

9-1-2003

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Mokhtar, Aly (2003) "Will This Mummification Saga Come to an End - The International Humanitarian Fact-Finding Commission: Article 90 of Protocol 1," *Penn State International Law Review*: Vol. 22: No. 2, Article 3.
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Will This Mummification Saga Come to an End? The International Humanitarian Fact-Finding Commission: Article 90 of Protocol 1

Aly Mokhtar*

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In 1864, the Maori Combat Order for the battle of Te Ranga in the Bay of Plenty in New Zealand began with the following New Testament verse: “If thine enemy hunger, feed him; if he thirst give him drink.”¹ This reference signals a theoretical recognition of the basic principles of

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1. Kenneth Keith, *International Humanitarian Fact-Finding Commission: Its Potential*, 5 AUSTL. J. HUM. RTS. 101 (1999) (citing *Romans* 12:20).

humanitarian law. Unfortunately, however, such recognition is not supported by an effective or fool-proof implementation and/or enforcement mechanism.

In general terms, the implementation and/or enforcement of international law is problematic. This is particularly true of the implementation of international humanitarian law during armed conflicts. Thus, the rationale for the inclusion of provisions relating to scrutiny of the implementation of obligations and verifying compliance with the rules applicable in armed conflicts can be described as follows: in time of war and contrary to peace time relations (where every country is in a status that can empower it to ensure how other countries treat its nationals and how the international conventions are applied), the breakdown in relations and communication between the parties to a conflict precludes any direct verification of compliance.² Consequently, that party to a conflict who ascertains that its adversary is not fulfilling its obligations has no time to identify, confirm, and verify the situation. Thus, it will launch into protests or, what is worse, reprisals, which, more often than not, do nothing to remedy a wrong.³

Accordingly, and in concomitance with suggestions to establish the origins and the reasons for inclusion of provisions of scrutiny, legal (e.g. to respect and ensure respect of the conventions), deterrent, other humanitarian, and practical reasons⁴ may explicate the necessity and/or determination for setting into motion a procedure of enquiry into the occurrence of a breach of the Conventions.

Nevertheless, articles relating to setting into motion a procedure of enquiry into the occurrence of a breach of Conventions were always burdened with heavy machinery, resulting in their mummification. Article 90 of Protocol I Additional to the Geneva Conventions of August

2. JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR 62 (Henry Dunant ed., 1975).

3. *Id.*

4. For example, the need for such a procedure of enquiry occurred during the Korean conflict. Supported by both Communist China and the former Soviet Union, North Korea contended that the United States was using bacteriological weapons. "The United States immediately proposed an investigation into said allegation." Communist nations, however, rejected the proposal and responded with the establishment of their own "Scientific Commission." As expected, the Commission verified the allegation. "The final chapter of this incident occurred when, some years later, a book was published in the former Soviet Union in which every instance of the use of chemical and bacteriological warfare was set forth . . . and there is no mention of the Korean incident." Viney, *Research Policy: Soviet Union*, in *CBW: CHEMICAL AND BIOLOGICAL WARFARE* 133 (Steven Rose ed., 1969); see also Howard S. Levie, *Pros and Cons of the 1977 Protocol I*, 19 AKRON L. REV. 537 (1986). Moreover, the Soviet bloc opposed any provision for an International Fact-Finding Commission that would be empowered to investigate any allegation of violations of the Conventions and the Protocol. *Id.*

12, 1949 (“Article 90”), is one of those mummified articles. The aim of this essay is to analyze Article 90 and to demonstrate the practical difficulties of its implementation. Suggestions for overcoming these implementation difficulties, with the aim of reviving Article 90, shall be offered.

Section 1 will trace the origins of Article 90, aiming towards explication of preexisting understanding of the need for, but reluctance to accept, an enquiry provision. Section 2 will focus on Article 90(1), with specific reference to the establishment of the International Humanitarian Fact-Finding Commission (“Commission”) and the election of its members. This shall take the form of an in depth discussion of the conditions regarding the establishment of the Commission, the prerequisite qualifications of its members, and other aspects pertaining to election of members.

Section 3 will focus upon the competence of the Commission. Due to this being a complex subject, this section is broken down into five subsections. The first subsection investigates the optional-compulsory competence of the Commission, with analyses of different viewpoints regarding the competence of the Commission during the preparatory conference. The second subsection deals with the enquiry competence of the Commission in grave breaches and serious violations. In the third subsection, the matter of good offices is considered. The loose and general terms of Article 90(2)(d) is dealt with in the succeeding subsection. The final subsection illustrates the relationship with, and the impact of, Article 90 on the enquiry provisions of the four Geneva Conventions.

Section 4 centers upon the Chambers of enquiry, and consists of two subsections. The first subsection focuses on the composition of the Chamber, while the second focuses on the conduct of the enquiry by the Chamber.

The subsequent section sets out the reporting process of the Commission in light of the Commission’s Rules of Procedure. Two specific aspects of the reporting process, Article 90(5)(b) and (c) will be analyzed in detail. The sixth section discusses Article 90(6) and (7), which comments on the Commission’s own Rules of Procedure and the issue of expenses and funding of the Commission. The concluding section of this article outlines the issue of expenses and funding of the Commission laid down in Article 90(7).

1. The Origins of Article 90

In searching for the origins of Article 90 of Protocol I, it is appropriate to start two phases earlier. Setting a procedure of enquiry

into motion can be traced back to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (“CACWSAF of 1929”).⁵ After considerable discussions, Article 30⁶ was adopted, and “the text was only approved by the Diplomatic Conference of 1929 after much hesitation. Many delegates were afraid of opening a door, in the Convention, to possible sanctions against States.”⁷ Despite difficulties in application (as the institution of inquiry will be decided between the interested Parties), Article 30 was still conceived as an important advancement in international humanitarian law. This is due to the fact that no provision of that type existed in either the Conventions of 1864 and 1906, or in the Hague Conventions of 1899 and 1907.

At the Fifteenth International Red Cross Conference of 1934, attention was drawn to the need to provide some type of practically automatic procedure.⁸ Consequent to both the aforementioned need, and the problems foreseen from applying Article 30 of the CACWSAF of 1929,⁹ the Commission of Experts, convened in 1937 by the International

5. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 118 L.N.T.S. 303, *available at* <http://www.icrc.org> [hereinafter CACWSAF of 1929].

6. Article 30 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 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.

Id. However, one of the most important enhancements of the Convention Relative to the Treatment of Prisoners of War “was the introduction of an effective and regular scrutiny of its application. This was entrusted to “protecting powers,” that is to say, to neutral States representing a belligerent in dealings with that belligerent’s adversary. These States offer two vital features deriving from their very nature: neutrality and official status.” They should ensure by their intervention that, “prisoners receive protection somewhat similar to the diplomatic protection to which foreigners are entitled in peace time.” The origins of the protecting power system could be traced back to the sixteenth century. “At that time only larger States maintained embassies, and the smaller powers asked them to look after their interests where they were not represented. The supervisory function assigned protecting powers in 1929 was complemented by recognition in law of the ICRC’s activities.” PICTET, *supra* note 2, at 62; *see also* MARCO SASSOLI, ET. AL., INT’L COMM. OF THE RED CROSS, HOW DOES LAW PROTECT IN WAR 228-230 (1999); *see generally*, G.I.A.D. Draper, *The Implementation And Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977*, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9-31 (Sijthoff & Noordhoff eds., 1980); Erich Kussbach, *Protocol I and Neutral States*, 218 INT’L REV. RED CROSS 231 (1980).

7. JEAN PICTET, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE 1ST GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF 12 AUGUST 1949, at 374 (1952).

8. *Id.* at 374.

9. An attempt was made to apply Article 30 of the 1929 Convention during the

Committee of the Red Cross (“ICRC”) to contemplate the revision of the Geneva Convention, studied the problem in detail.¹⁰ The Commission of Experts elucidated certain principles to be defined in a new Article. The Sixteenth International Red Cross Conference, which met in London in 1938, adopted its conclusions with virtually no alteration.¹¹

Following the Second World War, the ICRC resumed work on the revision of the Geneva Conventions. Herein, the conclusions of the aforementioned Commission of Experts served as a basis for the proposals put forward. Thus, at the Conference of Government Experts held in Geneva in 1947, the ICRC made certain recommendations.¹² The Government Experts opposed the establishment of a specialized authority, provided for in advance by the Convention, preferring that the President of The Hague Court appoint members of the Commission of Enquiry. Basing itself on the Government Experts’ conclusions, the ICRC submitted a text to the Seventeenth International Red Cross Conference in Stockholm in 1948, under the title of Investigation Procedures (Article 41).¹³

Italo-Abyssinian War of 1935-1936. *Id.* at 378.

10. *Id.* at 374.

11. *Id.* at 374-375.

12. *Id.* at 374-375. These recommendations were as follows:

1. That the procedure of enquiry be initiated as rapidly as possible and in a practically automatic fashion.
2. That the enquiry may be demanded by any Party to the Convention concerned, whether belligerent or neutral.
3. That a single, central, and permanent authority, for which provision is made in advance in the Convention, be entrusted with the nomination of the whole or part of the Commission of Enquiry.
4. That the Commission of Enquiry be appointed for each particular case, immediately after the request is made, following an alleged violation of the Convention.
5. That the members of the Commission of Enquiry be appointed by the aforesaid authority from lists, kept up-to-date, of qualified and available persons, whose names have been submitted beforehand by Governments.
6. That special agencies be appointed in advance to undertake, in case of need, any immediate investigation of the facts which may appear necessary.
7. That the report of the Commission of Enquiry contain, where necessary, not only a record of the facts established, but also recommendations to the Parties concerned.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 41, 7 U.N.T.S. 31, *available at* <http://www.icrc.org> [hereinafter First Convention].

13. The submitted text reads as follows:

Independently of the procedure foreseen in Article 9, any High Contracting Party alleging a violation of the present Convention may demand the opening of an official enquiry.

This enquiry shall be carried out as soon as possible by a Commission instituted for each particular case, and comprising three neutral members selected from a list of qualified persons drawn up by the High Contracting

In the Diplomatic Conference of 1949, the Joint Committee (a Committee to which all the provisions common to all four Conventions were submitted) was entrusted to study Article 41, which was submitted in the Stockholm Conference, where one slight alteration was made. The Joint Committee referred the Article to its Special Committee, where it was dealt with by the Working Party responsible for problems concerning the settlement of disputes that might arise in connection with the application of the Conventions.¹⁴

The Special Committee expressed itself as follows:

The Special Committee considered that Articles 41 and 45(2) of the Stockholm drafts set up a procedure for recruitment which was too complicated, and that it would be appropriate to revert once more to the provision contained in Article 30 of the Wounded and Sick Convention of 1929, while defining its terms more clearly.

Thus, the Special Committee proposed an Article,¹⁵ which was submitted to the Joint Committee. Without discussion, the Joint Committee and the Plenary Assembly approved this Article, as well as the decision to include it in all of the four Conventions. However, the 1949 Diplomatic Conference did not feel that it could accept, either as a whole, or in part, the conclusions reached by the experts consulted by the ICRC.¹⁶

Therefore, the adopted Articles (common Articles 52, 53, 132, 149)¹⁷ replicated much the same wording as Article 30 of the

Parties in time of peace, each Party nominating four such persons.

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.

As soon as the enquiry is closed, the Commission shall report to the Parties concerned on the reality and nature of the alleged facts, and may make appropriate recommendations.

All facilities shall be extended by the High Contracting Parties to the Commission of enquiry in the fulfillment of its duties. Its members shall enjoy diplomatic privileges and immunities.

Id. art. 41; *see* PICTET, *supra* note 7, at 375-376.

14. PICTET, *supra* note 7, at 376.

15. The Article proposed by the Special Committee provides:

The initiative for the enquiry procedure belongs to either one of the belligerents and not to all the Contracting Parties. The membership of the Commission of enquiry was determined by agreement between the Parties and not from a previously established list.

Id. Moreover the enquiry procedure "was not closed by a mere recommendation, but by findings which were mandatory for the Parties." *Id.*

16. *Id.* at 377.

17. First Convention, *supra* note 12, art. 52; Convention (II) for the Amelioration of

CACWSAF of 1929. The primary difference between the two rested in the addition of the following phrase: "If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire, who will decide upon the procedure to be followed."¹⁸ Accordingly, the enquiry procedure embodied in the four Geneva Conventions of 1949 was still lacking a permanent nature, and no progress was made regarding the automatic operation of the procedure of enquiry or the choice of those responsible for carrying it out.¹⁹

Surprisingly, the Draft Protocol, which was elaborated by the ICRC and served as the basis for discussion of the Diplomatic Conference inaugurated in 1974, did not contain any provision to improve the enquiry procedure provided in the 1949 Conventions.²⁰

In the Diplomatic Conference of March 19, 1975, Denmark, New Zealand, Norway and Sweden jointly forwarded a proposal adding a new article.²¹ This proposal, together with one offered by Pakistan,²² on the

the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 53, 75 U.N.T.S. 85, *available at* <http://www.icrc.org> [hereinafter Second Convention]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 132, 75 U.N.T.S. 135, *available at* <http://www.icrc.org> [hereinafter Third Convention]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 149, 75 U.N.T.S. 287 [hereinafter Fourth Convention]. The aforementioned Articles are similar and read as follows:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire, who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

18. First Convention, *supra* note 12, art. 52.

19. PICTET, *supra* note 7, at 377.

20. Masayuki Takemoto, *The Enquiry Procedure Under International Humanitarian Law*, 1 KANSAI U. REV. L. & POL. 21 (1980).

21. The proposal forwarded jointly by Denmark, New Zealand, Norway and Sweden reads as follows:

1. A permanent International Enquiry Commission, consisting of fifteen members of high personal integrity, shall be established, consideration being given to the need for representation of different areas of the world. 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.

2. (a) The function of the International Enquiry Commission is to enquire into alleged violations of the Conventions and the present Protocol and other rules relating to the conduct of an international armed conflict

(i) At the request of one or more Parties to the conflict;

(ii) On its own initiative.

(b) One or more Parties to a conflict may request the International Enquiry Commission to undertake an enquiry in pursuance of Articles 52,

53, 132 and 149 common to the Conventions and Article 74 of the present Protocol.

(c) All enquiries shall be undertaken by a Chamber, consisting of the President and four other members of the Commission appointed by the President in accordance with paragraph 3 of this Article.

3. When the Commission undertakes an enquiry, the President shall immediately consult with the Parties to the conflict regarding the composition of the Chamber. If the Parties agree upon the inclusion of one or more members in the Chamber, the President shall appoint those members. The Parties may each request the President to refrain from appointing certain members, but not more than four, to the Chamber

4. (a) The Chamber appointed under paragraph 3 to undertake an enquiry shall invite the Parties to the conflict to submit evidence and argument. Evidence may also be accepted from international organizations, governments, non-governmental organizations and individuals.

(b) Such evidence and argument shall be fully disclosed to the Party or Parties which shall have the right to comment on it.

(c) A Party may invite the Chamber to investigate the situation in loco.

(d) The Chamber may appoint, as experts assisting it, the qualified persons referred to in Article 6 of the present Protocol if such persons are made available by a High Contracting Party.

(e) The Chamber shall publicly report its findings on the facts and the law unless Parties agree otherwise. If it is unable to secure adequate evidence for factual and impartial findings it shall state the reasons for that inability.

5. The Commission shall adopt its rules of procedures.

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

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977), CDDH/I/SR.57 (1976) [hereinafter Official Records].

22. The proposal forwarded by Pakistan reads as follows:

1. A permanent Commission for the enforcement of Humanitarian Law hereinafter referred to as the Commission shall be established.

2. The Commission shall consist of five members, one from each of the five regional groups, appointed for one year in the manner hereinafter prescribed and one member nominated by each Party to the conflict who is not already represented upon the Commission.

3. (i) The depositary of the Protocol shall draw up and maintain five separate regional lists of the high contracting Parties in alphabetical order.

(ii) In the month of December in every region the countries whose names appear at the top of the regional list shall separately nominate a representative each to be a member of the Commission.

(iii) Such members shall hold office for one calendar year on the expiry of which they shall automatically retire.

(iv) Each country whose name appears next in a regional list shall similarly nominate a member to fill the vacancy caused by retirement and inform the depositary without delay, and this process shall be repeated in the month of December every year till a list is exhausted when the country ranking first in alphabetical order shall start the process all over again.

(v) Any vacancy arising during the course of the year shall be filled by the country whose representative has caused it.

4. The Commission shall have a Chairman who shall hold office for one calendar month and shall be appointed from amongst the members of the Commission in strict alphabetical order of the countries represented upon it.

25th of March 1975, were the main foundations for Article 90.

2. Establishment of the Commission and Electing its Members

One of the major innovations in Protocol I is that, for the first time in the history of humanitarian law, States gave their consent to the establishment of a *permanent* international fact-finding body. This body, adding 'Humanitarian' to its title to avoid confusion with other fact-finding bodies, became the International Humanitarian Fact-Finding Commission.

Article 90(1)(a) of Protocol I reads as follows: "An International Fact-finding Commission (hereinafter referred to as 'the Commission') consisting of fifteen members of high moral standing and acknowledged impartiality shall be established."²³

The Commission is comprised of fifteen members.²⁴ The requisite qualifications for the members of the Commission are encapsulated in the phrases, "of high moral standing"²⁵ and "acknowledged

5. The Commission shall on being moved by a Party to the conflict or a Protecting Power:

(a) Enquire into any alleged violations of the Conventions and the present Protocol and other rules relating to the conduct of an international armed conflict.

(b) Take appropriate steps for the resolution of any disagreement amongst the Parties to the conflict regarding the interpretation or application of the Conventions and the Protocol where the conciliation procedure provided therein has failed.

