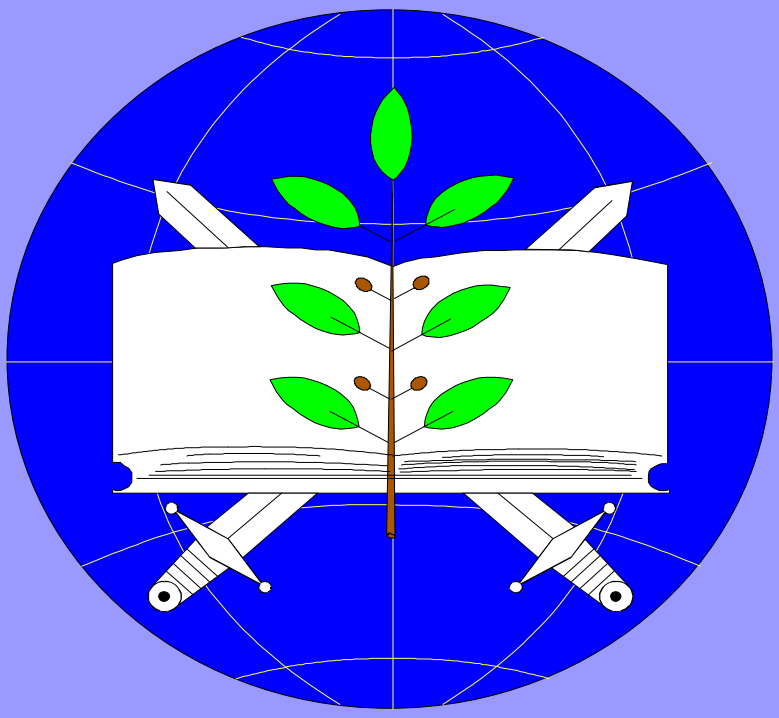
INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION (IHFFC)

(ARTICLE 90 OF PROTOCOL ADDITIONAL I TO THE GENEVA CONVENTIONS)



REPORT ON THE WORK OF THE IHFFC

Berne, 29 May 2006

Report on the Work of the International Humanitarian Fact-Finding Commission

The International Humanitarian Fact-Finding Commission (IHFFC, hereinafter "the Commission"), constituted in 1991 pursuant to article 90 of Protocol I Additional of 1977 to the Geneva Conventions of 1949, has now been in existence for fifteen years. Its services, however, have not been used to date. In this situation, the Commission feels a need to evaluate its situation, to draw a balance sheet and to submit it to the High Contracting Parties having recognised the competence of the Commission (hereinafter "the States Parties").

The Commission presents this report to the States Parties in order to enable them to assess the work of the Commission. In presenting this Report, the Commission wishes to highlight the services which it may provide as a means of ensuring the better implementation of international humanitarian law. On the other hand, the Commission has been aware of, and wishes to draw attention to, the particular constraints to which it is subject in accordance with the international legal framework which forms the basis of its very existence, and which constitutes its mandate.

Chapter 1

The mandates of the Commission – outline of the Report

Art. 90 gives the Commission powers of enquiry, if requested by States (or other parties to a conflict), and the power to offer its good offices. In order to fulfil these functions, the Commission is established as a permanent institution which can commence an enquiry or be available to the parties at short notice. This implies, as a necessary preliminary step, a mandate for the Commission to be prepared for this event and to ensure that it is able to work if called upon to do so. After a short summary of the history of the Commission (Chapter 2), the report tries to give the necessary information to the States Parties to enable them to evaluate whether the Commission has correctly fulfilled this part of its mandate. This is the object of Chapter 3 of the Report. It will be shown that the Commission has indeed fulfilled this part of its mandate. It is operational and able to function should the occasion arise.

Art. 90 was drafted by the Diplomatic Conference on International Humanitarian Law in the years 1974 to 1977 on the assumption that the fact-finding and good offices mandate of the Commission was a means necessary and useful for the better implementation of international humanitarian law. The fact that the Commission has so far not been called upon to function does not necessarily mean that this assumption was incorrect. But this very fact invites the question whether, in the light of developments which have taken place since the adoption of the Additional Protocols, further measures could and should be taken in order to enable the Commission to play indeed the positive role for which it was created. It is the purpose of Chapter. 4 of the report to describe the reflection of the Commission concerning this question.

The conclusions and recommendations of the Commission will be presented in Chapter. 5.

Chapter 2

The establishment of the Commission and the elections

According to article 90 (1)(b) Additional Protocol I (AP I), the Commission was to be established once 20 States had accepted its competence. The 20th declaration of acceptance was submitted on 20 November 1990 and the first twenty States having accepted the competence of the Commission[1] performed the first election on 25 June 1991. The Commission had its first meeting in Berne on 12 and 13 March 1992. The Swiss government has provided the necessary administrative facilities for the Commission (Art. 90 (1) (f)).

