The International Fact-Finding Commission

THE ICRC'S ROLE

by Françoise Krill

I. INTRODUCTION

To ensure that it is respected, international humanitarian law (IHL) requires mechanisms for its implementation. Most of these are known and have proved their worth, whether as means of prevention, control or repression.[1] They do however have their limitations and, in this sense, the International Fact-Finding Commission provided for in Article 90, Protocol I, fills a gap.

The 1929 Geneva Convention does admittedly contain an enquiry mechanism, which is reproduced in the 1949 Conventions; we shall return to this later. Suffice it to say that the wording of Article 3 common to the four Conventions is so succinct that the proceedings can be paralysed at a procedural level at any time[2] and that it was intended to be invoked only on an *ad hoc* basis. Article 90 represents distinct progress in this respect. The advantage of making it a standard practice to institute an enquiry is that such enquiries are not subject to the prior consent of the Parties concerned. Acceptance of the Commission's competence is given in principle, in peacetime, before there is any need to conduct an enquiry. Moreover, the fact that the Commission is a permanent institution is a considerable deterrent for Parties to a conflict which might be tempted to commit breaches of IHL.[3]

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[1] Sandoz, Yves: "Implementing international humanitarian law", in *The International Dimensions of Humanitarian Law*, Paris, UNESCO, and Pedone, Geneva, Henry Dunant Institute, 1986, pp. 259-326.

[2] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, eds. Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, ICRC, Martinus Nijhoff Publishers, Geneva, 1987 (hereinafter *Commentary on the Protocols*), Article 90, p. 1047, para. 3629.

[3] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,*

We shall first examine the origins of the Commission and dwell on the enquiry mechanism provided for in the Geneva Conventions.[4] We shall then see how the Commission works. The second part of the article will be devoted to the ICRC's role as regards enquiries in general and then within the specific context of Article 90, Protocol I, with particular reference to our relations with the future Commission.

II. THE FACT-FINDING COMMISSION

1. Origins of the Commission

A. Enquiries under the 1929 Geneva Convention

The Commission represents a new and important means of implementing IHL.

As we have seen, the idea of holding an enquiry is not, however, a new one. The 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field makes provision for a similar mechanism. Article 30 reads as follows:

"On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible".

B. Enquiries under the 1949 Geneva Conventions

At the time, this provision was a major step forward because no mechanism had been provided for in previous Conventions. Nevertheless, in 1934, at the 15th International Conference of the Red Cross, it was pointed out that application of the article would be difficult, as it presupposed agreement between the Parties to the conflict, and that

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Geneva (1974-1977), Federal Political Department, Bern, 1978 (hereinafter *Official Records of the CDDH*), IX, p. 190, para. 4 and p. 191, para. 8. CDDH/I/SR.56.

[4] We have decided not to include the fact-finding procedure's historical development in the present article, but to confine our study to enquiries within the context of the Geneva Conventions. It should be noted, however, that for almost 100 years States have shown an interest in setting up an enquiry procedure: first, Part III of the 1899 Hague Convention was adopted, and was then followed by quite a wide range of established practices and a large number of treaties (see Ben Salah, Tabrizi: *L'enquête internationale dans le règlement des conflits*, Bibliothèque de droit international, ed. Charles Rousseau, vol. LXXIX, Paris, 1976).

some practically automatic procedure ought therefore to be provided.[5] In 1937 a Commission of Experts convened by the ICRC reached certain conclusions which were adopted with practically no amendment by the 16th International Conference of the Red Cross (London, 1938). These conclusions served as a basis for the proposals put forward at the 1949 Diplomatic Conference. The latter did not feel, however, that it could accept, either as a whole or in part, the conclusions reached by the experts consulted by the ICRC.[6] With the exception of the second paragraph, common Articles 52, 53, 132 and 149 accordingly reproduce much the same wording as that to be found in paragraphs 1 and 3 of the 1929 text. They now read:

"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 on 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".

