



Report of the International Fact-Finding Commission 1991 - 1996

The Geneva Conventions for the Protection of War Victims

The Geneva Conventions of 1949 as supplemented by the additional Protocols of 1977 set out principles and rules, binding on the Parties to armed conflicts, designed to protect the victims of those conflicts. From the adoption of the first Convention in 1964 those responsible for the preparation and updating the Conventions have realised that it is not enough simply to state the rules. As well, provision must be made for their implementation and enforcement. Accordingly, among other means, the Conventions and Protocols require the Parties to disseminate knowledge of the rules to their armed forces and more widely, to acknowledge the role of the Protecting Powers and the International Committee of the Red Cross, and to provide for the prosecution and punishment of individuals who breach the rules.

A new method of implementation: the Commission

The first additional Protocol of 1977 added an important new element to support the implementation of international humanitarian law. It provided in Article 90 for the establishment of a permanent International Humanitarian Fact-Finding Commission. That provision built on an article for enquiries first included in 1929 and retained in the 1949 Conventions. Article 90 and that common article from the 1949 Conventions are set out in appendix 1.

The Commission is competent to enquire into certain allegations of breaches of the Conventions and the Protocol. In 1991, following the acceptance of that competence by 20 States Parties to the Conventions and Protocol I, those States elected the 15 original members of the Commission. The States accepting the jurisdiction have more than doubled in the last five years and now number 48. They come from all continents as appears from the list in appendix II. In order to accept the Commission's competence the States deposit the appropriate declaration with the Swiss Government as depository of the Conventions and the Protocols.

In 1992, following initial meetings and the adoption of its Rules (set out in appendix III) the Commission became operational.

The competence of the Commission

The broad purpose of the Commission is to protect the victims of armed conflict by obtaining the observation of the principles and rules of international law applicable in armed conflict. In particular the Commission is competent to

1. enquire into any facts alleged to be a grave breach as defined in the Conventions and the Protocol or other serious violations of the Conventions or the Protocol.
2. facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol (Article 90 (2)(e)).

The Commission has that competence if the States Parties to the proceeding have deposited the appropriate declarations accepting its competence. In such a case no further manifestation of consent is needed for the Commission's competence to be established. That compulsory jurisdiction is however only one part of the Commission's competence.

As well, in terms of Article 90 (2)(d) the Commission may institute an enquiry in other situations at the request of a Party to the conflict, but only if the other Party or Parties concerned consent. That is to say competence can also be accorded ad hoc. In that context the Commission has stated its willingness to enquire into alleged violations of humanitarian law, including those arising in non-international armed conflicts, so long as all Parties to the conflict agree. It has adopted that understanding of its competence on the basis first of the broad wording of Article 90 (2)(d) and second of the purpose of the provision. Paragraph d) refers simply to "other situations" which on its face means situations involving allegations of serious breach of the Conventions including their common Article 3. That provision states minimum obligations for international armed conflicts and it is of course developed and supplemented by the second additional Protocol of 1977. The broad purpose of Article 90 (2)(d) is, if the Parties to a conflict agree, to make available to them an independent procedure for resolving allegations about compliance with international humanitarian law. That purpose, the consent of all the Parties of the conflict and the wording of Article 90 underpin the willingness which the Commission has stated.

The Commission, in the preamble to its Rules adopted under Article 90(6) of the Protocol, has in addition expressed its conviction of the need to take all appropriate steps, as necessary in cooperation with other international bodies, in particular the United Nations, with the purpose of carrying out its functions in the interest of the victims of armed conflict. That conviction is based in part on Articles 89 and 1 (1) of the first additional Protocol and Article 1 common to the Geneva Conventions and the special characteristics of international humanitarian law. The Security Council, the General Assembly and the Secretary-General of the United Nations might strongly urge the Parties to a conflict to consent to a Commission enquiry. Indeed, in certain situations, the Security Council might consider using its binding power under the Charter.

