The International Fact-Finding Commission

ARTICLE 90 OF PROTOCOL I ADDITIONAL TO THE 1949 GENEVA CONVENTIONS

by J. Ashley Roach*

I. INTRODUCTION

The United States considers many provisions of Protocol I additional to the Geneva Conventions of 1949[1] to be either statements of customary international law or to reflect what that law should be.[2] It is in that vein that the United States views Article 90 on the International Fact-Finding Commission. The U.S. Joint Chiefs of Staff (JCS) military analysis of the Protocols expressed the views of the U.S. Department of Defense on Article 90 as follows:

"One major innovation of the Protocol is the creation of a permanent 15-member International Fact-Finding Commission to investigate alleged grave breaches or serious violations of the Protocols and the Conventions and to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and [the] Protocol".[3]

The JCS analysis correctly notes the Commission's major limitation, i.e. that it

"cannot act... without the consent of the parties to the dispute. Such consent can be given either on a one-time, permanent basis or on an ad hoc *basis for a particular dispute".*[4]

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See pp. 182-189 for notes and references.

In 1986 the United States JCS predicted:

"Given the persistence of the Soviet refusal to allow third-party supervision of the Geneva Conventions, it is extremely unlikely that either the USSR or any of its allies or clients would consent to the activities of the Commission".

Many must then have been surprised when, on 29 September 1989, in conjunction with its ratification of both Protocols, the USSR accepted *ipso facto* the competence of the Fact-Finding Commission to be established under Article 90 of Protocol I when 20 States party have accepted said competence. Byelorussia and the Ukrainian SSR quickly followed suit, bringing the total to 18 acceptances. On 20 May 1990, Uruguay — already a party to Additional Protocol I — accepted the competence of the Fact-Finding Commission. Then, on 20 November 1990, Canada became the twentieth State to accept the competence of the Fact-Finding Commission when it deposited its instrument of ratification of Additional Protocol I. Several other States, including the Federal Republic of Germany,** have signaled their intention to follow suit in the near future.

Thus, of the 99 nations to have ratified or acceded to Protocol I, as at 31 January 1991, the other nations to have so far accepted the competence of the Fact-Finding Commission include some most unlikely adversaries in the post-Cold War era: the neutrals (Austria, Finland, Sweden and Switzerland), other smaller NATO allies (Belgium, Denmark, Iceland, Italy, Netherlands, Norway and Spain), and Algeria, Liechtenstein, Malta and New Zealand. Nevertheless, those acceptances are not pointless, for a State which requests an enquiry need not be the victim of a violation, it only has to have accepted the competence of the Commission.[5] More about that later.

The JCS study paradoxically continued:

"Historically, the United States has consented to the jurisdiction of such bodies on a permanent basis (e.g., the World Court in The Hague [recognition subsequently modified in 1984 and terminated in 1986 in connection with the ICJ litigation involving the mining of Nicaraguan harbors[6]], and the US Government would presumably do so again if it ratifies the Protocol".

On the other hand, the JCS analysis, after reviewing all the compliance mechanisms set out in Protocol I, pessimistically concluded:

** [Ed.] On 14 February 1991, the Federal Republic of Germany ratified the Protocols. It is the twenty-first State to make the declaration accepting the competence of the International Fact-Finding Commission.

"While the compliance articles are acceptable, the Protocol has not significantly improved the international machinery for ensuring compliance with international humanitarian law in armed conflict. The United States did not, therefore, achieve its most important negotiating objective in participating in the Protocol negotiations".[7]

With that decidedly downbeat introduction, my analysis turns to the challenges of inquiry procedures. This is an opportune time to do so, because there are now the requisite 20 acceptances of the competence of the Fact-Finding Commission,[8] and the Swiss Government is required under Article 90 to start the prescribed steps to bring life into this hope.

II. TYPES OF FACT-FINDING

To assist the reader in understanding the unique character of the Fact-Finding Commission, let me briefly describe other types of fact-finding extant in the world today.

Judicial fact-finding involves a determination on the basis of facts presented by the opposing sides. Examples in the international arena include the International Court of Justice and the European Court of Human Rights. The court does not go out and gather the facts, and generally does not appoint others to do so for the court.

Another type of fact-finding involves an investigative body going out to uncover the facts based on allegations presented from outside the organization. Examples include the inquiries by the special representatives of the UN Secretary-General into the use of gas in the Iran-Irak conflict;[9] activities by the European and Inter-American Commissions on Human Rights; and the activities of non-governmental organizations such as *Amnesty International, Africa Watch, Asia Watch, and Americas Watch.*[10]

A third form of fact-finding could be called preventive fact-finding. Here an organization investigates a situation (not an allegation) with a view to preventing abuses. The ICRC frequently engages in this type of activity,[11] which also occurs under the European Convention of the Prevention of Torture.[12] This method can, of course, be combined with investigative fact-finding, but does not require a prior allegation of abuse.

Finally, some State representatives abroad report back to their own governments on the human rights record in their place of assignment, for domestic purposes. For example, the U.S. State Department

publishes annual *Country Reports on Human Rights Practices*, which include reports on countries in which armed conflicts are occurring.

As we shall see, the Fact-Finding Commission is a unique combination of aspects of these three models.

III. ESTABLISHMENT OF THE COMMISSION

A. Role of the depositary

Initial steps to form the Commission may only be taken "when not less than" twenty High Contracting Parties (i.e. States) to Protocol I have agreed, by virtue of a declaration, that they "recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation", the competence of the Commission.[13] It is to be presumed that the organizers do not have to act immediately on deposit of 20 such acceptances; there would seem to be no objection to waiting a reasonable period of time to begin the process, if that seems appropriate.