The same objections expressed in connection with Article 30 of the 1929 Convention were subsequently made to this provision as well, i.e. that no progress had been achieved in regard to the automatic operation of the procedure of enquiry or the choice of those responsible for carrying it out. That is undoubtedly the greatest obstacle to the implementation of the present Articles.[7]

In actual fact, these Articles common to the Geneva Conventions have never been applied. States have never succeeded in instituting such an enquiry because the opposing Parties did not give their consent.[8]

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[5] *1949 Geneva Conventions*, I, *Commentary*, ed. Jean S. Pictet, ICRC, Geneva, 1952, Article 52, p. 374.

[6] *Ibid*, pp. 375-377.

[7] *Ibid.*, p. 377.

[8] For examples, see J. Pictet, *Humanitarian Law and the Protection of War Victims*, A.W. Sijthoff, Leiden, Henry Dunant Institute, Geneva, 1975, p. 73.

C. Article 90 of Protocol I

• *The 1974-1977 Diplomatic Conference*

From the beginning of the *travaux préparatoires* to the 1974-1977 Diplomatic Conference, the need for some form of verification of compliance with the rules applicable in the event of armed conflict was emphasized by the experts. Two amendments presented during the Conference constitute the main basis for Article 90, Protocol I.[9]

One of the drafts was submitted by the delegations of Denmark, New Zealand, Norway and Sweden, and another by Pakistan.[10] Both drafts contained quite similar proposals, i.e. the establishment of a Permanent Commission vested with the mandatory power to investigate any serious violations of the rules of the law of armed conflicts.[11]

These proposals gave rise to a whole series of counterproposals and amendments. The most serious objections came from a large number of delegations opposed to the Commission's mandatory jurisdiction, its right of initiative and its competence to express an opinion on questions not only of fact but also of law.[12] The text which was finally adopted in plenary represents a compromise between the different tendencies which manifested themselves during the Conference.[13] The ICRC's role is dealt with in detail in section III 2A. below.

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[9] *Commentary on the Protocols*, para. 3602, p. 1040.

[10] *Official Records*, III, pp. 338-339, CDDH/I/241 and *Official Records*, III, pp. 340-342, CDDH/I/267; see also M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, para. 2.3, pp. 539-540.

[11] Graefrath, Bernhard: "Die Untersuchungskommission im Ergänzungsprotokoll zu den Genfer Abkommen vom 12.8.1949", *Wissenschaftliche Zeitschrift der Humboldt-Universität* zu Berlin, Ges-Sprachw. R. XXX, 1981, p. 11.

[12] Kussbach, Erich: "Commission internationale d'établissement des faits en droit international humanitaire", *The Military Law and Law of War Review*, Brussels, XX-1/2, 1981, pp. 91-116.

[13] It is interesting to note that an amendment was submitted to plenary by 22 States from the third world allowing for a dispensation to the rule whereby an enquiry could be opened only with the consent of all Parties, i.e. "in case of an occupied territory, the request of the Party whose territory is occupied shall suffice for the institution of the enquiry". This proposal was finally rejected (see *Official Records*, III, p. 344, CDDH/415 of 25 May 1977, and Bretton Philippe: "La mise en œuvre des Protocoles de Genève de 1977", *Revue de droit public et de science politique en France et à l'étranger*, Paris, Vol. 95, No. 2, March-April 1979, pp. 379-423).

- ***The relation between Article 90 and enquiries as provided for by the Geneva Conventions.***

According to the terms of Article 90, para. 2 (e), *"the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol"*.

Paragraph 2 (e) alludes to three hypothetical situations in which the Commission cannot engage in an enquiry:

— none of the Parties to the conflict has made the declaration provided for in subparagraph (a) of the same paragraph, or

— the defending Party has not given the consent provided for in subparagraph (d), or

— neither of these hypothetical situations exists (there is an *ad hoc* declaration or agreement), but the alleged violations are not serious violations within the meaning of para. (c) (1).