In accordance with article 90 (1) (b), the second election took place five years later, on 29 October 1996, 48 States having accepted the competence of the Commission.[2]

The third election took place in 2001, 58 States having accepted the competence of the Commission.

The next election will take place on 7 December 2006, 69 States having accepted the competence of the Commission up to now.

During these 15 years, the geographical composition of the group of States having recognised the competence of the Commission and, thus, entitled to elect its members has changed considerably. While in 1991, it was primarily composed of European States, the current membership of 69 States is spread over all continents, including regions where armed conflicts have taken place or where serious political tensions exist. That changing composition of the electoral body was bound to have, did have, and will have in the future, an impact on the composition of the Commission. Nevertheless, the practice of re-electing a number of members of the Commission has ensured a sound combination of continuity and renewal.

1 Sweden, Finland, Norway, Switzerland, Denmark, Austria, Italy, Belgium, Iceland, Netherlands, New Zealand, Malta, Spain, Liechtenstein, Algeria, Russia, Belarus, Ukraine, Uruguay, Canada.
2 See 79 IRRC 234 (1997).

Chapter 3

The work of the Commission to enable it to fulfil its mandate

The work of the Commission to enable it to fulfil its functions has taken various forms. There is, first, the adoption of the additional or secondary rules which are necessary for its functioning (3.1). Secondly, certain practical steps have been taken to put the Commission into a better position to fulfil its functions. They include information gathering (3.2), training (3.3) and contingency planning (3.4). A third level is outreach and promotional activities of various kinds (3.5). They include the representation of the Commission at various international events, in particular the International Red Cross and Red Crescent Conferences, consultations with the United Nations, and promotional trips to various regions of the world. Finally, the Commission has indeed offered its services in a few cases (3.6).

The financial aspects of the activities of the Commission deserve a special comment (3.7).

The Commission has also received encouragement and support from a number of international organisations and institutions (3.8).

3.1 Rule-making

Art. 90 (6) AP I tasks the Commission to establish its own rules, a necessary requirement for the Commission's functioning deriving directly from the text of the Protocol. These rules were adopted soon after the actual establishment of the Commission, on 8 July 1992. They are a matter of public record. They have been published in the Commission's information brochure and are available on the Commission's website.

The financial regulations are a responsibility of the States Parties pursuant to Art. 90 (7). The final version of these regulations was adopted at the International Conference concerning the Financial Procedures for the Administrative Expenses of the Commission, which took place from 8 to 9 September 1994.

Thus, the necessary additional regulatory framework for the functioning of the Commission was established at an early stage.

In addition, the Commission adopted detailed internal operational guidelines in 2003 which will structure its working processes.

3.2 Practical preparations – information gathering

As will be shown in further detail below, fact-finding as a means of international crisis management has undergone a considerable development during the last three decades. An institution which has to face the challenges of modern fact-finding missions must keep abreast of these developments. Therefore, seminar-type events where specific developments of modern fact-finding were presented have been a regular feature of the annual meetings of the Commission. Examples are meeting of

the Commission dealing with the UN fact-finding mission to Darfur (presentation by and exchange of views with its chairman, Prof. Antonio Cassese in 2005) and fact-finding concerning the respect of international humanitarian law in Iraq conducted by Human Rights Watch (presentation by a representative of the organisation in 2005). A seminar on different forms of fact-finding, to provide for a comprehensive review of its methods, is currently under consideration in cooperation with other relevant organisations.

3.3 Practical preparations - training

In September 1998, the Commission, at the invitation of the government of Sweden, undertook an exercise in the form of a mock inquiry. The government of Sweden provided all the facilities for the exercise, including the “players”. Important conclusions were drawn from that exercise which have been incorporated into the operational guidelines (see 3.1).

3.4 Logistics and contingency planning

The Commission is well aware of the fact that an enquiry might require substantial resources in terms of manpower and equipment which are costly. The Commission is not, and cannot be, an institution which holds these resources in store. The functioning of the Commission in particular cases will therefore depend on its ability to mobilise such resources as the need arises. It has been a constant concern of the Commission to ensure that this is possible.

In order to facilitate this task, the Commission already in 1993 established a working group to deal with the question of available equipment. In 2003, it established a new committee tasked to evaluate the logistical requirements in more detail. The committee continues to work and endeavours to make sure that the Commission can face the logistical challenges of any enquiry it is called upon to undertake.

It is not clear from a legal point of view whether the treaty obligation of Switzerland to assume the Secretariat of the Commission also includes the obligation to provide for material logistical support for launching fact-finding missions if the need arises. Regardless of that legal question, Switzerland accepted to help the Commission in the establishment of a basic structure. In 1993, the Swiss authorities agreed in principle to offer support to the Commission in the field of logistics, transportation and equipment and, possibly, to place at its disposal the services of external expert members of the Swiss Expert Pool for Civilian Peace Building. An agreement has been made between the Secretariat and the Swiss Disaster Relief Unit (SDRU) on the provision, by SDRU, of standard personal equipment that would be kept at the disposal of the Commission at all times.

