

International Humanitarian Fact-finding Commission: its potential

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In 1864, at the Battle of Te Ranga in the Bay of Plenty in New Zealand, the Order of the Day for Combat on the Maori side began with a verse from the New Testament of the Christian Bible: 'If thine enemy hunger, feed him; if he thirst give him drink'.¹ A related document sent by five Catholic Chiefs to Colonel Greer stated 'our laws for regulating the fight'. They included:

1. If wounded or captured whole and the butt of the musket or hilt of the sword be turned to me, he will be saved ...
4. The unarmed pakehas, women and children will be spared ... These are binding laws for Tauranga.²

Seventy years later, George Orwell was a member of the International Brigade in the Spanish Civil War. He refrained from shooting a man who jumped out of a trench and ran along the top of a parapet in full view. Why?

The man was half dressed and was holding up his trousers with both hands as he ran ... I did not shoot partly because of that detail about the trousers. I had come here to shoot at 'Fascists'; but a man who is holding up his trousers isn't a 'Fascist', he is visibly a fellow-creature, similar to yourself and you don't feel like shooting at him.³

I begin with those two stories to make three points about the protection of human

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1 Romans 12: 20.

2 Mair G *The Story of Gate Pa* (Bay of Plenty Times, 1937). A somewhat different form of 'law four' was used by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons Case* ICJ Reports 1996, para 78.

3 Quoted in Walzer M *Just and Unjust Wars* (Basic Books, 1977) p 140.

rights in armed conflict. First, that rules have been established for some time, even on a unilateral basis, to govern relations between combatants and to protect civilians in warfare. Second, that humanitarian and religious principles may underlie the rules and indeed, as the Orwell story shows, may give greater protection than the law requires. Third, that internal armed conflicts are not new. The last point is seen most clearly in the 1995 Annual Report of the International Committee of the Red Cross (ICRC), which also shows the major impact of those wars on civilians. The President of the ICRC, Cornelio Sommaruga, in his introduction to the Report, gives the awful figures: in 120 armed conflicts since 1945, 22 million people have been killed; overwhelmingly the deaths are of non-combatants and occur in non-international armed conflicts; and 30 of the conflicts continue to rage bringing tragedy to their innumerable victims.⁴

About 20 years ago the ICRC prepared a valuable statement of seven fundamental rules, extracted from the hundreds of pages of the Geneva Conventions, their Protocols and related treaties established over the last 150 years.⁵ A sense of the advance in the substance of the law — but also of the need for new laws prepared in response to the dreadful consequences of warfare — is given by comparing that text with the very first Geneva Convention for the Ameliorating of the Conditions of the Wounded in Armies in the Field which was signed in the Alabama room at the Hotel de la Paix in Geneva just four months after the battle at Te Ranga.⁶

Those principles and rules are stated and accepted for internal armed conflicts as well as for international ones. But what of their implementation? The 1864 Convention states that the best primary means is that of national implementation. Under Article 8:

The implementing of the present Convention shall be arranged by the Commanders-in-chief of the belligerent armies following the instructions of their respective governments and in accordance with the general principles set forth in this Convention.

That dissemination obligation has been elaborated over the last 130 years and now extends to peacetime as well as to times of war and beyond the armed forces, to civilian authorities, for instance, through their educational institutions and to

4 International Committee of the Red Cross, Annual Report, 1995.

5 'Fundamental Rules of Humanitarian Law Applicable in Armed Conflict' (1978) 206 *International Review of the Red Cross* 247-249. See also the *Handbook of the International Red Cross and Red Crescent Movement* (13th ed, 1994).