It is precisely when one of the aforesaid situations arises that Articles 52, 53, 132 and 149 common to the Four Conventions should take effect and apply to any violation — serious or not — of the Geneva Conventions and Protocol I.[14]

Nevertheless, if the Parties to the conflict have neither made a declaration nor agreed to an enquiry under Article 90 of Protocol I, it is very unlikely that they will agree on the procedure for an enquiry as provided for in Articles 52, 53, 132 and 149 common to the Four Conventions. On the other hand, the fact that recourse may be had to such a procedure still retains its interest in cases of minor violations of IHL. Parties to the conflict may then opt for a different procedure from the one referred to in Article 90, Protocol I. However, this reservation in favour of the autonomy of the Parties to the conflict does not give them any general authority to alter the procedure before the Commission.[15]

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[14] E. Kussbach, *op. cit.*, pp. 105-106; Ph. Bretton, *op. cit.*, pp. 399-400; M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544, para. 2.16; *Commentary on the Protocols*, p. 1047, paras. 3627-3629.

[15] M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544, para. 2.16.

2. Functioning of the Commission

A. Constitution of the Commission

Article 90 of Protocol I states that the Commission shall be established when not less than twenty States have declared that they agree to accept its competence. Canada was the twentieth[16] State to make this declaration on ratifying the Protocols, and thus the formal conditions for constituting the Commission have been met.

B. Election of members

Switzerland, as the depositary State, has the duty to convene the meeting to be attended by representatives of the said States, who then elect the **fifteen members** of the Commission[17] by secret ballot. Switzerland has sent a note to these twenty States, informing them of certain procedures involved in setting up the Commission and questions that should be considered with regard to its functioning.

These fifteen members must be *"of high moral standing and acknowledged impartiality"*.[18] Those electing them must ensure that each of the persons to be elected to the Commission possesses *"the qualifications required"* and that *"in the Commission as a whole, equitable geographical representation is assured"*.[19] Given the fact that most of the optional declarations of acceptance of the Commissions's competence come from European countries, it will initially be difficult to achieve true geographical representation. It would, however, be wise to encourage electing countries to heed this criterion when submitting candidates — all the more so to promote referral to the Commission on an *ad hoc* basis, within the meaning of Article 90, para. 2 (d) (20).[20]

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[16] The other States which have made this declaration are: Algeria, Austria, Belgium, Byelorussia, Denmark, Finland, Germany, Iceland, Italy, Liechtenstein, Malta, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, Ukraine, Uruguay and the USSR (as at 31 March 1991).

[17] Article 90, para. 1 (a), Protocol I.

[18] Article 90, para. 1 (a), Protocol I. See *Commentary on the Protocols*, paras. 3605-3608, pp. 1041-1042.

[19] Article 90, para. 1 (d), Protocol I. See also M. Bothe, K.J. Partsch and W.A. Solf, *op. cit.*, pp. 542-543: "... the principle of equitable geographical representation should be understood in a broader sense, taking into account, as far as possible, the composition of the High Contracting Parties of the Protocol and not only those which have recognized the competence of the Commission". See also *Commentary on the Protocols*, para. 3614, p. 1043.

[20] *Commentary on the Protocols*, para. 3611, p. 1042.

However, since only States which have made the relevant declaration recognize the Commission's competence in advance, we feel that they cannot, out of a desire for equality, be expected in addition to put forward a candidate from a country which has not made the declaration. Consequently, the greatest possible number of States should be encouraged to make this declaration in order to ensure that the members of the Commission are representative of a broader geographical distribution.

