1. INTRODUCTION

The enforcement of international law has always been problematic, particularly in relation to the enforcement of international humanitarian law during armed conflicts. Thus we see the rationale for the inclusion of provisions to verify compliance with the rules applicable in armed conflicts. Times of war are contrary to the situation in times of peace, in which every country is in a position to ascertain how other countries treat their nationals and how international conventions are applied. However, the breakdown in relations and communications between Parties to a conflict preclude any direct verification of compliance. Consequently, a Party to a conflict which ascertains that its adversary is not fulfilling its obligations has no time to identify, confirm and verify the situation. Thus, it generally launches into protests or, worse, reprisals, which, more often than not, do nothing to remedy a wrong.1

In addition to the inherent difficulties of enforcement, provisions relating to the scrutiny of the implementation of obligations and to the verification of compliance with the rules applicable in armed conflicts have always been mysterious. These provisions have been embodied in instruments regulating humanitarian law since 1929, but have been burdened with heavy machinery, resulting in their mummification. For example, Article 90 of Protocol I Additional to the Geneva Conventions of 12 August 1949 (hereinafter Article 90) provided for the establishment of the first permanent enquiry Commission, the International Humanitarian Fact-Finding Commission. However, this Commission has never been called upon and Article 90 remains one of the abovementioned mummified articles. Article 90 is the focus of this study, as we explore possible options for activation.

This study is divided into three sections. Section 2 briefly looks at the International Humanitarian Fact-Finding Commission (hereinafter referred to as the Commission), its origins, establishment, election of its members and its competence. Section 3 examines the relationship between the Commission and other international

---

bodies. This section is divided into two subsections: the first examines the relationship between the Commission and the United Nations and whether the former could be activated through the Security Council; the second subsection examines the relationship between the Commission and the International Criminal Court (ICC). The concluding section examines whether the Commission would be competent to investigate in two hypothetical situations. This section is broken down into two subsections: the first subsection examines whether the Commission would be competent to enquire into serious violations resulting from the use of force for humanitarian intervention. The second subsection examines the competence of the Commission in serious violations committed in internal armed conflicts.

2. THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION IN BRIEF

2.1. Origins of the Commission

The origins of the enquiry approach can be traced back to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, in which Article 30 states: "On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible".

Under the Geneva Conventions, the articles providing for the enquiry procedures (common Articles 52, 53, 132, and 149)\(^2\) employed similar wording to Article 30 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1929. In 1974 the International Committee of the Red Cross (hereafter the ICRC) elaborated a Draft Protocol that served as the basis for discussion at the Diplomatic Conference inaugurated in 1974. Surprisingly, this Draft Protocol did not contain any provision to improve the enquiry procedure provided for in the 1949 Conventions.\(^3\)

In the Diplomatic Conference of 19 March 1975, Denmark, New Zealand, Norway\(^4\) and Sweden, jointly forwarded a proposal to add a new article.\(^5\) This proposal, together with one forwarded by Pakistan,\(^6\) on 25 March 1975, were the main foundations for Article 90.

---


\(^4\) In Doc. CDDH/I/241/Add.1, Norway was added as a co-sponsor.


\(^6\) For the text of this proposal see ibid., pp. 340-341.