More recently, the Commission has contacted a number of relevant institutions in a number of countries with a view to being be able to draw on their specific expertise and human resources which might be needed in case of an inquiry. The fields of expertise include communications, criminal investigation, forensic pathology, military matters (e.g. ballistics, weapons), and public relations. The basic concept is to form a

network on which the Commission can rely in case of need. Promising steps have been taken to that end.

The question of the security of the mission has also been kept under review.

3.5 Outreach and promotional activities

Experience shows that there is a constant need to disseminate international humanitarian law, including the various procedures for its better implementation which exist. On the occasion of various encounters, members of the Commission were confronted with the fact that knowledge about the Commission and its possibilities left a lot to be desired. On the other hand, the Commission felt a need to know more about the actual fact-finding requirements of States and relevant international organisations in order to enable it to react to these requirements, in particular in the light of new legal and political developments.

This is the background for numerous and systematic outreach activities undertaken by the Commission.

The Commission was represented at various international events related to its functions.

A first example of this type of activity are the various International Red Cross and Red Crescent Conferences (26th International Red Cross and Red Crescent Conference, Geneva 1995; 27th International Red Cross and Red Crescent Conference, Geneva 1999; 28th International Conference of the Red Cross and Red Crescent, Geneva 2003). Representatives of the Commission also attended the various regional seminars organised by the ICRC in 2003 for the better implementation of international humanitarian law.

The second example are various interstate conferences relating to the Geneva Conventions, such as:

- International Conference for the Protection of War Victims 1993;
- First Periodical Meeting of States Parties to the Geneva Conventions on General Problems Relating to the Application of International Humanitarian Law, Geneva 1998
- Celebration of the 50th Anniversary of the Geneva Conventions, Geneva 1999;
- International Conference of Governmental and Non-Governmental Experts on the Missing, Geneva 2003.

As to the relationship with the International Criminal Court (ICC), the Commission was represented at the Rome Conference 1998, which adopted the Statute of the ICC, and at the various meetings of the Assembly of the States Parties to the Statute.

In 2004, the work and the potential of the Commission were presented before the Group of Governmental Experts of the States Parties to the Convention of 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. The background of this presentation was that suggestions had been made to create an implementation and monitoring instrument for that Convention.

Members of the Commission also were in a position to present its case to various scientific conferences.

Relations with the United Nations have been a concern of the Commission since its establishment. Shortly after the establishment of the Commission, in December 1992, its first President, Ambassador Erich Kussbach, addressed a letter to the Secretary-General of the United Nations suggesting the development of some kind of cooperation. The first visit of the United Nations Headquarters by the President of the Commission took place in November 1992, followed by another visit in February 1994. Since that time, there have been regular contacts and consultations between the Commission and the UN Secretariat as well as delegations at the UN. The most recent example of this activity was a visit by a delegation of the Commission in December 2005, where it met with the Secretary General of the UN, Mr Kofi Annan. The Commission has, on various occasions, suggested that it could undertake enquiries within the framework of the United Nations. High ranking representatives of the Secretariat, including the Secretary General, have expressed an interest in these services of the Commission. So far, this has not led to any agreement on a particular action. The perspectives of a possible cooperation will be further discussed below.

The Commission undertook a number of contacts with particular States in order to raise the awareness of the services which the Commission can offer and to get acquainted with the problems these States might see in that respect. A number of bilateral talks were held on the occasion of Red Cross conferences, for example in Geneva in 2003.

Members of the Commission also undertook promotional missions to various countries: Central America in 2000[3]; Venezuela and Ecuador in 2001; Western,[4] Southern and Eastern Africa [5] in 2004 and South-East Asia in 2006. [6] The representatives of the Commission met with high-ranking government officials as well as with representatives of the National Red Cross or Red Crescent Societies and of non-governmental organisations.

An important tool to make the potential of the Commission known is its website (http://www.ihffc.org), which was launched on 28 August 1998. It includes information on the procedure of the Commission as well as regular news and a number of reports.

3.6 Initiatives

In 1996, Professor Kalshoven, then president of the Commission, offered the Commission's services to undertake certain investigations concerning the internal conflict in Colombia. This initiative was based on the Commission's view that article 90, as part of a treaty relating to international armed conflicts, did not bar the Commission from accepting similar tasks in the case of a non-international conflict and to offer its good offices in that context. Professor Kalshoven conducted talks with

[3] The following countries were visited: Guatemala, El Salvador, Honduras.
4 The following countries were visited: Cameroon, Côte d'Ivoire, Niger, Senegal.
5 The following countries were visited: South Africa, Botswana, Mozambique, Kenya.
[6] The following countries were visited: Thailand, Vietnam, Cambodia, Brunei.

the Colombian government and one of the parties to the conflict, but finally, no agreement could be achieved on a mandate for the Commission.