The Members of the Commission

The 15 members of the Commission are to be of high moral standing and acknowledged impartiality. They are elected to five-year terms by those States Parties to the Conventions and Protocol which have accepted the competence of the Commission. They serve in their personal capacities, an obligation which is reinforced by the solemn declaration that they all make that they will exercise their functions as members impartially, conscientiously and in accordance with the provisions of the Protocol and the Rules, including those concerning secrecy (see Rule 1(2)). Among the current members elected by the States Parties at the first election and by the Commission to fill casual vacancies are medical doctors, judges, high ranking military experts, diplomats and scholars of international law. They are listed in Appendix IV. Several have undertaken enquiries in their personal capacity of the type contemplated by Article 90.

Procedure

When a complaint is initiated, the enquiry is to be undertaken, unless the Parties concerned otherwise agree, by a Chamber of seven members: five members of the Commission, not national of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the

Parties to the conflict, and two ad hoc members, again not nationals of any party to the conflict, one to be appointed by each side.

The Chamber is to invite the Parties to the conflict to assist it and to present evidence. The Chamber may seek such other evidence as it considers appropriate and may carry out an investigation of the situation on the ground. The Chamber is to fully disclose all evidence to the Parties which have the rights to comment on it and challenge it.

Once that procedure for the gathering of evidence is complete the Chamber is to make findings. It is the Commission itself which submits to the Parties a report on those findings, along with such recommendations as it may consider appropriate. If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission is to state the reasons for that inability.

The Commission may not report its findings publicly, unless all the Parties to the conflict agree.

Administration, finance and publicity

The Swiss Government provides the Commission's Secretariat with the necessary administrative facilities for the performance of its functions.

The administrative expenses of the Commission are met by contributions for the States which have made the declarations under the Protocol and by voluntary contributions. The States Parties have now adopted a set of financial regulations which in essence adopt the proportions established by the United Nations General Assembly for the expenses of the United Nations. The regulations are set out in appendix V. The Party or Parties to the conflict requesting an enquiry must advance the necessary funds for the expenses incurred by a Chamber and are to be reimbursed by the Party or Parties against which allegations are made to the extent of 50% of the costs of the Chamber.

The Rules provide that the Commission should meet at least once a year. It has in fact had seven ordinary meetings. At those meetings it has drafted and adopted its rules and financial procedures, established its methods of work, considered ways in which it should make itself better known and discussed possible initiatives it, or its members, might take in respect of particular conflicts. It has also taken the opportunity to meet with the President and other members and representatives of the International Committee of the Red Cross and representatives of the International Federation of Red Cross and Red Crescent Societies. Further detail is provided in the Chronology which appears in appendix VI.

To make itself better known the Commission has published a brochure explaining the role of the Commission. That was first distributed at the 26th International Conference of the Red Cross and Red Crescent held in Geneva in December 1995 and it has since been widely distributed. At that Conference the President of the Commission addressed the delegates on the role of the Commission as he had at the 1993 International Conference for the Protection of War Victims and the 1992 session of the United Nations General Assembly. The President, two members of the Commission and the head of its Secretariat visited United Nations headquarters in early 1994 and met the Ambassadors and senior representatives of 12 of the Members of the Security Council and the Secretary-General, the Assistant Secretary-General for Peace Keeping and other senior staff. The Commission at its 1994 meeting held immediately after those meetings did in fact offer its services to the Secretary-General to carry out a particular enquiry. That offer was not taken up. Members of the Commission have participated in conferences and services in many parts of the world. They have published papers on the Commission.

Members have also participated in their own personal capacity in enquiries set up by other bodies, notably in the Commission of Experts into violations of international humanitarian law in former Yugoslavia established under a Security Council resolution. Another was a member of a Sri Lankan Presidential Commission set up with the assistance of the Commonwealth Secretary-General to enquire into an incident in the armed conflict here. Individual Commission members have as well suggested to Governments that the Commission might be invited to enquire into allegations arising from conflicts in Europe, South America, the Middle East and Africa.