Under the terms of Article 90, no professional qualifications or legal training are required.[21] It is however essential that jurists be present. At the outset, they will be useful advisers in drawing up rules of procedure. Then, they will play an important role in defining the Commission's competence and assessing evidence *(«preuves»)*. [22] To ensure that the Commission can do its work properly people from other professions should also be included in so far as the obligations incumbent upon it relate to the spheres of medicine, chemistry, physics and military science, as well as to international law.[23]

C. Referral to the Commission

It is worth recalling that Article 90, when initially drafted, suggested that the Commission's competence should be obligatory. The final wording of para. 2, Article 90, Protocol I, represents a compromise. A Contracting Party may accept the Commission's competence, either in advance **by declaration**, or on an ***ad hoc*** basis when it is the subject of an enquiry.[24]

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[21] F. Kussbach, *op. cit.*, p. 94.

[22] Some delegates at the Conference expressed the fear that in this way the Commission would come up against some thorny problems regarding its own competence, which could become a source of possible controversy. This is yet another reason why the Commission should include amongst its members highly qualified lawyers. See *Commentary on the Protocols*, para. 3623, p. 1045 and E. Kussbach, *op. cit.*, p. 94.

[23] Circular dated December 1990 from the Swiss Federal Department of Foreign Affairs to States having accepted the competence of the Commission as referred to in Article 90; see also M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 542.

[24] *"There is no doubt that only States are competent to submit a request for an enquiry to the Commission, to the exclusion of private individuals, representative bodies acting on behalf of the population, or organizations of any nature. On the other hand, there is no reason why a Protecting Power, duly entrusted in protecting the interests of a Party to the conflict which had recognized the Commission's competence, could not submit a request to the latter in the context of its general mandate. Moreover, it is not necessarily the Party which is the victim of the alleged violation which requests the enquiry. Any Contracting Party in the sense of paragraph 1 (b) can do so, provided that the request applies to another Contracting Party in the sense of*

- ***By declaration***

If the plaintiff accepts the Commission's competence in advance, it may impose an enquiry on any other party that has made the same declaration.[25] Conversely, if either Party has not accepted the Commission's competence, the latter cannot initiate an inquiry. This means that the **declaration** itself establishes and constitutes the obligation to accept the Commission's competence.[26] The clause in Article 90, para. 2 (a), Protocol I, is also referred to as the *"optional clause of obligatory enquiry"*. [27] It should be pointed out that a Party to Protocol I may make such a declaration of recognition at any time.

- ***On an* ad hoc *basis***

Non-acceptance of the Commission's competence is not necessarily final. A State which has not made the optional declaration may change its mind and later accept the Commission's competence to enquire into a specific situation;[28] this alternative is provided for in Article 90, para. 2 (d). This means that any Party to an international armed conflict, even if it is not a Party to the Protocol,[29] may approach the Commission regarding an allegation of a grave breach or serious violation of the Conventions.[30]

National liberation movements may also have recourse to this simplified procedure.[31] Protocol I, Article 96, para. 3 (a), stipulates that, on receipt of the declaration of intent, *"the Conventions and this Protocol are brought into force with immediate effect"*. Assuming that the opposite were the case — a liberation movement could not make an *ad hoc* declaration under Article 90 — part of the content of Article 96 would lose its meaning and it would be necessary to

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the same provision. As regards the Commission, it is absolutely not permitted to act on its own initiative". See *Commentary on the Protocols*, para. 3618, p. 1044; see also E. Kussbach, *op. cit.*, p. 101, who confirms that the Commission may not act on its own initiative.

[25] See Article 90, para. 2 (a), Protocol I.

[26] See E. Kussbach, *op. cit.*, p. 99.

[27] See Ph. Bretton, *op. cit.*, p. 398: *"le Protocole contient une clause que l'on pourrait appeler 'clause facultative d'enquête obligatoire' dans la mesure où elle ressemble beaucoup à l'article 26, paragraph 2 du Statut de la Cour Internationale de Justice, qui a créé la clause facultative de juridiction obligatoire de la Cour"*.

[28] See E. Kussbach, *op. cit.*, p. 99.