Article 90, para. 1 (*b*) places the depositary in charge of initiating the process of forming the Commission. Consequently the Swiss Federal Council,[14] designated depositary by Article 93, is now required to "convene a meeting of representatives of those High Contracting Parties" which have accepted the competence of the Commission "for the purpose of electing the [15] members of the Commission." A strict reading of Article 90, para. 1 (*b*) suggests that only those few States can be represented on the Commission. However, the meeting is charged to elect members so that the "Commission as a whole" reflects "equitable geographical representation." So far no State from Asia, and only one State each from Africa and from Latin America, have signed on, making it very difficult to meet the criterion of "equitable geographical representation" by electing nationals from those countries accepting the competence of the Fact-Finding Commission. Hence, one can argue the need to wait until at least one State from each of the regional groupings has accepted the competence of the Commission before convening the initial meeting.

On the other hand, at the 15th Round Table of the International Institute of Humanitarian Law, a representative of the Swiss Government suggested that it would begin the process promptly after deposit of the 20th acceptance. The Swiss representative suggested that States may wish to take roughly three months to exchange information about potential nominees before submitting formal nominations. He proposed

that approximately one month later the election meeting be held in Bern or Geneva. That way his Government would be able to send the list of 20 names and nationalities to the 20 States one month before the meeting.[15] Some participants in the Round Table suggested that might be an overly optimistic timetable for convening the election meeting.

B. Qualifications of candidates for election as members of the Commission

In this connection let us consider what may be the nationality of the members. The High Contracting Parties attending the constitutive meeting called by the depositary may nominate one person each. However, Article 90 does not require the member to be of the same nationality as the State that nominates him or her. The requirement for "equitable geographical representation" would seem to permit States to reach beyond their borders to satisfy that criterion. If so, then perhaps the depositary need not wait until at least one State from each geographical region has accepted the competence of the Commission before calling the initial meeting, if it has reason to believe that the criterion of geographical representation will be met in this way.

What conditions, besides geographical diversity, must candidates meet to be elected members of the Commission? Article 90, para. 1 (*d*) requires only that each member ("individually") be of (1) "high moral standing" and (2) "acknowledged impartiality". Both criteria are obviously necessary to ensure the credibility and effectiveness of the Commission's Chambers. They follow the example set in fact-finding commissions established under other international agreements, such as the committee established under Article 8 of the International Convention on the Elimination of all Forms of Racial Discrimination.[16]

What other criteria may be implied? The competence of the Chambers is to enquire into any facts alleged to be a "grave breach" or other "serious violation" of the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol I thereto. Hence the members of the Commission must be knowledgeable about what acts constitute "grave breaches" and "serious violations". Some at least should be international lawyers, perhaps even judge advocates, with expertise in international humanitarian law. The members will also need access to relevant scientific, medical and military expertise, if

they do not already possess it. The Swiss representative at the Round Table suggested that the nomination of government officials should be considered only if no other qualified candidates were available, since it was imperative that the Commission conduct its enquiries in an atmosphere of political independence.

C. Conduct of the election

Once the meeting of representatives is convened, it is strictly limited in purpose to electing the members of the Commission. Nothing else is within the meeting's competence.

The 15 members are to be elected by secret written ballot. However, there is no indication of what size vote is required for election. The norm would seem to be that of a simple majority, in the absence of a requirement for a larger majority or unanimity. The Swiss representative at the Round Table suggested following the rules set out in the 1966 Covenant on Civil and Political Rights for the election of the Human Rights Commission. Article 30(4) requires a quorum of two-thirds to conduct the election and an absolute majority of the representatives present and voting to elect each member of that Commission. States will have to agree on the rules before conducting the initial election of members. Those rules should also provide for the selection from among the representatives of an *ad hoc* President of the election meeting. Perhaps a draft of the rules should be circulated to States at the time the call for nominations is issued.

Elected members are required to serve as individuals in their personal capacity for terms of five years and until their replacements are elected.[17] Vacancies are to be filled by the Commission from the list of those nominated by the High Contracting Parties but not previously elected, while still maintaining "equitable geographical representation".[18]

IV. ORGANIZATION OF THE COMMISSION

A. Selection of an *ad hoc* President

Article 90, para. 6 provides that the Commission "shall establish its own rules, including rules for the presidency of the Commission." Logically, the President should be elected during the first formal meeting of the Commission.[19] The members may wish to consult infor-

mally among themselves, by phone, fax or in person, to agree on the procedures for the conduct of that first meeting. The first order of business of the initial meeting of the members of the Commission should then be to select an *ad hoc* President. His sole task should be to obtain the election from among members of the President of the Commission.

B. Election of the President of the Commission

Here again, the Commission members may wish to follow standard UN practice in electing the President from among themselves. Although Article 90 sets out no particular criteria for the Commission's President, he will likely need to be available at all times.[20]

C. Rules of Procedure of the Commission

Article 90, para. 6 provides that the "Commision shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber." The members will then need to draft those rules. Those rules will have to reflect the requirements of Article 90 as well as the impartiality and procedural probity required to promote acceptance of the Commission. Professor Tom Franck has suggested five key indicators of impartiality or procedural probity that should be reflected in the rules: (1) choice of subject, (2) choice of fact-finders, (3) terms of reference, (4) procedures for investigation, (5) utilization of product.[21] He suggests that the following procedural norms be respected to satisfy these objectives in drafting rules for fact-finding missions:

"A fact-finding mission should not begin its quest without clearly defined terms of reference that circumscribe the precise area in which it is to operate. These terms of reference should be neutrally stated in the form of questions of fact. The mission should insist that within this area it be free to apply the best available tools of perceptive objectivity, insulated from socio-political passions and assumptions.... Evidence should be taken in such a way as to facilitate informed cross-examination and rebuttal, and at the same time to protect witnesses against reprisal. The panel should have its own staff capable of researching issues as well as preparing agendas and itineraries independently. The fact-finders' on-site freedom of movement and

access should be assured ab initio. *Draft findings should be circulated to the parties for comment. The final product should accurately reflect the result, whether it is a consensus, a majority, or a wide diversity of views as to the facts. Members should be free to write separately or dissenting reports".*[22]

V. COMPETENCE OF THE COMMISSION

Now that we have some sense of how the Commission members will be chosen and how the Commission may organize itself, let me turn next to the competence of the Commission. The Commission is empowered to do two separate things: (1) enquire into certain facts, and (2) facilitate respect for the Conventions and Protocol I. First, what is the scope of a permissible enquiry?

A. Grave breaches and other serious violations

According to Article 90, para. 2 (*c*), the Commision is authorized to "enquire" into "facts" alleged to be a *grave breach* "as defined in the Conventions and this Protocol" or *other serious violations* of the Conventions or the Protocol.

The Commission is thus competent to enquire into facts and not to judge. If a submission regarding certain facts alleged to have taken place is made, the Commission must necessarily be competent to attempt to establish whether those facts took place.[23] The Commission does not have the power to issue a formal judgment on whether these facts, if found to have occurred, constitute a grave breach or serious violation.[24]

The Commission is not entitled to enquire into all violations as may occur in enquiries conducted pursuant to common Article 52/53/132/139.[25] The Commission is thus not competent to enquire into facts alleged to be only breaches, without being "grave breaches" or "serious violations". Further, in no case can a violation of other rules of armed conflict outside the Geneva Conventions and Protocol I, whether they are customary law or treaty-based, form the object of a request to the Commission.[26]

Grave breaches are defined in common Article 50/51/130/147,[27] and in Articles 11, paras 1-4 and 85, paras 2-4 of Protocol I.[28] On the other hand, serious violations are not explicitly defined in either the Conventions or Protocol I. The ICRC's commentary on Article 89 of

Protocol I (the only other place in Protocol I where the term "serious violations" is used) suggests the term refers to "conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of 'serious breaches.'"[29] The *Commentary* suggests such violations include the following conduct:

- isolated instances of conduct, not included among the grave breaches, but nevertheless of a serious nature;
- conduct which is not included among the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of the circumstances; and
- "global" violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol.[30]

Who is to judge that this threshold has been met (so that an enquiry can be launched)? How is one to decide if the threshold is met? Article 90 provides no guidance. The Commission will have to decide for itself.

B. Good offices

The other major role of the Commission is to "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.[31] The term "good offices" involves the communication of conclusions on points of fact, comments on the possibilities of a friendly settlement, and written and oral observations by the States concerned.[32] The *ICRC Commentary* seems to suggest that the Commission need merely take "note" of such facts for it to bring its good offices to bear. It notes the requirement of subparagraph 5. (*a*) to submit a report to the Parties on the findings of fact and "such recommendations as it may deem appropriate" and recommends that such reports express only a "*prima facie* appraisal" and not include "elements of legal evaluation", even though the Commission will undoubtedly have first formed an opinion regarding non-respect.[33]

Thus it would seem entirely within the authority of the Commission, having noted certain facts which may not rise to the level of grave breaches or serious violations, to suggest ways to provide better protection. I submit the parties are more likely to take up these suggestions.

An example could be the occurrence of high civilian casualities. That fact does not in and of itself necessarily mean either that civilians have been targeted or that the hostilities have been conducted indiscriminately. Indeed, there may be no evidence of a grave breach or a serious violation. But the Commission should be able to recommend, if warranted, that the parties establish non-defended localities under special protection. Of course, if the Chamber finds evidence of a grave breach or serious violation, it should make that finding independently of any recommendation it may also wish to make.

On the other hand, it would not seem to be within the competence of the Commission for its President to exercise this power independently of any request for an enquiry.[34]

C. *Ad hoc* enquiries into grave breaches and serious violations

The Commission is to act on the request to it by States which have previously accepted the competence of the Commission. Thus the Commission cannot act on the request of entities other than States, such as the population of an occupied territory. The State which requests an enquiry will not — as noted in the Introduction — necessarily be the victim of a violation of the Conventions or Protocol I committed by an adverse Party which has also accepted the competence of the Commission. It merely must have recognized the competence of the Commission.[35]

The Commission may also act on requests by States that have not accepted the competence of the Commission generally *only* if the adverse Party consents, even if it had previously accepted generally the competence of the Commission.[36] Such requests can be made even by States that have not ratified or accepted Protocol I, such as the United States.[37]

VI. CHAMBERS OF ENQUIRY

Once a competent request for an enquiry has been received, Article 90 contemplates the enquiry being carried out quickly by a chamber of seven persons, five of them members of the Commission. For obvious reasons of fairness, none of those five may be nationals of *any* Party to the conflict.[38] The five persons are to be appointed by the President of the Commission on the basis of equitable representation of

geographical areas, after consultation with the Parties to the conflict.[39] While the *ICRC Commentary* suggests that the President of the Commission is not bound by the opinion of the Parties that have been consulted, a private commentator has suggested that appointment of a member not having the agreement of the Parties would jeopardize the success of the enquiry.[40]

The other two members are to be appointed *ad hoc*, one by each side; again, neither may be a national of *any* Party to the conflict.[41] They need not be members of the Commission; rather they "represent" the Party that has appointed them and "should contribute to creating an atmosphere of trust within the Chamber itself."[42] Since Protocol I is silent on this point, it is to be hoped that these *ad hoc* members would have credentials similar to those possessed by the other members of the Chamber. Failure to have these qualifications would only detract from the credibility and effectiveness of the Chamber and its work, but would not be disqualifying.