In recent years, the Commission has offered its good offices in relation to other conflict situations. In 2002, exploratory talks were held concerning fact-finding in the aftermath of a non-international armed conflict. In 2004, an offer was made regarding specific allegations of violations of the rules concerning the treatment of prisoners. In neither case, however, could an agreement be reached. Offers of good offices are confidential, as are the proceedings of the Commission in general. The publication of the offer or any measure related thereto depends on the arrangements in concrete cases.

There were also cases in which talks were held as to whether members of the Commission should be part of fact-finding missions undertaken by the UN. A certain precedent for this participation was set as early as 1992 when two members of the Commission took part in the fact-finding mission established by the Security Council to investigate violations of international humanitarian law in former Yugoslavia.[7] Recent cases where this possibility was considered were the missions established by the UN Secretary-General in 2002 for an inquiry of the situation in Jenin[8] and in 2004 the mission to Darfur.[9]

3.7 Finance

The administrative expenses of the Commission are born by the States having accepted its competence (article 90 (7)), while it is the concept of this provision that the cost of specific enquiries are borne by the States which are parties to the enquiry procedure. The latter principle poses practical problems and even constitutes an impediment for the work of the Commission. On various occasions during the contacts just described, members of the Commission have been made aware of this fact. In particular where conflicts take place between or in developing countries, one cannot expect that these countries already facing tremendous economic difficulties invest important financial resources in humanitarian fact-finding. It is significant that in the case of the talks concerning the internal conflict in Colombia, the government of the Netherlands paid the travel expenses for the talks. It was always understood in these talks that the cost of the good offices were to be covered by voluntary contributions and could not be shouldered by the parties to the conflict.

3.8 Support and encouragement for the Commission

The Commission has received support and encouragement through a number of resolutions, declarations, recommendations and guidelines adopted by international institutions and bodies. In particular, these documents have called upon States to accept the competence of the Commission and to use its services. The following list contains the major examples:

7 See UNSC Resolutions 780 of 6 October 1992 and 787 of 16 November 1992.
8 See UNSC Resolution 1405 of 19 April 2002.
9 See UNSC Resolution 1564 of 18 September 2004, para. 12.

United Nations General Assembly:
- Resolution 55/148 of 12 December 2000;
- Resolution 57/14 of 19 December 2002;
- Resolution 59/36 of 16 December 2004.

United Nations Security Council:
- Resolution 1265 of 17 September 1999;
- Debate on the protection of civilians in times of armed conflict, 9 December 2005.[10].

Resolutions of International Red Cross/Red Crescent Conferences:
- Plan of Action adopted by the 27th International Red Cross and Red Crescent Conference 1999;
- Declaration adopted by the 28th International Red Cross and Red Crescent Conference 2003;
- Resolution 1 adopted by the same Conference.

Other bodies:
- Council of Europe, Parliamentary Assembly: Recommendation 1427 of 23 September 1999;
- European Union: Guidelines on promoting compliance with international humanitarian law of 12 December 2005[11].

3.9 Summary and conclusions

The Commission has undertaken a vast array of activities to be in a position to fulfil its mandate. It has approached the promotion of its goals from a variety of perspectives. The two major elements have been preparedness on the one hand and dissemination through various outreach activities on the other. Preparedness includes the adoption of the necessary secondary rules, gathering of relevant information, training and contingency planning. Steps have been taken in order to ensure that the Commission has at its disposal the necessary logistic support and expertise, including human resources, which may be needed if a fact-finding mission is to be launched.

The commission is also aware of the fact that additional financial resources may have to be raised in the not unlikely case that the parties to a conflict are unable to bear the financial burden of an inquiry.

Outreach activities include representation of the Commission at relevant international events as well as information provided to, and consultations with, States and international organisations. Thus, the Commission has taken many different steps and initiatives to see to it that it is in a position to fulfil its functions and to render its services.

Further outreach activities are under consideration, but they should be well targeted. This targeting should be decided on the basis of the considerations set out in the following chapter of this Report.

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10 S/PV 5319, see in particular p. 19 (Russia) and Resumption 1, p. 18 (Spain).
11 Adopted by the General Affairs Council, 2005/C 327/04, OJ of 23 December 2005, (sec. 15 (a)).

Chapter 4

Fact-finding as a means of implementing international humanitarian law – the role of the Commission

4.1 Introduction

The fact that the Commission has so far not been called upon to exercise its functions in any given case calls for attempts at an explanation. If it were faithful to its mandate of doing everything in its power to be at the disposal of parties to a conflict for fulfilling its role, the Commission would be obliged to engage in an analysis of this situation. The Commission would like to share with the States Parties the results of this reflection.

