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The International Fact-Finding Commission According to Art. 90 Additional Protocol I to the Geneva Conventions and its Potential Enquiry Competence in the Yugoslav Conflict

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1. Introduction

Four years after its creation in 1991[1] the International Fact-Finding Commission (= Commission) still leads the shadowy existence of a sleeping beauty since it has not yet engaged in any actual fact-finding. The provisions in Art. 90 of the 1977 First Additional Protocol to the Geneva Conventions (= Protocol I)[2] are the result of a new effort to seek "some form of check on compliance with the rules applicable in case of armed conflict".[3] If one recalls the political climate of the Diplomatic Conference 1974–77 when the Commission's tasks and powers were designed, it becomes obvious that the Commission in its present form does not correspond to the ambitious proposals for a permanent, compulsory enforcement institution.[4] The Commission is the product of compromises. Thus, it is not an enforcement (or adjudicative) organ, but rather a mere "fact-finding" institution; its competence does not automatically follow for all States Parties to the Protocol, but rather depends upon a separate act of acceptance modelled after the optional clause of the ICJ or genuinely *ad hoc*.[5]

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[1] Kussbach, The International Humanitarian Fact-Finding Commission, 43 *International and Comparative Law Quarterly* (1994), pp. 174–185 (= Kussbach, Fact-Finding Commission), at 174.

[2] 1125 UNTS 3; 16 ILM 1391. If not otherwise indicated, citations of Articles refer to Protocol I.

[3] Sandoz/Swinarksi/Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) (= Commentary), p. 1040.

[4] According to one proposal put forward at the Conference a "Permanent Commission for the Enforcement of Humanitarian Law" was envisaged, Cf. Commentary, *op. cit.*, p. 1040.

[5] Commentary, *op. cit.*, p. 1044.

It took, however, fourteen years for the twenty State acceptances necessary to proceed to the election of its fifteen members and thereby to its effective establishment.[6] But mere formal establishment does not imply effective work. In order to start its fact-finding tasks, the Commission has to be seized with an actual "case". Furthermore, the possibility of such a seizure is clearly dependent upon the Commission's competence.

Recent experiences, and especially the tragic events of the Yugoslav conflict, have led to the question of whether the Commission could be activated in this context. In this respect, it is important to be aware of the fact that while Slovenia, Croatia, Bosnia-Herzegovina and the "Former Yugoslav Republic of Macedonia" have made declarations of acceptance according to Art. 90 para. 2 sub-para. a), no such declaration has been made by the "Federal Republic of Yugoslavia" (Serbia and Montenegro).[7]

This issue is primarily a question of the Commission's competence. There is no doubt that it could be resorted to by States, parties to a conflict, agreeing on its competence *ad hoc* or if they had both accepted its competence according to Art. 90 para. 2 sub-para. a). It is, however, not so clear whether the Commission could also act,

1) in a non-international conflict,
2) upon the request of a Contracting Party not involved in the conflict or
3) even *proprio motu*.

The following considerations try to shed light on these issues which might become crucial if one considers possible ways of involving the Commission in the Yugoslav conflict.

2. The Commission's Primary Area of Competence

The Commission's competence rests upon Art. 90 para. 2. According to its sub-para. c) the Commission is endowed with two core areas of competence: "(i) [to] enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violations of the Conventions or of this Protocol; (ii) [to] facilitate, through its good offices, the restoration

[6] Cf. Declaration de l'état dépositaire, 73 *Revue Internationale de la Croix-Rouge*, No. 788 (1991), p. 222; See also Kussbach, Die Internationale Ermittlungskommission nach Art. 90 des Zusatzprotokolls I zu den Genfer Rotkreuz-Abkommen, 18 *Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht* (1993), pp. 71–95 (= Kussbach, Internationale Ermittlungskommission), at p. 72.

