



The IHFFC at 25
Reflecting on Our History and Moving Forward
April 2016

Introduction:

With the International Humanitarian Fact-Finding Commission (hereinafter “IHFFC”) celebrating its 25th anniversary, we have a unique opportunity to reflect on the last quarter century of the IHFFC’s existence and to consider its best path forward.

The creation of a mechanism to enhance compliance with the rules applicable in case of armed conflicts was a highly innovative step in 1977, when the first Protocol Additional to the 1949 Geneva Conventions (“AP I”) that created the Commission was signed. In 1991, after twenty High Contracting Parties agreed to accept the competence of the Commission, the IHFFC was officially established. The Commission is composed of fifteen elected individuals acting in their personal capacity.

Reflecting on the past:

Since its establishment, the activities of the Commission have developed along the following lines:

- Establishment of internal rules to ensure operational efficiency (first adopted in 1992; amended in 2003, 2009, 2011, and in 2014).
- Continual training of its members in fact-finding matters for purposes of mission readiness.
- Development of external relations by obtaining observer status with the UN General Assembly in 2009 (UN GA Resolution 64/121), by entering into various types of co-operation agreements (e.g. Organization of American States in 2012), and by building up external support (e.g. Friends of the Commission).
- Promotion of the knowledge about the Commission by drafting informational materials, which have been revised in 2015 and are now available in English, French, Spanish and Arabic, in hard copy as well as on the Commission’s website (www.ihffc.org).
- Activities aimed at convincing more States Parties to AP I to accept the Commission’s competence, with four new States Parties accepting the competence of the Commission during the current electoral term (2011-2016).
- Notably, throughout the current term, the Commission has made the choice to develop a preventive and confidence-building approach rather than focusing on accountability. In order to fulfill its mandate and to conduct independent investigations, the Commission not only depends on the strength of its legal foundation, but also on the political will of the international community to make use of the IHFFC and its potential. Garnering such political will require dissemination of knowledge about the IHFFC’s mandate and profile, the establishment of coalitions supporting the Commission,



and a preparedness to cooperate in order to prevent breaches of international humanitarian law, rather than simply responding to serious violations after the fact.

As far as the Commission's legal basis is concerned, a broad reading of the Commission's competence according to Article 90 AP I has been accepted. Over the years, the Commission has developed a common understanding on the following issues:

A. Competence of the Commission

- The Commission is competent to enquire in situations of non-international armed conflicts. This follows from the drafting history, subsequent practice, as well as the ordinary meaning in light of the object and purpose underlying Article 90 AP I.
- In line with the right given to an impartial humanitarian body under common Article 3 (2) of the Geneva Conventions, the Commission may offer its services to the Parties to the conflict on its own initiative.
- The Commission can also use its right of initiative to offer its "good offices" to any Party or Parties to the conflict.

B. Significance of a request by a Party

- Under Article 90(2)(a) AP I, the Commission can only act if allegations of serious violations/grave breaches are submitted to it.
- Such allegations can be submitted by any State having accepted the IHFFC's competence under Article 90(2)(a), including any third-party State, if the allegations are directed against a State that has also accepted this competence.
- In all other situations (Article 90(2)(d) AP I), the Commission can act only at the request of any "concerned" Party to the conflict in relation to a particular incident. Consistent with international humanitarian law, States and non-State actors alike, including international organizations, can in principle be Parties to the conflict "concerned" and thus can file a request with legal effect.
- Independently of Article 90 AP I, the Commission may take action on the basis of a Chapter VII UN Security Council resolution.



C. Consent of the concerned Party

- Under Article 90(2)(d), the Commission shall institute an inquiry only with the consent of the Party or Parties to the conflict concerned.
- A Party to the conflict is concerned if it is directly implicated in the incident or the facts in question.
- In all cases, the consent of the Parties to the conflict in the quality of territorial State, the alleged author of the violation and the alleged victim of the violation are required.
- In the case of a request being made by a State that has not yet recognized the competence of the IHFFC under Article 90(2)(a) against a State that has recognized this competence, the consent of the latter is necessary for a mandate of enquiry of the Commission.