In doing so, the Commission must stress that it is only a part of a complex system of measures designed to ensure a better implementation of, and respect for, international humanitarian law. Its functions have to be seen in that entire context. It has also to be noted that Art. 90 is an example of a more general technique of international dispute settlement, namely enquiry and fact-finding. Enquiry figures as an example of dispute settlement in Art. 33 of the United Nations Charter. Thus, the role and the potential of the Commission have also to be seen in that more general context of international dispute settlement and fact-finding in general.

On this basis, the analysis will proceed in two steps. There will first be a description of the development of international fact-finding and its current function in international relations. Then, the particular situation and role of the Commission in this connection will be considered.

4.2 Ascertaining facts in international relations – an overview

Fact-finding is a traditional means of interstate dispute settlement, but it has been a complex development and it has acquired many different roles and functions in recent decades. This has an impact on the role of the Commission as it was conceived by the drafters of Art. 90 of AP I and as can be seen in the 21st century. The Commission, thus, must briefly address various actors and various functions of fact-finding.

There is, first, unilateral fact-finding by the State concerned, i.e. the State where relevant facts happened or are still happening. It has its own agenda for clarifying facts. This type of fact-finding often occurs in a post conflict situation as part of a process of re-establishing normality in a conflict-torn society. Establishing the truth may be part of a normalisation process. In recent years, it has become an important element of post-conflict peace building. The decisive question is whether the result achieved is really accepted as the truth. This will depend on the political context and the personalities chosen for the purpose of fact-finding. Foreign participation in such an exercise may add to its credibility. This was, for instance, the case of the truth commission in Guatemala, the chair of which was a person appointed by the UN Secretary-General. This gave additional authority to that commission. But on the other hand, foreign participation may in other cases be considered an unwelcome infringement on the State's sovereignty. Where a foreign role is wanted, there is a

possible role for the Commission. This approach has been the basis of certain initiatives of the Commission in relation to non-international armed conflicts mentioned above.

Fact-finding is also used as a means of dispute settlement between States. Inquiry is a traditional means of dispute settlement as witnessed by the relevant treaties established by the Hague Peace Conferences[12] and the so-called Geneva General Act of 1928.[13] As such, it is referred to in Art. 33 of the UN Charter. States create enquiry commissions or the like to clarify facts which are the object of, or relevant for, concrete disputes existing between them. But States may also create permanent bodies for this purpose. The International Humanitarian Fact-Finding Commission is a body of this type.

There are, however, very few cases of the use of this type of procedure since the Hague Peace Conferences, in particular not after the 2nd World War. The Commission has not been used by the States, nor have any bilateral enquiry commissions or the like recently been instituted. On the other hand, other fact-finding mechanisms are booming, in particular those instituted by intergovernmental and non-governmental organisations.

Another means of interstate dispute settlement, namely judicial or quasi-judicial procedures, also contain an element of fact-finding, namely the taking of evidence. International adjudication of various types has undergone tremendous progress during the last decades. There is, first of all, the International Court of Justice (ICJ) whose role has greatly increased in recent years. Its function is to state in a legally binding way violations of international law and (if so requested) to award damages for these violations. This also applies to international humanitarian law. The Court has fulfilled these functions in the Nicaragua[14] and the recent Congo case[15]. These judgments were the result of extensive fact-finding by the Court. The two cases show the potential of the Court in this field.

Arbitration similarly plays an increasing role. A recent example is the Eritrea-Ethiopia Claims Commission dealing with violations of international humanitarian law during the conflict between these two States.[16] On the basis of extensive fact-finding, it has rendered a number of awards, stating either that violations of international humanitarian law had happened or could not be proved and that one of the States was liable to pay compensation for a particular case of damage.

Whether and to what extent human rights bodies play a role in enforcing international humanitarian law, which applies in parallel to human rights law, still is a matter of some controversy, but it has been recognised as a matter of principle by the International Court of Justice.[17] This means that a violation of a human right can at the same time constitute a violation of international humanitarian law, and that the

12 Hague Convention for the Pacific Settlement of Disputes, 29 July 1899, Art. 9 et seq.
13 LNTS 93, 343.
14 Case concerning military and paramilitary activities in and against Nicaragua, Nicaragua v. United States of America, Judgement of 27 June 1986.
15 Case concerning armed activities on the territory of the Congo, Democratic Republic of the Congo v. Uganda, Judgement of 19 December 2005.
16 See for example the award rendered 28 April 2004, 43 ILM 1249 (2004).
17 Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, paragraphs 102 et seq.

human rights remedy (a complaint by the individual victim before a human rights tribunal) also covers the violation of international humanitarian law.[18] Thus, taking evidence, i.e. fact-finding done by and for international human rights tribunals may also be relevant for international humanitarian law. This has become increasingly important in recent years.

Another important development is that of international criminal courts. The establishment of the two *ad hoc* tribunals for the former Yugoslavia and for Rwanda have opened a new chapter as to the ways and means of ensuring respect of international humanitarian law. They have done a great amount of fact-finding under difficult circumstances. The ICC has its own procedure of investigation which is in the hands of the Office of the Prosecutor. Investigations undertaken to ascertain individual responsibility have to be distinguished from fact-finding relating to situations of alleged violations which are the task of the Commission.