Principle and its application

The Commission must remain true to certain basic characteristics expressed or implied in Article 90: it must carry out its functions in an independent and impartial way, in accordance with the international law requirements of fair procedure and in general on the basis of the consent of the Parties given by declaration under Article 90 or ad hoc. Consistent with the purpose, competence and basic characteristics of the Commission, there is as well considerable flexibility for making adaptations in the operation of the Commission if the Parties agree. This flexibility may apply for instance to the means of initiating an enquiry: so a State which has made the declaration under Article 90 may initiate an enquiry into an alleged grave breach or other serious violation even although it is not Party to the particular conflict; or the Commission process might be facilitated through the United Nations.

Furthermore if the Parties agree in a particular case, there can be variations regarding:

- the composition of the particular Chamber
- the procedure to be followed
- the financing of the enquiry
- the form of the conclusions of the Chamber and Commission
- the publicity to be given to the findings and recommendations of the Chamber and Commission.

That flexibility, along with the essential elements of independence, due process and availability, should encourage use of the Commission. That is so even although in some circumstances other procedures and institutions, such as the ad hoc War Crimes Tribunals, might appropriately be preferred.

The potential role of the Commission

The Commission is convinced that its effectiveness as a mechanism for promoting compliance with international humanitarian law through fact-finding and the exercise of good offices will increase with the growing number of States making the declaration under Article 90 of the Protocol. The Commission is encouraged by the final declaration which was adopted by the International Conference for the Protection of War Victims held in Geneva from 30 August to 1 September 1993. The States participating in that Conference urged all States to make every effort to contribute to an impartial clarification of alleged violations of international humanitarian law and, in particular, to consider recognising the competence of the Commission. It is also very encouraging that the 26th International Conference of the Red Cross and Red Crescent held in December 1995 endorsed that Declaration "which confirms the need to reinforce implementation of and respect for international humanitarian law". The

international community does appear to be increasingly committed to procedures for finding the truth.

But the sad fact must be recorded that the Commission has not been called on to act. History provides examples of the value to bitter, divided Parties to a conflict of the impartial clarification of allegations to which the War Victims conference referred. The careful, dispassionate, independent examination of a situation aimed at determining the facts and helping the Parties to comply with their obligations has several advantages: it removes one source of rancour between the Parties; it protects humanitarian values; and it facilitates the establishment of a better peace after the conflict is over. At this very moment the world is observing a notable instance of a process aimed at both finding the truth and achieving reconciliation within a country which was racked for decades by racial strife and divided by fear and hatred.

The Commission

- reflects the humanitarian and non political character of the law for the protection of the victims of armed conflict
- is a permanent body available to the international community whenever necessary and with the prospect of the build up of experience; ad hoc appointments can be avoided
- has within its membership highly qualified, internationally recognised, independent experts covering relevant areas of expertise
- offers guarantees of fair and thorough procedures for finding the facts
- is committed to restoring an attitude of respect for the Conventions and the Protocol, to the advantage of all, including the Parties to the conflict and especially the victims.

The International Humanitarian Fact-Finding Commission is a young institution established only in 1991, despite the fact that Protocol I was adopted in 1977. With the approval of its rules of procedure in July 1992, the Commission became operational. Since then it has concentrated on practical matters such as the availability of equipment for enquiries in loco, setting up lists of special experts, discussing the experience of ICRC delegates in the field, establishing ways and means of introducing the Commission to the international community and of drawing the international community's attention to its availability, and, last but not least, elaborating a scheme for financing the costs of its regular activities.

The Commission is convinced that within its area of competence it can serve the interest of the international community. It is up to that community as a whole and to individual States to realise the importance and usefulness of the Commission and to take advantage of its availability.

Appendices I	Article 90 and common article on enquiries
II	States Parties
III	Rules
IV	Members
V	Financial regulations
VI	Chronology of events concerning the Commission 1990-1996

**Chronology of events concerning
the International Humanitarian Fact-Finding Commission 1990 – 1996**

1990

20 November The twentieth State declares recognition of the competence of the Commission. The prerequisite for the establishment of the Commission has thus been met.

1991

25 June Election of the 15 Members of the Commission by Diplomatic Conference of the 20 States having declared to recognise the competence of the Commission in Berne.

1992

12 – 13 March 1st ordinary meeting of the Commission in Berne.

The Commission establishes its seat with the Depositary in Berne, Switzerland.