[7] See International Humanitarian Fact-Finding Commission, Information leaflet distributed at the *Meeting of the Intergovernmental Group of Experts for the Protection of War Victims*, Geneva, 23–27 January 1995, appendix II (on file with the author).

of an attitude of respect for the Conventions and this Protocol". Certainly, the first aspect, the fact-finding task, is crucial. It has been correctly stressed that the Commission's competencies are limited to fact-finding, enquiries proper, and do not encompass any legal evaluation of the facts established in the sense of a determination of a breach of legal obligations.[8] Thus some cautionary remarks have been provoked by the second aspect, the good offices, in particular whether these could be fulfilled in practice without any legal evaluation.[9]

Apart from this delimitation of the Commission's "subject matter jurisdiction",[10] Art. 90 para. 2 sub-para. a) and d) set out the Commission's competence *ratione personae*: "The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare 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 to enquire into allegations by such other Party, as authorized by this Article";[11] "In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party concerned".[12] It becomes clear that only those States which accept the Commission's competence, either in advance (sub-para. a)) or *ad hoc* (sub-para. d)), are obliged to accept an enquiry.

3. The Commission's Competence in Non-International Conflicts

Against the background of the legal uncertainty of whether the Yugoslav conflict could be seen as an international armed conflict covered by the four Geneva Conventions and Protocol I or not, it makes sense to investigate the Commission's potential competence of enquiry in cases of non-international conflicts.

For reasons of the intense international involvement in the conflict it seems that meanwhile this question has been largely resolved in the affirmative, with respect to both the fighting going on in Croatia and in Bosnia-Herzegovina.

[8] This has already been deduced from the title of the Commission and the wording of Art. 90 para. 1 sub-para. a) (Commentary, *op. cit.*, p. 1041), but it also clearly follows from Art. 90 para. 2 sub-para. c). It is, however, true that when determining its own competence – which relates to "facts alleged to be a grave breach" – some legal evaluation might be necessary (Commentary, *op. cit.*, p. 1041).

[9] Commentary, *op. cit.*, p. 1046.

[10] Kussbach, Commission internationale d'établissement des faits, 20 *Revue de droit pénal militaire et de droit de la guerre* (1981), pp. 78–109 (Kussbach, Commission internationale), p. 101, speaks of "compétence materielle".

[11] Sub-para. a).

[12] Sub-para. d).

Only the problem of 'at which moment' this conflict was "internationalised" is left open.[13] However, it might well be that Red Cross institutions as well as the Commission[14] take a narrower view on the definition of international conflicts triggering the application of the entire international humanitarian law than, for instance, UN organs such as the War Crimes Commission or the Security Council which seemed to be willing to qualify the Yugoslav conflict as an international one at an early stage.[15]

It appears all the more important to check the potential non-international reach of the Commission's competence since it has itself stated its "willingness to enquire into alleged violations of humanitarian law, including those arising in non-international conflicts, so long as all parties to the conflict agree".[16] It is, however, not so clear whether the Commission might be competent at all to enquire into facts arising during a non-international conflict even if all parties agreed to it, since this appears to be primarily an issue of the Commission's subject matter "jurisdiction" which might be beyond the parties disposition.

3.1. *The System of the Conventions and the Protocols*

First and foremost a systematic or rather contextual objection against such an enlargement of the Commission's investigatory powers might be raised: The Commission was created by Art. 90 Protocol I; it is, thus, a "treaty-organ" of Protocol I governing international armed conflicts, not of Protocol II governing non-international armed conflicts. If the Commission were to have

[13] Cf., *inter alia*, Meron, War Crimes in Yugoslavia and the Development of International Law, 88 *AJIL* (1994), pp. 78–87, p. 81; Oeter, Bürgerkrieg in Jugoslawien – Konflikt um Kroatien – Serbisch-Kroatischer Krieg?, *Humanitäres Völkerrecht–Informationsschriften* (1992), pp. 4–10; Jakovljevic, International Tribunal for Violations of International Humanitarian Law in Former Yugoslavia: Applicable Law, *Humanitäres Völkerrecht – Informationsschriften* (1993), pp. 224–229, pp. 224 *et seq.*

[14] The Commission is a treaty organ created by Protocol I, but not institutionally linked to the Red Cross organs.

[15] Cf. Interim Report of the Commission of Experts Established Pursuant to Security Council Res. 780 (1992), UN Doc. S/25274, Ann. I, para. 45 (1993): "[t]he character and complexity of the armed conflict concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts in the territory of the former Yugoslavia"; Cf. among the Security Council resolutions, *inter alia*, Res. 771 (1992) op. para. 1 whereby the Council "[r]eaffirms that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the conventions are individually responsible in respect of such breaches".

