Chapter 37

The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?*

On 31 May 1977, just one week before the adoption of the two Protocols Additional to the Geneva Conventions of 1949, the Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted a long text on the creation of a new, permanent instrument for the promotion and enforcement of international humanitarian law (or IHL). Included in Protocol I, the text became Article 90, and the instrument was styled the International Fact-Finding Commission.

Today, twenty-five years after its creation, there is reason to ask ourselves what has become of the Commission: why do we hear so little about it; has it turned into a “sleeping beauty”?

A first comment is that not even at its birth did the Commission qualify as a beauty. At that moment in time, it was nothing but a paper construct: an idea reduced to a string of treaty clauses, not rooted in customary humanitarian law and tainted with several unattractive birth marks reflecting the struggle that had accompanied its creation. At the Conference, in effect, the idea of creating a permanent fact-finding mechanism had been as enthusiastically embraced by some as strongly opposed by others. Since neither side could win, the outcome was the inevitable compromise: a text no-one was entirely happy with but that was not so bad as to preclude consensus.¹

This outcome may be illustrated with the example of two German participants at the Conference. Both had been actively engaged in the debate but each on opposing sides, and at the end of the day both could support the adoption of Article 90, though each with their own misgivings. One was Dr. Dieter Fleck, delegate of the Federal Republic of Germany; the other, Professor Bernhard Graefrath, member of the delegation of the German Democratic Republic. For Dr. Fleck, the baby was less perfect than he had hoped for: the text displayed defects that he rather not seen. Professor Graefrath’s preference would have


been for an abortion; yet, largely owing to his own doings, the end product had become sufficiently neutralised for him to regard it as acceptable.

Always in these terms, the battle at the Conference may be described as one between the Fleckians on one side: proponents of a strong commission, with automatic, compulsory jurisdiction and, for some, even a right of initiative – largely, the Western and likeminded countries; and, on the other side, the Graefrathists: opponents of the very idea of an independent fact-finding body – the Soviet bloc, and a good part of the Third World. The outcome was a commission with no right of initiative, with “competence” instead of “jurisdiction”, and not adorned with any automatic or compulsory powers: without exception, its activities would require the consent of all sides involved in a fact-finding situation.²

Article 90(2)(a) provides States parties to Protocol I with the option to give this consent beforehand, by depositing a declaration recognizing the competence of the Commission in relation to any other State party accepting the same obligation. Twenty such declarations were required before the Commission could even be established. It took a full 14 years, until 1991, for the Commission to travel this distance from “virtual” to “real” existence – a long time, yet six years less than Professor Rudolf Bindschedler, head of the Swiss delegation at the Conference, had originally predicted.³

Today, the International Humanitarian Fact-Finding Commission (as it has restyled itself) is in the 11th year of its “real existence”. Its competence has been recognized by 60 States, and these not just minor ones, such as Liechtenstein, Malta, or Trinidad and Tobago. Also major powers have done so: Russia as early as 1989; the United Kingdom, 10 years later. In effect, virtually all European States have made the declaration, with France as notable exception: that State overcame its hesitations to become party to Protocol I as late as 2001, and evidently has not considered the time ripe to accept the competence of the Commission as well. Contrast this with those States that declared their acceptance at times when they were actually engaged in armed conflict: Croatia, 11 May 1992; Bosnia and Herzegovina, 31 December 1992; and Colombia, 17 April 1995. Even so, the Commission has to this day failed to attract actual work, whether from States that had made a prior declaration pursuant to Article 90(2)(a) or from parties which ad hoc decided to engage its services. These services, it should be noted, may be twofold: as provided in Article 90(2)(c), the Commission is competent to “enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or


³ Op. cit. note 1, at p. 211. The requirement of 20 acceptances of the Commission’s competence stems from an American amendment – one more country that did not particularly like the idea of an independent commission.