(c) Endeavour to bring back to an attitude of respect for and obedience to the provisions of the Conventions and this Protocol, a Party which fails to fulfil its obligations thereunder.

Official Records, *supra* note 21.

23. Protocol Addition to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter "Protocol I].

24. The Commission is composed of fifteen members (like the International Court of Justice [hereinafter ICJ]), while the Human Rights Committee consists of eighteen members, as provided in Article 28 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The idea of a fifteen member Commission was embodied in the proposal forwarded by Denmark, New Zealand, Norway, and Sweden. The proposal forwarded by Pakistan calls for a Commission consisting of five members. The formation of the Commission of fifteen members is more concordant with the competence of the Commission and is more practical: It can be anticipated that more than one conflict could surface at the same time and may require the obtrusion of the Commission. This holds true if paragraph 1(a) is read in tandem with paragraph 3(a)(i); the latter addresses the appointment of the Chamber that undertakes enquiries, which consists of 7 members (5 members of the Commission and 2 ad hoc members). This can afford to the Commission to enquire into three different conflicts at the same time.

25. This condition is enshrined in some international and regional human rights

impartiality.”²⁶ Both conditions are evidently indispensable to pledge credibility and effectiveness of the Commission. As pertaining to the condition of the “acknowledged impartiality” of the members of the Commission, the following question should be posited: Does a member’s holding of certain offices contemporaneously in his or her own country conflict with this condition?

Rule 3 of the Rules of Procedure of the International Humanitarian Fact-Finding Commission (“Rules of the IHFFC”)²⁷ provides that members shall not engage in any occupation that may shed a legitimate doubt on their morality and impartiality. Moreover, it provides that in case of doubt, the Commission shall decide on the proper measures to take. Accordingly, the condition of “acknowledged impartiality” may prevent the election of persons who, in their own countries, are actively holding certain offices. On the other hand, not all persons holding offices in their own countries have to be regarded as disqualified. Similarly, a person who is known for his uncompromising public position with regard to states that are or could be involved in an armed conflict, would not be eligible.²⁸

Moreover, Rule 3 of the Rules of the IHFFC provides that, “Members shall not . . . make any public Statement that may cast a legitimate doubt. . . .” This rule indicates that members of the Commission, once elected, should abstain from making any public comment on current armed conflicts.²⁹ The requirements that members remain independent and make a solemn declaration, which are embedded in Rule 1 of the Rules of Procedure of the Commission, serve to reinforce the aforementioned requirements and obligations.³⁰

conventions with regard to supervisory bodies (e.g. ICCPR *supra* note 24, art. 28, and Article 34 of the American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, 1144 U.N.T.S. 123, (entered into force July 18, 1978) [hereinafter ACHR]).

26. With regard to the supervisory set up under some of the human rights conventions, this condition is also embodied in some of them (e.g. Article 8 of the International Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195, (entered into force Jan. 4, 1969)) [hereinafter CEFRD].

27. Under the title of Incompatibilities, Rule 3 of the Rules of the IHFFC reads as follows:

During their term of office, Members shall not engage in any occupation or make any public statement that may cast a legitimate doubt on their morality and impartiality required by the Protocol. In case of doubt the Commission shall decide on the proper measures to take.

Rules of the International Humanitarian Fact-Finding Commission, July 8, 1992, available at <http://www.ihffc.org> [hereinafter Rules of the IHFFC].

28. YVES SANDOZ, ET. AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1041 (1987).

29. *Id.* at 1041.

30. Under the title of Independence and Solemn Declaration, Rule 1 reads as

Furthermore, Article 90(1)(d) and Rule 5(1) of the Rules of the IHFFC obligate the High Contracting Parties at the elections to ensure that the elected members (individually) possess the requisite qualifications.³¹

However, under a literal reading, Article 90(1)(a) implies that no professional qualifications are required or should be pursued in nominating or electing the members of the Commission. Nevertheless, given the nature and competence of the Commission, (to enquire into any facts alleged to be a grave breach or other serious violation) it is axiomatic that other qualifications ought to be considered in the nomination and election of members. Some of them must be experts, or experienced, in humanitarian law, and others must be experienced in areas (e.g. investigation experts, military experts, etc., if such persons are not elected they shall assist the Commission as externals) that enable the Commission to function appropriately and effectively. However, during the preparatory work discussions, it was suggested that the task of inquiry would be entrusted to a group of experts. This group should be "acquainted with and have interdisciplinary experience of, the various aspects of enforcement of the Geneva Conventions and the Protocols."³²

follows:

1. In the performance of their functions, the Members of the Commission (hereinafter referred to as the 'Members') shall accept no instructions from any authority or person whatsoever and serve in their personal capacity.
2. Before taking up his duties, each Member shall make the following solemn declaration: "I will exercise my functions as a Member of this Commission impartially, conscientiously and in accordance with the provisions of the Protocol and these Rules, including those concerning secrecy."

Rules of the IHFFC, *supra* note 27, Rule 1. In this context, it is worthwhile to note that the members of the Human Rights Committee take an oath or make a solemn declaration, partly inspired by the one taken by the judges of the International Court of Justice, to perform their duties and exercise their powers honorably, faithfully, impartially, and conscientiously. See M. Schreiber, *La Pratique Des Nations Unies Dans Le Domaine De La Protection Des Droits De L'homme*, 145 HAGUE RECUEIL 334 (1975).

31. Additionally, Rule 5(1) of the Rules of the IHFFC provides that: "[t]he Commission shall ensure that each candidate possesses the qualifications required by article 90 of the Protocol and that, in the Commission as a whole, equitable geographical representation is maintained." Rules of the IHFFC, *supra* note 27, Rule 3.

32. Official Records, *supra* note 21. In the Belgrade Minimum Rules of Procedure for International Human Rights Fact-Finding Missions, these rules are intended to curb serious abuses and departures from fundamental norms of due process, which were found by a research committee. This committee was composed of members from Britain, Austria, Singapore, Kenya, Uruguay, Bulgaria, Cyprus, Ghana, the Netherlands, and the U.S. It studied this matter for four years. The 59th Conference of the International Law Association, held in Belgrade from August 8 to 23, 1980, approved by consensus a set of minimal procedures to protect the integrity of human rights fact-finding by non-governmental organizations. These norms, designated the Belgrade Rules, are intended to encourage States to cooperate with fact-finding missions and to contribute to the credibility of the facts found. Although the International Law Association is a non-

The Commission is independent from the States that established it. Thus, following elections, the members of the Commission are required to serve as individuals in their personal capacity. In other words, they are not acting as representatives of any government or international organization but as individuals accountable for themselves.³³ This condition, incarnating the complete impartiality of the members, is enshrined in Article 90(1)(c).³⁴ Moreover, Rule 1 of the Rules of the Commission places additional emphasis upon this condition.³⁵

Article 90(1)(b) of Protocol I reads as follows:

When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 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.³⁶

This paragraph outlines the acceptance of twenty parties³⁷ to the

governmental forum, its formulations of international law carry considerable weight because of the expertise of the members and the organization's broad geographical coverage.

Rule 4 of the IHFFC reads as follows: "The fact finding mission should be composed of persons who are respected for their integrity, impartiality, *competence* and objectivity. . . ." Rules of the IHFFC, *supra* note 27, Rule 4 (emphasis added); see Thomas M. Franck, *The Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions*, 75 AM. J. INT'L L. 163 (1981).

The condition of the members' competence in the field related to the competence of the body they are elected for is embodied in Article 28(2) of the ICCPR, which lays down the qualifications of the members to be elected; it provides as follows: "The Committee shall be composed of . . . who shall be persons of high moral character and recognized competence in the field of human rights. . . ." ICCPR, *supra* note 24, art. 28(2).

33. Erich Kussbach, *The International Humanitarian Fact-Finding Commission*, 43 INT'L & COMP. L. Q. 174, 175 (1994).

34. Article 90(1)(c) reads as follows: "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." Protocol I, *supra* note 23, art. 90(1)(c).

35. Rule 1 of the Rules of the IHFFC provides as follows:

1. In the performance of their functions, the Members of the Commission (hereinafter referred to as the "Members") shall accept no instructions from any authority or person whatsoever and serve in their personal capacity.

2. Before taking up his duties, each Member shall make the following solemn declaration: "I will exercise my functions as a Member of this Commission impartially, conscientiously and in accordance with the provisions of the Protocol and these Rules, including those concerning secrecy."

Rules of the IHFFC, *supra* note 27, Rule 1.

36. ICCPR, *supra* note 24, art. 90(1)(b).

37. As may be observed, this condition was not embodied in either the proposal forwarded by the Scandinavian countries and New Zealand or in that forwarded by

Protocol to Competence of the Commission,³⁸ as the underlying condition for the establishment of the Commission. (This condition is linked to the mandatory competence of the Commission in paragraph 2(a), which will be discussed later). Once this condition is satisfied, the obligation to establish the Commission is not tied to the existence of an armed conflict. However, the purpose of the inclusion of this condition seems to serve no purpose and may further be regarded as an impediment to the immediate set up of the Commission. Accordingly, it took more than thirteen years to achieve this number.³⁹ Such a time frame signifies that the acceptance of the Commission's competence was an uneasy and uneven release to the parties. This reflects the apprehension and opposition of the States toward an international fact-finding body that is

Pakistan. In Committee I, paragraph 1(b), adopted by an overwhelming majority, stated that the meeting for election of members of the Commission was to be convened when Article 90 had become applicable among not less than *twenty High Contracting Parties*. However, paragraph 2(d), adopted at the same time by the Committee, stated that the provisions of Article 90 should come into force when *twenty States Parties to the Protocol made declarations under paragraph 2*. A contradiction exists between these two paragraphs. See Takemoto, *supra* note 20, at 36.

Accordingly, a proposal was forwarded by the United States of America to the plenary meeting:

“When not less than twenty High Contracting Parties have agreed to accept the jurisdiction of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties. . . .” The United States delegate added that, the word “jurisdiction” in the second line of his delegation’s amendment should be replaced by the word “competence.” This amendment was adopted by 49 votes to 2, with 34 abstentions. However, Mr. Bindschedler, the head of the delegates of Switzerland, stated while explaining his delegation’s vote (and he was absolutely right), “the adoption of the amendment proposed by the United States would have the effect, in practice, of preventing the Fact-Finding Commission from being set up for another twenty years.

See Official Records, *supra* note 21.

38. Although circumstances have not evolved as follows, the following question might be raised: What would happen if two countries, involved in armed conflict with one another, accepted the competence of the Commission before reaching the twenty acceptances that ignite the establishment of the Commission? Could one of those two countries or even the two countries ask for the establishment of the Commission disregarding the twenty acceptances condition (which is a formal condition) in order to benefit from their acceptance? This bulleted question had not been raised in the preparatory work during the 1974-1977 Diplomatic Conference, but a literal reading of Article 90 suggests that the drafters’ intention was to confine the triggering of Commission establishment only after its competence is accepted by twenty of the Contracting Parties. This holds true in view of the fact that, in order for the Commission to be established, *not less* than twenty Contracting Parties must accept its competence with a separate declaration.

39. On the 20th of November 1990, Canada was the twentieth state to accept the competence of the Commission. Today, 65 parties have accepted the competence of the Commission. Mali was last to accept the Commission on the 6th of May 2003.

empowered to investigate grave breaches and serious violations. This apprehension and opposition is founded on the ground that this would be a violation of their sovereignty. On the other hand, such a time frame implies that the Commission can play an effective role in deterring States from violating international humanitarian law.

After meeting the formal conditions for establishing the Commission, the Swiss Government, as the depositary power of the Protocol, convened a meeting of the representatives of the countries that had accepted the competence of the Commission. This meeting was convened in Berne on the 25th of June 1991, for electing the members of the Commission. The wording of Article 90(1)(b) denotes that the meeting of the representatives of the countries that had accepted the Commission's competence is "strictly limited in purpose to electing the members of the Commission. Nothing else is within the meeting's competence."⁴⁰ Moreover, it signifies that the depositary power is obligated to convene the meeting of the representatives of the States that accepted the competence of the Commission, once the formal condition is met. Furthermore, it is obligated to convene this meeting every five years for the purpose of electing the members.

As regards election of members, it is to be argued that the nominated and elected members should be nationals of the countries that accepted the competence of the Commission, according to Article 90(1)(b). This is due to the fact that the meeting for the election of the members will be convened of the representatives of the countries that have accepted the competence of the Commission. Thus, the nominated and elected members will be of those countries.

If paragraph (1)(a) is read in tandem with paragraph (1)(d) ("in the Commission as a whole, equitable geographical representation is assured"), a counterargument arises. Namely, in order to meet this

40. J. Ashley Roach, *The International Fact-Finding Commission: Article 90 of Protocol I Additional to the 1949 Geneva Conventions*, 281 INT'L REV. RED CROSS 167, (1991).

It is worthwhile to note that the proposal submitted by the Scandinavian countries and New Zealand presupposed that ICRC should undertake the appointment of the members, in accordance with the Rules of Procedure drawn by itself. The ICRC expressed its unwillingness to perform the function envisaged in that proposal. However, the opinions on this matter were divided diversely among the delegates. Some delegates supported the proposal of the Scandinavian countries and New Zealand. They did so because it seemed fitting to request this of the ICRC because of its very wide experience in the field of humanitarian activities. Moreover, this would not affect the impartiality of the ICRC. On the other hand, several States opposed this proposal, arguing that it is inadmissible that an international non-governmental organization, however worthy of respect it might be, should accept the appointment and, in practice, control the action of an international enquiry Commission engaged in supervising the activities of the States. See Takemoto, *supra* note 20, at 28.

requirement, the condition of equitable geographical representation⁴¹ suggests that the nomination and election of the members should be from the States Parties to the Protocol, in line with the Commission's approach,⁴² or even from the States Parties to the Protocol and the Geneva Conventions.

However, if the condition of equitable geographical representation is to be satisfied, it should be applied universally. In other words, it is to be applied regardless of either the acceptance of the competence of the Commission or the State Parties to the Protocol and the Geneva Conventions. This argument is supported by the fact that the Commission can be called upon to enquire into facts of a conflict whose adversaries are not Parties either to the Protocol or to the Geneva Conventions. Obviously, if the members of the Commission are representing different forms of civilizations and different legal systems, this will facilitate their task. It will further augment their effectiveness and credibility. However, taken by itself, the condition of equitable geographical representation suggests different applications. That is to say, it can be applied by electing three members from each continent, or it can be applied proportionate to the number of States in each continent.

The wording of Article 90(1)(b) stipulates that each represented State has the right to nominate only one person. In this context, the following question is raised: could the representatives elect more than one national of the same country?⁴³ Although this did not occur, nothing in the wording of Article 90 bans this. Thus, while the phrasing of Article 90(1)(b) provides a specification that each representative shall

41. The requirement of equitable geographical representation is embodied in some of the human rights conventions, regarding the bodies with supervisory functions. Article 31 of the ICCPR reads as follows:

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

ICCPR, *supra* note 24, art. 31. However, the representation of the different forms of civilization and of different legal systems, which is embodied in the abovementioned article, is of vital importance. This is true because the Commission may work in different areas of the world.

It should be noted that the requirement of the equitable geographical representation was embodied in the two proposals forwarded by the Scandinavian countries and New Zealand and Pakistan, although the latter embodied a strict application of the equitable geographical representation.

42. This criterion is also followed in electing the members of the Human Rights Committee. Article 28(2) of the ICCPR, reads as follows: "The Committee shall be composed of nationals of States Parties to the present Covenant who. . . ." *Id.* art. 28(2).

43. In this context, it is worthwhile to note that Article 31(1) of the ICCPR forbids the election of more than one national of the same State. It provides as follows: "The Committee may not include more than one national of the same State." ICCPR, *supra* note 24, art. 31(1).

nominate only one person, it does not provide a condition that excludes the election of more than one member of the same State. Moreover, the qualifications required of the members may not be obtainable in all the nominated persons, which is a condition that should be fulfilled. Furthermore, the wording of Article 90(1)(a), stipulates that the qualifications should be satisfied in the members and not in the nominated persons.

On the other hand it should be argued that the condition of equitable geographical representation may be affected if this happens. However, an interpretation of Article 90 from the perspective of the context of the terms of the treaty and the object, purpose, and intention of the parties⁴⁴ suggests that the inclusion of the equitable geographical representation condition assures a worldwide representation (geographically, culturally, legally, etc.). This worldwide representation will definitely be affected if we consider the number of the members of the Commission (fifteen). Moreover, with regard to the nominated persons, the representatives of the States are morally obliged to nominate only persons who are qualified to be elected as members. Furthermore, one can infer that there is a definite obligation to nominate only qualified persons. This can be suggested if Article 90(1)(b) is read concomitantly with Article 90(1)(a).

However, the second suggestion appears to be more concordant with the conduct of the representatives of the States in their meetings for

44. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/26, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

Article 31 of the above cited Convention reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose;
2. The context for the purpose of the interpretation of a treaty shall comprise, in
 - a) addition to the text, including its preamble and annexes; any agreement relating to the treaty which was made between all the Parties in connection with the conclusion of the treaty.
 - b) any instrument which was made by one or more Parties in connection with the conclusion of the treaty and accepted by the other Parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a) any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions;
 - b) any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation;
 - c) any relevant rules of international law applicable in the relations between the Parties.
4. A special meaning shall be given to a term if it is established that the Parties so intended.

Id. art. 31. For a thorough discussion on the law of treaties, see generally, LORD MCNAIR, *THE LAW OF TREATIES* (1986); see also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (2000).

the election of the members. Their practice indicates nothing that would contradict this suggestion.