[16] International Humanitarian Fact-Finding Commission, Information leaflet distributed at the *Meeting of the Intergovernmental Group of Experts for the Protection of War Victims*, Geneva, 23–27 January 1995, p. 2 (on file with the author).

competencies in non-international armed conflicts, at least some reference to it should have been included in Protocol II. Since there is no such reference, facts allegedly amounting to violations of Protocol II do not fall under the Commission's competence.[17]

3.2. *The Wording of Art. 90 Para. 2 Sub-Para. c)*

Also a literal reading of Art. 90 para. 2 sub-para. c) laying down the Commission's competence seems to bar such a broad interpretation of its competence. According to this provision the Commission shall be competent to "(i) enquire into any facts alleged to be a grave breach as defined in the *Conventions and this Protocol* or other serious violations *of the Conventions or of this Protocol*; (ii) facilitate, through its good offices, the restoration of an attitude of respect for *the Conventions and this Protocol*".[18] Again the systematical *e contrario* argument seems to apply: the competence clearly refers to the Conventions and *this* Protocol, i.e. Protocol I governing international conflicts. Thus, acts potentially violating the other Protocol, Protocol II governing non-international conflicts, cannot give rise to the Commission's competence.

3.3. *The Intentions of the Contracting Parties*

This restrictive interpretation of the scope of the Commission's competence seems to be reaffirmed by a short glance at the provisions drafting history. Among the principal arguments raised by a group of socialist countries against an enquiry commission with compulsory competence as originally proposed[19] was the claim that such an international institution would infringe upon the affected States' sovereignty and unduly interfere with their internal affairs. In an article on the Commission *Kussbach* recalls the Western States' reply to that: alluding to the famous *S.S. Wimbledon Case* of the Permanent Court of International Justice,[20] they stated that every international

[17] Similarly Kussbach, Commission internationale, *op. cit.*, p. 97.

[18] Emphasis added.

[19] Although the final wording of Art. 90 para. 2 lit a) contains an optional clause – similar to Art. 36 para. 2 Statute of the ICJ – the objections against the strictly compulsory version are also valid against this weaker form of advance agreement on jurisdiction. Thus, the clause has been aptly described as "clause facultative de juridiction obligatoire" (Bretton, La mise en oeuvre des protocoles de Genève de 1977, 2 *Revue de Droit public et de la Science politique en France at a'étranger* (1979), p. 398), because once the optional agreement to the Commission's competence has been given, it becomes obligatory as well.

[20] P.C.I.J. (1923), Ser. A., No. 1, p. 25, where the Court stated: "No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty".

engagement implies a certain limitation of a State's sovereignty, but at the same time it is an expression of this sovereignty to oblige oneself. As far as the intervention argument is concerned they replied that "dans le cadre d'un conflit armé international on se trouve dans un domaine par excellence international".[21] On the other hand, *Kussbach* dismisses any reference to non-international conflicts – where arguably an interference into internal affairs could result from an enquiry of the Commission. He calls any reference to such internal conflicts "clairement erronée", "d'abord parce que l'article sur la Commission d'enquéte fait partie du Protocole I portant sur la protection des victimes des conflits armés *internationaux* tandis que le Protocole II sur la protection des victimes des conflits armés non internationaux ne connait pas de pareille disposition".[22] Only by restricting the Commission's competence to international conflicts, any potential interference into internal affairs would be excluded. And only thereby the provision became acceptable to all States at the Conference.

3.4. *The Wording of Art. 90 Para. 2 Sub-Para. c) Again – Common Art. 3 of the Conventions as Part of the Commission's Area of Competence*

Against such a sweeping exclusion of any facts occurring in non-international conflicts from the Commission's competence – which seems to be in accordance with the dichotomy of the two Protocols and the political will of the contracting parties – a literal interpretation of the Commission's competence provision might again be brought forward.

If we go back to the wording of Art. 90 para. 2 sub-para. c) which speaks of "grave breach[es] as defined *in the Conventions and this Protocol* or other serious violation[s] *of the Conventions or of this Protocol*", it is clear that Common Art. 3 of the Geneva Conventions as nucleus of the humanitarian law of non-international conflicts is included thereby, if infringements of Common Art. 3 can be qualified as "grave breaches" or "serious violations".