One problem not addressed in Article 90 is the international status of and protection granted to the members. There is no established requirement that they be granted diplomatic status yet they should receive some form of protection while they are conducting their enquiry "in country". Surely they are not mere tourists. I question whether they are true international civil servants. Perhaps there needs to be developed a model agreement for their status when conducting an enquiry in foreign territory.[43]

Article 90 provides a mechanism to counter attemps to delay activation of the Chamber by a State failing to appoint its *ad hoc* member. If one or both *ad hoc* members are not appointed within the time limit set by the President of the Commission, then the President shall immediately make the necessary appointment(s) himself (or herself) from the members of the Commission.[44] Article 90 provides no guidance on what that time limit should be. The *ICRC Commentary* notes the importance of the time limit set in Article 90, para. 3 (*b*) for the appointment of the *ad hoc* members:

"In time of armed conflict, the time taken by the body responsible for supervising compliance with the applicable rules may be crucial, not only for the fate of possible victims but also with regard to the risk of counter-measures being taken by the Party which considers itself wronged. ... Moreover, the longer matters drag on, the more difficult it may become to establish the facts precisely".[45]

Indeed, I would add that there is a great need to move rapidly to obtain evidence which in the nature of things disappear (e.g., use of chemical warfare or poison) or which may be removed easily.

Thus the *ICRC Commentary* is correct to admonish the President of the Commission to "react immediately to a request presented to him", and to appoint the two *ad hoc* members when the Parties fail to do so, "perhaps after attempting a final consultation with the Parties".[46] Perhaps the time limit should be set in the rules of procedure as hours or a few days; certainly it should never be weeks or months.

I should also note that the membership of five plus two applies not only to enquiries conducted on the request of parties which have accepted the competence of the Commission, but also to enquiries based on special agreement.[47]

VII. CONDUCT OF THE ENQUIRY

A careful reading of Article 90 will show that most of the foregoing is spelled out in the text of that article. Article 90 is, in contrast, noticeably less detailed in its prescription for the conduct by the Chamber of its enquiry.

A. Article 90, paragraph 4

Article 90, para. 4 (*a*) simply addresses three subjects. First, it states that the Chamber **shall** "invite the Parties to the conflict to assist it and to present evidence". Second, it says that the Chamber **may** also "seek such other evidence as it deems appropriate". And third, it provides that the Chamber **may** "carry out an investigation of the situation *in loco*".[48] Thus the Chamber may not completely exclude the parties from its enquiry. The Chamber must provide the parties with the opportunity to present evidence. The parties are not, however, required to do so. Further, the Chamber is not limited, as judicial fact-finding bodies generally are, to considering the evidence presented to it by the parties. Rather, the Chamber is authorized to seek out evidence on its own by travelling to the site, subject to entry approval. Failure to permit the Chamber to enter its territory with guarantees of safety will not help that State's case.

Since the Chamber can also make recommendations, it has been suggested that the Parties should be able to present legal arguments relevant to an evaluation of the evidence. For example, if

"an attack against forces for the adversary has also affected the civilian population, the State alleged to have committed a grave breach should be entitled to be heard with the argument that the principle of proportionality should be taken into account".[49]

B. Rules of procedure for conduct of the enquiry

Except on one point, Article 90 does not specify the procedures to be followed by the Chamber.[50] Hence it will be up to either the Commission to establish fact-finding procedures to be followed by all Chambers, or leave it to each Chamber to set up its own. I suggest the former is preferable, because of the urgency of getting on with each Chamber's work and the need for uniformity and credibility of the results of enquiries. Fortunately the Commission does not have to start from scratch. It may draw upon several model rules of procedure adopted by various UN bodies and others.[51] It bears stating the obvious that the rules should be drafted in such a way as to promote the successful achievement of the objectives of the Fact-Finding Commission and its Chambers.

VIII. REPORT ON THE RESULTS OF THE ENQUIRY

After the investigation is completed, the Chamber is required to prepare a "report on the findings of fact". That report must be "factual and impartial". If the Chamber is not able to secure sufficient evidence for such findings, it must provide those reasons to the Commission, for transmission to the Parties.[52] The Chamber's report is submitted to the Commission. The rules should state to whom the Chamber's report is to be submitted, the President or to the Commission as a whole. I recommend the former.

A question exists whether the Commission is to consider the Chamber's report and take action thereon, or whether the report should automatically receive the status of the Commission's report, as is the case under Article 27 of the Statute of the International Court of Justice? Under Article 90, the Commission is required to submit to the Parties the report "with such recommendations as it may deem appro-

priate".[53] May the Chamber draft or propose recommendations, or is that to be the exclusive function of the Commission? I would hope the Chamber would be permitted under its rules to bring to bear its familiarity with the facts and to make appropriate recommendations.

To arrive at recommendations, the Chamber and the Commission members will necessarily have to have legally evaluated the facts as they found them. Hence the membership will require, as I noted earlier, expertise in international humanitarian law as well as in warfare. The Commission's rules will have to address how it is to evaluate the Chamber's report, and how to arrive at recommendations. Those rules should provide that the members of the Commission will be given the opportunity to examine the report of the Chamber and to propose recommendations, and for individual members to record any dissent from the majority view. Similarly, the rules should also deal with attachment to the report of the opinions of members of the Commission who do not agree with the report or the recommendations. Certainly, any recommendations made by the Commission must be within the competence of the Commission's work and made with a view toward mitigating, not aggravating, the situation.