Unfortunately, some developments have hampered the activation of the Commission:

- A lack of knowledge persists about the IHFFC. Among other initiatives, the open pledge created by the Swiss Government supporting the IHFFC on the occasion of the 32nd International Red Cross and Red Crescent Conference in 2015 aims at improving this situation.
- States Parties and international organizations have established numerous *ad hoc* commissions of inquiry regarding violations of international humanitarian law, which often blur the lines between international humanitarian law and International human rights law, instead of mandating the Commission, which is the only permanent intergovernmental supervisory body on international humanitarian law.
- While the establishment of international criminal tribunals has improved accountability options, States may have lost sight of complementary instruments of conflict resolution such as the confidence-building and peace enhancing potential of the IHFFC.

These may have been some reasons for why the Commission has not yet been formally activated for a particular conflict, in spite of, or perhaps even because of, its specificity.

This compels a critical reflection of the Commission's unique specificities:

As already noted, the IHFFC is the only permanent intergovernmental and international monitoring body established to deal exclusively with breaches of international humanitarian law. Its members are elected in their personal capacity and bound by independence, impartiality, neutrality and confidentiality. The findings and eventual recommendations of the Commission will not be published by the Commission, but instead confidentially transmitted to the parties concerned; this ensures that the Article 90 procedure largely remains a state-driven process.



In spite of these assets, the Commission has not yet been formally mandated to conduct its first fact-finding mission *stricto sensu*. However, the IHFFC has been in touch with parties to various conflicts during the current electoral period and has attracted the attention of victims of armed conflict.

In light of the political and academic debate over the last decade on fact-finding in international humanitarian law and in international human rights law, the Commission has stepped up its outreach activities. Individual members have performed such activities throughout the year and all around the globe, including at diplomatic meetings, regional ICRC conferences, the UNGA, UNHCHR, academic meetings, and various other gatherings.

One of the most encouraging developments may be that NGOs (such as Médecins sans Frontières, MSF; Amnesty International; Human Rights Watch; Geneva Call; and others) have also made the Commission more visible and better known. The best example is MSF's proposal that the Commission perform fact-finding related to the attack on its hospital in Kunduz, Afghanistan, as well as the attacks on MSF hospitals in Yemen and in Syria. The Commission cannot as such respond to requests by civil society, but individual States Parties have demonstrated support of such initiatives.

Outlook:

Today, after 25 years, one cannot speak of the Commission as a sleeping beauty anymore. It is rather highly alert and proactive, offering its good offices in many situations, even though this has not yet resulted in a mandate for formal fact-finding.

The tasks for the future are manifold:

- Activate States in areas where participation is not yet satisfactory, especially in sub-Saharan Africa, and in Asia.
- Grow the number of States Parties that recognize the IHFFC beyond 100 in order to build more powerful coalitions for prevention of violations of international humanitarian law.
- Obtain recognition by more regional bodies.

The Commission hopes that the upcoming elections in December 2016 will draw candidates with diverse cultural and professional backgrounds representing an equitable geographical distribution. It also hopes that nominating States will consider the physical demands of deployment and the need to be available on short-notice in selecting their candidates that will be mission ready.

The question is no longer whether the Commission will get a mandate, but rather when it will be called upon to fulfil its role. Preparedness at a juridical level has never been in doubt, however law is not only an academic, but also a practical matter; with members from the legal, medical and diplomatic as well as military professions this operational readiness will be guaranteed. In order to be prepared at a moment's notice, a 2015 agreement between the Commission and the Swiss Agency for Development and Cooperation



(SDC) now ensures the necessary support is readily provided to the IHFFC in case of a mission. The same holds true for the Secretariat provided by the Swiss government.

This means that the Commission is well prepared and stands ready for action: what it needs is to receive support from those countries who want to enhance respect for and compliance with international humanitarian law in armed conflicts of any character. Support means disseminating knowledge about the Commission, proposing the activation of the Commission, and encouraging cooperation with and utilization of the Commission in situations of an armed conflict that involve alleged breaches of international humanitarian law.

When this happens, respect for international humanitarian law will increase and genuine prevention of unnecessary suffering will be closer to being realized. This would constitute a step forward in a conflict and war torn moment of history, making the 25-year long preparatory activities of the IHFFC worth the effort.

A handwritten signature in black ink, which appears to read "Gisela Perren-Klingler". The signature is written in a cursive, flowing style.

Gisela Perren-Klingler, MD
President
International Humanitarian Fact-Finding Commission