

crimes are intentionally directing attacks against the civilian population as such, intentionally directing attacks against personnel objects involved in humanitarian assistance and peace-keeping missions, rape and sexual violence, and conscripting or using children below the age of 15 in the armed groups or armed forces. Of course, the Rome Statute does not cover everything under the Second Additional Protocol on non-international armed conflict, notably the weapons provision does not appear in the second part of Article 8 Rome Statute. Neither do provisions on target selection and proportionality.

It is understandable that the focus of attention with respect to international humanitarian law is now on the Rome Statute and the entry into force of this instrument. However, I would like to point out that not only the Rome Statute includes rules of international humanitarian law. The Geneva Conventions include specific provisions listing acts that are considered grave breaches of their rules, such as the killing and torture of protected persons. The list of grave breaches was expanded in 1977 with the adoption of the First Additional Protocol to criminalise other acts and establishing universal jurisdiction over them, such as acts aimed at harming civilians through the unlawful combat in hostilities. According to the Rome Statute, the Court is complementary to national jurisdictions, which means that States are first responsible for bringing perpetrators to justice. Many States are now in the

process of drafting legislation in order for their laws to be in conformity with the Rome Statute.

The Rome Statute of the International Criminal Court is not the only instrument that contains the rules on international humanitarian law. It is first of all up to States to respect and to ensure respect for the rules of International Humanitarian Law; the Rome Statute did not change or end this obligation, which is contained in the first article of each of the four Geneva Conventions. The ratification and the implementation of the Additional Protocols, which complemented the Geneva Conventions, would be the first step in the further protection of those who do not or no longer take part in the hostilities.

In conclusion, I would like to very briefly quote part of a speech held by the ICRC's President Kellenberger yesterday at a round-table conference organised by the ICRC and the Swiss government, which was also referred to just now "our belief in the continued validity of existing law should not be taken to mean that IHL is perfect, for nobody of law can lay claim to perfection. But any attempt to re-evaluate its appropriateness can only take place after it has been determined that it is the law that is lacking and not the political will to apply it."

Thank you very much for your kind attention. ■

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

Frits Kalshoven\*

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.<sup>1</sup>

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

\* Former Professor of International Law at the University of Leiden, Netherlands.

<sup>1</sup> For an overview of the drafting history of Art. 90, see Kalshoven, F. "The International Humanitarian Fact-finding Commission: its Birth and Early Years", in Denters, E. & Schrijvers, N. (eds.), *Reflections on International Law from the Low Countries*, Kluwer Law International, The Hague, 1998, pp 201-215.

text displayed defects that he had 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.<sup>2</sup>

Article 90, paragraph 2(a) provides States parties to Protocol I with the option to give this consent beforehand, by depositing a declaration recognising 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.<sup>3</sup>

Today, the International Humanitarian Fact-Finding Commission (as it has restyled itself) is in the 11<sup>th</sup> year of its “real existence”. Its competence has been recognised 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 who 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, paragraph 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, paragraph 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 of this Protocol”, and to “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol” – the latter clause obviously reminiscent of similar clauses in various human rights treaties.

The Commission has attempted to improve its lot along two lines. The first line has involved an internal process, with the members trying to find ways around some of the restrictions embedded in Article 90. Particularly troublesome in this respect are: (1) the fact that Article 90 is included in an instrument, Protocol I, that is specifically applicable in international armed conflicts; and (2) the repeated references in the Article to “the Conventions and this Protocol”. Obviously, international armed conflicts have become a rarity, with the great majority of today's armed conflicts being of the non-international variety. As well, what we regard today as international humanitarian law is quite a bit broader than the contents of the Geneva Conventions of 1949 and Protocol I of 1977 alone.

The Commission accordingly has almost from day one declared itself ready to carry out its functions in situations of internal armed conflict as well. It considers that nothing in the text of Article 90 prevents it from doing so, provided all the parties concerned in a particular enquiry or good offices procedure consent to its functioning. Similarly, it is convinced that whether in a situation of international or internal armed conflict, the scope of applicable law need not be restricted to “the Conventions and this Protocol” and may effectively encompass the entire field of IHL, again, provided the parties concerned accept such an extension.