Under the relevant articles of the Conventions[23] and of Protocol I[24] a deliberate distinction is made between "grave breaches" and other breaches. While the contracting parties are obliged to "suppress" all kinds of breaches (which might involve apart from penal also administrative or disciplinary sanctions),[25] they are under a special duty to prosecute and try persons

[21] Statement of the Greek representative, Actes de la Conférence, vol. IX, p. 227, cited by Kussbach, Commission internationale, *op cit.*, p. 98.

[22] Kussbach, Commission internationale, *op cit.*, p. 97.

[23] Art. 49ff. First Convention, Art. 50ff. Second Convention, Art. 129ff. Third Convention, Art. 146ff. Fourth Convention.

[24] Art. 85ff.

[25] Commentary, *op cit.*, p. 975.

alleged to have committed "grave breaches" regardless of their nationality and regardless of the place where such "grave breaches" occurred (principle of universality) or at least to extradite such persons.[26] For our purposes it is important to note that the relevant provisions do not only list a number of acts which might qualify as "grave breaches", but stand under the proviso that in order to constitute "grave breaches" such acts must be "committed against persons or property protected by the [present] Convention[s]".[27] Since the conventional definitions of "protected persons"[28] apparently do not cover the persons protected by Common Art. 3, violations of Common Art. 3 are generally regarded as being outside the scope of potential "grave breaches".[29] Consequently the Commission's jurisdiction cannot be based upon violations of Common Art. 3 as "grave breaches".

The only option left would be to establish that violations of Common Art. 3 could constitute "other serious violation[s]" of the Conventions in the sense of Art. 90 para. 2 sub-para. c) Protocol I. The text of the Conventions and Protocol I is not very helpful in order to elucidate the difference between "serious violations" and "grave breaches".[30] *Kussbach* has convincingly suggested that "serious violation" relates to the international responsibility of the party to the conflict, while "grave breach" implies the individual responsibility of the person committing a war crime.[31] The ICRC Commentary devotes the greater part of its remarks on the Commission's enquiry competence to this distinction acknowledging that there is virtually no difference in the Conventions and the Protocol and that consequently the Commission might become involved in a difficult legal appraisal of its own competence. The Commentary finally suggests that "[a] serious violation might be found which is not covered by the list of grave breaches" and that "[m]inor violations may become serious if they are repeated".[32] If we want to avoid seeing the reference to "grave breach[es] [. . .] or other serious violation[s]" merely as a tautological phrase

[26] Commentary, *op cit*., pp. 974f.

[27] Art. 40 First Convention, Art. 51 Second Convention, Art. 130 Third Convention, Art. 147 Fourth Convention.

[28] Art. 13, 24, 25 First Convention, Art. 13, 36, 37 Second Convention, Art. 4 Third Convention, Art. 4 Fourth Convention.

[29] Even Th. Meron, generally supporting a broad field of application for humanitarian law, concedes that "[v]iolations of common Article 3 of the Geneva Conventions, which concerns internal wars, do not constitute grave breaches giving rise to universal criminal jurisdiction". Meron, War Crimes in Yugoslavia, *op cit*., p. 80.

[30] Without defining the difference Protocol I obviously takes it for granted since it speaks of "grave breaches in Art. 85 ff and of "serious violations" in Art. 89.

[31] Kussbach, Commission internationale, *op cit.*, p. 101; Kussbach, Fact-Finding Commission, *op cit*., p. 177, deduces this from the fact that "grave breaches" are by definition committed "intentionally" and have to be considered war crimes.

[32] Commentary, *op. cit.*, p. 1045.

signifying identical acts, it appears indeed appropriate to understand "serious violations" as the broader category than the relatively precisely defined group of "grave breaches". This interpretation is reinforced by the adjective "other" which implies that if some act is not a "grave breach" it might be another violation. If we thus look at the "seriousness" of the acts listed in Common Art. 3, it seems immediately evident that most of them will be equivalent to the "grave breaches" of the Conventions *per se* and need no constant repetitions in order to qualify as "serious violations". If we consider the large-scale atrocities committed in former Yugoslavia, it should be beyond doubt that – even if we consider this an internal conflict – they are not minor infractions of Common Art. 3, but rather amount to "serious violations".

