, Tuvalu, Mexico (for APII)). Others mentioned that it is not a priority and invoked a lack of resources.

As we have seen during this 3-day Roundtable, there is wide agreement that the rules of the APs give expression to international customary law.

One may therefore ask why accede to the APs given that through the development of customary law and the development of the practice of the International Tribunals, the decision not to join APs has now limited practical effect?

Two main reasons:

- The first is that each additional accession will send a much needed signal in favor of IHL. It is a kind of a pledge for IHL.
- The second is what Professor Clapham pointed out on Thursday. The difference between applying the APs as a matter of policy or as a matter of law and the possible impact on criminalization at the national level and through references to war crimes in other treaties such as the Arms Trade Treaty (ATT).

Therefore, all States not parties to the APs may examine whether the reasons for not

ratifying the APs still exist. And if yes, they should answer the two following questions:

- Firstly: Are there ways to address lingering concerns?
- Secondly: Do the challenges outweigh the advantages of joining the APs?

What concrete means and ways may lead to further accession?

The role of the National IHL Commissions is of paramount importance in these efforts. 9 States not yet parties to the APs have such a Commission. One State explicitly told us to be ready to consider joining the APs if the IHL Commission formulates a recommendation in this direction.

States may consider seizing all available opportunities to promote the ratification/accession such as bilateral diplomatic dialogue. We are considering making use of the **Universal Periodic Review** to encourage further accession.

And last but not least, States parties to the APs may also seize the opportunity of the 40th anniversary to:

- Firstly: if not yet done so, they may consider to recognize the competence of the International Humanitarian Fact-Finding Commission (IHFFC) (art. 90 of API). This may also be done at the time of ratification or of accession to API. Reminder: Out of 174 States parties to API, 76 have done so.
- Secondly: they may consider withdrawing the reservations they may have issued at the time of ratification or accession. I am very much aware that reservations do not have solely unfortunate aspects but may also foster universal participation in a treaty.

I thank you very much for your attention.