The second line has consisted of a series of promotional activities. Members seized every opportunity to introduce and explain the Commission in academic and similar suitable meetings. The Commission was represented in international Red Cross and other official conferences. Delegations headed by the president visited a number of capitals, meeting with political and military authorities. Visits were brought to the United Nations headquarters and to permanent representatives of States members of the Security Council. The latter visits served, *inter alia*, to explain the possibility for that organisation, and for the Security Council in particular, to utilise the Commission for specific enquiries into alleged serious violations of IHL.<sup>4</sup>

While these combined efforts may have significantly contributed to the remarkable increase in the number of States that accept the competence of the Commission, its capacities remained untested in practice. Our question, whether the Commission has turned into a “sleeping beauty”, might therefore be answered in this sense that although never a “beauty” in the first place, it certainly continues to be “sleeping”. Why is this so? In effect, a number of factors may be

<sup>2</sup> Prof. Graefrath wrote about this himself: “Die Untersuchungskommission im Ergänzungsprotokoll zu den Genfer Abkommen vom 12. 8. 1949”, (1981) *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Ges.-Sprachw. R. XXX*, p12.

<sup>3</sup> *Op. cit.* note 1, at 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.

<sup>4</sup> More than once on those occasions it became apparent that not all of these authorities had a clear idea, to say the least, of IHL and its relations with, and distinctions from, human rights law.

determinant of this unsatisfactory situation. Two are highlighted here: (1) the Commission's independence, and (2) the reluctance of parties to an armed conflict to have the truth about certain alleged facts exposed.

The case of the former Yugoslavia may serve as an example. The break-up of Yugoslavia, in mid-1991, and the outbreak of armed conflicts between the various former parts of that State, coincided with the beginning of the "real existence" of the Commission. Allegations of serious violations of IHL accompanied the conflicts from the very outset. The ICRC time and time again urged the parties to refer their complaints to the Fact-Finding Commission. To the extent the parties reacted at all, each time at least one party chose not to follow that advice. Then, in October 1992, the UN Security Council, rather than mandating the Commission to investigate the facts at issue, requested the Secretary-General to set up a special commission of experts, with the task to collect and analyse all available information about serious violations, and to report its findings to the Secretary-General (and, through him, to the Security Council). Ironically, two of the five members of this *ad hoc* commission were also members of the Fact-Finding Commission.<sup>5</sup> As we know, this commission was soon overshadowed by the equally *ad hoc* International Tribunal for the Former Yugoslavia.<sup>6</sup>

The first factor mentioned above, the Commission's independence, was hailed at the outset as one of its major assets. It had been created on purpose as a treaty body, not organically connected with either of the two dominant networks in this sphere of interest: the Red Cross/Red Crescent Movement, and the United Nations (where initiatives for investigations are frequently launched, whether by the Security Council, the Secretary-General, the High Commissioner for Human Rights, or the Special Rapporteurs). To underscore its complete independence, the Commission initially held its annual meetings in Berne, at the seat of its Secretariat and, more important, far from the Geneva offices of the ICRC and the United Nations! However, as evidenced by the Yugoslavian example, such a blissful state of utter independence acts as a two-edged sword: while protecting the Commission from undue influence (the reason why the construction was chosen in the first place) it also isolates it as a sort of alien body not belonging to one's proper family.<sup>7</sup>

The other point, the reluctance of parties to see the truth about alleged facts exposed, is intrinsic in the nature of the Commission's mandate. For it to enquire into facts alleged to be serious violations of IHL requires that it searches for the truth about these allegations. True, the rules of procedure prescribe that a report of the Commission is sent to the parties and may be disclosed only by those parties. Even so, the outcome may be a finding that one party had lied (or "distorted the truth"). Clearly, this is what parties to armed conflicts do all the time, and they go to great lengths to prevent their schemes being exposed. Parties to the various Yugoslavia conflicts too, have often preferred to use allegations of violations as a propaganda weapon rather than as a first step towards the disclosure of the truth about the alleged facts.