Governmental organisations are another important actor in international fact-finding. Besides serving as host institutions for some of the bodies just described, they use fact-finding as a genuine means to perform their various tasks. The United Nations, in particular, have used fact-finding in different contexts as part of their activities for the maintenance of international peace and security. Usually, the purpose is to find a reliable factual basis for further measures to be taken by the Organisation. In the case of the UN, rendering public the results of a fact-finding mission stating violations of international humanitarian law may be part of a process of exerting pressure on a State to return to an attitude of respect for the law. The work of the Special Rapporteurs of the Human Rights Commission may be quoted in this respect. In the case of the Security Council, fact-finding may lead to various actions which are relevant for the implementation of international humanitarian law.

As the Security Council has stated on several occasions that systematic violations of international humanitarian law constitute a threat to the peace,[19] the entire array of measures within the power of the Security Council can be triggered by such fact-finding. Examples are the creation of the International Criminal Tribunal for the Former Yugoslavia and that for Rwanda, both preceded by a fact-finding mission. A recent example of this practice is the case of Darfur, which the Commission studied during its 2005 annual meeting. In 2004, when there were horrifying reports about massive human rights violations in the Darfur region of Sudan, the Security Council requested the Secretary-General to establish a fact-finding mission, which was to be headed by Professor Antonio Cassese, former President of the ICTY, to enquire into the violations of human rights and international humanitarian law and also into the nature of the crimes allegedly committed in the area.[20] The result of its report was that the Security Council referred the case to the Prosecutor of the International Criminal Court.[21]

The increased and increasing role of UN fact-finding is the background of the discussion described above as to whether the Commission should become involved in this UN framework,

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18 As to the inter-American practice, see the Tablada case decided by the Inter-American Commission of Human Rights, IACHR Report No. 55/97.
19 Resolutions 827 (1993) (former Yugoslavia); 955 (1994) (Rwanda); 1564 (2004) (Darfur).
20 Resolution 1564 18 September 2004.
21 Resolution 1593 of 31 March 2005.

In the context of fact-finding by intergovernmental organisations, the fact-finding activities of the International Committee of the Red Cross (ICRC) have to be mentioned. The ICRC resembles intergovernmental organisations as it derives its powers and functions from international treaties, i.e. the Geneva Conventions and the Protocols Additional thereto. The ICRC is probably the most important fact-finding body in the field of international humanitarian law. For the ICRC, fact-finding is an integral and inseparable part of its action in favour of the victims. It ascertains facts in order to assess whether there are violations which require its intervention, usually diplomatic persuasion. It ascertains facts in order to assess the relief needed by the victims. All this is a core element of the implementation of international humanitarian law.

Last, but not least, non-governmental organisations play a major role in international fact-finding, in particular in the fields of environmental protection (Greenpeace) and of human rights (Amnesty International, Human Rights Watch). Amnesty International has published numerous reports concerning alleged violations of international humanitarian law.[22] Human Rights Watch recently published a report concerning the respect for international humanitarian law by both sides during the American and British intervention in Iraq. Whether or not governments welcome the activities of these organisations, they are indeed an indispensable part of the current fabric of ensuring respect for international law.

This development of various institutions involved in ascertaining fact in international relations generally and in respect of international humanitarian law in particular was bound to have an impact on fact-finding as a means of interstate dispute settlement. One of the reasons of the non-use of these procedures may be that the decision to seize a fact-finding body means overcoming a threshold. Where fact-finding is initiated by third parties, in particular IGOs and NGOs, which have an agenda of their own, these actors may have a sufficient impetus to engage in such procedures which is lacking where the States just decide on their own. The costs involved in a bilateral fact-finding procedure also constitute a restraining factor. Furthermore, it must be noted that there is an increased acceptance of judicial procedures. The basic assumption underlying article 90 is that it is one of the major advantages of fact-finding procedures that they end short of stating the law. Although this is still true, States are apparently more often prepared to have immediately recourse to judicial procedures instead of going to international fact-finding.

4.3 Fact-finding as a means of implementing and enforcing international humanitarian law – current situation and the role of the Commission

On the basis of these reflections, it will now be attempted to specify the possible role of the Commission as a means of ensuring a better respect for international humanitarian law. At the outset, the particular context in which the relevant text, i.e. art. 90 AP I, was negotiated has to be recalled. Apart from dissemination, the attention of the negotiators of the Protocols, as far as ensuring respect for international humanitarian law is concerned, concentrated on two traditional instruments already found in the Conventions: the Protecting Powers and inquiry.

22 Examples are recent reports concerning the detainees at Guantanamo Bay and the bombing campaign during the Kosovo conflict.