Although there was great debate at the Diplomatic Conference over the merits and demerits of making the report public, Article 90, para. 5 (*c*) **clearly provides that the Commission may** *not* report the findings publicly, unless *all the Parties to the conflict* — not just the parties to the investigation — have requested the Commission to do so. It has been suggested that when such a request for release of the "findings" is received, the report as a whole "as well as its constitutive elements" are to be released.[54]

Once the rules have been adopted by the Commission, copies should be sent to all States for their information and consideration. States which have not accepted the competence of the Commission may thus be encouraged by properly drafted rules to file the necessary declaration.

IX. EXPENSES OF THE COMMISSION AND ITS CHAMBERS

Administrative assistance to the Commission is to be provided by the Swiss Government as depositary.[55] On the other hand, Article 90, para. 7 provides that the administrative expenses of the Commission shall be met (1) by contributions from the High Contracting Parties who have accepted the competence *ipso facto* of the Commission, and

(2) by voluntary contributions. One respected commentator suggests administrative facilities to be made available by the depositary are the necessary rooms, interpreters and precis-writers, but not the travel expenses of the members. Apparently, such expenses would be met in accordance with paragraph 7.[56] Other items needed include video-recording and word-processing equipment.

Unlike the International Covenant on Civil and Political Rights, Article 90 makes no provision for the advance of initial expenses of the members of the Commission.[57]

Article 90 does not indicate how the expenses of the Commission are to be apportioned among the States accepting the competence of the Commission. Perhaps the apportionment can be modeled on the practice in financing review conferences, i.e. apportioning the expenses in accordance with the scale of assessment of the United Nations regular budget adjusted to take into account differences between the United Nations membership and the participation of States taking part in the Commission. Adjustment would also have to be made for the participation of States not members of the UN, such as Switzerland.

The Commission will presumably also need to adopt a budget and appropriate financial accounting methods.

Although Article 90 states that the expenses of the Commission may also be met by voluntary contributions, it does not expressly limit the contributors to States or States party. The Commission will need to determine if it may accept contributions from governmental and non-governmental international organizations or from the private sector.[58]

The expenses of a Chamber are to be met differently — exclusively from the parties using its services. The party or parties to the conflict requesting an enquiry are required to advance the necessary funds for expenses to be incurred by a Chamber. They are to be partially reimbursed by the party or parties against which the allegations are made, to the extent of 50% of the costs of the Chamber, whether or not the allegations are true.[59] Article 90 provides no other guidance on how to determine the amounts.

Where there are counter-allegations before the Chamber, each side is required to advance half of the necessary funds.[60]

X. CONCLUSION

Twenty States have now accepted *ipso facto* and without special agreement the competence of the Fact-Finding Commission. The Government of Switzerland, as the depositary of Additional Protocol I,

is taking the first steps necessary to bring the Fact-Finding Commission into being. It is hoped this article will assist those responsible for taking the many decisions that will shape and guide the Fact-Finding Commission as it undertakes its important responsibilities. For, as Professor Kalshoven has written, "the activities provided for the Commission may be expected to contribute considerably to the speedy and fair settlement of disputes arising from allegations of serious violations of the Conventions or the Protocol, and to the reduction of tensions attending such allegations".[61]

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NOTES AND REFERENCES

[1] *International Legal Materials*, Washington, D.C., November 1977, vol. 16, pp. 1371 *et seq.* For a discussion of the U.S. decision not to ratify Protocol I, see "Agora", *American Journal of International Law*, Washington, D.C., October 1987, vol. 81, pp. 910-25 and *id.*, October 1988, vol. 82, pp. 784-87.

[2] *Proceedings of the American Society of International Law*, Washington, D.C., 1987, vol. 81, pp. 28-31 (remarks of U.S. Department of State Deputy Legal Adviser Matheson); "The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols additional to the 1949 Geneva Conventions", *American University Journal of International Law and Policy*, Washington, D.C., 1987, vol. 2, p. 428 (remarks of U.S. Department of State Deputy Legal Adviser Matheson).

[3] Article 90 originated in two proposals, one made by Pakistan and the other made jointly by Denmark, New Zealand, Norway and Sweden. Both proposals stated that when a request for an inquiry was made by a party to the conflict, such an inquiry would be conducted and would not be subject to veto by the other side, either directly or indirectly. As was to be expected, early in the discussions the concerns for "violation of national sovereignty" and "interference in internal affairs" were raised by the Communist countries (H. Levie, *Protection of War Victims*, Dobbs Ferry, N.Y., Oceana, 1977, vol. 4, pp. 390 (paras. 1-9), 394 (paras. 35-36), 395 (paras. 40-43, etc.). "As a result the article as adopted is, once again, completely consensual and will probably be no more effective than the common article of the 1949 Geneva Conventions

and its predecessor have proved themselves." H. Levie, *The Code of International Armed Conflict*, Dobbs Ferry, N.Y., Oceana, 1986, vol. 2, p. 878.

Common Article 52/53/132/149 of the 1949 Geneva Convention provides that "at the request of a Party to the conflict, an enquiry shall be instituted" concerning any alleged violations thereof. Although the *ICRC Commentary* considers this to be "obligatory" (*The Geneva Conventions of 12 August 1949 — Commentary*, under the editorship of Jean Pictet, ICRC, Geneva, 1960, vol. III, p. 632), no such inquiry has ever been conducted and it is extremely doubtful that one ever will be, as it is so very easy for the party alleged to have committed the violations to prevent the inquiry from being conducted. It can do so by refusing to agree to a procedure and then by refusing to agree to the choice of an umpire. Article 30 of the 1929 Geneva Convention contained the identical "obligatory" wording ("an enquiry shall be instituted") and there is no public record of any inquiry ever having been conducted thereunder. *Id.*, pp. 878, 874. See note 25 below. See also T. J. Murphy, "Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977," *Military Law Review*, Charlottesville, Va., 1984, vol. 103, p. 3.