[29] Andries, André, *Fonctionnement de la Commission internationale d'établissement des faits*, Commission interdépartementale belge de droit humanitaire, 1990, 12 pp.

[30] *Commentary on the Protocols*, para. 3626, p. 1046.

[31] *Ibid*; see also E. Kussbach, *op. cit.*, p. 100.

examine on a case-by-case basis which provisions in Protocol I the aforesaid movement must respect.

Clearly, in all the above-mentioned cases, the consent (by means of an ***ad hoc* agreement**) of the challenged Party is always necessary even if the latter has made a declaration in advance recognizing the Commission's competence. Indeed, were consent to be a foregone conclusion, it would introduce an element of disparity: a Party to a conflict which has not recognized the Commission's mandatory competence could oblige another Party to the conflict which *has* recognized this competence to accept an enquiry, but without having to accept an enquiry itself.[32]

D. Extent of the Commission's competence

Protocol I[33] lays down two distinct duties.

- ***Enquiry***

The Commission's task is 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"* (para. 2 (c) (i)).

The Commission is competent to enquire into the **facts** and not to decide matters of law or pass judgment.[34] However, it must be admitted that, in order to determine the extent of their mandate, the members of the Commission must make a preliminary assessment of the admissibility of the request, hence the importance for the Commission to include highly qualified legal experts amongst its members (see section 2 B above). It should be recalled that any allegation brought before the Commission must relate to a *"grave breach"* or *"serious violation"* of the Conventions and the Protocol. It obviously follows that breaches and violations which are not serious are excluded,[35] although these violations may become serious if they are repeated.[36] Above all, it would be difficult to distinguish between grave breaches and serious violations in that this distinction scarcely appears in the

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[32] *Ibid.*

[33] Protocol I, Article 90, para. (c).

[34] *Commentary on the Protocols*, para. 3620, p. 1045.

[35] "Its competence does not extend to all violations as in common Articles 52/53/132/149." See M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544.

[36] *Commentary on the Protocols*, para. 3621, p. 1045.

text of the Conventions and the Protocol, which always refer to "grave breaches".[37]

- ***Good offices***

The Commission is also competent to *"facilitate, through its* ***good offices****, the restoration of an attitude of respect for the Conventions and the Protocol..."* (Para. 2 (c) (ii)).

Clearly, the members of the Commission would be quite unable to accomplish this task without assessing the facts in terms of the law. Nevertheless, when the Commission submits, as laid down in Article 90, para. 5, *"such recommendations as it may deem appropriate"*, it must avoid including in its report any comments or judgment on the relevant law and must adhere solely to the facts.[38] The term "good offices" can be understood to mean the communication of conclusions on the possibilities of a peaceful settlement, and written and oral observations by States concerned.[39]

E. Role of the Chamber of Enquiry

- ***Constitution of the Chamber***[40]

According to Article 90, para. 3, all enquiries shall be undertaken by a Chamber consisting of five members appointed by the President of the Commission and two *ad hoc* members appointed by the Parties to the conflict.

The Chamber is set up only upon receipt of a request for an enquiry.

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[37] We shall mention however Article 89, Protocol I, which does use the term "serious violations", and the Commentary on this Article which defines this term in relation to that of "serious breaches". See *Commentary on the Protocols*, paras. 3591-3592, p. 1033; E. Kussbach uses responsibility as the basis for distinction: "breaches as defined by the Conventions and the Protocol invoke — either directly (war crime) or under internal law *(delictum juris gentium)* — the personal responsibility of the individual who committed the international crime. On the other hand, violations involve the responsibility of a Party to the conflict which has violated a rule of international law".

[38] M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544.

[39] *Commentary on the Protocols*, para. 3625, p. 1046.

[40] For more details on the constitution of the Chamber, please see:
— *Commentary on the Protocols*, paras. 3630-3633, p. 1048.
— M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 545.
— E. Kussbach, *op. cit.*, pp. 102-103.
— Ph. Bretton, *op. cit.*, pp. 401-402.