As to inquiry, this traditional instrument was considered as useful despite the fact that it had not been used. The negotiators wanted to improve the situation by eliminating the need to establish the inquiry body *ad hoc* by a special compromise, a need which might account for the non-use of the conciliation procedure found in the Conventions since 1929. Thus, they created a standing commission. It would, in the circumstances at the time, have appeared to daring to create an obligatory competence for this new body. Thus, they adopted a copy of the optional clause of Art. 36 of the Statute of the International Court of Justice.

As has just been shown, the possibilities and practices of fact-finding in the field of international humanitarian law have since then considerably developed. What is, in this complex new context, the role of the Commission as an institution specifically created for the purpose of ascertaining facts where there are allegations of violations of international humanitarian law? When the Commission was created by the Diplomatic Conference 1974-77, the multiplicity of procedures just described was not imagined. The functions of the Security Council were hampered by the phenomenon of the so-called automatic veto. Resort to the International Court of Justice was rather rare. No international criminal tribunal existed, and those who advocated its establishment were regarded as utopians. The enforcement of international humanitarian law by human rights tribunals was certainly not a perspective which came to mind of the negotiators. It was assumed and hoped that the maximum acceptable for States in terms of a third party dispute settlement procedure was that Commission with a limited jurisdiction.

Does the fact that the circumstances have changed mean that the Commission has become superfluous, in particular in the light of the fact that it has so far not been seized by any State and that there are so many “competing” institutions? An answer to this question, which the Commission thinks is negative, has to single out what are the specific traits the Commission presents for the States to take advantage of, which the other procedures do not have. These specific characteristics are

- that it is an interstate procedure which is very much influenced and even shaped by the States concerned;
- that the procedure is confidential;
- that its result stops short of a statement of the law.

All three elements are important, in particular in the light of the situation described above.

State influence on the procedure: The parties to the procedure, not a fact-finding body coming with the authority of the Security Council or that of the Prosecutor of the ICC, determine the scope of the case. This is obvious where the Commission offers its good offices (Art. 90 (2) (c)(ii)). But although the scope of an enquiry will be determined by the allegation (Art. 90 (2) (c)(i)), the procedure possesses a cooperative character. It is up to the parties, both parties (!), to decide whether the report is rendered public.

Confidentiality: This element is related to the first one. It is important for States that there is no naming and shaming involved as is the case with many other procedures.

No statement of the law: This remains important in relation to the various judicial procedures. Once the facts are stated, the parties can agree on what follows. If the ICJ has jurisdiction in the case, one party can still go to the ICJ for a declaration of the law and an award of damages. But this is highly improbable. The facts being ascertained will as a rule facilitate an agreement among the parties on the question of just compensation. The Commission may even offer its good offices to arrive at such an agreement. This may be less expensive and less time consuming than going to the ICJ or to arbitration. Thus, although the Commission can and will deal with questions of law, it can do so in a more flexible way.

Similar considerations apply concerning the question of whether the Commission might pronounce itself on individual responsibility for certain violations. As a matter of principle, this is not the Commission's function. But depending on the case which is submitted to it, i.e. depending on the wishes of the parties, it may be called upon to do so.

In relation to the ICC, an early functioning of the Commission may render superfluous the need to call upon the Prosecutor of the ICC. The stated facts may facilitate a party's decision itself to prosecute, which would exclude the jurisdiction of the ICC.

The Commission is not the only institution charged with fact-finding for the purpose of a better implementation of international humanitarian law. There remains, however, a considerable potential for it, in particular in cases where the States concerned want to retain a control of the procedure which either the Security Council or the ICC Prosecutor might take away from them. A closer look at the relevant details is necessary to become aware of this perspective.

Fact-finding is indeed a major tool for a better implementation and enforcement of international humanitarian law, yet it has become multifaceted and complex.

4.4 Perspectives: the relationship of the Commission to other bodies involved in ascertaining facts

Having elaborated the specific role the Commission in the overall complex of ascertaining facts in current international relations, the Commission wants to add a few comments concerning its relationship to other bodies tasked with ascertaining facts relevant for their functions which have been mentioned.

The first question is that of the relationship of the Commission with the United Nations. Assuming that the Security Council requests the assistance of the Commission, the situation presents particular problems. When the Security Council acts under Chapter VII of the Charter, it may adopt decisions which are binding on the member States as well as on intergovernmental organisations. It may create fact-finding bodies as its subsidiary organs or oblige the Secretary-General to establish such bodies as part of the Secretariat, but it may also task existing bodies, including the Commission. In doing so, the Council is bound by the Charter and also, according to a prevailing view, by customary norms relating to the protection of human rights, but arguably not by the details of the AP I concerning the confidentiality of the work of the Commission. As a matter of expediency, however, there is no reason why the Council should disregard these rules. If the Council wants to establish a fact-finding

procedure of a different nature, it can do so, and it has done so, without having recourse to the services of the Commission. If the Council wants to mandate the Commission to undertake a fact-finding mission, it will as a rule do so because it wants to use the particular advantages the Commission has to offer, which have been described above.