[4] In one respect Article 90 is an improvement on past efforts. Paragraph 3, providing for the designation of the members of the Chamber which is to make an investigation, is so drafted that it will be impossible for an alleged violator which has filed a declaration or has agreed to the investigation, to prevent the establishment of the Chamber and the investigation by refusing to name an *ad hoc* member. See text accompanying notes 44-46 below.

[5] M. Bothe, K. J. Partsch & W. A. Solf, *New Rules for Victims of Armed Conflicts*, The Hague, Nijhoff, 1982, para. 2.12, p. 543.

[6] *International Legal Materials*, May 1984, vol. 23, p. 670; *U.S. Department of State Bulletin*, January 1986, p. 67; *International Legal Materials*, November 1985, p. 1742.

[7] The JCS analysis continued:

"This conclusion lends greater importance to the earlier recommendation that the limits on reprisals in Articles 51-56 be reserved. If the United States cannot rely on neutral supervision to ensure compliance with humanitarian law, then the threat of unilateral retaliation retains its importance as a deterrent sanction to ensure at least a minimum level of humane behavior by US adversaries".

[8] Communication to the author from Commander W. Fenrick, CF, Office of the Judge Advocate General, Ottawa, November 21, 1990.

[9] Reports of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and the Republic of Iraq, UN Docs. S/16433 (1984); S/17127 and Add. 1 (1985); S/17911 and Corr. 1 and Add. 1 and 2 (1986); S/18852 and Add. 1 (1987); S/19823 and Corr. 1 and Add. 1, 25 April 1988; S/20060, 20 July 1988, and S/20063, 25 July 1988. These reports led to vigorous condemnation of the use of chemical weapons, albeit without assigning responsibility to one side, in Security Council Resolution 612, 9 May 1988, *U.S. Department of State Bulletin*, July 1988, p. 69. Similar reports have been submitted regarding the treatment of prisoners of war: Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General, January 1985, UN Doc. S/16962*, 22 February 1985, and The Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and the Republic of Iraq, UN Doc. S/20417, 24 August 1988.

[10] See, *e.g.*, the Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan, attached to UN Doc. A/C.3/42/8, 17 November 1987.

[11] The ICRC has issued guidelines to govern its activities in the event of breaches of the law ("Action by the International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law," *International Review of the Red Cross*, No. 221, March-April 1981, pp. 81-83):

"1. **Steps taken by the ICRC on its own initiative**

General rule: The ICRC shall take all appropriate steps to put an end to violations of international humanitarian law or to prevent the occurrence of such violations. These steps may be taken at various levels according to the gravity of the breaches involved.

However, they are subject to the following conditions:

Confidential character of steps taken: In principe these steps will remain confidential.

Public statements: The ICRC reserves the right to make public statements concerning violations of international humanitarian law if the following conditions are fulfilled:

- the violations are major and repeated;
- the steps taken confidentially have not succeeded in putting an end to the violations,
- such publicity is in the interest of the persons or populations affected or threatened;
- the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources".

The ICRC made public representations regarding the Iran-Iraq war. See *International Review of the Red Cross*, No. 235, July-August 1983, pp. 220-22 (press release of 11 May 1983 describing appeal of 7 May 1983 to the nations party to the Geneva Conventions); *id.*, No. 239, March-April 1984, pp. 113-15 (press release of 15 February 1984 regarding appeal to governments of 10 February 1984); *id.*, No. 243, November-December 1984, pp. 357-58 (press release describing appeal to governments of 24 November 1984). The ICRC issued a press release on misuse of the red cross emblem in Lebanon, *id.*, No. 248, September-October 1985, pp. 316-17; and a press release on the Afghan conflict on 20 May 1984, *id.*, No. 241, July-August 1984, pp. 239-40.

The ICRC Guidelines further provide:

Special rule: The ICRC does not as a rule express any views on the use of arms or methods of warfare. It may, however, take steps and, if need be, make a public statement if it considers that the use or the threat to make use of a weapon or method of warfare gives rise to an exceptionally grave situation.

Such situations arose during the course of the Iran-Iraq war. ICRC, *Annual Report 1984*, pp. 60-61 (7 March 1984, report on the use of prohibited weapons, and 7 June 1984, press release on the bombing of Iraqi and Iranian cities); *International Review of the Red Cross*, No. 257, March-April 1987, p. 217 (appeal of 11 February 1987 regarding bombing of cities); ICRC, *Bulletin*, No. 147, April 1988, p. 4 (10 March 1988, press release protesting against bombing of cities, and 23 March 1988, press release condemning use of chemical weapons in the province of Sulaymaniyah).

The ICRC Guidelines continue:

2. **Reception and transmission of complaints**

Legal basis: In conformity with article 6, para. 4 of the Statutes of the International Red Cross, the ICRC is entitled to take cognizance of "complaints regarding alleged breaches of the humanitarian Conventions".

Complaints from a party to a conflict or from the National Society of a party to a conflict: The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them.

Complaints from third parties: Complaints from third parties (governments, National Societies, governmental or non-governmental organizations, individual persons) shall not be transmitted.

If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided

that the violation has been recorded by its delegates or is common knowledge, and in so far as it is advisable in the interest of the victims.

The authors of such complaints may be invited to submit them directly to the parties in conflict.

