



International Humanitarian Fact-finding Commission

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**Statement
by
Vice-President Professor Michael Bothe**

**at an informal Meeting of the 6th Committee
of the
United Nations General Assembly**

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Mr. President, distinguished delegates,

In the name of the International Humanitarian Fact-finding Commission, I would like to express our sincere gratitude for this opportunity to present the cause of the Commission before the members of the 6th Committee of the United Nations General Assembly. In the course of its current session, the Committee will be invited to adopt a new draft resolution calling for more States to accept the competence of the IHHFC established pursuant to Art. 90 of the first Protocol Additional to the Geneva Conventions (AP I). The UN General Assembly has already adopted similar resolutions in earlier years, and the Security Council has also endorsed the work of the Commission. In the name of the Commission, I would like to thank you for this renewed support.

We think that this constitutes indeed a very important contribution to the overall purpose of the resolution, namely a more effective implementation of international humanitarian law. And this is what this short presentation is meant to show.

You will recall that the Commission was introduced in the text of AP I as one of the means designed by the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law 1974-77 to ensure compliance with the Conventions and the additional Protocols then in the course of negotiation. It was thought that clarification of relevant facts is a decisive contribution to the settlement of a dispute relating to alleged violations of international humanitarian law. Ascertaining facts is a traditional instrument of international dispute settlement and a necessary part of the work of many international institutions. In the case of armed conflicts, both international and internal, but also in cases of internal violence in split societies, uncertainty about what has happened and what is happening poisons the atmosphere, gives rise to mutual accusations, warranted or not – and all this leads to a state of mind of the people and of decision makers which makes the return to peace more difficult than it is anyway. Mutual allegations may also lead to escalating countermeasures. On the other hand, clarity of relevant facts established through trustworthy, credible fact-finding will serve as a basis of mutual confidence and also for redress in cases allegations prove to be warranted.

Inquiry as a means to ensure a better respect for international humanitarian law has been part of the Geneva Conventions since 1929. The 1974/77 conference wanted to improve this instrument. But as an “automatic” mechanism would not have been acceptable at the time, access to the Commission’s inquiry process was modelled after the optional clause of the ICJ Statute: Recognition of the competence of the Commission does not occur *ipso facto* with the ratification of the Protocol, it requires an additional declaration of acceptance. So far, 69 States from all regions of the world have made this declaration.

The basic concept of article 90 is this: where a State having accepted the competence of the Commission alleges that another State having made the same declaration has violated international humanitarian law, the Commission sets up a Chamber for the purpose of an inquiry and then establishes a report on its findings concerning relevant facts. That clarification of the facts is then the basis for further steps to be taken by the parties with a view to return to a situation of respect of international humanitarian law.

According to the terms of Art. 90, the Commission was established in 1991 when 20 States had accepted its competence. It has quickly taken the necessary steps to facilitate its practical functioning: adoption of rules of procedure, contingency planning, practical exercises. It has also engaged in a number of promotional activities. Right from the beginning, it has sought co-operation with and support from the United Nations. Most of this work of the Commission is now accessible on the Commission's website (www.ihffc.org).

Yet, during the 15 years of its existence, this possibility has not been used – although a considerable amount of fact-finding relating to alleged violations of international humanitarian law by other institutions has taken place and continues to take place. Why is this so? There are two possible answers: Some might argue that the need for fact-finding concerning violations of international humanitarian law is covered by these other institutions, but it could also be that the advantages which the Commission's procedure presents are not sufficiently known. Let me plead the case that the latter answer is correct – and that therefore the call you have just formulated is absolutely justified and essential. In a way, the IHFFC is a sleeping beauty of international humanitarian law.

Why is the Commission different?

- It does not ascertain facts for the purpose of establishing individual criminal responsibility – as do fact-finders which prepare or are engaged in criminal prosecutions, national or international. That does not exclude that the findings of the Commission may be useful for such purposes.
- It does not have behind it any enforcement powers – as do fact-finding missions established by the Security Council. This does not exclude that the Security Council might use the Commission or its members where it considers this to be useful. But that would be a different matter.
- It does not establish facts for the purpose of exerting pressure on the States concerned – as do fact-finders of certain non-governmental organisations. Its findings do not involve any “blaming and shaming”. Its reports remain confidential unless the parties to the proceedings decide otherwise.

These are distinct advantages which States involved in an armed conflict might want to use. The Commission is at the service of States which consider that the impartial establishment of controversial facts by internationally recognised experts would be useful for solving a dispute and for a return to a situation of respect for international humanitarian law. For that purpose, the Commission can do even more than just ascertaining the facts. It can make recommendations.

So far, no State has requested an inquiry to be made by the Commission. But the Commission feels that it has a mandate to see to it that its potential does not stand idle. It has therefore decided to adopt a more proactive approach and to use the additional facility it has under Art. 90, namely to offer its good offices in cases where it thinks its services could be useful, for the reasons already explained. It would be inappropriate to go into any detail of such initiatives, past, pending or under preparation. But the Commission wishes to assure you that it is prepared to become involved wherever needed. This is, so to say, a public offer.

In order to be able to fulfil its functions, the Commission has engaged in contingency planning and preparations which would enable it to timely establish and deploy an inquiry mission providing all the expertise required by the circumstances of the particular case. We

are grateful to the Government of Switzerland for the support it has pledged to that effect. The concept which has been developed and which continues to be refined is that of a network of institutions willing to provide human resources and equipment when required.

The good offices of the Commission are “offered” – nothing more, nothing less. States are completely free to accept or not to accept them. The Commission has not tried to exert any public pressure to have its services accepted. On the other hand, the voluntary character of these offices allows the Commission to offer them also to States which have not accepted its competence in a general way, and also in cases of non-international conflict. In all these cases, the terms of reference of any inquiry will be drafted in agreement with the party or parties concerned. There is one essential condition on the part of the Commission: it will only engage in an inquiry which can be regarded as credible and trustworthy. It wants to be independent and impartial. It wants to have access to any information it considers relevant under the circumstances. This may require special arrangements, be it for the protection of witnesses, be it for the protection of certain information which is legitimately considered secret.

The Commission is also aware of the problem of the costs of an inquiry. The concept of Art. 90 is quite simple: in principle, the cost is born by the parties to the proceedings. But this is not always feasible and not necessarily the final word in all cases. Voluntary contributions are not excluded, and fund raising is not outside the mandate of the Commission as it adopts a proactive approach.

To summarise, the Commission wants to offer to the international community at large a service to increase the prospects of a better implementation of international humanitarian law through clarification of facts which may constitute a violation of this law. This means a better protection for the victims of armed conflicts and a better chance for a return to peace. This is what our founding treaty requires us to do, and what the United Nations General Assembly also enjoins us to perform. We sincerely hope that this call made by the General Assembly will finally promote actual use being made of the Commission. We are grateful for this support and encouragement, and I thank you for your attention.