In the course of the first 10 years of its actual existence, the Commission has more than once been involved in situations that might have led to real work. To mention a few: The Sri Lankan Tamil Tigers once were briefly interested in the possibility of submitting to the Commission, cases of alleged violation of IHL by government forces: they lost interest when they realised that the government might have claims against them as well. – The Chechnyan authorities invited the Commission to investigate violations allegedly committed by Russian forces, on the basis, unacceptable to the Commission, that Chechnya was an independent State and the conflict with Russia therefore an international armed conflict, and Chechnya was successor to the Soviet Union as party to the Geneva Conventions and Protocol I as well as in the declaration under Article 90 made in 1981 by the Soviet Union. – In the recent conflict in Afghanistan, Amnesty International wrote to the parties concerned (the United States, the United Kingdom, and the Northern Alliance) that they should have the facts that led to numerous deaths among prisoners at Mazar-I-Sharif clarified by the Commission; the parties never even answered to Amnesty's suggestion.

The Commission came closest to actual involvement in Colombia – a hornet's nest that has been the theatre of vicious internal armed conflict since long years.<sup>8</sup> At one time, after several years of talks with the government and one guerrilla party, the ELN, an agreement between these two parties was in the making. However, elections brought a new president, who set a different course which did not leave room for involvement of the Commission as long as the armed conflict was continuing. Even so, the case of Colombia is illuminating in that it brings to light the importance of trust gradually growing between parties, to the point where they can seriously consider entering into an agreement involving the submission of their mutual accusations of wrongful conduct of hostilities to an independent, neutral body of outsiders. The negotiating parties, it may be added, had set great store by the good offices capacity of the Commission, considering that its involvement actually might contribute to bringing the parties closer to peace.

The question may be asked whether the Fact-Finding Commission is likely to get an actual job any time soon? Any answer to that question would be a matter of speculation. Rather, I wish to add a few more words about the Commis-

<sup>5</sup> The commission was established pursuant to Resolution 780 (UN Doc. S/RES/780 (1992)), with the present author as chairman and as members: Prof. Cherif Bassiouni, Mr. William J. Fenrick, Judge Keba Mbaye and Prof. Torkel Opsahl. Its final report, with Prof. Bassiouni as chairman, was submitted to the Security Council by the Secretary-General on 24 May 1994 (UN Doc. S/1994/674, 27 May 1994).

<sup>6</sup> The ICTY was established by Resolution 827 (UN Doc. S/RES/827 (1993)), 25 May 1993.

<sup>7</sup> To the Secretary-General, in 1992, the Commission must have appeared like a distinguished yet untested body. In the appointments list of 26 October 1992, the fact is mentioned that I was a member of the Fact-Finding Commission. Yet, the Commission was bypassed.

<sup>8</sup> On the attitude of Colombia in relation to Protocol II of 1977, and to IHL in general, see, by this author, "Protocol II, the CDDH and Colombia", in Wellens, K. (ed), *International Law: Theory and Practice*, Kluwer Law International, The Hague, 1998, pp 597–622.

sion's potentialities in relation to its function of "finding facts" concerning alleged serious violations of IHL. Consider, first, what may be the purpose of such an exercise? This actually will depend entirely on the specific task the Commission is given: it may be to establish an historical record; to expose the truth; to lay bare the facts pointing to the responsibility of a party; to provide grounds for compensation of victims. Each of these tasks may serve a useful purpose.