Although article 90(1)(b) provides that the election of the members shall be made by secret ballot from those nominated persons, it does not offer a quorum to conduct the elections. It was suggested by the Swiss representative at the Round Table to follow the rules set out in the 1966 Covenant on Civil and Political Rights for the election of the Human Rights Commission.⁴⁵ Surprisingly, the Rules of Procedure of the Commission have not addressed this issue. However, on the event of every meeting for the elections, an election procedure is proposed. The representatives usually agree to it.⁴⁶ Finally, it should be noted that, nothing in Article 90 hinders the re-election of the members if they are re-nominated.⁴⁷

Paragraph 1(e) addresses the case of casual vacancy. It states that the "Commission proceeds by co-option, based on the original list of candidates presented at the constitutive meeting or the last meeting or the

45. Roach, *supra* note 40, at 172. Article 30(4) of the ICCPR requires a quorum of two-thirds to conduct the election of the members of the Human Rights Commission, as it provides as follows:

Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

ICCPR, *supra* note 24, art. 30(4). However, the rules of the IHFFC provide no quorum to conduct the election of the members in the meeting of the representatives.

46. In the Meeting for the Election of the Members of the International Humanitarian Fact-Finding Commission, held on November 9, 2001 in Bern, the distributed proposal for conducting the elections, agreed to by the representatives, was as follows:

Election Procedure:

The fifteen candidates obtaining the highest number as well as the absolute majority of the votes cast by the representatives of the High Contracting Parties present and voting shall be elected. Inasmuch as the first ballot proves inconclusive additional ballots will be held until all fifteen seats have been filled. No absolute majority of the votes will be required after the third ballot.

The representatives of the High Contracting Parties may cast a maximum of 15 votes and not more than one vote per candidate. The representatives entitled to participate in the election proceed to cast their votes on the ballot-paper distributed by the chairman and containing the names of the candidates and of the nominating countries.

Distributed Proposal for the Election of Members (on file with the author).

47. The members of the Human Rights Committee are elected for a term of four years, and they can also be reelected. These rules are provided in Article 32 of the ICCPR, which reads as follows: "1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However," ICCPR, *supra* note 24, art. 32.

last meeting convened for an election.”⁴⁸ At this stage, one can relate the condition of equitable geographical representation to the case of filling casual vacancies. That is to say, if a candidate from the same region to which the former member belonged is available, he should have precedence even over candidates from other regions who received more votes at the election.⁴⁹ Rule 5 of the Rules of the IHFFC discusses the case of filling casual vacancies in greater detail.⁵⁰ However, it makes no reference to the condition of equitable geographical representation.

The last sub-paragraph (f) in Article 90(1) focuses upon administrative facilities for the Commission, which would enable it to accomplish its functions. These facilities should be available by the depositary. However, this clause “seems to cover only availability of the necessary locations and secretarial facilities, independently of the expenses provided for under paragraph 7.”⁵¹

3. The Competence of the Commission:

After outlining the specific scope within which the Commission was established, explicating the procedures for the election of members and their requisite qualifications, and underscoring the Rules of Procedure of the IHFFC that coordinate the aforementioned themes, we will now discuss the competence of the Commission.

48. SANDOZ, *supra* note 28, at 1043.

49. MICHAEL BOTHE, ET. AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 543 (1982).

50. Rule 5(2) and (3), under the title of the filling of casual vacancies, provides as follows:

2. In the absence of a consensus among the Members, the following provisions shall apply:

a. When no candidate obtains in the first ballot the majority required, a second ballot, restricted to the two candidates who obtained the highest number of votes, shall be taken.

b. If the second ballot is inconclusive and a majority vote of Members present is required, a third ballot shall be taken in which votes may be cast for any eligible candidate. If the third ballot is inconclusive, the next ballot shall be restricted to the two candidates who obtained the highest number of votes in the third ballot and so on, with unrestricted and restricted ballots alternating, until a Member is elected.

c. The elections referred to in this Rule shall be held by secret ballot. Election shall be by a majority of the Members present.

3. A Member elected under this Rule shall serve for the remainder of the term of his predecessor.

Rules of the IHFFC, *supra* note 27, Rule 5.

51. SANDOZ, *supra* note 28 at 1043.

A. *Optional—Compulsory Competence*

The mandatory competence of the Commission is an optional clause embraced in Article 90(2)(a), which reads as follows:

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 inquire into allegations by such other Party, as authorized by this Article. . . .⁵²

Although this clause provides a compulsory competence to the Commission, it signifies a notable retrograde step from the principal objectives envisaged in the two proposals constituting the main foundations for Article 90. This holds true, insofar that the aforementioned proposals targeted instigation of an investigation solely at the request of one party to a conflict, which was a crucial issue during the discussions. The present formulation originated from an amendment by the German Democratic Republic.⁵³ On the one hand, this amendment can be considered the life jacket that saved a provision for creating a permanent enquiry Commission from drowning in a choppy sea of wide oppositions. As such, it established a compromise between two positions that created a serious rift between the participants of the Conference. One side of the participants insisted on a system of compulsory enquiry, while the other was irreversibly opposed to what they regarded as an intolerable encroachment on the sovereignty of States.⁵⁴ On the other hand, the amendment is clear insofar as it sought to place boundaries around opportunities of an enquiry by the Commission, and not vice-versa. This holds true, considering that, from the start, the German Democratic Republic was one of the States that had strongly opposed establishing an enquiry Commission.⁵⁵

52. This optional clause corresponds to the clause embodied in Article 36(2) of the Statute of the ICJ and it is crystal clear that it is borrowed from it. Article 36(2) of the ICJ statute provides as follows: "The States Parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning. . . ." Statute of the International Court of Justice, June 26, 1945, art. 36(2), 59 Stat. 1031 [hereinafter ICJ Statute].

53. The amendment of the German Democratic Republic reads as follows: "The High Contracting Parties may at any time declare that they recognize *ipso facto* and without special agreement, in relation to any other State accepting the same obligations, the competence of the Commission to. . . ."

54. SANDOZ, *supra* note 28, at 1044.

55. During the preparatory work, the delegations were divided into two groups. One group of delegations was persistently opposed to establishing a new enquiry provision. This group included Socialist States and the States of Eastern Europe. Their main

arguments against inclusion of a new enquiry provision can be summarized in the following points:

1. Setting up a supranational control body was contrary to international law in as much as it was likely to lead to interference in the internal affairs of the countries concerned and that amounted to derogation from the sovereignty of the States. Official Records, *supra* note 21, CDDH/I/SR.57 §§ 2, 62 (regarding the Byelorussian Soviet Republic and the Ukrainian Soviet Socialist Republic).
2. Establishing a permanent international enquiry Commission went further than the Conference's diplomatic powers, for such a Commission deviated from the spirit and meaning of the Geneva Conventions. *Id.* CDDH/I/SR.57 §§ 1, 2 (regarding argument by the Ukrainian Soviet Socialist Republic); *id.* CDDH/I/SR.58 §§ 33, 34 (regarding Poland's argument).
3. The Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, which was held in 1971 and 1972, together with the working if the ICRC on the provisions of draft Protocol I for some years, both included a provision for an international enquiry Commission. *Id.* CDDH/I/SR.57 § 75 (regarding India).
4. The Convention already includes a number of provisions establishing the system of protecting powers, and providing for enquiry and conciliation procedures which had been functioning effectively for the past quarter century. Moreover, the enquiry procedure provided by the Geneva Conventions was based on an excellent principle, which was that the Parties to the conflict should agree on the need for an enquiry. Thus there was no need to establish a new body. *Id.* CDDH/I/SR.57 §§ 3, 35 (regarding Soviet Socialist Republic and Hungary).
5. In view of the present international situation, it would be best to allow the United Nations Security Council to enquire into breaches of the Conventions, and it would be premature to institutionalize an enquiry procedure binding all States since many of them were not prepared to accept it. It was also pointed out that it was undesirable to contribute to proliferation of international bodies. *Id.* CDDH/I/SR.57 § 41 (regarding German Democratic Republic); *id.* CDDH/I/SR.58 § 3 (regarding Hungary).

Meanwhile, the other groups were the delegations of Western Europe, Arabs, and some of the Third World countries. They supported the establishment of a permanent enquiry body and refuted the abovementioned arguments. Their counter arguments can be summarized in the following points.

1. Setting up a permanent enquiry body was a first step toward the creation of a body able to ensure the enforcement of the international humanitarian law. Moreover, that new provision was the cornerstone of the entire system of humanitarian law which the Conference was endeavoring to create. Official Records, *supra* note 21, CDDH/I/SR.56 §§ 44, 71 (regarding Kuwait and Switzerland); *id.* CDDH/I/SR.57 § 10 (regarding Israel).
2. The proposals to establish a permanent enquiry Commission were by no means beyond the mandate entrusted to the Diplomatic Conference because it was called upon, not just to state the rules, but also to find proper methods of applying them. *Id.* CDDH/I/SR.58 § 39 (regarding New Zealand).
3. The provision concerning the enquiry procedure common to the 1949 Conventions had never been put into practice; although it stipulated that in the event of a violation of the Convention, an enquiry should be held if one of the Parties to the conflict so required, it lost much of its force because it was left to the interested Parties to decide between themselves the manner of such an enquiry. *Id.* CDDH/I/SR.57 § 11 (regarding Sweden).
4. Regarding the danger of infringing the national sovereignty or interfering in a State's internal affairs, the concept of national sovereignty was constantly evolving, and in practice, an increasing number of States were ready to accept

Pursuant to the wordings of Article 90(2)(a), the word “may” offers an elective clause. This clause is made for a Party to declare its acceptance, *ipso facto* and without any special agreement, of the competence of the Commission in advance, on a reciprocal basis with other Parties that do likewise. The obligation to accept the competence is established by a declaration,⁵⁶ made at the time of signing, ratifying, or acceding to the protocol,⁵⁷ or at any other time.

If Article 90(2)(a) is read concurrently with Article 90(2)(d), which states that: “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,” this question arises: should such consent be deemed to have been obtained in advance when the Party that is the subject of these allegations is one of those that recognized the Commission’s competence a priori (sub-paragraph (a) above).⁵⁸ According to the ICRC commentary on the Protocol, this interpretation would “undeniably introduce an element of inequality: The Parties to the conflict which have not recognized the compulsory competence of the Commission could force a Party which has recognized this competence

methods of peaceful settlement by a third Party. Therefore, it was difficult to see how the formation of any such enquiry body could be regarded as an infringement of national sovereignty or as unwarranted interference in the internal affairs of States. *Id.* CDDH/I/SR.58 §§27, 40 (regarding New Zealand and Greece).

56. The Federal Department of Foreign Affairs of the Swiss Confederation, in its capacity as the depositary State of the Geneva Conventions and their Additional Protocols, drafted a text to serve as a model for declarations of recognition of the competence of the IHFFC. The text reads as follows:

[The Government of . . .] declares that it recognizes *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission to enquire into allegations by such other Party, as authorized by Article 90 of Protocol I additional to the Geneva Conventions of 1949.”

See 297 INT’L REV. RED CROSS 526 (1993).

57. It is worthwhile to note that the difference between signature, ratification, and accession are stipulated in the Vienna Convention on the Law of Treaties in Articles 12, 14 and 15 respectively. However, during codification of the law of treaties at the International Law Commission, sir Gerald Fitzmaurice, the third Special Rapporteur on that topic, insisted that, “Strictly, accession implies, and should be only made to, a treaty already in force. It is essentially a method of joining a going concern so to speak and this results from the fact that accession is essentially the acceptance of something already done, not a participation in the doing of it.” *See* 2 Y.B. INT’L L. COMMISSION 125, § 83 (1956). This constituted the fundamental difference between accession and signature. *See also* Masayuki Takemoto, *The 1977 Additional Protocols and the Law of Treaties*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* (Christophe Swinarski ed., 1984). *See generally* P.K. MENON, *THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS* (1992).

58. SANDOZ, *supra* note 28, at 1046.

to accept the enquiry, but not the other way around.”⁵⁹

As regards the ICRC commentary argument, however, running counter to this argument may be deemed necessary for activating the Commission. Additionally, the ICRC commentary argument can counteract the specificities and the norms of the humanitarian law. This can be examined through a hypothetical situation, wherein State *X* does not and is not willing to recognize the competence of the Commission. State *Y*, however, recognizes the competence of the Commission. State *X* alleges that State *Y* has committed grave breaches or serious violations that fall within the competence of the Commission. State *X* asks the Commission to investigate its allegation resting on its consent and not on the recognition. The expected supporting argument to be advanced by State *X* is that according to Article 90(2)(d), the Commission shall inaugurate an enquiry at the request of a Party to the conflict. This inauguration is conditioned with the consent of the other Party. Accordingly, the acceptance of State *Y* of the compulsory competence in advance should be considered as consent. This is because State *Y* waived its right to oppose enquiring by the Commission, by declaring that it recognizes its compulsory competence. This can imply that no further manifestation of consent is needed for the Commission’s competence to be established. On the other hand, State *Y* might counter argue, leaning on the literal reading of Article 90(2)(a), which signifies that there should be a reciprocal recognition to institute an enquiry. Moreover, State *Y* can also rest on the argument of the ICRC commentary.

Thus, there might be two trends. The first is that the Commission might adhere to the literal reading of Article 90(2)(a) and the ICRC commentary argument. Therefore, the Commission might request State *X* to accept its compulsory competence by the declaration to be able to set up the enquiry. The second is that the Commission can set up an enquiry, without asking State *X* to accept its compulsory competence. Accordingly, if the Commission favored the first trend, the case will be closed, unless State *X* accepts the competence of the Commission. However, if the Commission favored the second trend, this should be on solid ground.

During the preparatory work, the main argument against establishing a permanent fact-finding Commission was that, according to the viewpoint of the States opposing establishment of the Commission, “the idea of setting up supranational bodies with wide powers of supervision of the activities of States and empowered to act against the freely declared will of States . . . [was] contrary to the universally

59. *Id.*

recognized principles of international law.”⁶⁰ Hence, State *Y* has already accepted the compulsory competence of the Commission. In doing so, it had freely declared its will to be bound by this competence, which is, in its natural meaning, consent in advance. Over and above, common Article 2 paragraph (3)⁶¹ to the Conventions can stand up for this trend.

Moreover, applying the argument of the ICRC commentary will forever lead to obstructing the Commission from enquiring into allegations between States that have accepted the Commission’s competence and those who have not. A contradiction may arise, insofar as the Geneva Conventions and the Protocols “reflect a constant endeavor to extend their application to the widest possible circle of States and conflictual situations, and to reduce to a minimum the legal grounds for avoiding such an application.”⁶² This further introduces a discriminatory element, not otherwise accepted in humanitarian law.

Additionally, the potential enquiring by the Commission will curb violations of the Protocol and the Conventions. This was the view of the delegates during the preparatory work, as illustrated by the Canadian delegate’s statement that, “the very fact of its existence will serve to warn potential violators of the implications of their act and thus also contribute to the prevention of breaches.”⁶³ In this sense, enquiring could be regarded as a way of protection, possessing the absolute character of protection. This “absolute character of protection resides not only in that the protective provisions and obligations are called upon to apply in all circumstances and regardless of reciprocity, but also in the prohibition of *inter se* agreement with a view to waiving or lowering the level of protection.”⁶⁴

However, through careful reading of the ICRC commentary argument, one might deduce one particular obstacle for acceptance of the Commission’s enquiring in this situation. Namely, a state of inequality will ensue. Thus, unless there is a mechanism to furnish equality in this situation, instituting an enquiry according to the second trend is

60. Official Records, *supra* note 21, at 207.

61. Common Article 2 paragraph (3) reads as follows:

Although one of the Powers in conflict may not be a Party to the present Convention, the Powers who are Parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

First Convention, *supra* note 24, art. 2(3); Second Convention, *supra* note 26, art. 2(3); Third Convention, *supra* note 26, art. 2(3); Fourth Convention, *supra* note 26, art. 2(3).

62. Georges Abi-Saab, *The Specificities of Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES: IN HONOUR OF JEAN PICTET 267 (Christophe Swinarski ed., 1984).

63. Official Records, *supra* note 21, at 364.

64. Abi-Saab, *supra* note 62, at 268.

unacceptable. Moreover, realistically speaking, the procedure for inquiry could not go into operation if a State opposed the intervention of the Commission.

Thus, equalization is indispensable in this situation; the two parties should have identical rights and obligations. As such, it is to be suggested that an ad hoc proceeding and written agreement might establish the aimed-for equality. The aforementioned agreement should embrace rules to ascertain equality (e.g. to give the right to the Commission to enquire into any allegations, falling within its competence, between States *X* and *Y*, in the present conflict, in potential future conflicts, etc.). However, this agreement might be easier said than done, giving rise to a problematic situation that can only be resolved by the support of other international organizations (e.g. United Nations or the ICRC). This international support will be presented while the Commission is creeping on its tip-toes, and then its credibility will speak for itself. Moreover, the details (its aspects and conditions) of this solution can be included in the Rules of Procedure of the Commission, which can be approved by the States that had already accepted the competence of the Commission.

Apparently, the above-mentioned suggestion can accomplish a compromise between the objectives of the Geneva Conventions and Protocols. It further reaches a compromise between the norms of humanitarian law and Article 90(2)(a), on one hand, and between Article 90(2)(a) and Article 90(2)(d) on the other hand. Moreover, it attains the object of resorting to the Commission by State *X*, without prejudicing the rights of State *Y*, as it builds a balanced situation between the two States. Furthermore, it expands the area of competence of the Commission, which is absolutely necessary to end the mummification saga of the Commission.

