

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.⁹ 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;¹⁰ that Bosnian Croats were acting as "agents" of Croatia in such clashes with the Bosnian government;¹¹ 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 government¹² (so that even Article 2 of the ICTY Statute could apply¹³).

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. ■

⁹ *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.

¹⁰ Paras. 9, 58-61.

¹¹ Para. 26.

¹² Paras. 13-21.

¹³ Paras. 7, 8.

Comments on the Presentation of Prof. Frits Kalshoven

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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".¹ The Inter-American Commission noted that the rights of persons under control of a State, and in case of armed conflict, might

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¹ 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.

be determined in part by “reference to international humanitarian law as well as international human rights law”.²

So, once again, the Inter-American Commission has filled the gap in supervision of compliance with international humanitarian law. It has done so before. I recall the *Tablada* case against Argentina,³ and its reports on the situation of human rights in Colombia.⁴

What can we learn from the Guantanamo Bay initiative of the Inter-American Commission when assessing the Fact-Finding Commission?

A first possible answer would be: leave the supervision of compliance with international humanitarian law to human rights bodies. This is what Christopher Greenwood suggested in his report on international humanitarian law presented on the occasion of the Commemoration of the 1899 Hague Peace Conference. He proposed that “the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts”.⁵

A second option would be that the Fact-Finding Commission enlarges its mandate through extensive interpretation. When not going too much by the text, some provisions of Article 90 of Additional Protocol I may allow for a somewhat broader reading. An example is paragraph 2 sub (c) of this article. This provision reads: “The Commission shall be 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.”⁶ Importantly, this provision merely requires an allegation that international humanitarian law is seriously violated. The Fact-Finding Commission could agree that it may act upon such an allegation by individuals, for example, victims of the violations of international humanitarian law. I would thus not interpret this provision as requiring a State invitation to look into the case. If we apply this provision to the case dealt with by the ICTY in the *Rajik* judgement, to which Frits referred, the Fact-Finding Commission would have been competent to enquire into this matter, even absent a specific request from Bosnia Herzegovina or Croatia.

Practically, the Fact-Finding Commission may be dependent on State cooperation to find the facts, at least to carry out an investigation *in loco*. But physical presence is not the only means for the Fact-Finding Commission to find facts. In particular cases, the Fact-Finding Commission may obtain detailed information through other channels, such as the media, members of a party to the conflict who have fled the country and willing to provide information, or other international bodies that are present in the State territory concerned.

And even for an investigation *in loco*, international bodies, such as the United Nations that are already physically present in a particular State may mediate so as to get in the Fact-Finding Commission, and provide the necessary facilities. It may be argued that cooperation with the United Nations impairs the political independence of the Fact-Finding Commission, as the United Nations clearly is a political body. But, on the other hand, it makes the Fact-Finding Commission less dependent from States, which dependence has up until now completely blocked its functioning.

In this regard, Article 89 of Additional Protocol I on cooperation between the State Parties and the United Nations may be taken into account.⁷ Why couldn't this article apply to the Fact-Finding Commission?

Also paragraph 2 sub (d) of Article 90 may leave some room for extending the Fact-Finding Commission's mandate. This provision stipulates that in situations in which parties have not recognised the competence of the Commission in advance, the Commission may institute an enquiry at the request of a Party to the conflict, with the consent of the other Party or Parties concerned.

The Fact-Finding Commission already agreed to read ‘Party to the conflict’ as including non-State parties in internal conflicts. So it accepted that it is also competent in internal conflicts. This interpretation may open the door for further broadening its mandate. For instance, the Fact-Finding Commission could take up requests from divisions of a conflict party. Maybe it could even take up requests from civilians who associate with one or another party, and who have become victims of violations of international humanitarian law.

Regarding ‘the consent of the other party or parties’, as required by paragraph 2 sub d, it has been suggested that if two States have recognised the competence of the Fact-Finding Commission, they may address the Commission with regard to an internal conflict occurring in one of these States, without the consent of the other party(-ies) in that internal conflict.

I admit, this second option, flexible reading of the Fact-Finding Commission's mandate, is not wholly in line with the textual logic of Article 90 of Additional Protocol I, but in view of the urgency of the situation and of earlier extensive interpretations by the Fact-Finding Commission of its competence, it may be worth considering.

A third and final possible response to the Guantanamo Bay initiative of the Inter-American Commission could be to more radically modify the Fact-Finding Commission and to equip it with a larger mandate allowing it to act on its own initiative, possibly at the request of individual victims. It could then also be considered that a judicial or quasi-judicial role is conferred to it. The rules on evidence, laid down in paragraph 4 subs (b) and (c) of Article 90, already tend to confer to the Fact-Finding Commission a quasi-judicial character.