Publicity given to complaints received: As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

3. **Requests for inquiries**

The ICRC can only take part in an inquiry procedure if so required under the terms of a treaty or of an *ad hoc* agreement by all the parties concerned. It never sets itself up, however, as a commission of inquiry and limits itself to selecting, from outside the institution, persons qualified to take part in such a commission.

The ICRC shall moreover not take part in an inquiry procedure if the procedure does not offer a full guarantee of impartiality and does not provide the parties with means to defend their case. The ICRC must also receive an assurance that no public communications on an inquiry request or on the inquiry itself shall be made without its consent.

As a rule, the ICRC shall only take part in the setting up of a commission of inquiry, under the above-stated conditions, if the inquiry is concerned with infringements of the Geneva Conventions or of their 1977 Protocols. It shall on no account participate in the organization of a commission if to do so would hinder or prevent it from carrying out its traditional activities for the victims of armed conflicts, or if there is a risk of jeopardizing its reputation of impartiality and neutrality. ...

4. **Requests to record violations**

If the ICRC is asked to record the result of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them. Moreover, the ICRC shall only send a delegation to the scene of the violation if it has received an assurance that its presence will not be used to political ends".

These guidelines do not deal with violations of international law or humanitarian principles to the detriment of detainees whom they have to visit as part of the activities which the ICRC's mandate requires it to carry out in the event of internal disturbances or tensions within a given State. Since this type of activity is based on *ad hoc* agreements with governments, the ICRC follows specific guidelines in such situations.

See also "ICRC Protection and Assistance Activities in Situations not Covered by International Humanitarian Law," *id.*, No. 262, January-February 1988, pp. 9-37.

[12] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, November 26, 1987, *International Legal Materials*, September 1988, vol. 27, pp. 1152 *et seq.*, entered into force 1 February 1989.

[13] Article 90, paras 1 (*b*) and 2 (*a*).

[14] It should be noted that Protocol I wisely gives no specific role to the ICRC in the creation or operation of the Fact-Finding Commission. Certainly the ICRC could give evidence to the Chamber but it will be disclosed, like all evidence, fully to both sides (Article 90, para. 4 (*b*). If the ICRC were to become involved in fact-finding, it would not be able to fulfil its traditional roles. See note 11 above. Governments could not be expected to allow the ICRC access to POW camps, for example, if the ICRC were at the same time conducting fact-finding enquiries and if, at a later date, ICRC delegates gave evidence to the Chamber without the consent of the government in question.

[15] This procedure follows the example set out in Article 30 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, for the election of members of the Human Rights Commission.

[16] 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, U.S. Sen. Ex. C., 95th Cong. 2d Sess., *International Legal Materials*, March 1966, vol. 5, pp. 352 *et seq.*

[17] Article 90, para. 1 (*c*).

[18] Article 90, para. 1 (*e*).

[19] One commentator suggests the President of the Commission may be appointed by the meeting of the States Parties. M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.23, p. 546. He also suggests that "as long as rules for the presidency of the Commission have not yet been established, the representative of the depositary takes the chair".

[20] *Cf.* M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.23, p. 546. Article 90, para. 6 provides that the rules of the Commission "shall ensure that the functions of the President of the Commission are exercised at all times and that, in case of an enquiry, they are exercised by a person who is not a national of the Party to the conflict". Hence the rules will have to provide for the designation of a President *pro tempore* when the elected President cannot exercise his functions on those grounds.

[21] T. M. Franck & H. S. Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies", *American Journal of International Law*, April 1980, pp. 308, 311.

[22] *Id.*, pp. 344-45.

[23] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC 1987, para. 3620, p. 1045 (Y. Sandoz, Ch. Swinarski & B. Zimmermann eds.) [hereinafter *ICRC Commentary*].

[24] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.15, p. 544.

[25] This common article provides:

"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the Conflict shall put an end to it and shall repress it with the least possible delay".

Article 90, para. 2 (*e*) extends this enquiry procedure to any violation of Protocol I. Unfortunately this enquiry procedure cannot be implemented when one Party does not wish the enquiry to take place. Not surprisingly, no enquiry has ever been instituted under this procedure. These defects led to the desire for a more compulsory enquiry procedure. See note 3 above, and *ICRC Commentary*, paras. 3628-29, p. 1047; M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.16, p. 544, J. Pictet, *The Geneva Conventions of 12 August 1949, Commentary, op. cit.*, 1952, vol. I, pp. 374-79; H. Levie, *The Code of International Armed Conflict*, vol. 2, pp. 878-79.

[26] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.14, p. 544. These would include violations of much of the law of naval warfare.

[27] While any violation of the law of armed conflict is a war crime, certain crimes are defined as "grave breaches" by common Article 50/51/130/147 if committed against persons or property protected by the Conventions. They include:

(i) willful killing, torture or inhuman treatment of protected persons;

(ii) willfully causing great suffering or serious injury to body or health of protected persons,

(iii) taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

(iv) unlawful deportation or transfer or unlawful confinement of a protected person;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,

(vi) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

[28] Additional Protocol I, Arts. 11, para. 4 and 85, paras 2-4, codify in greater detail the two separate categories of grave breaches. The first category relates to combat activities and medical experimentation and provides for the first time a meaningful standard by which such acts can be judged. A breach within this category requires (1) *willfulness* and (2) that *death or serious injury to body or health be caused* (Art. 85, para. 3).

The Protocol provides that the following acts constitute grave breaches:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause extensive loss of life, injury to civilians and damage to civilian objects, as defined in Article 57, para. 2(a)*(iii);*

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, para. 2(a)*(iii);*

(iv) making non-defended localities and demilitarized zones the object of attack;

(v) making a person the object of attack in the knowledge that he is hors de combat*;*

(vi) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent, or other protective sign recognized by the Conventions or this Protocol;

(vii) physical mutilations;

(viii) medical or scientific experiments; and,

(ix) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the state of health of the person or consistent with medical practice or conditions provided for in the Conventions.