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.⁶⁵ However, which State might request an enquiry? In this

65. SANDOZ, *supra* note 28, at 1044. It should be noted that, in the proposal of the three Scandinavian countries and Norway it was provided that the Commission could set up an enquiry on its own initiative. On the other hand, the Pakistani proposal provided that the Commission could set up an enquiry on the request of a party to the conflict or a protecting power. The discussion in the committee focused on the initiative of the Commission provided in the former proposal. This was widely criticized. Thus the co-sponsors of that proposal suggested by implication their readiness to delete the words recognizing the initiative by the Commission. However, according to the Official Record, Mr. Ruud, the Norwegian delegate stated that:

[His] delegation could not accept the deletion of the clause stipulating that the international inquiry Commission could institute an enquiry "on its own

sense, and as provided in the ICRC commentary, “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.”⁶⁶

At first glance, it can be argued that this interpretation will augment the role of the Commission. It can support its interference in critical situations of conflict between a State that has recognized the competence of the Commission, and an adversary that does not. According to the commentary interpretation, in the case of a third State that is not party to the conflict, and has recognized *ipso facto* the competence of the Commission, this third State can invoke the competence of the Commission. Apparently, common Article 1 (respect and ensure respect) might support the commentary interpretation; moreover a literal reading to Article 90(2)(a) might also sponsor this interpretation, since it uses the term “High Contracting Party” and not “party to the conflict.”

Meanwhile, it is to be counter argued that acceptance of this interpretation will create a peculiar situation. This is because it provides a State that is not a party to the conflict with the right to request an enquiry (even without the consent of the party that did not accept the competence of the Commission). Meanwhile, it restrains the party to the conflict from doing so. This can be considered as an infringement on the sovereignty of that State. Moreover, given the ICRC commentary interpretation, it is plausible to assume that an element of inequality will develop (which is refuted by the commentary). This could be expected if the enquiry requested by the third State were based upon political reasons or friendly relations with that party to the conflict, which had accepted the competence of the Commission. This holds true, as the State that did not accept the competence of the Commission will not be able to request an enquiry if it is a victim of allegations. Meanwhile, it might be forced to accept the enquiry if it is the violator—as such sovereignty can be infringed upon and inequality might ensue. This will

initiative” . . . in the opinion of his delegation, the Geneva Conventions and Protocol I were also of great importance to the civilian population. He therefore wondered whether it was fair that only Parties to the conflict should be entitled to request the Commission to open an enquiry. In any case, that right should not pertain solely to the official representatives of the Parties concerned, but should be also allowed to the civilian population if the official representatives of their country should neglect to make the request for one reason or another.

Official Records, *supra* note 21. The proposals that the Commission be able to institute an enquiry on its own initiative and then on the request of the civilian population were widely opposed. *See id.* at 201.

66. SANDOZ, *supra* note 28, at 1044.

not be because of humanitarian considerations, but for political and friendly relations, which is indeed unacceptable in humanitarian law.

Furthermore, according to the commentary interpretation, Article 90(2)(a) provides a sole condition, namely, the requesting State merely has to have recognized the competence of the Commission. This leads to questions of whether or not such recognition should be restricted to certain cases or situations, or be in conjunction with certain conditions. Additionally, and of greater importance, are the practical obstacles that may arise if such an enquiry is established without the consent of the parties to the conflict and without any means of international enforcement. Consequently, without a criterion specifically outlining situations wherein such interpretation can be pursued, together with requisite conditions, this can propel our departure from the interpretation of the ICRC commentary. In fact, this is neither provided by Article 90 nor by the Rules of Procedure of the Commission.⁶⁷

Interestingly, regarding the specific problems of the occupied territories, an amendment sponsored by twenty-one States gave rise to a heated discussion. The controversy focused on the addition of the following sentence: “[i]n case of an occupied territory, the request of the Party whose territory is occupied shall suffice for the institution of the enquiry.”⁶⁸ This amendment was rejected, having failed by a narrow

67. In part III, chapter I, which deals with the enquiry request and under the title of lodging the request, Rule 20 of the Rules of Procedure reads as follows:

1. The request for an enquiry shall be addressed to the Secretariat.
2. It shall state the facts 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.
3. It shall list the evidence the requesting Party wishes to present in support of its allegations.
4. It shall name the authority to which all communications concerning the enquiry shall be addressed, as well as the most expedient means of contacting that authority.
5. Where applicable and to the extent possible, it shall contain, in the enclosure, the original or a certified copy of any document cited in the list of evidence.
6. If the Commission receives a request for an enquiry under article 90(2)(d), and the consent of the other Party or Parties concerned has not yet been indicated, the Commission shall refer the request to that Party or those Parties with a request that it or they indicate its or their consent.

Rules of the IHFFC, *supra* note 27, Rule 20.

68. Mr. Clark, the Nigerian delegate, while introducing the amendment and giving reasons for the forwarded amendment, commented as follows:

Paragraph 2 of article 79 [Article 90(2)] was based on political and administrative considerations. Its object was therefore narrow and limited. Since the adoption of Article 79 [90(2)], the sponsors of the proposed amendment had re-examined the situation in the light of draft Protocol I as a whole, and a number of points had become clear to them.

They took the view that, in its present form, paragraph 2(a) was incomplete

margin to obtain the necessary two-thirds majority.⁶⁹ However, while discussing Article 90(2)(d), Sri Lanka made another attempt for the

because it did not address itself to the specific problems of occupied territories. The notion of sovereignty, which was synonymous with independence, was of capital importance. To say that temporary occupation of a territory derogated substantially from the owner's sovereignty over it was to deny the United Nations principle that the acquisition of territory by force was illegal and inadmissible.

Paragraph 2 of Article 79 [90(2)] was contrary to the spirit and the letter of the fourth Geneva Convention of 1949 and Protocol I. If the occupying power was permitted to refuse the intervention of the Fact-Finding Commission, it could proceed with impunity to violate the provisions relating to the protection of the civilian population and civilian objects in occupied territory and even ignore the outcry of world opinion.

Now that there was no mention of reprisals in the texts adopted, it was important that no occupying power should be given a pretext for refusing to adhere strictly to the provisions of the Convention and the Protocol. Paragraph 2 introduced another dangerous doctrine by placing the aggressor and the victim of his aggression on a footing of equality in law and in fact. It would, in fact, sanction the military advantage gained by the adversary, a notion alien to international law, the Geneva Conventions, and Protocol I. Sovereignty can be relinquished only by the consent of the Parties concerned. Several international organizations had, in numerous resolutions, expressed grave concern for the fate of peoples in occupied territories and called for international action along the lines proposed by some twenty States in amendment CDDH/415 and Add. 1 and 2 and Corr.1. Such action led, for instance, to the setting up of the Fact-Finding Commission on Namibia. *The sponsors of the proposed amendment were from non-aligned developing countries in Africa, Asia, and Latin America.*

See Official Records, *supra* note 21, at 311-312 (emphasis added).

The Yugoslavian delegate stated that the most frequent violations of human rights occurred in occupied territories as a result of endeavours by the occupying power to pacify occupied populations. This was also the viewpoint of the Egyptian delegate. *Id.*

69. The vote for this amendment was a roll-call vote requested by the Mexican delegate, speaking on behalf of the sponsors. The vote was 54 in favor, 28 against, and 14 abstentions. However, opposition of this amendment was on the following grounds: The Federal Republic of Germany and the German Democratic Republic noted that the occupying power could not be assimilated to the aggressor, and the amendment introduced an exception for the occupied territories. Requirements were the same in all cases, and rules should be the same for all. In addition, Italy noted that the Fact-Finding Commission would in practice find it possible to carry out its mandate in occupied territories without the agreement of the occupying power. The Canadian delegation added that it considered itself bound by the "package deal" reached in the Committee. The Israeli delegation felt that the text was quite inappropriate and that there had been no chance to consider it in the Committee. The pervading mood regarding the discussions of Article 90 was best described by the Egyptian delegate, Abi-Saab, while he was explaining his vote: he said that he deplored the outcome of the vote on the amendment and "found it very revealing that the great majority of third world countries had voted in favour of it." In rejecting the amendment, the conference had discarded the only article that provided a mandatory implementation system and, consequently, Article 79 [90] remained theoretical and had no practical value. The vote had been a bitter lesson, showing that when considerations of theory were done with, and it came to undertakings of a practical nature, most states, namely the big and the powerful, wavered and shirked their responsibility. *Id.* at 314-315, 320.

addition of an oral amendment to the proposed text by the United States delegation. Sri Lanka argued for the addition of a phrase which read that "except in the case of a territory occupied as a result of aggression, in which case the request of the Party whose territory is occupied will suffice for the institution of an enquiry."⁷⁰ This amendment was similarly defeated, having failed to obtain the requisite two-thirds majority.

One can question whether or not the declarations to recognize the competence of the Commission can be made with reservations.⁷¹ Will

70. *Id.* at 322. The vote on this amendment was taken by roll-call, at the request of the Ukrainian Soviet Socialist Republic. The result was 54 in favor, 33 against, and 7 abstentions.

In comparing the result of the above-mentioned vote to the vote on the twenty-one States' amendment to Article 90(2)(a), it is interesting to note that the two votes were in the same meeting (the forty-fifth plenary meeting held on Monday, May 30, 1977). This meeting began at 3:10 p.m. and lasted until 7:00 p.m. Moreover, some delegates who opposed the first vote indicated that they would accept the amendment if it provided an exception in the case of a territory occupied as the result of aggression. *See* German Democratic Republic CDDH/SR.45 § 35; *see also* Federal Republic of Germany in CDDH/SR.45 § 30.

It is clear that the 54 States voting in favor on both votes were the same number but were not the same States. In the first vote, Bangladesh, Republic of Korea, Switzerland and Zaire voted in favor. Surprisingly, in the second vote, neither Bangladesh nor Zaire voted in favor, against, nor abstained. Switzerland voted against the amendment in the second vote. Republic of Korea abstained from the second vote. In the first vote, 54 States voted in favor and 28 against—just two favorable votes shy of the two-thirds requirement needed for adoption. The number of States who abstained in the first vote decreased from the first vote to the second, fourteen to seven respectively. The following States abstained in the first vote and voted against the amendment in the second vote: Austria, Japan, Liechtenstein, Nicaragua, New Zealand, Socialist Republic of Viet Nam, Holy See and Sweden. Only Kenya abstained from the first vote and voted in favor in the second vote. The aforementioned statistics regarding the voting on two separate but substantially similar proposals confirms Sri Lankan delegate Breckenridge's observation that "the conference was in process of limiting the scope of humanitarian law to political law, which would cast doubts on its moral level." *See id.* at 318 (details on the twenty-one State proposal); *id.* at 324 (details of votes on the amendment of Sri Lanka); *id.* at 317 (speech of the delegate of Sri Lanka).

71. Article 2(d) of the Vienna Convention on the Law of Treaties defines "reservation" as follows:

[R]eservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. . . .

Vienna Convention on the Law of Treaties, *supra* note 44, art. 2(d). However, the following definition of a reservation is also a useful one:

a "reservation" is a formal declaration by which a State, when signing, ratifying, or acceding to a treaty, specifies as a condition of its willingness to become a Party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be Parties to the treaty.

Harvard Draft Convention on the Law of Treaties, prepared under the auspices of

these reservations have a reciprocal effect? Thus far, the situation has not presented itself. However, if it does, will such a declaration be accepted or not,⁷² and what will be the effect of other Parties' objections? While the preparatory work gave no indication of whether or not the declaration would be subject to reservation, the issue of reservations generally arose. Thus, an article addressing the fact that some provisions in the Protocol should not be subject to reservation was proposed. The discussion, however, culminated in the rejection of the inclusion of such an article (Article 85 of the ICRC draft 1973).⁷³ Nonetheless, it should be noted that, Article 90 was not one of those articles that were proposed

Harvard Law School and published as a supplement to 29 AM. J. INT'L L. 657 (1935) [hereinafter Harvard Research]; see also MCNAIR, *supra* note 44, at 158.

72. It is worthwhile to note that reservations unprohibited by the Vienna Convention on the Law of Treaties, may still be objected to by other contracting States. AUST, *supra* note 44, at 112.

73. This Article was included in the ICRC draft and reads as follows:

1. Each one of the Parties to the Conventions may, when signing, ratifying, acceding to the present Protocol, formulate reservations to articles other than, Arts. 5, 10, 20, 33, Art. 35, para. 1, first sentence, Art. 38, para. 1, first sentence, and Arts. 41, 43, 46 and 47.
2. Each reservation shall be operative for five years from the entry into force of the present protocol in respect of the High Contracting Party formulating the reservation. Any reservation may be renewed for further successive periods of five years subject to a declaration being sent to the depositary of the Conventions not less than three months prior to the expiry of the said period. A reservation may be withdrawn at any time by notification to this effect addressed to the depositary of the Convention.

Through the inclusion of this article, the ICRC had two intentions. First it intended to exclude a number of important articles from being subject to reservations. Secondly, it sought to limit the validity of reservations to five years; if a State Party wanted to prolong the validity of a reservation, it had to repeat the reservation, which can be regarded as an effective mechanism of getting rid of certain reservations declared only for political reasons that are valid for limited time. This holds true, since the States will be obliged after five years to decide anew whether they can carry on the responsibility of denying the validity of certain parts of humanitarian law. However, this article led to ample discussions in Committee I and in the plenary meeting. An amendment sponsored by twenty-one States was forwarded, which was slightly different from the proposal forwarded in Committee I, as it preferred a new and shorter list comprising articles 1, 41, 42, and paragraph 3 of article 84, as those texts represented a development in humanitarian law and bore witness to a widening of concern in the international community. The oppositions to this article were based on the idea that the articles specified had been selected on a basis that distorted the significance of the Protocol as whole, as the United Kingdom noted, there were many articles of an inarguable humanitarian character in the Protocol that were not included. Moreover, the United States argued that the articles mentioned in the amendment were of a political, rather than a humanitarian nature. Furthermore, Turkey pointed out that the adoption of such article might prevent some States from becoming Parties to the Protocol. At the request of the representative of Mali, a vote was taken by roll call. The result was 42 in favor, 36 against, and 17 abstentions. Not having obtained the necessary two-thirds majority, the amendment was rejected. See Official Records, *supra* note 21, at 355-359. See also BOTHE, *supra* note 49, at 570-572.

to be barred from reservations. This is understood from the fact that the first proposal to include Article 90 was introduced on May 19, 1977, while the matter of reservations was first proposed in the ICRC draft of 1973, and was discussed extensively in Committee I and on various occasions, before the inclusion of Article 90.

Nevertheless, it might be argued that rejecting the inclusion of Article 85 in the draft Protocol implies that all the articles of the Protocol can be subject to reservations. On the other hand, one can argue that Article 85 considered the prohibition of reservations to some articles, targeted to add emphasis to their obligatory meanings. However, the declaration stipulated in Article 90(2)(a), is an optional clause, whereby States should either take it or leave it as a whole. Accordingly, while reservations to it can be prohibited, the legal basis for this prohibition must be established.

In its Advisory Opinion on the reservations to the Genocide Convention, the International Court of Justice ("ICJ"), stated that:

[i]n the absence of any express provisions [on the subject, to determine the possibility of making reservations as well as their effects, one must consider their character, their purpose, their provisions, their mode of preparation and adoption. . . . It follows that the compatibility of the reservation and the object and the purpose of the Convention is the criterion to determine the attitude of the State which makes the reservation and of the State which objects.⁷⁴

The ICJ developed the criteria that reservations are inadmissible if they are incompatible with the object and purpose of the treaty. The broad purpose of the Commission is to protect the victims of armed conflict by obtaining the observation of the principles and rules of international law applicable in armed conflict. Thus, it can be argued that obstructing the Commission's potential intervention will be incompatible with the object and purpose of the Protocol, which is entitled "Protocol Additional . . . and Relating to the Protection of Victims of International Armed Conflicts."

Furthermore, the practice of sixty States that have recognized the competence of the Commission accentuates this view. By analogy with the Advisory Opinion of the Permanent Court of International Justice ("PCIJ") on *the competence of the International Labour Organization with respect to Agricultural Labour*, the Court opined that:

If there were any ambiguity, the Court might, for the purpose of

74. Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28).

arriving at the true meaning, consider the action which has been taken under the Treaty. The Treaty was signed in June, 1919, and it was not until October, 1921, that any of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organization. During the intervening period the subject of agriculture had repeatedly been discussed and had been dealt with in one form or another. All this might suffice to turn the scale in favour of the inclusion of agriculture, if there were any ambiguity.⁷⁵

Additionally, and in accordance with the Italian delegate's viewpoint, Italy being one of the countries opposing the inclusion of Article 85 in the ICRC draft: the "adoption of Article 85 . . . would give the impression that each State would be authorized to regard the unmentioned provisions of the Protocol as being open to reservations. That would be absolutely unacceptable."⁷⁶

According to this speech, and noting the added incompatibility with the object and purpose, and the practice of the sixty States that have already accepted the competence of the Commission with no reservations, one could assume that no reservations might be allowed to the declaration.

The declarations to accept the competence of the Commission shall be deposited with the depositary, as established by Article 90(2)(b). "[T]his provision obliges the depositary to notify all Parties to the Protocol, and even all Parties to the Conventions in accordance with Article 100 (notifications), sub-paragraph (c), and not only the Contracting Parties who made a declaration on compulsory competence."⁷⁷ Finally, it should be noted that the Commission is

75. Advisory Opinion on the Competence of the International Labour Organization with Respect to Agricultural Labour, 1922 P.I.C.J. (ser. B) Nos. 2 & 3, at 40, 41. The effect of the subsequent practice of the Parties is well stated in the comment upon Article 19 of the Harvard Research Draft Convention. It stated:

In interpreting a treaty, the conduct or action of the parties thereto cannot be ignored. If all the parties to a treaty execute it, or permit its execution, in a particular manner, the fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.

Harvard Research, *supra* note 71. See also McNAIR, *supra* note 44, at 424. For a discussion on the effect of the subsequent practice and distinguishing its effect from estoppel, see Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176 (1957). See also Lord McNair, *The Legality of the Occupation of the Ruhr*, 5 BRIT. Y.B. INT'L L. 17 (1924).