As a result, it seems correct to conclude that the Commission also has, albeit a limited, subject matter competence to conduct a fact-finding in non-international armed conflicts.[33]

In his early article on the Commission *Kussbach* rejected even this limited approach based on Common Art. 3. Extending the argument advanced by *Pictet* that para. 3 of Common Art. 3 not only states that the parties to the conflict are merely drawn to respect Art. 3, but that they can ignore the other provisions of the Conventions[34] (including the common provisions for an enquiry procedure),[35] *Kussbach* concludes that they are also not bound to respect Art. 90 of Protocol I.[36] It seems, however, that *Kussbach* might have focused too strictly on Common Art. 3. It is certainly true that one cannot deduce any obligation to honour other provisions of the Conventions or even of Protocol I from the mere fact of being bound by Common Art. 3. It is, however, a different case to conclude that a State having ratified (the Conventions as well as) Protocol I and accepted the competence of the Commission *ratione personae*, will then have to respect its competence concerning the entirety of its obligations under the Conventions (including Common Art. 3).

The contradiction which could apparently be seen in *Kussbach's* earlier literary remarks, denying the Commission's potential competence in non-

[33] One has to acknowledge, however, that this result is – from a systematic point of view – not very satisfactory, since it would allow a modest enquiry competence of the Commission in situations covered by Common Art. 3, not, however, in conflicts of a more serious intensity as those regulated by Protocol II. On the restricted field of application of Protocol II, which in Art 1 requires, *inter alia*, "the exercise of such control over part of [the] territory [of a High Contracting Party] so as to enable the [dissident armed forces] to carry out sustained and concerted military operations", cf. Gasser, Das humanitäre Völkerrecht, in: Haug (ed.), *Menschlichkeit für alle*, Bern-Stuttgart-Wien (2nd ed., 1993), pp. 517–618 (= Gasser), p. 593.

[34] Pictet, *La Convention de Genéve I*, Commentaire, Genéve (1952), p. 63.

[35] Art 52 First Convention, Art 53 Second Convention, Art. 132 Third Convention, Art. 149 Fourth Convention provide for an enquiry procedure which has never been successfully used (Commentary, *op cit.*, p. 1040).

[36] Kussbach, Commission internationale, *op. cit.*, p. 98.

international armed conflicts, and recent statements of the Commission (of which, since 1991, he is President) affirming its willingness to take up even issues involving non-international armed conflicts,[37] might be dissolved, if one looks closely at the perceived basis for such action in the eyes of the Commission.

3.5. *Non-International Armed Conflicts as "Other Situations" in the Sense of Art. 90 Para. 2 Sub-Para, d)?*

In its self-presentation the Commission has stated that apart from its competence flowing from Art. 90 para. 2 sub-para. c) it might be also competent in other situations: "[a]s well, the Commission may institute an enquiry in other situations at the request of a party to the conflict, but only if the other party or parties concerned consent. In that context the Commission has stated its willingness to enquire into alleged violations of humanitarian law, including those arising in non-international conflicts, so long as all parties to the conflict agree".[38] By stressing the necessity of consent of all parties concerned in "other situations" than the ones mentioned in the immediately preceding text (concerning "grave breaches" and "serious violations") the Commission seems to rely on Art. 90 para. 2 sub-para. d) – without explicitly mentioning it.

It thus becomes crucial to determine whether the passage "[i]n other situations", which are the opening words of Art. 90 para. 2 sub-para. d), should be read as referring to situations other than those under sub-para a), i.e. where no advance acceptance of the Commission's competence has taken place, *or* to sub-para. c) defining the Commission's competence which is obviously limited to international conflicts in general.[39]

The second understanding which seems to be shared by the Commission is probably the syntactically more plausible interpretation. If one reads Art. 90 paragraph by paragraph, sub-para. d) following sub-para. c) speaks of the "other situations" than those enshrined in the preceding sub-para.[40] If sub-para. d)'s "other situations" intended to refer to the advance recognition of sub-para. a), then it should have been positioned as sub-para. b) (or maybe as

[37] Cf. *supra*, footnote 16.

[38] International Humanitarian Fact-Finding Commission, Information leaflet distributed at the *Meeting of the Intergovernmental Group of Experts for the Protection of War Victims*, Genéva, 23–27 January 1995, p. 2 (on file with the author).