(1) Exceptions to the prohibition in subparagraph (ix) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

(2) Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions above or fails to comply with these requirements shall be a grave breach of this Protocol.

The second category of grave breaches defined by Protocol I is contained in Article 85, para. 4. The only requirement to be satisfied with respect to these offences is *willfulness*:

(i) The transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.

(ii) Unjustified delay in the repatriation of prisoners of war or civilians.

(iii) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

(iv) Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subpara-

graph (b), *and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.*

(v) Depriving a person protected by the Conventions or referred to in paragraph 2 of this article of fair and regular trial.

See also H. Levie, *The Code of International Armed Conflict*, vol. 2, pp. 857-71, and H. S. Burgos, "The Taking of Hostages and International Humanitarian Law", *International Review of the Red Cross*, No. 270, May-June 1989, p. 196.

[29] *ICRC Commentary*, para. 3591, p. 1033.

[30] *ICRC Commentary*, para. 3592, p. 1033. It must be noted that there is no explicit indication of what was meant by this term in Article 89. It replaces "grave breaches" in an article that was to circumscribe reprisals for grave breaches but which was defeated in committee. See H. Levie, *Protection of War Victims*, vol. 4, pp. 333-71. See also *ICRC Commentary*, para. 3621, p. 1045, note 34.

[31] Article 90, para. 2 (*c*) (ii).

[32] *ICRC Commentary*, para. 3625, p. 1046.

[33] *ICRC Commentary*, para. 3624, p. 1046.

[34] *Cf. ICRC Commentary*, para. 3624, p. 1046.

[35] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.12, p. 543.

[36] *Ibid.*, para. 2.13, pp. 543-44.

[37] *ICRC Commentary*, para. 3626, pp. 1046-47. The making of such a request would seem to be an appropriate action considering the duty of all States under common Article 1 to ensure respect for the Conventions "in all circumstances".

[38] Article 90, para. 3 (*a*) (i).

[39] *Ibid.*

[40] *ICRC Commentary*, para. 3631, p. 1048 and note 41 (Philippe Bretton).

[41] Article 90, para. 3 (*a*) (ii).

[42] *ICRC Commentary*, para. 3632, p. 1048; M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.18, p. 545.

[43] In contrast, the members of the Human Rights Commission and the *ad hoc* Conciliation Commission established under the International Covenant on Civil and Political Rights are, under Article 43 thereof, entitled to the "facilities, privileges and immunities of experts on mission for the United Nations" as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 16.

[44] Article 90, para. 3 (*b*).

[45] *ICRC Commentary*, para. 3633, pp. 1048-49.

[46] *Ibid.*

[47] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.17, p. 545.

[48] It may be assumed that a special agreement could exclude the right to conduct investigations *in loco*. M. Bothe, K. J. Partsch & W. A. Solf, para. 2.20, p. 545.

[49] *Ibid.*, para. 2.19, p. 545.

[50] Indeed, Article 90, para. 6 provides that the Commission is to establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Article 90, para. 6 does require that the rules provide that the presidency of a Chamber be filled by a person not a national of a Party to the conflict, not just a party to the enquiry.

[51] *E.g.*, Model Rules of Procedure for United Nations Bodies dealing with violations of human rights (UN Doc. E/CN.4/1134, 1 February 1974), Draft Model Rules of Procedure suggested by the Secretary-General of the United Nations for *ad hoc* bodies of the United Nations entrusted with studies of particular situations alleged to reveal a consistent pattern of violation of human rights (UN Doc. E/CN.4/1021/Rev.1), Model rules of procedure of United Nations bodies dealing with violations of human rights

(ECOSOC res. 1870 (LVI)), and the Belgrade Minimal rules of procedure for international human rights fact-finding missions (*American Journal of International Law*, January 1981, vol. 75, pp. 163-65, adopted by the 59th Conference of the International Law Association, Belgrade, 23 August 1980). All of these are reproduced as annexes to *International Law and Fact-Finding in the Field of Human Rights*, The Hague/Boston, Nijhoff, Kluwer, B.G. Ramcharan ed., 1982. Another detailed set of suggested procedural rules may be found in Franck & Fairley, *supra* note 21. See also D. Weissbrodt & J. McCarthy, "Fact-Finding by International Nongovernmental Human Rights Organizations," *Virginia Journal of International Law*, Fall 1981, vol. 22, p. 1.

[52] Article 90, para. 5 (*a*) and (*b*).

[53] Article 90, para. 5 (*a*).

[54] *ICRC Commentary*, para. 3638, p. 1051.

[47] Article 90, para. 1 (*f*).

[56] M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.11, p. 543.

[57] Article 42, para. 10 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, U.S. Sen. Ex. C, 95th Cong. 2d Sess., provides that the UN Secretary-General may advance the expenses of the *ad hoc* Conciliation Commission.

[58] One commentator mentions only voluntary contributions from States party. M. Bothe, K. J. Partsch & W. A. Solf, *op. cit.*, para. 2.24, p. 546. The *ICRC Commentary*, and the original proposals, are silent on this point. *ICRC Commentary*, para. 3641, pp. 1051-52.

[59] Bothe, Partsch & Solf criticize this solution as "highly counter-productive" because it may "prevent a State Party from calling in the Commission". *Id.*, para. 2.25, p. 546.

[60] Article 90, para. 7.

[61] F. Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1987, p. 131.