76. Official Records, *supra* note 21, at 356.

77. SANDOZ, *supra* note 28, at 1044-1045. Article 100 of Protocol I reads as follows:

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

prohibited to work on its own initiatives.

B. Enquiry: Grave Breaches and Other Serious Violations

Pursuant to Article 90(2)(c)(i) the Commission is entitled to “enquire into any facts alleged to be a grave breach as defined in the Conventions and the Protocol or other serious violations of the Conventions or of this Protocol.”

Thus, the Commission is competent to enquire into facts and not to judge.⁷⁸ In other words, if a State, pursuant to Article 90(2)(a) or (d), alleged that the adversary in a conflict had committed grave breaches or serious violations, the Commission would be competent to try to establish whether these facts took place.⁷⁹ It is crystal clear that the Commission’s area of competence is confined to grave breaches and serious violations. Thus, it is necessary to outline those acts which constitute grave breaches and serious violations under both the four Geneva Conventions and Protocol I.

The 1949 Geneva Conventions distinguished between simple breaches and grave breaches of the Conventions. Grave breaches⁸⁰ are respectively defined in the four Geneva Conventions, in common Articles 50, 51, 130, and 147.⁸¹

- a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;
- b) the date of entry into force of this Protocol under Article 95;
- c) communications and declarations received under Articles 84, 90 and 97;
- d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and
- e) denunciations under Article 99.

Protocol I, *supra* note 23, art. 100.

78. SANDOZ, *supra* note 28, at 1045.

79. *Id.*

80. In 1948, the Red Cross experts introduced the concept of a particular system for the suppression of violations, which was then developed and accepted by the Diplomatic Conference in 1949. “This new system consists of two elements, which combine definitions and matters of jurisdiction.” The four Conventions include provisions defining specific acts as grave breaches. In addition, the “high contracting Parties are obliged to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons regardless of nationality, before their own courts. The combination of both aspects is today regarded as the essence of the universality principle.” See Horst Fischer, *Grave Breaches of the 1949 Geneva Conventions*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 69 (Gabrielle Kirk McDonald et. al. eds., 2000).

81. Articles 50, 51, 130, and 147 of Conventions I, II, III and IV respectively, read as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by

The acts that constitute grave breaches of the Geneva Conventions, if committed against persons or property protected by the Conventions, are listed in each Convention. Due to the different scope of application of each Convention, the proscribed grave breaches are not identical in each of them. A collective list of grave breaches is as follows:

1. Willful killing, torture or inhuman treatment, including biological experiments.
2. Willfully causing great suffering or serious injury to body or health.
3. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.
4. Compelling a prisoner of war (Third Convention) or a protected person (Fourth Convention) to serve in the forces of the hostile power.
5. Willfully depriving a prisoner of war (Third Convention) or a protected person (Fourth Convention) of the rights of fair and regular trial prescribed in the Convention.
6. Unlawful deportation or transfer or unlawful confinement of a protected person.
7. Taking of hostages.⁸²

In addition, establishment of a grave breach requires that the victim be:

- 1) a wounded or shipwrecked member of the armed forces of any party (including a party's own nationals);
- 2) a prisoner of war in the custody of a detaining power; or
- 3) a protected civilian, *e.g.*, a person who is in the power of a party of which he is not a national, and who is not of a neutral or cobelligerent with whom the detaining power maintains diplomatic relations.⁸³

Unlike the Geneva Conventions, Protocol I encompasses rules

the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The grave breaches provisions of the four Geneva Conventions of 1949 deal with the protection of victims, such as prisoners of war, who are in the power of the High Contracting Party.

82. M. Cherif Bassiouni, *Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 RUTGERS-CAM. L.J. 185 (1977). See also Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Geneva Conventions of 1949 and Geneva Protocol I of 1977*, at 103 MIL. L. REV. 3 (1984).

83. Bassiouni, *supra* note 82, at 195.

relating to the conduct of armed conflict. Therefore, during the Diplomatic Conference the issue became whether violations of these rules should be categorized as simple breaches or grave breaches.⁸⁴

84. In the forty-third meeting held on April 23, 1976, the representative of the ICRC, Mr. Pilloud, gave a speech which addressed the repression of breaches of humanitarian law that had been under discussion for many years. In the sessions of the Conference of Government Experts on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflicts, held in 1971 and 1972, it was not easy to draft the appropriate provisions, and the results were somewhat contradictory. Thus, the ICRC consulted some penal law experts. This enabled the ICRC to submit the March 3, 1975 document entitled "Additional study of Article 74 of draft Protocol I on the repression of breaches of that instrument." Official Records, *supra* note 21, CDDH/210, annex 2. In that document the ICRC listed the acts that should be considered as grave breaches of the Protocol. In September 1975, at a meeting held in San Remo, a new idea was introduced, namely, that a distinction should be made between the manner of dealing with breaches committed on the battlefield and those committed in other areas. Attention had likewise been drawn to the fact that it seemed difficult to determine what were grave breaches by defining the persons and objects affected by them. *Id.* CDDH/1/SR.43, §§ 2-7.

However, in the course of the discussions two trends appeared. A group of States (mainly western countries) suggested to proceed with great caution and to exclude from the category of grave breaches those breaches committed on the battlefield. The following statements of the delegates of Canada, U.S.A., and the United Kingdom might clarify this viewpoint and the arguments supporting it. Mr. Miller, the Canadian delegate stated:

in the course of those deliberations: one sought to broaden the concept of grave breach by including other breaches therein; the other sought to proceed with great caution with regard, in particular, to the inclusion of breaches committed on the battlefield in the category of grave breaches . . . [this] tendency to broaden the scope of the article . . . could not fail to raise awkward problems when it came to practical application, . . . [that's why his delegation] deemed that the utmost caution would be necessary if that course was taken.

Id. CDDH/1/SR.43, §§ 8-10.

Mr. Breuckner, the Belgian delegate, was of a similar viewpoint. He stated that: grave breaches was not only a moral but also a legal concept: the 1949 negotiators had made a distinction between grave breaches and acts contrary to the provisions of the Conventions . . . within the meaning of the 1949 Conventions, a grave breach was a highly reprehensible act committed against victims at the mercy of the enemy, and as such, subject to universal jurisdiction, and leading to trial or extradition.

Id. CDDH/1/SR.44, §§ 40-48.

Mr. Bettauer, the delegate of the United States of America, was of the same opinion, stating:

[n]one of the solutions proposed was satisfactory [referring to the ICRC draft Article 74 (CDDH/1) and its revision (CDDH/210, annex 2) and to the various amendments submitted], and they would, moreover, fundamentally alter the scope of the system advocated for the repression of grave breaches. Two approaches might be envisaged: to undertake a fundamental revision of the criteria applied to define the term "grave breach," which was likely to prove a lengthy and difficult task; or to adhere to the system provided for in the 1949 Geneva Conventions, subject to some minor refinements. In drafting provisions on which penal sanctions would be based, it was of the utmost importance to proceed with extreme caution and to be clear and precise, since

there was a danger that any ambiguity in the provisions, . . . might be used for political purposes. A text that was unduly ambitious might thus hamper the application of the Conventions. . . . The existing provisions relating to grave breaches or to new breaches which were strictly analogous to them, might prove difficult to apply if extended to different kinds of violations of the Protocol. The system applicable to grave breaches was designed to cover situations involving persons in the hand of an adversary and definite breaches concerning specific objects. . . . [He added that due to the imprecision and ambiguity of the Protocol's provisions, this might] create the risk that any soldier involved in a conduct of warfare, would, without intentional violation of the Protocol's provisions, be open to charges of war crimes. [Thus his delegation] considered that the term "grave breaches" should apply only . . . to "protected persons" and "protected objects" within the meaning of the 1949 Geneva Conventions, and to the persons referred to in Articles 42 and 64 of draft Protocol I.

Id., CDDH/I/SR.43, §§ 16-19.

The United Kingdom was also one of the opposing States. Mr. Keens, stressed the importance that his delegation attached to the development of a practical and realistic system for repression of breaches. He stated that:

his delegation was bound to state its reservations in regard to the grave breaches listed in document CDDH/210, annex 2. Some countries would undoubtedly find it very difficult to mount an enquiry into events which had occurred in a remote part of the world and to qualify certain acts as grave breaches when the situation was confused and evidence was lacking.

Id. § 43-46.

On the other hand, another group of States (the socialist countries, various Arab States, and a few western countries, proposed to extend the concept of grave breaches by including, *inter alia*, violations of combat rules, following the model of war crimes tribunals (particularly the Nuremberg International Military Tribunal). The delegation of these countries, in their statements, counter argued the viewpoints of the above-mentioned countries.

Mr. Cassese, the Italian delegate, answered the argument advanced by the United Kingdom delegate. He first stated that his delegation favored the idea of including among grave breaches the use of methods and means of combat, together with the violations of the provisions protecting the civilian population against the effects of hostilities:

It considered that breaches of the provisions included in part III and part IV of the draft protocol were no less serious than infringements of substantive rules governing other equally important matters . . . that argument if accepted, would result in totally excluding battlefield crimes from the category of breaches of the Protocol. It was difficult to think that anyone would wish to go that far if only because those violations were already crimes under customary international law. The same problems of proof will arise if the aim was to make them simple breaches of the Protocol. That being so, he could not see why such violations should not fall under the category of grave breaches. Some of the penal provisions relating to grave breaches might even facilitate the search for evidence. Article 79 relating to mutual assistance in criminal matters was a case in point.

Id. §§ 46-48

Mr. Abi-Saab, the Egyptian delegate, observed that the controversy over the status of humanitarian law was largely a function of the probability of its observance in practice. One of the main questions that had to be addressed was how to bring about a high correlation between humanitarian rules and actual behavior in specific situations. He stated that his delegation considered that prevention was the most potent guarantee

After lengthy discussions, the result was the elaboration of a list that broadens the categories of grave breaches (Article 11(4) and Article 85), and includes various provisions relating to combat. It does not, however, include violations of the rules prohibiting the use of means of warfare.

Moreover, Article 11(4) of Protocol I made certain violations of Article 11 (concerned with the protection of the physical and mental integrity of the human person)⁸⁵ grave breaches of the Protocol.

and consistently sought to perfect the system of scrutiny of implementation. He also stated that after the loose system of scrutiny adopted in Article 5 of the draft protocol, it was necessary to concentrate on the repression of breaches as a remedial action. *Id.* §§ 14-15. Refuting the argument of the U.S.A. delegate regarding the ambiguity and the imprecise provisions and their consequences, he stated:

[although] many of the prohibitions in part III and IV were loosely formulated . . . their violations could not be sufficiently defined to entail criminal responsibility for their perpetrators, according to the fundamental principle *nulla poena sine lege* . . . [the] objection raised a technical question of drafting, which could be taken into consideration in the Drafting Committee, but it could not place an obstacle in the way of the sanctioning of some of the most serious violations of Protocol I . . . [He added that] it had to be recognized that violations committed against persons in the power of the enemy such as maltreatment of prisoners of war or civilians in occupied territory were much easier to conceal than air attacks against civilian objectives for instance.

Id. §§ 45-48.

For a thorough discussion on means of warfare, its general principles and evolution, see Antonio Cassese, *Means of Warfare: The Traditional and the New Law*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT*, (Antonio Cassese ed., 1979).

85. Article 11 reads as follows:

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:
 - a) physical mutilations;
 - b) medical or scientific experiments;
 - c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.
3. Exceptions to the prohibition in paragraph 2(c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of

Article 11(4) of Protocol I:

[C]onstitutes a part of the compromise on donations of blood and skin, but it is of broader application and does not only cover forbidden removal of tissue or organs. On the other hand, it does not apply to every violation of paras 1, 2 and 3 of the Article, but only to specific ones, namely:

- a) to intentional violations (“any *wilful* act or omission”)
- b) to violations *seriously* endangering the physical or mental health or integrity of a person
- c) to violations where the victim does not belong to the same side as the person committing the violation.⁸⁶

paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written Statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Protocol I, *supra* note 23, art. 11.

86. BOTHE, *supra* note 49, at 115. As provided in the ICRC commentary on the Protocol, for a breach of §§ 1, 2 and 3 to be considered a grave breach, it must accomplish the following conditions cumulatively:

- a) It must be a *wilful* act or omission. Thus, no grave breach can be committed through negligence, even though this may constitute a breach of paragraphs 1, 2 and 3. Moreover, the adjective *wilful* also omits persons with “an immature or greatly impaired intellectual capacity . . . or persons acting without knowing what they are doing.” On the other hand, “the concept of recklessness . . . must also be taken to be part and parcel of the concept of *wilfulness*.”
- b) The act or omission must “seriously endanger the physical or mental health or integrity” of the persons concerned. “This does not go as far as the principle contained in paragraph 1 which prohibits acts or omissions which ‘endanger health.’” Thus, “[t]he scope of the acts or omissions covered by paragraph 4 is therefore more restricted. However, the health does not necessarily have to be affected by the act or omission, but it must be clearly and significantly endangered. . . .”
- c) “The act or omission must violate any of the prohibitions in paragraphs 1 and 2 or fail to comply with the requirements of paragraph 3. . . .”
- d) Finally, “the act or omission concerned must be committed against a ‘person who is in the power of a Party other than the one on which he depends.’” Thus acts or omissions committed “in connection with deprivation of liberty imposed by a Party to the conflict on its own nationals are not considered as grave breaches, even if they are wilful and seriously endanger their physical or

According to Article 85(1) of Protocol I, the rules of repression of the breaches and the grave breaches stipulated in the four Geneva Conventions operate to the repression of all the breaches (not only to grave breaches) of Protocol I.⁸⁷ This reference is of particular importance as it combines the content of Article 85 referring to repression with the obligation of State parties to try or extradite.⁸⁸ Moreover, Article 85(2)⁸⁹ of the Protocol extends the grave breaches defined in the Conventions to those new categories of protected persons introduced by the Protocol.⁹⁰

Furthermore, Article 85(3) introduces a selected number of acts committed on the battlefield, extending the system applied in the Geneva Conventions to elements brought into humanitarian law from the law of

mental health or integrity, and even if they are deprived of liberty, as a result of a situation referred to in Article 1.”

See SANDOZ, *supra* note 28, at 160.

87. Article 85(1) reads as follows: “The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.” Protocol I, *supra* note 23, art. 85(1).

88. Fischer, *supra* note 80, at 74.

89. Article 85(2) reads as follows:

Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

Protocol I, *supra* note 23, art. 85(2).

90. The qualification of grave breaches is extended to acts defined as such in the Conventions when they are committed against the following categories of persons and objects:

[1.] Persons who have taken part in hostilities and have fallen into the power of an adverse Party within the meaning of Articles 44 (Combatants and prisoners of war) and 45 (Protection of persons who have taken part in hostilities): this definition is broader than that of prisoners of war in the Third Convention;

[2.] Refugees and Stateless persons within the meaning of Article 73 (Refugees and Stateless persons) (which makes them protected persons under the Fourth Convention);

[3.] The wounded, sick and shipwrecked of the adverse Party: Article 8, sub-paragraphs (a) and (b) enlarges the corresponding categories as defined in the Conventions;

[4.] Medical or religious personnel, medical units and transports under the control of the adverse Party and protected by the Protocol: the same applies as for the wounded, sick and shipwrecked [*cf.* Article 8, sub-paragraphs (c), (d), (e) and (g).] The expression “under the control of the adverse Party” is justified by the fact that such persons and objects may come, for example, from a non-belligerent State, an aid society recognized and authorized by such a State or even an impartial international humanitarian organization which makes them available to a Party to the conflict.

SANDOZ, *supra* note 28, at 993.

the Hague.⁹¹ “These acts are expressly called grave breaches of the Protocol despite the fact that as between States which are Parties to both the Geneva Conventions of 1949 and Additional Protocol I, the Geneva Conventions apply as supplemented by Additional Protocol I.”⁹² The acts stipulated in Article 85(3) are grave breaches only if they caused death or serious injury to body or health, and are committed willfully, in violation of the relevant provisions of the Protocol.⁹³

In addition, Article 85(4) enumerates a set of unrelated offences that are considered to be grave breaches.⁹⁴ In other words, there is no

91. Article 85(3) reads as follows:

In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- a) making the civilian population or individual civilians the object of attack;
- b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
- c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
- d) making non-defended localities and demilitarized zones the object of attack;
- e) making a person the object of attack in the knowledge that he is *hors de combat*;
- f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

Protocol I, *supra* note 23, art. 85(3).

92. Fischer, *supra* note 80, at 69.

93. The relevant provisions to Article 85(3)(a) are: Article 49 (Definition of attacks and scope of application); Article 50 (Definition of civilians and civilian population); Article 51 (Protection of the civilian population); and Article 57 (Precautions in attack). Protocol I, *supra* note 23, art. 49, 50, 51, 57.

The relevant provisions to Article 85(3)(b) are: Article 49 (Definition of attacks and scope of application); Article 50 (Definition of civilians and civilian population); Article 51 (Protection of the civilian population); Article 52 (General protection of civilian objects); and Article 57 (Precautions in attack). *Id.* art. 49, 50, 51, 52, 57.

The relevant provisions to Article 85(3)(c) are: Article 49 (Definition of attacks and scope of application); Article 50 (Definition of civilians and civilian population); Article 51 (Protection of the civilian population); Article 52 (General protection of civilian objects); Article 56 (Protection of works and installations containing dangerous force); and Article 57 (Precautions in attack). *Id.* art. 49, 50, 51, 52, 56, 57.

The relevant provisions to Article 85(3)(d) are: Article 59 (Non-defended localities); and Article 60 (Demilitarized zones). *Id.* art. 59, 60.

The relevant provision to Article 85(3)(e) is Article 41 (Safeguard of an enemy *hors de combat*). *Id.* art. 41.