6 129 Consolidated Treaty Series 361. The Convention was signed on 22 August 1864.

national Red Cross and Red Crescent Societies.⁷ The ICRC has declared that:

One cannot insist enough on the importance of prevention, in particular of teaching schoolchildren the basic principles of international humanitarian law so as to ensure that they acquire an awareness of such values as humanity, respect and solidarity at a very young age. The National Red Cross and Red Crescent Societies have an important role to play in this area.⁸

National action includes the disciplining and prosecuting of those who breach the rules, a jurisdiction which can apply as well to foreign nationals, especially members or former members of foreign military forces. Military commanders are now also, as appropriate, to have legal advice about the application of the law. A notable recent instance is the use of lawyers by the Americans in the Gulf War. General Colin Powell of the US, has said that the law of war has proved invaluable in the decision making process; decisions were influenced by legal considerations at every level.⁹

As well as national processes, international processes have long been provided for, especially in the recognition of the role of the ICRC and later with the establishment of Protecting Powers.¹⁰ Extensive attempts were made in the 1970s, when the Geneva Conventions were last revised, to strengthen those international methods. Relevant at present is the process for the preparation of a Statute for the International Criminal Court. In addition, a new body was provided for in the First 1977 Additional Protocol: the International Humanitarian Fact-Finding Commission (the Commission). The 1949 Geneva Conventions provide in a general way for the possibilities of an inquiry into alleged breaches of the Conventions, but provide no body and no available mechanism. The parties to the conflict and the dispute had to agree not only to have an inquiry but also to all the details of the process including the nature and membership of the body.¹¹ Those matters were to be settled in the course or aftermath of a war and it is not surprising that the provisions have never been used. As seen in the proposed International Criminal Court, there is real value in having a permanent available body.

7 Common Article 47/48/127/144 of the 1949 Geneva Conventions. Australia provides a notable dissemination example: see for example Annual Reports of the Advisory Service on International Humanitarian Law of the ICRC.

8 ICRC, *Armed Conflicts linked to the Disintegration of State Structures* (1997).

9 See Keeva S 'Lawyers in the War Room' (1991) 77 *American Bar Association Journal* 52.

10 Common Article 8/8/8/9 of the 1949 Geneva Conventions.

11 Common Article 52/53/132/149 of the 1949 Geneva Conventions.

Some delegations at the 1974-1977 Conference on the Geneva Conventions attempted to give greater substance to the inquiry provisions.¹² As appears from Article 90 of the First Protocol they were successful at least at the level of the agreed treaty text. Article 90 provides:

1. (a) An International Fact Finding Commission (hereinafter referred to as 'the Commission') consisting of 15 members of high moral standing and acknowledged impartiality shall be established.
- (b) When not less than 20 High Contracting Parties have agreed to accept the competence of the Commission pursuant to para 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.
- (c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.
- (d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.
- (e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding sub-paragraphs.
- (f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.
2. (a) 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 recognise *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 authorised by this Article.
- (b) The declarations referred to above shall be deposited with the depositary, which shall

12 The main initiatives came from the delegations of Denmark, Japan, New Zealand, Pakistan and Sweden.

transmit copies thereof to the High Contracting Parties.

(c) 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 violation 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.

(d) 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 or Parties concerned.

(e) Subject to the foregoing provisions of this paragraph, 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.

3. (a) Unless otherwise agreed by the Parties concerned, all enquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:

(i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;

(ii) two ad hoc members, not nationals of any Party to the conflict, one to be appointed by each side.

(b) Upon receipt of the request for an enquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any ad hoc member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (a) The Chamber set up under para 3 to undertake an enquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation in loco.

(b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.

- (c) Each Party shall have the right to challenge such evidence.
5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.
 - (b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.
 - (c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.
6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.
7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under para 2, and by voluntary contributions. The Party or Parties to the conflict requesting an enquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of 50 per cent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance 50 per cent of the necessary funds.

Despite these provisions, further steps were required to give reality in practice to that commitment. The major step that has *not* been taken is that in its seven years of existence the Commission has not been asked to undertake its inquiry and good offices role. That is so notwithstanding the dreadful wars that continue to rage and the efforts of the members of the Commission and of others (including NGOs) to promote its role.

The Commission was not to come into existence until 20 States had accepted its jurisdiction (Article 90(1)(b)). That did not happen until 1991. The 15 original members were elected in 1991 and a new membership (including 10 of the original 15) was elected in 1996. The members of the Commission include medical doctors, military experts, diplomats, international law scholars and judges. They are not as widely representative as Article 90(1)(d) appeared to expect; a deficiency that the Commission attempted to redress during its first term through its power to appoint members to casual vacancies. In terms of Article 90(1)(f) the Swiss Government provides the Commission with the necessary administrative facilities for the performance of its functions. The States parties have now adopted a set of financial

regulations that adopt the United Nations (UN) budgetary proportions under Article 90(7), which also regulates the expenses of inquiries.