- ***Conduct of the enquiry***

In accordance with Article 90, para. 4, after being set up the Chamber will invite the Parties to the conflict to assist it in seeking and presenting evidence. Furthermore, the Chamber itself may seek such other evidence as it deems appropriate. It may also carry out an investigation *in loco.*

Obviously, Article 90 states only the general principles for the enquiry procedures. Under para. 6 it is up to the Commission to establish its own rules of procedure, which will then have to specify whether the responsibility for drawing up the rules governing the conduct of an enquiry rests with the Commission itself, or whether this task devolves upon the Chamber, which adopts its own rules of procedure. We share the opinion of Mr. Roach, who prefers the first alternative.[41] As regards the content of the rules themselves, standard procedures have been established for this purpose for the organs of the United Nations which have to deal with violations of human rights.[42]

One issue remains unresolved: the compatibility between the provisions of the above-mentioned rules of procedure and the national legislation of member States of the Commission. The Interdepartmental Commission on Humanitarian Law in Belgium has already studied this aspect of the problem and believes that on several points modifications would be necessary.[43]

- ***Report***

Under Article 90, para. 5, the Commission submits a report on the findings of fact of the Chamber, and may add recommendations. The Commission will not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

F. The Commission's expenses

In accordance with Article 90, para. 7, the **administrative expenses** will be met by mandatory contributions from the Contracting

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[41] Ashley Roach: "The International Fact-Finding Commission - Article 90 of Protocol I additional to the 1949 Geneva Conventions", p. 179 above: "I suggest the former is preferable, because of the urgency of getting on with each Chamber's work".

[42] We shall not expand on this because Mr. Roach mentions it in his article. See also *Commentary on the Protocols*, para. 3634, p. 1049. We should nevertheless like to add that, during the CDDH, Denmark proposed inviting international, governmental and non-governmental organizations together with private individuals to supply evidence. Although Article 90 does not contain this proposal, it is not opposed to it either (See B. Graefrath, *op. cit.*, p. 14).

[43] See A. Andries, *op. cit.*, pp. 7-8.

Parties which made the optional declaration accepting the mandatory competence of the Commission, and by voluntary contributions.

The **expenses incurred by a Chamber** are divided between the Party to the conflict which asked for the enquiry and the defendant Party.[44]

Switzerland will provide the Commission with the administrative facilities for the performance of its functions.[45]

III. THE ICRC's ROLE

1. The enquiry

Some proposals put forward in this respect at the 1949 Diplomatic Conference were rejected (see section II 1 B above), notably a text submitted by the ICRC to the 17th International Conference of the Red Cross (Stockholm, 1948), on the basis of the conclusions reached by government experts. Paragraph 3 of its Article 41 "Enquiry procedure" gave the ICRC a role in appointing members of the Commission of enquiry:

"The plaintiff and defendant States shall each appoint one member of the Commission. The third member shall be designated by the other two and, should they disagree, by the President of the Court of International Justice or, should the latter be a national of a belligerent State, ***by the President of the International Committee of the Red Cross.***"[46]

Articles 52, 53, 132 and 149 common to the four 1949 Geneva Conventions which were finally adopted make no provision for any intervention by the ICRC. Nevertheless, it has been called upon a number of times to initiate enquiries: in 1936, for instance, when various incidents occurred in the course of the conflict opposing Italy and Ethiopia; in 1943 for the Katyn affair, and in 1953, when a request was submitted for an enquiry into the alleged use of bacte-

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[44] See E. Kussbach, *op. cit.*, p. 105.

[45] Article 90, para. 1 (f).