The relevant provisions to Article 85(3)(f) are: Article 37 (Prohibition of perfidy); and Article 38 (Recognized emblems). *Id.* art. 37, 38.

94. Article 85(4) reads as follows:

In addition to the grave breaches defined in the preceding paragraphs and in the

common denominator for the acts declared to be grave breaches in paragraph four other than the fact that they fit into neither paragraph two nor paragraph three.⁹⁵ These acts declared as grave breaches are subject to two conditions: that they be committed 1) willfully; and 2) in violation of the Conventions or Protocol I. Unlike Article 85(3), Article 85(4) does not lay down particular consequences (like death or serious injury to body or health) as constitutive elements which the grave breaches it defines have in common.⁹⁶ Finally, Article 85(5) provides a general clause, stipulating that the grave breaches of the Conventions and Protocol I shall be regarded as war crimes.⁹⁷ However, it is subject to the reservation that this is without prejudice to the application of the Conventions and of the Protocol.⁹⁸

Apparently, "the demarcation line between the 'grave breaches' and other violations of the Conventions and the Protocols is a vague one."⁹⁹ Interestingly, Protocol I provides a new category of violations or

Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol:

- a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

Protocol I, *supra* note 23, art. 85(4).

95. BOTHE, *supra* note 49, at 517.

96. SANDOZ, *supra* note 28, at 999.

97. Article 85(5) reads as follows: "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes." Protocol I, *supra* note 23, art. 85(5).

98. It should be noted that, during the preparatory work, the addition of the phrase "without prejudice to the application of the Conventions and of the Protocol" was "to make it clear that the declaration that grave breaches are war crimes has neither the consequence that all war crimes are grave breaches nor the result that persons found guilty of having committed grave breaches lose the protection of humanitarian law." See BOTHE, *supra* note 49, at 521.

99. Bert V.A. Roling, *Aspects of the Criminal Responsibility for Violations of the Laws of War*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 213 (Antonio Cassese ed., 1979).

breaches, not mentioned in either the Four Geneva Conventions or in Protocol II,¹⁰⁰ namely, the “serious violations.” The term “serious violations” was mentioned outside of Article 90, in Article 89 of Protocol I.¹⁰¹ The characteristic of the word “serious” is obviously related to the severity, while the characteristic of the word “violation” is related to a conduct (either act or omission) that is contrary to the Conventions and the Protocol.¹⁰² However, the scope and meaning of the term “serious violations,” remains indistinct.¹⁰³ Thus, in the commentary on Article 89, the ICRC suggested that such violations include the following conduct:

- [1] isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature.
- [2] conduct which is not included amongst the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;
- [3] “global” violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol.¹⁰⁴

Roling suggested that, “[f]rom the context of Article 90[(2)(c)(i)], one is entitled to conclude that a ‘serious violation’ is something between a non-grave and a ‘grave breach,’ something that is less than a ‘grave breach.’”¹⁰⁵ Additionally, the ICRC commentary suggestions imply that the term “serious violations” constitutes a category of violations that falls between the “grave breaches” and the “simple breaches” envisaged in both the Conventions and the Protocol.

Nevertheless, it might be argued that the suggestions contained in the ICRC commentary, which imply that “serious violations” exist as a category between “simple breaches” and “grave breaches,” are paradoxical with the ICRC commentary itself. The ICRC commentary provides that “[t]he United Nations actions [in response to serious violations] to which Article 89 refers may therefore consist, . . . where

100. Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

101. The term “serious violations” has been mentioned in Protocol I in only one article besides Article 90, which is Article 89. Article 89 reads as follows: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” Protocol I, *supra* note 23, art. 89.

102. *Id.*

103. *Id.*

104. SANDOZ, *supra* note 28, at 1033.

105. Roling, *supra* note 99, at 213.

appropriate, of coercive actions which may include the use of armed force.”¹⁰⁶

If one places a number of considerations in mind, a contrary view will present itself. The primary consideration here is that in determination of the severity of a conduct (excluding the consequence of the conduct upon the protected persons or objects, since serious violations, grave and simple breaches might overlap in effect), one of the main elements is to consider the consequences that emerge as a result of this conduct (condemnation and sanctions). In the international community, disregarding political motivations, these consequences are crystallized in the degree of the condemnation of conduct, and the typology of action that might be conceived to repress it. According to the ICRC commentary, in situations of “serious violations,” the United Nations can use armed force.¹⁰⁷ This is the utmost action that can be undertaken by the topmost organization in the international community. Thus, one might deduce that “serious violations” are more severe than “grave breaches.”

On the other hand, it can be argued that the categories provided by the ICRC commentary imply that the concept of “serious violations” is a wide one that encompasses that of “grave breaches,” in conjunction with other violations of a serious nature. This is true insofar that maintaining the opposing view in the aforementioned argument only allows the United Nations to use armed force and intervene in serious violations. It does not give it such leeway in case of “grave breaches.” This is unacceptable, in view of the fact that, “from the treaty history [the Geneva Conventions] it seems to be clear that the term ‘grave breaches’ was chosen . . . to emphasize the difference between these crimes of serious character and ordinary crimes.”¹⁰⁸

However, consideration of the recent International Statutes and Judgments is enlightening. For example, the Statute of the International Criminal Tribunal of former Yugoslavia, in Article 1 under the title “Competence of the International Tribunal,” reveals that: “[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”¹⁰⁹ Moreover, in

106. SANDOZ, *supra* note 28, at 1035.

107. Official Records, *supra* note 21.

108. Fischer, *supra* note 80, at 70.

109. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. 5/RES/827 (1993).

Prosecutor v. Dusko Tadic the Court stated that, “[a] systematic construction of the Statute emphasizes the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to ‘serious violations’ of international humanitarian law.”¹¹⁰ This view is emphasized in the Statute of the International Criminal Tribunal of Rwanda¹¹¹ and the Rome Statute of the International Criminal Court.¹¹²

Thus, it might be concluded that “serious violations” is of a broad meaning comprising “grave breaches” and other violations of a serious nature. Moreover, this view might be supported through a consideration of the wording of Article 90(2)(c)(i), which uses the phrase “or other serious violations.”¹¹³ Here, the phrase “or other” implies that the grave breaches are considered to be serious violations, but the serious violations are not limited to grave breaches.

However, it should be noted that ambiguity and lack of definitions are the most reasonable grounds upon which States may be motivated to elude the signature, ratification, or accession to treaties. Thus, it is imperative that the Commission define the “serious violations” that fall within its competence. It should do so with the guidance of the developments in international law, given that “[m]inor violations may become serious if they are repeated.”¹¹⁴

As previously mentioned, the Commission is only competent to enquire into facts and not to judge. This leads one to ask whether or not restriction is absolute, especially in the context of evaluating an alleged violation. It is clearly established that the competence of the Commission to enquire does not extend to all the alleged facts or violations submitted by the Parties to a conflict. This is due to the fact that it is only constrained to enquire into “grave breaches” and “serious violations” of the Conventions and the Protocol. Thus, evidently, establishing the competence of the Commission is tied to judging the alleged violation. Nevertheless, the Commission “must be careful not to include . . . elements of legal evaluation in its report.”¹¹⁵ Moreover, its

110. *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Int’l Crim. Trib. of the Former Yugoslavia, (Oct. 2, 1995) (decision on the defense motion for interlocutory appeal on jurisdiction).

111. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. 5/RES/955 (1994).

112. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, preamble, U.N. Doc. A/CONF. 183/9 [hereinafter the Rome Statute].

113. Protocol I, *supra* note 23, art. 90(2)(c)(i).

114. SANDOZ, *supra* note 28, at 1045.

115. *Id.*

legal appreciation must remain an internal element and can lead neither to a formal judgment nor even to a report on the law to be applied.¹¹⁶

C. *Good Offices*

Under the *chapeau* “the Commission shall be competent to,” Article 90(2)(c)(ii) provides as follows: “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.” This provision authorizes the second function of the Commission, which is to perform good offices with the object of facilitating prevention or repression of breaches of the Conventions and the Protocol.¹¹⁷ This provision emerged from a Japanese amendment.¹¹⁸

The dictionary definition attached to the term “good offices” is “the involvement of one or more countries or an international organization in a dispute between other countries with the aim of contributing to its settlement or at least easing relations between the disputing countries.”¹¹⁹

Unlike the delineated area of competence of the Commission in inquiring (only in grave breaches and serious violations), the area of competence of the Commission to perform good offices is not specified. However, one author suggested confining the competence of the Commission in performing good offices to “serious violations,” stating that:

[a]t first sight it is not quite clear whether or not the violation has to be “serious.” Considering, however, that the Commission is

116. BOTHE, *supra* note 49, at 544.

117. Protocol I, *supra* note 23, art. 90(2)(c)(ii).

118. Mr. Yamato introduced the Japanese amendment, which called for inclusion of good offices as one of the functions to be assigned to the Commission concomitantly with enquiring. He stated that:

[a]s there were historical examples to show that inquiry Commissions set up solely for the purpose of investigating an incident or an alleged violation had often played a useful intermediary role between the Parties to a conflict, his delegation recommended that the Conference should adopt a provision enabling the inquiry Commission to perform its good offices so as to facilitate the repression or prevention of breaches, but only in so far as there was no risk of its failing to be impartial.

Official Records, *supra* note 21, CDDH/I/SR.56, § 20.

In the Working Group, the expression “facilitate through its good offices, repression or prevention of breaches and to restore an attitude of respect for the Conventions and the Protocol” was generally supported, which was a combination of two proposals submitted by Pakistan and Japan. However, a number of amendments were still brought before Committee I. “The text adopted by Committee I and also by plenary meeting has simpler wording, that is, ‘facilitate, through its good offices the restoration of an attitude of respect for the Conventions and this Protocol.’” This quote came from the amendment of the German Democratic Republic as further amended by the USA. See Takemoto, *supra* note 20, at 38.

119. BLACK’S LAW DICTIONARY 701 (7th ed. 1999) [hereinafter BLACK’S].

supposed to enquire into grave breaches or “serious violations” exclusively and further taking into account the aspects of “procedural economy,” it is suggested that it must be a “serious” violation.¹²⁰

This suggestion is not constructed on solid bases. First, and from a humanitarian and preventative viewpoint, if the Commission is entitled to perform good offices in simple breaches, it will prevent the worsening of many situations. This holds true, as many simple breaches might escalate into serious violations or grave breaches. Thus, it could be deemed necessary to perform good offices in simple breaches to prevent deterioration of situations.

Second, and as stipulated in Article 90(2)(c)(ii), the goal of good offices is to “facilitate the restoration of an attitude of respect for the Conventions and this Protocol.”¹²¹ It, thus, did not confine the good offices to serious violations or grave breaches. Conversely, it provides a flexible concept for performing good offices.

Third, the competence of the Commission to enquire is irrelevant to the competence of the Commission to perform good offices. In fact, the two channels are completely unconnected. Thus, it is unpersuasive to invoke the Commission’s area of competence in enquiring (which is an investigation process), in determining its competence in performing good offices (which is a contribution aiming to settle a dispute or ease relations). This holds true in view of two aspects. First, Article 90(3) and (4) provides certain procedures for inquiring; meanwhile no such procedures are provided for good offices.¹²² Second, the outcomes of the two mechanisms are different, as the enquiry culminates in a report submitted to the Parties. On the other hand, there is no such result in good offices, since that function merely culminates in recommendations to the parties. Consequently, one can conclude that good offices can be offered in the event of any breach of the Conventions and the Protocol and are not limited to serious violations or grave breaches.

However, two questions might be significant in offering good offices. First, whether the Commission needs a request to “offer” good offices or whether it can “offer” on its own initiative. Second, whether offering good offices should be limited to situations where the States (parties to a conflict or dispute) are parties to the Conventions and the Protocol.

There is no easy answer to the first question. Article 90 is silent on

120. Kussbach, *supra* note 33, at 178. This seems to be the viewpoint of the ICRC commentators, as it was stated that, “when it has taken note of facts which seem to it to constitute grave breaches or serious violations, the Commission is invited to facilitate, through its good offices . . .” See SANDOZ, *supra* note 28, at 1046.

121. Protocol I, *supra* note 23, art. 90(2)(c)(ii).

122. *Id.* art. 90(3) and (4).

the issue, and the ICRC did not address this issue. Conversely, a minimal amount of scholarly work has been undertaken for the review and analysis of the law and practice of good offices. It is, therefore, necessary to refer to the practice of good offices in answer to this question. In 1958 the U.S. and U.K. practiced good offices in a dispute between France and Tunisia following a French attack on a Tunisian village.¹²³ In this case, "the United States informed the Tunisian and French Governments of its willingness to make available its good offices in conjunction with the United Kingdom."¹²⁴ This denotes that good offices might be offered even without being requested by the Parties to a conflict (but it is subject to the acceptance of the Parties to the conflict). This fact will enhance the role of the Commission, enabling it to launch its activities and gain credibility.

Considering the second question, one must take into account the silence of Article 90 and the preparatory work, while bearing in mind

123. After an attack on the Tunisian village of Sakiet-Sidi-Youssef on February 8, 1958 by French military aircraft, "allegedly to deal with an Algerian rebel stronghold," Tunisia informed the United Nations Secretary General on February 9 of the actions which were characterized as "armed aggression" and proclaimed that the Tunisian Government in self-defense had banned French troops stationed in Tunisia from leaving their barracks and had recalled its Ambassador in Paris. "On February 12, the Tunisian Government requested the Security Council to consider its complaint [S/3952] regarding the French attack" and to take whatever action it might deem appropriate to put an end to the conditions threatening Tunisian security and international peace and security. In a counter complaint (S/3954), France asked the Council to consider the situation "resulting from the aid furnished by Tunisia to rebels enabling them to conduct operations from Tunisian territory directed against the integrity of French territory and safety of the persons and property of French nationals." The Tunisian and the French Governments accepted the offer. However, the following statement was made by the United States representative Mr. Wadsworth. After confirming the offer of good offices, he stated:

[I]n the first instance, the responsibility for a peaceful solution of the differences which are outstanding between France and Tunisia lies with those two countries under Article 33 of the United Nations Charter. The fact that the Governments of these two countries have elected to accept the good offices, of two mutual friends is taken by my Government as an indication of their sincere desire to reach a solution. . . . To a large extent, the precise manner in which these good offices are to be implemented will have to be worked out by the four powers involved. As one of the two powers which are extending their good offices, the United States hopes to be able to offer affirmative suggestions to advance the objective of a peaceful and equitable solution of these problems.

12 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 997-998 (1971).

The United Kingdom representative, Mr. Dixon, also stated:

[I]t clearly remains to be seen how the good offices which we had offered can in practice best be exercised, but it is certainly our intention to proceed with this task with the deepest sense of responsibility. While our essential object is to bring the Governments of France and Tunisia together, we may wish to offer some positive suggestions to them. . . .

Id.

124. *Id.* at 997.

that the good offices, from a humanitarian perspective, will help in settling disputes and easing situations between the parties to a conflict. This can consequently prevent violations or, at least, prevent their intensification. In addition, if one considered the general non-discriminatory character of the humanitarian law, one can infer that offering good offices is not confined to the parties of the Conventions and the Protocol.

Finally, it should be noted that the recommendations submitted by the Commission, as a result of its good offices, are subject to the same condition (non inclusion of any legal evaluation) aforesaid in the reports submitted as an outcome of the enquiry process. Additionally, good offices should be offered after any enquiry, because, if it is performed, it might help in diminishing tension between the Parties. This will lead to the observance and respect of humanitarian law, which is the primary aim of the Conventions and the Protocols.

D. Other Situations

Article 90(2)(d) stipulates that, “[i]n 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.”¹²⁵

“In other situations,” is the loose and general phrase with which Article 90(2)(d) commences.¹²⁶ Proposed by the German Democratic Republic representative, this provision was initially Article 90(2)(a) of the Committee draft. It was originally read as follows: “[a]t the request of a Party to the conflict, the Commission shall institute an enquiry with the consent of the other Parties concerned in relation to any alleged violation of the Conventions or of this Protocol.”¹²⁷

This provision was subject to an amendment by the United States of America¹²⁸ and it was transferred to Article 90(2)(d). However, “there was an assurance not only from the sponsors but also from the representative of the GDR, that no substantial change was intended, only an improvement in the drafting. It has to be doubted whether the change is an improvement.”¹²⁹

125. Protocol I, *supra* note 23, art. 90(2)(d).

126. *Id.*

127. BOTHE, *supra* note 49, at 543-544.

128. The amendment of the United States of America was in the forty-fifth Plenary meeting, held on May 30, 1977. Mr. Aldrich, the U.S. representative, while introducing the amendment, stated that “[i]n the new sub-paragraph (d) the obligation to obtain the consent of the Party which was the subject of the enquiry was retained.” The amendment was put to vote, and it was adopted by 43 votes in favor, 13 votes against and 33 abstentions. See Official Records, *supra* note 21, at 325.

129. BOTHE, *supra* note 49, at 544.

Although it is agreed in the ICRC commentary, and most of the few scholarly works analyzing this provision, that it refers to Article 90(2)(a) and not to Article 90(2)(c), the position of this reference is questionable. According to the interpretation doctrine *ejusdem generis*, “when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type.”¹³⁰ The expression *noscitur a sociis* is “a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.”¹³¹ Thus, it might be argued that according to the aforementioned doctrines of interpretation, Article 90(2)(d) refers to Article 90(2)(c) and not to Article 90(2)(a).

Application of the abovementioned interpretation can be convincing. However, if Article 90(2)(d) is read in conjunction with Article 90(2)(e) (which will be discussed in the following sub-section), this interpretation is unacceptable. This is due to the fact that, should the competence of the Commission be extended to situations other than grave breaches and serious violations in the Conventions and the Protocol, the Commission will be competent to enquire as to all the violations of the Conventions and the Protocol. This will lead to the suspension of the enquiry system of the Conventions (articles 52, 53, 132, and 149), contrary to the stipulation of Article 90(2)(e).