² *Id.*

³ Rep. No 55/97, Case No. 11.137, Argentina, 30 October 1997.

⁴ Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, 4 October 1993; Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev.1, 26 February 1999.

⁵ Greenwood C., “International Humanitarian Law” in Kalshoven, F. (ed), *The Centennial of the First International Peace Conference*, Kluwer Law International, The Hague, 2000, pp. 161-259.

⁶ This provision applies with regard to States that have recognised the Commission's competence.

⁷ Art. 89 reads: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.”

As a model for such a revision of the Fact-Finding Commission could serve the individual complaints procedures existing under human rights treaties. The International Covenant on Civil and Political Rights already served as a model for several procedural aspects of the Fact-Finding Commission.⁸

Especially the last idea received closer attention recently.⁹ Texts have been drafted developing the idea of setting up a body competent to receive complaints or requests from individual victims of violations of international humanitarian law. The idea will be developed in two expert meetings, the first to be held in the winter of 2003.

In conclusion, it would seem to me that – in theory – Article 90 of Additional Protocol I could have proved to be useful, despite some shortcomings. It did institute for the first time a permanent, non-political and impartial body, to which the parties to the conflict could resort to at any time. The

problem is, they did not. Therefore, the three options I just described (supervision of compliance with international humanitarian law by human rights bodies; extensive interpretation of its mandate by the Fact-Finding Commission; formally modifying the Fact-Finding Commission, extending it for example with an individual complaints procedure) may be worth considering more closely. ■

⁸ For example the constitution of the Chamber of Enquiry under paragraph 3 of Article 90 is on some points similar to Art. 42 of the International Covenant on Civil and Political Rights, see Sandoz, Y. et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, p. 1048.

⁹ Kleffner, J. K. & Zegveld, L., “Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law”, *Yearbook of International Humanitarian Law*, vol. 3, T.M.C. Asser Press, 2000, pp. 384–401.

The Additional Protocols 25 Years Later: Remarks on a Success Story

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The presentations and discussions of the conference deserve final comments on three major points: the success of the Additional Protocols, the influence of the protocols on other areas of international humanitarian law and the question whether there is a demand for new and additional rules. Let me start commenting on the success story by briefly making a remark concerning the perspective we had developed during this meeting on the Additional Protocols. Obviously, listening to everyone here, we had taken a lawyer’s perspective looking at the protocols and looking at the past 25 years of their implementation. Now, Hans-Peter Gasser described the perspective from 1974 when the Diplomatic conference started and he referred to the main objective of the whole diplomatic process which was to better protect the civilians in armed conflict. Now, taking that into account, probably the right perspective for any debate in the Additional Protocols should have been based on a sociological approach, rather than a lawyer’s approach. Of course that would have meant to deal with figures about the real protection of civilians in armed conflict provided by the restated and new law included in the Additional Protocols. To give a more convincing answer to the questions of protection we definitely need to enrich our debate by looking at the real situation on the ground.

However, from a legal perspective the Additional Protocols are an undeniable success. As Hans-Peter Gasser mentioned, there have been 160 ratifications for Protocol I and 150 for Protocol II now. With these numbers the Protocols belong to the class of treaties which are accepted not only by a majority of states but also ratified by states from all regions. However from time to time it is worth looking at the reservations and declarations made by the state parties. They are an indica-

tion of how much the text of the treaty reflects the consensus and moreover what value the text has been for the development of customary law. When forming a generally positive view, we should not forget that some of the fundamental and innovative rules of the Additional Protocols which were praised in the past as the success of the Diplomatic conference have now been challenged tremendously. Let me just quickly refer to some examples of the voiced criticisms.

Hans-Peter Gasser has outlined the advantages of article 51 of Additional Protocol I which is definitely a cornerstone of the whole Protocol. Out of all the innovations contained in the Protocol one would have expected the prohibition of reprisals against civilian population to be transformed into customary law quite quickly. The ICTY Chambers have already referred to such a customary law prohibition. On the other hand scholars, just to mention Christopher Greenwood, have used good arguments to criticise the judgement and outlined their view of the state of customary law also by referring to the reservations made by some states when ratifying the Protocols. The debate will especially continue with respect to the war against terrorism. This will not only have an effect on the state of customary law in this respect. The Additional Protocols as treaties will also suffer from this debate. The arguments used with regard to customary law do not only challenge the existence of the necessary state practice and *opinio juris*. By referring to the reservations regarding reprisals and under-

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