[39] Cf. *supra* text at footnote 18.

[40] This must also be the assumption of Bothe/Ipsen/Partsch who consider that sub-para. d) provides for fact-finding in case of non-serious violations (Bothe/Ipsen/Partsch, Die Genfer Konferenz über humanitäres Völkerrecht, 38 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1978), pp. 1–85, p. 62).

sub-para. c) after the present sub-para. b) dealing with the deposition of the declarations of advance acceptance). Furthermore, the fact that sub-para. d) speaks of a "Party to the conflict" and "other Parties concerned" and not of the "High Contracting Parties" – like sub-para. a) and b) – could be interpreted that here not only States, as "High Contracting Parties", which might conduct an international armed conflict proper, but also other entities, possibly insurgents waging civil war, could consent to a fact-finding mission.[41] Consequently, the "other situation" could be one where not only State parties are involved in the conflict, but also other parties.

Nevertheless, the first alternative seems to be the correct way of reading Art. 90 para. 2 sub-para. d). Although the reference "[i]n other situations" at the beginning of the sentence is ambiguous, the remainder of that phrase – speaking of consent – makes it systematically more likely to relate it to "other situations" (than under sub-para. a)) where no advance consent exists. Sub-para. d) deals with an issue of consent. It concerns a question of competence *ratione personae*, not of the potential subject matters. It would be inconsistent to supplement a lacking subject-matter competence (sub-para. c)) by consent. It seems far more logical to require *ad hoc* consent in cases where no advance acceptance (sub-para. a)) is at hand.

This result seems to be the most widely accepted one.[42] The ICRC Commentary does not really address the problem, it simply states that sub-para. d) creates the possibility of resorting to the Commission for States which have given no advance declaration in accordance with sub-para. a).[43] Also *Kussbach* states that sub-para. d) primarily complements sub-para. a), but he even endorses the view that it might be a basis for the Commission's competence to enquire into non-serious violations if so agreed.[44]

It is submitted, however, that the fact that sub-para. d) refers to "Party to the conflict" and the "other Parties concerned" and not to "High Contracting Parties" like sub-para. a) and b) cannot lead to a true inclusion of internal armed conflicts. This provision does indeed imply that also non-contracting parties might accept the Commission's competence: any State and – as the ICRC Commentary stresses[45] – even national liberation movements might do

[41] This view might be supported by the Commentary's statement that "[t]his provision has the advantage of allowing all parties to an armed conflict, including national liberation movements, to resort to the Commission on a case by case basis [. . .]" Commentary, *op. cit.*, p. 1047.

[42] Roach generally limits the capacity to ask for an enquiry to States "et non d'autres entités comme, par exemple, la population d'un territoire occupé", Roach, Commission internationale d'établissement des faits, 73 *Revue Internationale de la Croix-Rouge*, No. 788 (1991), pp. 178–203 (= Roach), at 188.

[43] Commentary, *op. cit.*, p. 1046.

[44] Kussbach, Commission internationale, *op. cit.*, p. 99.

[45] Commentary, *op. cit.*, p. 1047.

so. But this inclusion follows from the fact that such liberation movements are mentioned in Art. 1 para. 4 of Protocol I.[46] Thereby such conflicts are "internationalised",[47] but this concerns only a very specific category of armed conflicts, the same does not apply to "ordinary" civil war.[48]

3.6. *Which State Can Request an Enquiry of the Commission*

A literal reading of Art. 90 para. 2 sub-para. a) might suggest that only the victim of allegations, i.e. the party violating the Conventions or Protocol I could request an enquiry of the Commission. It speaks of the recognition of the Commission's enquiry competence by one contracting party relating to "allegations by such other party". This, however, would lead to a completely untenable result whereby a persistant perpetrator of violations of humanitarian law (the victim of allegations in the sense of Art. 90 para. 2 sub-para. a)) could obstruct the Commission's competence by simply not requesting an enquiry and at the same time refraining from alleging violations on the part of the other side.