[46] *Commentary on the First Geneva Convention*, Article 52, p. 376.

riological weapons.[47] Over the years the ICRC has decided on the attitude it intends to adopt in this respect and it has made it known.[48]

2. Background to Article 90 of Protocol I

A. The 1974-1977 Diplomatic Conference

- ***Initial proposals***

At the beginning of the Conference, Pakistan proposed an Article 7 bis conferring a key role on the ICRC to open and conduct an enquiry[49] as well as an Article 7 ter entitled "Settlement of disagreements" which also mentioned the ICRC.[50] These two amendments were withdrawn at the final session of the Conference. During the second session of the Conference in 1976, Denmark, New Zealand, Norway and Sweden added a new Article 79 bis, the first and sixth paragraphs of which proposed entrusting to the ICRC the task of administrator of a Permanent International Enquiry Commission.[51] A few days later Pakistan made a counterproposal entrusting this role to

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[47] See "Action taken by the ICRC in the event of breaches of international humanitarian law", in *IRRC*, No. 221, March-April 1981, p. 80.

[48] ICRC guidelines in the event of breaches of international humanitarian law are reproduced *in extenso* in Mr. Roach's article *op. cit.*, pp. 183-185.

[49] *Official Records*, III, p. 42, CDDH/I/27, 11 March 1974; paras. 1 and 2 of the new Article 7 bis were worded as follows:

"1. ... or the International Committee of the Red Cross shall institute an enquiry concerning any alleged violation of the Conventions or this Protocol...

"2. ... or the International Committee of the Red Cross to carry out an independent enquiry. The Protecting Power or the International Committee of the Red Cross shall carry out the enquiry in accordance with paragraph 1 of this Article."

[50] *Official Records*, III, p. 43, CDDH/I/25, 11 March 1974; Article 7 ter, para. 2 was worded as follows:

"2. ...or delegated by the International Committee of the Red Cross, who shall be invited to participate in such a meeting".

[51] *Official Records*, III, p. 338, CDDH/I/241 and Add. 1, 19 March 1975; paras. 1 and 6, Article 79 bis, were worded as follows:

"1. ... The International Committee of the Red Cross shall draw up the procedures for appointment, as well as other rules relating to membership, including the Presidency of the Commission, and shall undertake the appointments but shall in no way be responsible for the enquiries undertaken or the findings which emerge from them.

"6. ... The Commission's activities shall be financed by voluntary contributions channelled by the International Committee of the Red Cross".

the depositary.[52] None of the subsequent amendments made reference to the ICRC's role in this respect.[53]

- ***The discussions***

The discussions on Article 79 bis took place during the third session of the Diplomatic Conference.[54]

Denmark, on behalf of three other delegations (New Zealand, Norway and Sweden), Pakistan and Japan submitted various amendments to Article 79 bis. Whilst the first four countries did not envisage any obstacles to the ICRC's role — specifying that "none of the provisions should in any way affect the traditional impartiality of the ICRC or its humanitarian activities",[55] Pakistan wanted "to avoid involving the ICRC in inevitable disputes".[56] The ICRC stated its willingness to accept the proposed administrative duties while making it clear that "what was of paramount importance was that the nature of that function — which must remain distinct from the other tasks undertaken by the ICRC — was open to no ambiguity. There must be no possibility of confusion between its role as administrator of the international enquiry commission and the traditional duties of protection and assistance conferred upon it by the Geneva Conventions and Protocol I".[57] The ICRC considered it essential that its "nomination as administrator of the Commission should not arouse controversy...".[58]

During the ensuing discussions, most of the delegations[59] expressed reservations in the sense that *"the ICRC must not be placed in a situation that would be incompatible with its traditional role, its right of initiative and its neutrality..."*[60]

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[52] *Official Records*, III, p. 340, CDDH/I/267, 25 March 1975.

[53] *Official Records*, III, p. 342, CDDH/I/316, 10 May 1976; *Official Records*, III, p. 343, CDDH/415 and Corr. 1 and CDDH/415/Add. 1 and 2, 25 May 1977; *Official Records*, III, p. 344, CDDH/416, 25 May 1977; *Official Records*, III, p. 345, CDDH/420, 26 May 1977.