12 May The Minister of Foreign Affairs of the Republic of Austria appeals to the States in the area of former Yugoslavia as well as to the States in the area of the former Soviet Union to recognise the competence of the Commission.

1 – 3 June Working Group meeting in Berne
The working group drafts the Rules of procedure of the Commission.

7 – 8 July 2nd ordinary meeting of the Commission in Berne

The Commission adopts its Rules of procedures, which immediately enter into force. They are communicated to the Governments of the States Parties to the Geneva Conventions of 1949 on 14 October. The Members decide that the official name of the Commission be "International Humanitarian Fact-Finding Commission".

10 November The President of the Commission, Ambassador Erich Kussbach, addresses the participants of a panel discussion at the Third Committee of the United Nations General Assembly. He also meets representatives of the members of the Security Council as well as representatives of the Secretariat General.

18 December The President of the Commission, Ambassador Erich Kussbach, addresses a letter to the Secretary General of the United Nations, Boutros Boutros-Ghali, suggesting to develop some way of collaboration between the Commission and the United Nations.

1993

- 28 January Working group meeting in Berne
- The working group holds discussions on practical matters such as the necessary equipment for field missions of the Commission. Such equipment would be available at a depot of the Swiss Disaster Relief Unit.
- 13 – 14 May 3rd ordinary meeting of the Commission in Geneva
- The Commission mainly discusses ways of cooperation with the United Nations. The Members agree that some sort of cooperation with the United Nations should be established. They also consider it important that the Commission maintains its own identity and independence.
- 30 August – 1 September International Conference for the Protection of War Victims in Geneva
- The Commission prepares a memorandum presenting itself to the States participating in the Conference
Part II, paragraph 6 of the Declaration adopted by the plenary session of the Conference invites the states to consider recognising the competence of the Commission.
- 1994**
- 31 January – 6 February The President, Ambassador Erich Kussbach, and two Members of the Commission, Sir Kenneth James Keith and Prof. Frits Kalshoven, visit the United Nations headquarters in New York. The Delegation has talks with representatives of the Secretariat General and with members of the Security Council on the extent of a potential cooperation between the Commission and the United Nations.
- 10 – 11 February 4th ordinary meeting of the Commission in Berne
- The Commission sends a message to the Secretary General of the United Nations offering the Commission's services in connection with the investigation of the shelling of the market place in Sarajevo. The Commission adopts a logo which henceforth figures on all the Commission's documents.
- 8 – 9 September International Conference on the Financial Procedures for the administrative expenses of the Commission
- The Financial Procedures for the administrative expenses of the Commission are adopted on 9 September. They enter into force on 1 January 1995.
- 13 October 5th ordinary meeting of the Commission in Berne
- The Members agree that active promotion of the Commission's publicity is important. They decide to publish a pamphlet on the Commission.

1995

- 11 – 12 May The 6th ordinary meeting of the Commission, scheduled for 11 and 12 May, has to be postponed for lack of funds of the Commission.
- 19 October 6th ordinary meeting of the Commission in Berne
- The Members reflect on the present situation and perspectives of the Commission. They discuss possible reasons for the unwillingness of States to entrust the Commission with an enquiry.
- 1 December A new pamphlet explaining the legal basis, the competence and the functioning of the Commission is published.
- 3 – 7 December 26th International Conference of the Red Cross and Red Crescent
- On 5 December, the President of the Commission, Ambassador Erich Kussbach, addresses the participants of Commission I of the Conference (victims of war and implementation of international humanitarian law). Copies of the new pamphlet of the Commission are distributed to all Delegations.

1996

- 10 June On behalf of the Commission, Professor Kalshoven offers the Commission's services to undertake certain investigations concerning the internal armed conflict in Colombia.
- 19 – 20 September 7th ordinary meeting of the Commission in Geneva
- The Members of the Commission meet with representatives of the International Committee of the Red Cross and the International Federation of the Red Cross and Red Crescent Societies.
- 29 October Election of the 15 member of the Commission by Diplomatic Conference of the 48 States having declared to recognize the competence of the Commission in Berne.