A closer look, however, reveals that only reciprocity is relevant, and thus a State making allegations may also bring a request for enquiry – a result which is also more in conformity with political reality and the likelihood of activating the Commission's enquiry capacity, since it will be most probably a State considering itself aggrieved by violations of humanitarian law who will demand an enquiry of its allegations.[49]

[46] Kussbach, Internationale Ermittlungskommission, *op. cit.*, p. 76, expressly extends the right to request an enquiry from the Commission to an "authority" (representing a people in an Art. 1 para. 4 type of conflict) which has given a declaration according to Art. 96 para. 3; in the same sense Krill, Commission internationale d'établissement des faits – Rôle du CICR, 73 *Revue Internationale de la Croix-Rouge*, No. 788 (1991), pp. 204–221, at 211 *et seq.*

[47] Gasser, *op. cit.*, p. 537.

[48] Elsewhere the ICRC Commentary stresses that "[t]here is no doubt that only States are competent to submit a request for an enquiry to the Commission" (Commentary, *op. cit.*, p. 1044).

[49] This is obviously also the understanding of the Commission itself, if one looks at Rules of the International Humanitarian Fact-Finding Commission adopted on 8 July 1992. Rule 20 regulates the lodging of an enquiry request. Its para. 2 and 3 demand that such a request "shall state the fact that, in the opinion of the requesting party, constitute a grave breach or a serious violation, as well as the date and the place of their occurrence" [and that] "[i]t shall list the evidence the requesting party wishes to present in support of its allegations". (International Humanitarian Fact-Finding Commission. Information leaflet distributed at the *Meeting of the Intergovernmental Group of Experts for the Protection of War Victims*, Geneva, 23–27 January 1995, appendix III [on file with the author]). Here it is clearly the party bringing allegations which requests an enquiry.

4. The Commission's Competence Invoked by States not Parties to the Conflict

The fact that it is only this reciprocity-element, which is laid down as a prerequisite to activate the Commission's competence, leads to an important conclusion: any contracting party – even a State not party to the conflict – can request an enquiry provided that both itself and the State the request relates to have recognized the Commission's competence. This clearly follows from the text of Art. 90 para. 2 sub-para. a). Its reciprocity requirement relates only to the fact of accepting the Commission's competence, not to the States' position in a conflict.

Without further reasoning the Commentary comes very close to this view stating that "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 the same provision".[50]

Kussbach also deals with this issue, but in the course of his argument he restricts his comments to the issue whether a Protecting Power might be competent to instigate the enquiry procedure. He recounts that an original Pakistani proposal would have expressly included such a possibility, but that the final version of Art. 90 remains silent on this issue. He tries to find an answer "sur la base des principes directeurs de cet article". As a starting point, he takes into consideration the difference between the envisaged enquiry procedure leading to the establishment of facts and a judicial procedure. He acknowledges that in most cases there will be a Party to a conflict whose rights are infringed and who will be interested in establishing the facts leading to this violation. But if – for whatsoever reasons – a State is not in a position to claim such infringements, *Kussbach* sees no obstacle why a Protecting Power should not be able to ask for an enquiry. He further demonstrates that during an armed conflict a third party's nationals might be affected by the hostilities and that – under the assumption that the duty to respect basic humanitarian rules is a *ius cogens* obligation – an infringement of this obligation would violate a duty vis-à-vis all States (*erga omnes*).[51] This already shows that it need not be

[50] Commentary, *op. cit.*, p. 1044.

[51] In the second instance, it might even be unnecessary to refer to the fragile notion of *ius cogens*: Common Art. 1 of the Conventions whereby "[t]he High Contracting Parties undertake to respect and ensure respect for the present Convention" could be seen as a basis for the competence of all States parties to the Conventions to request an enquiry from the Commission. It might even imply a duty to do so. Cf. for a view affirming the *ius cogens* and *erga omnes* character of the humanitarian norms of Protocol I: Condorelli/Boisson de Chazournes, Quelques remarques á propos de l'obligation des Etats de ⟨respecter et faire respecter⟩ le droit international humanitaire ⟨en toutes circonstances⟩, in: *Etudes et essays en l'honneur de Jean Pictet*, Genève-La Haye (1984), pp. 17–35, p. 31.

a Protecting Power, but that it might be any third State which may then be in a position to approach the Commission. All these examples given by *Kussbach* have in common that the violation of rights would entail the aggrieved States' right to petition the Commission. In a later article on the subject *Kussbach* confirms our conclusion by expressly stating that neutral powers which are treaty parties and have recognized the Commission's competence may also request an enquiry.[52]

It seems very significant that the text of Art. 90 para. 2 sub-para. a) not only refrains from requiring that a conflict be one between the party bringing allegations and the one allegedly having violated humanitarian law, but also that there is no legal dispute requirement as e.g. in the jurisdictional provisions of the International Court of Justice.[53] This is completely in line with the underlying idea of the Commission as a fact-finding institution, not an adjudicative organ. Its competence is clearly limited to establishing facts, not to determine violations of legal rights and obligations.