Nevertheless, the interpretation of the ICRC commentary seems to be more concordant with the wording of Article 90(2)(d). This holds true, as it offers the possibility of turning to the Commission to those States that have not recognized the mandatory competence of the Commission according to the optional clause in Article 90(2)(a). Thus, in providing an alternative to the compulsory competence, it touches on consent, which is more likely to be related to Article 90(2)(a). Thus, “[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, subject, however, to the condition that the challenged Party gives its consent.”¹³²

E. Common Articles 52, 53, 132, 149 and Article 90

The relationship between the enquiry system of the Four Geneva Conventions of 1949 and Article 90 is illustrated in Article 90(2)(e).¹³³

130. BLACK'S, *supra* note 119, at 535.

131. *Id.* at 1084. For a thorough discussion for the doctrines of interpreting the general words and special words, see MCNAIR, *supra* note 44, at 393-410.

132. SANDOZ, *supra* note 28, at 1047.

133. This provision originated from an oral amendment proposed by the United States

That Article provides that, “[s]ubject 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 this Protocol.”¹³⁴

Common Articles 52, 53, 132, and 149 of the Four Geneva Conventions respectively, read as follows:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.¹³⁵

Inevitably, the question that will arise is: What is the impact of adopting Article 90 as whole, and particularly Article 90(2)(e), on the enquiry articles in the Four Geneva Conventions? The answer may be found in the phrase “subject to the foregoing provisions of this paragraph,” and paragraph two in its entirety.

It should be noted that the impact of the inclusion of Article 90(2)(e) on the compulsory competence system in the Conventions and on the area of competence emanates from a general interpretation rule.

of America at the time when Committee I was going to adopt that Article. Discussions focused on its procedural aspects: whether the manner of its submission was permissible under the Rules of Procedure of the Conference, whether priority for voting should be given to the second paragraph of the final working paper or to the amendment of the German Democratic Republic with the United States of America oral amendment, and whether voting should take place on the second paragraph as a whole or on sub-paragraph by sub-paragraph. There was no debate on the substance of Article 90(2)(e). Takemoto, *supra* note 20.

However, an interesting speech was made by the Syrian delegate while explaining his vote against Article 90 as whole in its present form. He stated:

[B]y providing for optional recourse by the opposing Parties to the proposed Fact-Finding Commission, paragraph 2 of the article adds nothing to the legal position already in effect under the 1949 Geneva Conventions. On the contrary, the wording of sub-paragraph (a) of the paragraph concerned [paragraph 2] is a retrograde step compared with the Conventions. While Articles 52, [53], 132, 149 of the Conventions state that “an enquiry shall be instituted”, if necessary, the wording of paragraph 2 of this article leaves it to the Parties to the conflict to decide whether or not to resort to an enquiry.

There is no element of compulsion.

See Official Records, *supra* note 21, at 384.

134. Protocol I, *supra* note 23, art. 90(2)(e).

135. First Convention, *supra* note 12, art. 52; Second Convention, *supra* note 17, art. 53; Third Convention, *supra* note 17, art. 132; Fourth Convention, *supra* note 17, art. 149.

According to this rule, the provisions of an earlier treaty should be subject to the provisions of a later one, and the general provisions are subject to special ones. The Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case¹³⁶ expressed this view, maintaining that “in case of doubt, the Protocol, being a special and more recent agreement, should prevail.”¹³⁷ Thus, if the provisions of an earlier treaty are general, and those of the later are special and detailed, that fact indicates that the parties intended the special one to prevail.

It seems that the enquiry provisions in the Conventions are affected by the inclusion of Article 90(2)(e) in two particulars. First, “the compulsory system envisaged in the common articles of the Conventions has been altered by the inclusion of that phrase in the Protocol to a voluntary system based on the consent of the parties concerned.”¹³⁸ Second, the grave breaches and the serious violations are excluded from the competence of the enquiry system of the Conventions. In other words, the area of competence of the enquiry system of the Conventions will be limited to other violations and not grave breaches or serious violations of the Conventions and the Protocol. Conversely, the Commission’s area of competence is also restricted to grave breaches and serious violations of the Conventions and the Protocol, as stipulated in Article 90(2)(c)(i).

Although Article 90(2)(e) narrowed the area of competence of the enquiry provisions of the Conventions, it expanded its competence to include the other violations (not grave breaches or serious violations) envisaged in the Protocol. It did so through the inclusion of the phrase “shall continue to apply to any alleged violation of this Protocol.” Thus, in regard to other violations that are not grave breaches or serious violations of the Conventions, the enquiry provisions in the Conventions will continue to apply, and these provisions will be extended to the same categories of violations of Protocol I.

4. The Chamber of Enquiry

The Chamber of enquiry is that body which undertakes all enquiries. The following two subsections shall highlight the constitution of the Chamber and the manner in which it conducts enquiry.

136. In this case the two litigating parties, Great Britain and Greece, were both parties to two instruments alleged to be in conflict: the Mandate dated July 24, 1922, and Protocol XII, annexed to the Treaty of Lausanne, dated July 24, 1923. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30) [hereinafter *Palestine Concessions*].

137. *Palestine Concessions*, *supra* note 136, at 31.

138. Takemoto, *supra* note 20, at 43.

A. *Composition of the Chamber of Enquiry*

Article 90(3)(a), reads as follows:

(a) Unless otherwise agreed by the Parties concerned, all inquiries 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.¹³⁹

Upon the receipt of a request¹⁴⁰ for an enquiry (a competent request after examination)¹⁴¹ either on the permanent basis or the ad hoc basis,

139. Protocol I, *supra* note 23, at Article 90(3)(a).

140. Under the title "Lodging the request," Rule 20 of the Rules of Procedure of the Commission provides as follows:

1. The request for an enquiry shall be addressed to the Secretariat.
2. It shall state the facts 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.
3. It shall list the evidence the requesting party wishes to present in support of its allegations.
4. It shall name the authority to which all communications concerning the enquiry shall be addressed, as well as the most expedient means of contacting that authority.
5. Where applicable and to the extent possible, it shall contain, in the enclosure, the original or a certified copy of any document cited in the list of evidence.
6. If the Commission receives a request for an enquiry under article 90(2)(d), and the consent of the other party or parties concerned has not yet been indicated, the Commission shall refer the request to that party or those parties with a request that it or they indicate its or their consent.

Rules of the IHFFC, *supra* note 27, Rule 20.

141. Providing the procedures to be followed upon the receipt of a request for an enquiry, and under the title of "Examination of the request for an enquiry," Rule 21 of the Rules of Procedure of the Commission reads as follows:

1. On receiving a request for an enquiry, the President shall without delay advise the interested party or parties of it. He shall send them, as soon as possible, a copy of the request as well as its enclosures and, subject to Rule 20(6), advise them of their right to submit, within a fixed time period, their observations concerning the admissibility of the request. The setting of that time limit does not however prevent the Commission from opening the enquiry at once.
2. The Commission may ask the requesting party to supply additional information within a fixed time limit.
3. If the competence of the Commission is contested, the latter shall decide by

the Chamber of enquiry should be set up to undertake the enquiry. The phrase “unless otherwise agreed by the Parties concerned” is significant and thus worthy of comment. In essence, it leaves an opening for “the possibility of any other solution which the Parties concerned may choose in common agreement, [thus Protocol I] remain[ing] flexible and susceptible to any other formulation.”¹⁴² This clause can be interpreted in the sense of its being conceivable that an enquiry be requested between more than two parties to a conflict. Therefore, this clause can be employed to legitimize the composition of a Chamber of more than seven members through the appointment of an ad hoc member by each party. Moreover, the number of Commission members appointed to the Chamber can be in excess of five. This is illustrated in the case of a multi-party conflict where an alliance between a number of the parties, in excess of five, could constitute a quorum.

The Chamber cannot perform good offices, as it is only competent to undertake enquiries. It is composed of seven members, five of whom are members of the Commission to be appointed by the President and non-nationals of the Parties to the conflict.¹⁴³ Although the possibility of the President being a national of a State party to the conflict is not addressed in Article 90(3), the solution is presented in Rule 9 of the Rules of the Procedure of the Commission. Thus, if this case arose, the President should assign the appointment of the members of the Chamber to the first Vice President or the second Vice President.¹⁴⁴

means of speedy consultation.

4. The Commission shall inform the requesting party if the request does not meet the conditions described in Rule 20, or if an enquiry cannot be conducted for any other reason.

5. All parties to the conflict shall be informed of the Commission's decision to open an enquiry.

6. If, in the course of an enquiry, the requesting party communicates to the Commission the withdrawal of its request, the Chamber shall cease its enquiry only with the consent of the other parties to the conflict. The withdrawal does not affect the payment of the costs of the enquiry in accordance with article 90(7) of the Protocol.

142. SANDOZ, *supra* note 28, at 1048.

143. It was envisaged during the preparatory work that the members of the Chamber must be nationals of neutral states so that the enquiry could be conducted in completely objective conditions, in other words, the members of the Chamber have to be nationals of States that maintain diplomatic relations with all States Parties to the conflict. *See* Official Records, *supra* note 21, at 209.

144. Under the title of “Temporary Replacement of the President,” Rule 9 of the Rules of Procedure of the Commission reads as follows:

The first Vice-President shall take the place of the President if the presidency is vacant or the President is prevented from carrying out his duties, especially if, in the case of an enquiry, he is a national of a party to the conflict. The second Vice-President shall replace the first Vice-President if the latter is prevented from carrying out his duties or if the office of first Vice-President is vacant.

The members of the Chamber should be appointed on the basis of equitable geographical representation. However, in this context, equitable geographical has several interpretations. First, it can be interpreted as pertaining to the *neutral* countries surrounding the parties to the conflict. Second, one may interpret it as relating to the same legal systems or civilizations. Third, it could be understood as the appointment of *members*, from neutral surrounding countries, or at least there should be members appointed to the Chamber from these neutral surrounding countries. This last interpretation could function to facilitate the task and enhance efficiency of the Chamber. However, it should be noted that the Chamber might need to take into account the cultures of the parties. Moreover, the national laws of the parties concerned should be considered, to the extent that they are consistent with the relevant international standards.

Although the President is assigned to appoint those five members, he must consult the parties to the conflict. Such consultation is obligatory according to the wording of Article 90(3)(a). However, the critical question is whether the President is obliged to comply with the results of the consultations or not. One author suggested that, should the President appoint members without the agreement of the parties to the conflict, he would be effectively jeopardizing the success of the enquiry. Accordingly, the obligation of consultation could well be transformed into a procedure of a binding opinion.¹⁴⁵ On the other hand the ICRC commentary suggested that, "the President is not formally bound by the opinion of the Parties that have been consulted."¹⁴⁶ Nonetheless, one can argue that the opinions of the parties to the conflict should ethically bind the President. That could be the case only if the disagreement is built on a reasonable basis that might negatively affect the credibility and the efficiency of the Chamber.

The two ad hoc members of the Chamber, who are to be appointed by the parties to the conflict, might or might not be members of the Commission. They "represent" the party that has appointed them.¹⁴⁷ The ad hoc members are also subject to the condition that they should not be nationals of the parties to the conflict. Although it seems that no qualifications are required in the ad hoc members, practically speaking,

The third Vice-President shall replace the second Vice-President if the latter is prevented from carrying out his duties or if the office of second Vice-President is vacant.

Rules of the IHFFC, *supra* note 27, Rule 9.

145. Philippe Bretton, *La Mise en Oeuvre des Protocoles de Geneve de 1977*, at 95 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 379 (1979).

146. SANDOZ, *supra* note 28, at 1048.

147. *Id.*

the ad hoc members might raise doubt over the impartiality of the Chamber and the enquiry. This is due to the fact that each party to the conflict will appoint one of them and he/she will be representing this party. Thus, it must be suggested that they possess the qualifications outlined in Article 90(1)(a). This is because they will be members of the Chamber, which is the body that carries the investigation task as a division of the Commission. This view might be supported by the ICRC commentary, which states that ad hoc members “should contribute to creating an atmosphere of trust within the chamber itself.”¹⁴⁸ Impartiality is essential in creating this atmosphere of trust. Moreover, the view of the ICRC Commentary might be further supported by the fact that, during the preparatory work, the suggestion that the Chamber should embody ad hoc members appointed by the parties to the conflict was based on a Japanese amendment. Here, the Japanese delegates stated that, “experience showed that the participation of ad hoc members appointed by the Parties to the conflict would facilitate the Commission’s work and ensure respect for its findings.”¹⁴⁹

Given the importance of the time frame, insofar as it impacts both the success of the enquiry and the fate of the victims in the time of armed conflict, Article 90(3)(b) provides that the President is obliged to specify an appropriate time limit for the enquiry Chamber to be set up. The stated provision targeted the negation of any attempts by a party, or parties, to the conflict, to impede the setup of the Chamber. The parties could impede the setup of the Chamber by delaying their appointment of the ad hoc members. The consequences for the failure to appoint the ad hoc member or members by the party or the parties to the conflict will be that the President shall (himself or herself) appoint two ad hoc members, “perhaps after a final consultation with the parties.”¹⁵⁰

Surprisingly, neither Article 90(3)(b) nor the Rules of Procedure of the Commission¹⁵¹ provide any guidelines for the appropriate time limit,

148. *Id.*

149. Official Records, *supra* note 21, at 194.

150. SANDOZ, *supra* note 28, at 1049.

151. Rule 23 of the Rules of Procedure of the Commission, entitled “Formation of the Chamber” reads as follows:

Unless the interested parties agree otherwise, the following provisions apply:

- a) The President shall appoint, after consultation with the Bureau and the parties to the conflict, and on the basis of equitable geographical representation, five Members of the Chamber, not nationals of any party to the conflict.
- b) The President shall invite the parties concerned to appoint, within a fixed time period, two additional persons, not nationals of any party to the conflict, as ad hoc Members of the Chamber.
- c) If one or both of the ad hoc Members have not been appointed within the time limit set under Rule 23(b), the President shall immediately make

although they should have. However, if the object and purpose of setting up the enquiry Chamber is considered, it will be concluded that the appropriate time limit should be very few days. This is validated by the fact that a successful enquiry necessitates the instantaneous collection of evidence. The importance of this is self-evident considering the vulnerable nature of evidence, whereby it may either fade away or be deliberately eliminated by the violator.

B. Conduct of the Enquiry

Subsequent to the composition of the Chamber of enquiry, consistent with Article 90(3), the question of how the enquiry will be carried out by this Chamber surfaces. At this juncture, Article 90(4) comes into play, which reads as follows:

- a) The Chamber set up under paragraph 3 to undertake an inquiry 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.¹⁵²

Although the very first step to be taken by the Chamber is to invite the parties to the conflict to assist it and to present evidence, this obligation must be understood in its proper context. Thus, it should be regarded as a call upon the Parties to assist the Chamber and to present the evidence they have. It does not, however, prevent the Chamber from searching for evidence by itself without waiting for a response to this invitation. This is confirmed by the fact that the parties are not obliged

the appointments necessary to fill the seats of the Chamber.

d) The President of the Commission shall appoint the Head of the Chamber.

e) If a Member appointed as a member of a Chamber believes that there are reasons disqualifying him from participating in the enquiry, he shall immediately impart them to the President, who may appoint another member.

Rules of the IHFFC, *supra* note 27, Rule 23. The above-mentioned rule gives no guidance to the appropriate time limit. It is recommended to include a certain time limit in the Rules of Procedure in order to avoid any disputes in this matter, as it might be conceivable that the delay in appointing the ad hoc members in most of the cases will be caused by the wrongdoer. Thus, it is also conceivable that this party might also challenge the appointment of the ad hoc member by the President on the basis that they were not given the appropriate time limit, which might result in more delay for setting up the Chamber.

152. Protocol I, *supra* note 23, art. 90(4).

to assist the Chamber or to present evidence as understood from the use of the verb "invite." Moreover, using the verb "assist" also supports this. However, it should be noted that the invitation to present evidence is exclusively for the "Parties to the conflict" and not to any other party, even if it is concerned. On the other hand, the Chamber can accept evidence from other parties concerned. This is valid insofar that the phrase "Parties to the conflict" is clearly related to the invitation. Furthermore, the phrase "[t]he Chamber may also seek such other evidence as it deems appropriate," sustains this view.

As the Chamber is not obligated to accept the veracity of the evidence presented by the parties, it "may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*." However, the Chamber's undertaking of an *in loco* investigation raises a number of questions. The first is whether or not the parties to the conflict are obliged to permit the Chamber to carry out an investigation *in loco*. Second, are the parties obliged to facilitate the Chamber's mission while investigating *in loco*? Finally, what is the international status of the members of Chamber and what are the privileges and immunities granted to the Chamber while investigating *in loco*?

Regarding the first question, if the parties to the conflict are States that have recognized the competence of the Commission in advance, pursuant to Article 90(2)(a), they are clearly bound by the entirety of Article 90. Accordingly, they are obliged to permit the investigation by the Chamber *in loco*. On the other hand, if the parties to the conflict have accepted the competence of the Commission pursuant to Article 90(2)(d) without any special agreement that bars the investigation *in loco*,¹⁵³ the parties are also obliged to permit the investigation *in loco*. Logically, this obligation includes that of granting the Chamber entry to their territories.