The Commission may also be called upon to identify the person or persons who *prima facie* may be regarded as individually criminally liable for a particular act, thus enabling the start of a prosecution that in turn may lead to a trial. In the early debate among members about Article 90, some members held this to be not just one possible role for the Commission but really its only task. It should be emphasised, and it was realised from the outset, that the Commission is not itself a judicial body. The most it could determine is "whether there are reasonable grounds for believing that [a particular person] committed the [serious violation imputed in the request]." I borrow this phrase from a Rule 61 decision taken by ICTY Trial Chamber II in September 1996 in the case of *Ivica Rajic*, who had been the commander of a Bosnian-Croat unit that attacked and destroyed the village Stupni Do in central Bosnia.<sup>9</sup> The question is: could the Fact-Finding Commission have done what this Chamber of the ICTY did? It may be recalled that at the time of the event (October 1993) both Bosnia and Herzegovina and Croatia had recognised the Commission's competence!

In effect, the Chamber found *prima facie* evidence of a variety of things: that *Rajic* had been in command of the Bosnian Croat unit that carried out the attack on Stupni Do;<sup>10</sup> that Bosnian Croats were acting as "agents" of Croatia in such clashes with the Bosnian government;<sup>11</sup> and that at the time, units of the Croatian Army were present in central Bosnia, had been sent there by the Croatian government, and were engaged in fighting against the Bosnian government<sup>12</sup> (so that even Article 2 of the ICTY Statute could apply<sup>13</sup>).

In my submission, the Fact-Finding Commission could have done all this. I do not know how many of its present members share this view. At least one member of the first hour has

remained convinced that the Commission can do no more than verify the basic "facts" – that a gun was fired and a man fell; not: who instigated or ordered the act, let alone a matter of command responsibility of persons higher up. This may be a last trace of the struggle between the Fleckians and the Graefrathians, with the latter definitely on the losing side.

I am not suggesting that a Stupni Do-type fact-finding mission would have been easy – far from it. Indeed, I strongly hope that the Commission's first case is not of that order of complexity. Nor, for that matter, would Colombia have been my theatre of choice! Cases apt to arise out of the situation in that country would be not so much of the "whodunit" variety (since the facts would often be plain) but involve questions of ultimate responsibility.

To conclude: the Fact-Finding Commission has not so far had the chance to demonstrate its capabilities. I am convinced that its day will come. I am also convinced that it will then be able to prove itself a useful addition to the list of existing international instruments for the promotion and enforcement of IHL. The instruments on that list are neither numerous nor overly effective. As for the most recent and much-heralded addition, the International Criminal Court, time will tell what it can effectively contribute. To revert to Colombia, that State became a party to the Court's Statute, and the president used the occasion to warn the guerrillas to mend their ways, or else!

Even with this recent addition to our list, there remains room for further expansion, in particular with instruments with a more direct impact on the parties' level of respect for their IHL obligations than may be expected of any *ad hoc* or permanent international criminal jurisdiction. On that note, I stop, leaving the floor to my assigned commentator, Liesbeth Zegveld, who will address that further perspective. ■

<sup>9</sup> *The Prosecutor v. Ivica Rajic a/k/a/ Viktor Andric*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Decision of 13 September 1996.

<sup>10</sup> Paras. 9, 58-61.

<sup>11</sup> Para. 26.

<sup>12</sup> Paras. 13-21.

<sup>13</sup> Paras. 7, 8.

## Comments on the Presentation of Prof. Frits Kalshoven

Liesbeth Zegveld\*

Where the International Humanitarian Fact-Finding Commission is withheld from its proper functioning, other international bodies have taken over its supervisory tasks. A remarkable example is the Inter-American Commission on Human Rights. It got involved in the case of the Guantanamo Bay prisoners. On 12 March 2002, the Inter-American Commission adopted precautionary measures, asking the Government of the United States to "take the urgent measures necessary to have the legal status of the detainees of the

Guantanamo Bay determined by a competent tribunal".<sup>1</sup> The Inter-American Commission noted that the rights of persons under control of a State, and in case of armed conflict, might

\* Dr. Liesbeth Zegveld is working as a lawyer for Böhler Franken Koppe de Feijter Advocaten in Amsterdam.

<sup>1</sup> International Law in Brief, developments in international law, prepared by the editorial staff of International Legal Materials, The American Society of International Law, 19 March 2002 and 4 June 2002.