[54] From 12 to 14 May 1976.

[55] *Official Records*, IX, p. 190, para. 7, CDDH/I/SR.56.

[56] *Official Records*, IX, p. 193, para. 17, CDDH/I/SR.56.

[57] *Official Records*, IX, p. 195, para. 25, CDDH/I/SR.56.

[58] *Official Records*, IX, p. 195, para. 26, CDDH/I/SR.56.

[59] *Official Records*, IX, p. 207, para. 3, p. 210, para. 17 and p. 211, para. 28, CDDH/I/SR.57; *Official Records*, IX, p. 223, para. 4, p. 224, para. 8, p. 227, para. 20 and p. 227, para. 25, CDDH/I/SR.58.

[60] *Official Records*, IX, p. 210, para. 17, CDDH/I/SR.57.

Article 90, as finally adopted by the Conference, does not confer any role on the ICRC. This was a wise decision.

B. Relations with the future International Fact-Finding Commission

Article 90, Protocol I, makes no mention of any connection between the ICRC and the future Commission. Be that as it may, the discussions during the 1974-1977 Diplomatic Conference show that States wished to make a clear distinction between the ICRC and the Commission, both as institutions and in terms of their respective mandates. Consequently, even if States were to express the desire for the ICRC to give its opinion on the nomination of members of the Commission, we consider that it would not be advisable for it to do so. We also feel that it would be equally inappropriate for the ICRC to take part in meetings of the Commission as an observer. Indeed, when the idea was mooted that nomination of the members of the Commission should be entrusted to the ICRC, it clearly responded that *"... the ICRC would not itself take part in the activities of the Commission"*.[61]

That does not mean, however, that there should be no relationship between the Commission and the ICRC. The XVth Round Table, organized in September 1990 by the San Remo International Institute of Humanitarian Law, put forward several recommendations in this connection.[62] This is the spirit that should prevail during consultations between the Commission and the ICRC.

IV. CONCLUSION

It is interesting to note that an enquiry procedure was proposed by the ICRC as early as 1937, in the course of its efforts to improve and strengthen Article 30 of the 1929 Convention. Regrettably, its recommendations went unheeded (see section II 1 B).

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[61] *Official Records*, IX, p. 232, para. 47, CDDH/I/SR.58.

[62] "... consultations on the respective working methods of the ICRC and the Commission would make it possible to define their respective approaches more clearly and to guarantee the necessary complementarity. It was therefore vital that the Commission, once set up, contact the ICRC". See XVth "Round Table of the International Institute of Humanitarian Law" (San Remo, 4-8 September 1990), *IRRC*, No. 280, January-February 1991, p. 62.

More than half a century was to pass before a Commission, which is indisputably an important means of developing and consolidating an enquiry mechanism, finally came into being.

Establishment of the Commission provided for in Article 90 of Protocol I also has further advantages. In the past, several requests for enquiries have been presented to the ICRC; it has thus frequently found itself in an awkward position because it never sets itself up as a commission of enquiry.[63] Henceforth, the ICRC can invite the plaintiff Party to contact the Commission which, by drawing up a confidential report, will incidentally be complying with the conditions the ICRC had set for itself in the event of a request for an enquiry.[64] Lastly we believe that this is an excellent means of implementing the obligation "to ensure respect" laid down in Article 1 common to the Four Geneva Conventions.[65]

Beyond all doubt, the Commission constitutes an additional means of strengthening the implementation of, and respect for, international humanitarian law. Although it is complementary to the ICRC it is distinct from it; this should enable the ICRC to continue its traditional tasks while retaining its reputation for impartiality and neutrality.

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[63] See "Guidelines in the event of breaches of international humanitarian law", *IRRC*, No. 221, March-April 1981, p. 83.

[64] *Ibid.*

[65] *Official Records*, IX, p. 192, para. 16, CDDH/I/SR. 56.

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