As to the ICC, it has already been pointed out that findings of the Commission may be used in subsequent criminal proceedings. This can cause a problem even where the State concerned itself institutes criminal proceedings. In the course of public proceedings, that State may use the findings which the Commission submits if all the parties to the Commission proceedings agree on them being made public (article 90 (5)(c) AP I). If that agreement is lacking, the findings may not be so used.

Where there is the necessary agreement, the question of how the findings are used in those proceedings is a matter of the law of criminal procedure of the State in question. From the point of view of the law governing the work of the Commission, there is no objection against members of the Commission or experts or investigators engaged by the Commission testifying before the national court. From the point of view of the procedural rights of an alleged perpetrator, it is, however, important that the findings of the Commission do not deprive that person of his or her right to challenge any evidence used against him or her.

These considerations apply *mutatis mutandis* to the ICC. The ICC is an institution tasked to ensure the application of international humanitarian law. This means that the ICC has to accept international humanitarian law as it is as a whole – which includes the rules concerning to confidentiality of the investigations of the Commission. Thus, unless there is an agreement by all parties to a Commission proceeding, its findings may not be used by the ICC, nor may members or investigators of the Commission be obliged to testify before the ICC. This limitation is implied in article 87 (6) of the ICC Statute which deals with assistance by intergovernmental organisations.

Chapter 5

Summary and plan of action

The Commission understands its role, as conceived by Art. 90, as meaning that it could and should be used as an effective instrument of the States Parties to comply with their obligation to ensure respect for the Geneva Conventions and the Additional Protocols. It has the important function of ascertaining facts in order to ensure a better implementation of international humanitarian law. It recognises that a number of other actors, in pursuing their particular functions, are also engaged in ascertaining facts: States, the United Nations, international judicial or quasi-judicial organs, the ICRC or non-governmental organisations. Each of these actors or institutions has different roles or functions. The Commission, too, has its specific profile and it presents advantages, as compared to other actors, which may induce States to have recourse to the services of the Commission.

These are

- the fact that the procedure is to a greater extent shaped and influenced by the States concerned;
- the confidentiality of the procedure;
- the fact that the procedure stops short of stating the law, which opens more possibilities for States to find mutually acceptable compromise solutions;
- the fact that, except where specifically so requested, it is not concerned with establishing individual criminal responsibility.

The Commission understands its role as an active one. In the spirit of the Conventions and the Additional Protocols, the Commission could not simply stand idle and wait until States or other relevant actors resolve to use the services of the Commission. The Commission can take, and has indeed taken, an proactive stance by offering its good offices in cases of armed conflicts, be they international or non-international, whenever it deems this to be appropriate. It intends to increase its activities in this respect.

For that purpose, the Commission intends to continue the following course of action:

The Commission will work in the sense that the possibility to offer its good offices is not left to *ad hoc* improvisation. For that purpose, available information on current or nascent conflicts will be systematically kept under review by an early warning unit to be established within the Secretariat of the Commission. This should enable the Commission to offer its services swiftly wherever it is appropriate.

The Commission will also offer its good offices in cases where forces of international organisations are involved in armed force or violence.

Dissemination activities should stress the specific comparative advantages which the services of the Commission present for States. This presupposes a constant reflection on these specificities and the appropriate division of tasks between various institutions, both from the legal and the practical point of view. This reflection should

be made by the Commission, but a dialogue between the Commission and other institutions should also regularly take place in this regard.

The Commission should and will continue its efforts to make its potential known to relevant actors. Therefore, it will systematically seek to ensure that its role is part of dissemination efforts which take place at various levels and in various contexts. This includes the relevant measures taken by various parts of the Red Cross and Red Crescent movement, such as courses of international humanitarian law and regional seminars. The cooperation with national commissions on international humanitarian law will be sought.

For the same purpose, the Commission will endeavour to be present in different relevant international fora and to liaise, on a regular basis, with competent international institutions. It will seek to obtain observer status with international institutions having functions which are important for the work of the Commission.

In accepting mandates of inquiry, the Commission should insist on respect for its own rules as they are established in, or on the basis of, article 90 of Additional Protocol I, without prejudice to the possibility, encouraged by the Commission, that individual members as such take part in fact-finding missions established by other organisations or bodies.

The Commission will develop its contingency planning in matters of logistics. It will seek the support of governments to obtain the human resources and material necessary to fulfil its tasks in particular cases.

The Commission will seek ways and means which enable it to alleviate the financial burden of the parties to the proceedings before it. It will, for that purpose, seek to obtain further voluntary contributions by States or support from other sources. A trust fund, fed by voluntary contributions or donations, should be established to finance enquiries where it seems inappropriate that the costs of the enquiry are born by the parties to a conflict.

The Commission has to rely, in fulfilling its mission and in taking concrete steps to obtain mandates, on the continued support of the States having accepted its competence.

Bern, 29th May 2006.