Thus, any State having accepted the Commission's competence can request an enquiry relating to a State under the same obligation.[54]

5. A Right of Initiative of the Commission

Nothing in the wording of Art. 90 indicates that the Commission could act *proprio motu*. Thus it has been concluded that "it is absolutely not permitted to act on its own initiative" – a result which receives confirmation by the drafting history, since an initial amendment containing such a right was deliberately abandoned later on.[55]

6. Conclusion

The preceding investigation has demonstrated that the Commission might be requested to conduct a fact-finding 1) even if a conflict is qualified as a non-international armed conflict although limited to facts which might constitute serious violations of Common Art. 3 of the Conventions and 2) even by third States as long as they have accepted the Commission's competence in the

[52] Kussbach, Internationale Ermittlungskommission, *op. cit.*, 75.

[53] Cf. the detailed discussion in Loibl, *Völkerrechtliche Regelungen zum Schutz der Umwelt und ihre Durchsetzbarkeit*, Ch. V (in print).

[54] Roach, *op. cit.*, 189. The same result is advocated by Condorelli/Boisson de Chazournes, *op. cit.*, p. 31, who deduce this *a contrario* from Art. 90 para. 2 sub-para. d which provides for the *ad hoc* competence of the Commission in cases of a request by a "Party to the conflict".

[55] Commentary, *op. cit.*, p. 1044, footnote 32.

same manner as the State the request relates to, while 3) it could not act of its own initiative. It is clear that with a view to the Yugoslav conflict and considering that a large number of States have made a declaration according to Art. 90 para. 2 sub-para. a) the second option seems to be most promising for triggering the Commission's activity. It should be borne in mind that such a request must not be understood as a politically unfriendly act, but rather as an expression of each State's duty "to ensure respect"[56] for the Conventions and Protocol I.[57]

7. Postscript

At the time this article was written, in early 1995, the fratricidal war in former Yugoslavia was raging; no Dayton Peace accord was in sight. By then the international community had already for years desperately sought to stop the fighting. What was particularly discerning were the large scale violations of fundamental rules of humanitarian law embodied in the horrendous atrocities committed in the course of the hostilities.

At a time when the effectiveness of the International Tribunal for the former Yugoslavia seemed to be barred by political circumstances, there was hope that a less intrusive method of international supervision such as fact finding might helpfully intervene.

Within the Red Cross and Red Crescent system some lawyers pointed to the International Fact-Finding Commission of Additional Protocol I to the Geneva Conventions as the perceivably ideal international organ to carry out such a task. Although discussed both at preparatory expert meetings and at the 1995 Geneva Red Cross and Red Crescent Conference, the idea to entrust such an important function to the Commission received only lukewarm support by the parties to the Geneva Conventions. One of the reasons for this reluctance was probably the perception of a double uncertainty: on the one hand, whether and at what time the conflict in the former Yugoslavia might be qualified as international or non-international conflict and, on the other hand, whether the Commission's competence might extend to non-international conflicts at all. My considerations above focused on this second issue.

For the purposes of the Commission's competence in general, however, Yugoslavia is but an example. Unfortunately, this "war" is not an isolated

[56] Cf. Common Art. 1 of the Conventions and of Protocol I.

[57] In this context it is important to remember that the request for an enquiry is not the bringing of a complaint. If we take the wording of Art. 90 para. 2 sub-para. a) as a starting point it seems to be in first line the State against which allegations of violations have been brought which should ask for an enquiry (which resembles more an exculpatory action than a complaint).

incidence of violent political confrontation, but rather another example in a long list of non-international armed conflicts in today's world. The considerations in this article are, of course, valid for all of these conflicts and might hopefully contribute to a climate of increased awareness that an existing humanitarian body might be ready to operate in a broad range of situations involving serious violations of humanitarian law.

A.R.