Since the initial election, there are now more than 50 States which have accepted the Commission's jurisdiction.¹³ They come from all continents, from the developed and developing worlds and from different political groupings; they include some States involved in armed conflict, notably internal armed conflict. While the States accepting the jurisdiction have increased markedly in the last five or six years, they still constitute well under a third of the parties to the First Protocol. There are also very few from the Asia-Pacific region.

Three provisions of Article 90 confer jurisdiction on the Commission:

1. As between States which have accepted the competence of the jurisdiction the Commission may inquire into any facts alleged to be a grave breach of the Conventions or the Protocol or other serious violations of the Conclusions or Protocol (Article 90(2)(c)(i)).
2. It may facilitate through its good offices the restoration of an attitude of respect for the Conventions and the Protocol (Article 90(2)(c)(ii)).
3. With the consent of the Parties to a conflict it may institute an inquiry 'in other situations' (Article 90(2)(d)).

By reference to that final power, the Commission made it clear from the outset that it considers itself competent to inquire into allegations arising from internal armed conflicts so long as there is the necessary consent.¹⁴ That interpretation is justified both by the very broad language of Article 90 and by the dreadful breaches in many internal armed conflicts. It is surprising that Australian authorities, in the past at least, have questioned that understanding. Consent is a great solvent.

The Commission in addition has expressed its conviction of the need to take all appropriate initiatives, as necessary in co-operation with other international bodies, in particular the UN, with the purpose of carrying out its functions in the interest of the victims of armed conflict.¹⁵ That conviction is based in part on Articles 89 and 1(1) of the First Additional Protocol and common Article 1 of the 1949 Geneva

13 There are 53 State parties as at December, 1998.

14 See the web site of the International Humanitarian Fact-Finding Commission: <<http://www.ihffc.org>>.

15 Preamble to the Rules of the International Humanitarian Fact-Finding Commission, above, note 14.

Conventions. Given the special characteristics of international humanitarian law, the parties to a conflict might properly be strongly urged to give the necessary consents, for instance by the Secretary-General or the Security Council of the UN, and that body might properly go further and require that an enquiry be undertaken, in terms of Chapter VII and Article 103 of the Charter of the United Nations.

The Commission is to carry out its functions in an independent and impartial way and in accordance with natural justice. Thus the Chambers of seven members (including two named by the parties) are to disclose all evidence to the parties which have the right to present evidence, comment on it and challenge it. Once the evidence is gathered the Chamber is to make findings. It is the Commission itself which submits to the parties a report on those findings, along with such recommendations as it may consider appropriate. If the Commission is unable to secure sufficient evidence for factual and impartial findings, it is to state the reasons for that inability. The Commission may not report its findings publicly, unless all the parties to the conflict agree.

A final feature of the processes of the Commission is the role of the consent of the parties and the related flexibility. This occurs at several stages. First, a State which has accepted the competence of the Commission may initiate an inquiry into an alleged grave breach or other serious violation even though it is not a party to the conflict, or the Commission process might be facilitated through the Secretary-General of the UN. Second, the composition of the particular Chamber might be varied from the norm by agreement; the parties can decide the procedure to be followed, the financing of the enquiry and the publicity to be given to the findings and recommendations of the Chamber and Commission.

The Commission reflects the humanitarian and non-political character of the law for the protection of the victims of armed conflict. It is a permanent body available to the international community whenever necessary and, with the prospect of increased experience, ad hoc appointments can be avoided. It has within its membership qualified, internationally recognised, independent experts in the relevant areas of expertise. It offers guarantees of fair and thorough procedures for finding the facts. It is committed to restoring an attitude of respect for the Geneva Conventions and the Protocol, to the advantage of all, including the parties to the conflict and, especially, to the victims. But there must as well be the political will to use the Commission in particular cases. Sadly, so far, that will has been lacking. ●