As regards the second question, it is to be noted that it is clearly related to the obligations outlined within the framework of the above response to the first question. However, facilitation of the Chamber's investigation implies that, "it should be provided with all the facilities necessary for this. Ideally it would be assisted by qualified personnel, in the sense of Article 6 of the Protocol."¹⁵⁴ Moreover, facilitation of

153. See BOTHE, *supra* note 49, at 545. Bothe states that "[b]y recognizing the competence of the Commission in accordance with paragraph 2(e), the State has also recognized the right to carry out investigations *in loco* (para. 4 (a)). A special agreement could exclude the right to carry out such investigations." *Id.*

154. SANDOZ, *supra* note 28, at 1049. Article 6 of the Protocol under the title of "qualified persons" stipulates that:

1. The High Contracting Parties shall, also in peacetime, endeavour, with the

investigation *in loco* implies that the Chamber's investigation should not be obstructed. Such obstruction assumes a multitude of forms, e.g. threatening witnesses or retaliation against them or against their relatives, etc., all of which are banned in accordance with the obligation to act in good faith. That obligation dictates that, "[t]he performance of treaties is subject to an over-riding obligation of mutual good faith."¹⁵⁵ In essence, it directly flows from the fundamental rule *Pacta Sunt Servanda*, which states that, "treaties are binding on the parties and must be performed in good faith,"¹⁵⁶ a rule that has now become a part of customary international law.¹⁵⁷

Surprisingly, in consideration of the third and final question, one realizes that Article 90 failed to tackle the international status and the protection of the members of the Chamber while carrying on investigations. "There is no established requirement that they be granted diplomatic status yet they should receive some form of protection while they are conducting enquiry 'in country.'"¹⁵⁸ However, this problem was

assistance of the national Red Cross [Red Crescent, Red Lion and Sun] Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.

2. The recruitment and training of such personnel are within domestic jurisdiction.

3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.

4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Protocol I, *supra* note 23, art. 6.

155. MCNAIR, *supra* note 44, at 465.

156. MENON, *supra* note 57, at 55.

157. Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 783 (1959).

158. Roach, *supra* note 40, at 177. It is useful to note that the members of fact-finding bodies working within the United Nations system are protected by the Convention of 1946 on the privileges and immunities of the United Nations and the corresponding Convention relating to the specialized agencies adopted in 1947. Article 43 of the ICCPR provides the members of the Human Rights Committee and the members of the ad hoc conciliation Commissions with privileges and immunities of the experts on a mission for the United Nations, and it reads as follows:

The members of the Committee, and of the *ad hoc* conciliation Commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

ICCPR, *supra* note 24, art. 43. Article VI of the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, dealing with the privileges and immunities of experts on missions for the United Nations, reads as follows:

Experts on Missions for the United Nations

dealt with in Rule 27(3) and (4) of the Rules of the IHFFC, which provides as follows:

3. The President shall remind the interested parties that, during an enquiry in loco, they must assure to the members of the Chamber and all persons accompanying them the privileges and immunities necessary for the discharge of their functions which shall not be less extensive than those accorded to the experts on mission under the 1946 Convention on Privileges and Immunities of the United Nations, as well as their adequate protection.

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

SECTION 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Id. Moreover, the Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Supp. No. 49 at 299, U.N. Doc. A/49/49 (1994), allows, in Article 1, for the experts on missions to be subject to the provisions of this Convention, as it reads as follows:

For the purposes of this Convention:

(a) "United Nations personnel" means:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

Id.

4. During an enquiry in loco, the members of the Chamber shall be issued a document stating their capacity, as well as a white badge displaying in clearly visible black letters the name of the Commission in the local language.¹⁵⁹

The fact is that Rule 27(3) and (4) is problematic, insofar as it commences with the phrase, “[t]he President shall remind.” This gives an impression of formerly laid down provisions or agreements, when none exist. This paradox seems to imply that the term “shall remind,” not be used in this context, as the investigations undertaken by the Chambers will be in cases of “grave breaches and other serious violations.” Thus the investigations could take place during war time, when protection of the members of the Chambers cannot be granted by “shall remind.” Accordingly, it is highly recommended that there should be an agreement regarding the privileges and immunities to be afforded to Chambers during investigations (including the protection of witnesses, their relatives, etc.). This agreement should be concluded between the parties that had accepted the compulsory competence of the Commission. Moreover, the parties should sign a special agreement to implement the suggested agreement in cases of ad hoc enquiries.

The rules of evidence laid down in Article 90(4)(c) and (d) tend to confer to the Chamber’s activity a quasi-judicial character.¹⁶⁰ This is true insofar that the evidence can be both commented upon and challenged. However, it should be noted that the wording of Article 90(4)(b) stipulates that the parties have the right to comment on the evidence to the Commission and not to the Chamber. Meanwhile, Article 90(4)(c) does not mention whether the evidence shall be challenged before the Chamber or before the Commission. Nonetheless, one may logically assume that, should the right to comment on the evidence be practiced before the Commission, the challenging of the evidence should also be before the Commission. This interpretation is supported by the *noscitur a sociis* rule of interpretation (the meaning of an unclear word or phrase should be determined by the words immediately surrounding it).

Disclosure of the evidence, comment upon it, and the challenging of it is not exclusively conceded to the parties to the conflict. Thus, the use of the term “Parties” rather than “Parties to the conflict” in Article 90(4)(b) and (c), signifies that these rights are granted to all concerned parties. Such a statement is further supported by the following fact:

“[t]he evidence may implicate either a party to the conflict which was not the object of the allegations made, whether or not it accepted the

159. Rules of the IHFFC, *supra* note 27, Rule 27.

160. SANDOZ, *supra* note 28, at 1050.

compulsory competence of the Commission, or a State which is not Party to the conflict (for example, in case of internment in . . . a neutral country).”¹⁶¹

Article 90 barely specifies any of the procedures to be pursued by the Chamber, providing for the invitation of the Parties to the conflict to assist it and to present evidence. Accordingly, it will be up to either the Commission to establish fact-finding procedures to be followed by all Chambers, or to each Chamber to set up its own.¹⁶² Roach suggested that the former is preferable “because of the urgency of getting on with each Chamber’s work and the need for uniformity and credibility of the results of the enquiries.”¹⁶³ While this view appears persuasive, the fact is that the investigation process is characterized by constant change. That is, the task of the investigation is the collection of evidence that varies from one situation to another and, within that, from one stage to the next.

161. *Id.*

162. Roach, *supra* note 40, at 179. It is worthwhile to call attention to Rules 26 and 27 of the Rules of the IHFFC. Rule 26 reads as follows: “The Commission may establish general or specific instructions or guidelines concerning the enquiry.” Rules of the IHFFC, *supra* note 27, Rule 26.

Rule 27 provides some details for the procedures of the Chamber and it reads as follows:

1. The Chamber shall invite the parties to the conflict to assist it and to present evidence within a fixed time period. It may also seek any other evidence it considers relevant and may carry out an enquiry in loco.
2. The Chamber shall determine the admissibility and the weight of the evidence presented by the parties to the conflict, and the conditions under which witnesses shall be heard.
3. The President shall remind the interested parties that, during an enquiry in loco, they must assure to the members of the Chamber and all persons accompanying them the privileges and immunities necessary for the discharge of their functions which shall not be less extensive than those accorded to the experts on mission under the 1946 Convention on Privileges and Immunities of the United Nations, as well as their adequate protection.
4. During an enquiry in loco, the members of the Chamber shall be issued a document stating their capacity, as well as a white badge displaying in clearly visible black letters the name of the Commission in the local language.
5. The members of the Chamber may separate in order to conduct simultaneous enquiries at different places. In particular, the Chamber may, at any time, detach two or more of its members for an urgent enquiry on the spot and, if necessary, to ensure the preservation of evidence.
6. Five members of the Chamber shall constitute a quorum.
7. The Chamber shall, as soon as possible, communicate the results of its enquiry to the Commission in accordance with the instructions given to it.
8. All the evidence shall be fully disclosed to the parties concerned who shall be informed of their right to comment on it to the Commission.
9. If necessary, the Commission may instruct the Chamber to undertake a complementary enquiry.

Id. Rule 27.

163. Roach, *supra* note 40, at 179.

Thus, the investigations often have to deal with innumerable situations that vary due to infinite factors. Accordingly, if it is imperative to lay down the Chamber's procedures, such procedures need be sufficiently flexible to enable the Chambers to accomplish their tasks effectively. Apparently, this was the route that ensued in the Rules of Procedure of the IHFFC.

Ultimately, attention shall be called to Rule 21(6) of the Rules of the IHFFC, which deals with the withdrawal of the request by the requesting party, in the course of an enquiry. The effect of this withdrawal is that the Chamber shall only cease its enquiry upon the consent of the other parties to the conflict.

5. Report of the Commission

After the Chamber's mission concludes, and the investigation process is terminated, a report including the Chamber's findings of facts is issued. Article 90(5)(a) provides the following: "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."¹⁶⁴

Article 90(5)(a)¹⁶⁵ does not stipulate whether it is the Commission or the Chamber who should prepare the report, but only that the submission of it is to be by the Commission. Nevertheless, if Article 90(5)(a) is read in tandem with Article 90(4)(b) and (c) (commenting on the evidence and challenging it before the Commission), one deduces that preparation of the report is the Commission's responsibility. Furthermore, Rule 28 of the Rules of the IHFFC clarifies that the Commission is in charge of drawing up the report.¹⁶⁶ According to Rule

164. Protocol I, *supra* note 23, Article 90(5)(a).

165. It was noted in ICRC commentary that the wording of Article 90(5)(a) is similar to the wording of Article 13(1) of the CEFRD, which reads as follows:

When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for amicable solution of the dispute.

CEFRD, *supra* note 26, art. 13(1). The ICRC commentary then stated that "[t]he similarity to the present sub-paragraph is striking, and it is therefore no longer merely a question of good offices, as in paragraph 2(c)(ii). This may be interpreted as a first step towards mediation." SANDOZ, *supra* note 28, at 1050.

166. Under the title of "Preparation of the Commission's Report," Rule 28 of the Rules of Procedure of the IHFFC provides as follows:

1. After each enquiry the Commission shall draw up, in the light of the Chamber's findings, a report to be transmitted to the parties concerned. In particular, the Commission shall consider, as appropriate, whether it should take steps to facilitate, through its good offices, the restoration of an attitude of respect for the Geneva Conventions and the Protocol.

2. The President shall transmit the report together with any recommendations the Commission considers appropriate to the parties concerned.

27(7), the Chamber's report should be submitted to the Commission as a whole and not to the President.¹⁶⁷

The report shall be submitted not only to the parties to the conflict, but to all the parties, with such recommendations that might be deemed appropriate. The Commission, and not the Chambers, shall make the recommendations, since the Commission is in charge of preparing the report as aforementioned. This is underscored in Rule 28(2) of the Rules of the IHFFC. However, it might be suggested that the Chambers may submit to the Commission its recommendations, and its recommendations shall be considered by the Commission, given that, the Chamber's recommendations will be insightful and based on a realistic and factual view. This will assist the Commission to submit to the parties the appropriate recommendations.

Article 90(5)(b) reads as follows: "If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability."¹⁶⁸ This case might be necessary "if the parties to the conflict do not respond properly to the Chamber's invitation to assist it and to present evidence."¹⁶⁹ In stating that the "Commission shall state the reasons for that," Article 90(5)(b) implies that the Commission shall make this statement publicly. That is, it aims to make it clear to the international community that a party or the parties to the conflict were not reliable when they accepted the Commission's competence, or they were unwilling to assist the Chamber and acted in bad faith. The statement of the Commission might exert ethical pressure upon the parties, and discomfit them before the international community.

Logically, if the Commission is to state the reasons for the inability to secure evidence for factual and impartial findings, there needs be a previously fixed time limit for the assistance of the parties to the conflict

3. The President shall have the date on which the Commission's report was sent to the interested parties duly registered. The Secretariat shall keep in its archives copies of the communications of the Chambers and the reports of the Commission in its custody. These records are accessible only to Members while in office.

Rules of the IHFFC, *supra* note 27, Rule 28.

167. It should be noted that the Chamber would certainly communicate the results, including its findings of fact to the Commission. It was suggested by Mr. Roach that the Chamber's report is recommended for submission to the President and not to the Commission as whole. Concerning this suggestion, and from a personal viewpoint, it might seem more appropriate that the Chamber's report should be submitted to the Commission as whole and not to the President. This holds true, since, according to Article 90(5)(a), the Commission as whole, and not the President solely, is responsible for the preparation of the report. See Roach, *supra* note 40, at 167.

168. Protocol I, *supra* note 23, art. 90(5)(b).

169. Kussbach, *supra* note 33, at 179.

and also for presentation of their evidence. In other words, the “question of the period of time is of great importance as it determines the moment when the Commission will have to expose publicly the responsibility of the Parties concerned, by publicly reporting their shortcomings, if any.”¹⁷⁰ Surprisingly, Article 90 does not provide such a deadline.¹⁷¹ However, Rule 27(1) of the Rules of the IHFFC provides that, “[t]he chamber shall invite . . . within a fixed time period.”¹⁷²

Article 90(5)(c) provides that “[t]he Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.”¹⁷³ Obviously, the wording of Article 90(5)(c) debar the Commission from publishing its report, unless it is requested to do so by all the parties to the conflict. This issue was widely controversial during the preparatory work.¹⁷⁴

170. SANDOZ, *supra* note 28, at 1050.

171. It was noted in the ICRC commentary that “unlike the corresponding provisions of the conventions on human rights, this sub-paragraph does not determine the period within which the State accused of violation has to reply to the Chamber’s requests.” The commentary here was pointing towards Article 41(1)(a) of the ICCPR, which reads as follows:

If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may by written communication, bring the matter to the attention of that State Party. Within three months after receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic remedies taken, pending, or available in the matter.

ICCPR, *supra* note 24, art. 41(1)(a). The ICRC commentary also pointed to Article 11(1) of the Convention on the Elimination of all Forms of Racial Discrimination, which provides as follows:

If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

CEFRD, *supra* note 26, art. 44(1)(a). However, it seems that the abovementioned articles are employed by the commentary only to show the importance of the time limit in those situations, but the time period stipulated in them does not fit, either with perceived consequences of the situations in an armed conflict or with Chamber’s tasks, as they are too long. The Chamber’s deadline should be less than that.

172. Rules of the IHFFC, *supra* note 27, Rule 21(1).

173. Protocol I, *supra* note 23, art. 90(5)(c).

174. The delegates were divided on the issue of publishing the Commission’s report. Three views were illustrated during the preparatory work; the first was the delegates who preferred that the report be made public. The delegate of the Syrian Arab Republic voted against Article 90, and one of the reasons for this vote was Article 90(5)(c). He stated that “paragraph 5(c), under which publication of the Commission’s report depends on the wishes and request of all parties to the conflict . . . publication of the findings—the only sanction open to the enquiry—can thus be prevented by the Party found to have

Although Article 90(5)(c) explicitly bars the Commission from publishing its report, this prohibition is not extended to the parties to the conflict or the parties concerned, as nothing in Article 90 bans this. However, it might be argued that, since the Commission is debarred from publishing its report, the parties to the conflict should be bound by this obligation. This could hold true, since the aim of this obligation is to bestow the advantages of discreet diplomacy.

On the other hand, it might be counter argued that nothing in the wording of Article 90(5)(c) indicates that the obligation not to publish the report is extended to the Parties to the conflict. This is what the plain terms and natural meaning of the Article 90(5)(c) imply. This meaning was expressed in 1925 by the Permanent Court of International Justice, in its advisory opinion upon the *Exchange of Greek and Turkish Populations*, wherein the Court had to determine the meaning of the word “etablis,” stating:

Nor is there any indication that the authors of the Convention, when they adopted the word that has given rise to the present controversy, had in mind national legislation at all. Everything therefore seems to indicate that, in regard to this point, the Convention itself-contained and the mixed Commission [the body charged with the supervision of the exchange] in order to decide what constitutes an established

committed a breach.” He concluded saying that “to deprive the Commission of its right automatically to publish its report is to deprive the enquiry procedure of one of its most effective means of pressure.” This might hold true in view of the fact that the party who is found in breach will be “able to avoid public control and exposure and is free to continue to violate the provisions of the Conventions and the Protocol.” Official Records, *supra* note 21, at 384.

The second view was of those who did not favor the publicity of the report of the Commission. The delegate of Switzerland, expressing this view, stated that “such publicity was completely contrary to the spirit of humanitarian law, since it could only furnish material for propaganda and false accusations from each side, without being help to the victims to be protected. On the contrary, discreet diplomacy was called for.” Moreover, the German Democratic Republic delegates stated that, “were the Commission to make its findings public, the facts might be distorted by the world’s leading information organ, given the political opinions held by most of them.” *Id.* at 214.

The third view, which was an intermediate solution, was illustrated in the statement of the Japanese delegate. He stated that, “[w]ith respect to the publicity to be given to the findings of an enquiry, he thought that the president of the Commission and the Chamber must be left free to decide on the question, in consultation with the parties.” Similarly, the delegate of New Zealand expressed the view that “while recognizing the Swiss representative’s point about the advantages of discreet diplomacy, the co-sponsors felt that it might be necessary, in extreme cases, to appeal to the bar of public opinion.” He added that, “there was no reason why there should not be a provision that the chamber could give the parties time for reflection before publicly reporting its findings.” Moreover, he noted that “the present text contained some flexibility since the parties could agree . . . not to have the report published, and the chamber would have a wide discretion in the way it drafted its report.” *Id.* at 231-232.

inhabitant must rely on the natural meaning of the words.”¹⁷⁵

Furthermore, in its advisory opinion upon *the interpretation of Article 3(2) of the Treaty of Lausanne (the Mosul frontier between Iraq and Turkey)*, the Permanent Court of International Justice has stated that, “if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted.”¹⁷⁶

Thus, one deduces that Article 90 does not debar the parties from publishing the Commission’s report. In this context, the following question imposes itself: Given the hypothetical situation of one of the parties publishing the Commission’s report after receiving it, but the said report contained incorrect or misleading findings, it is utterly conceivable that the other party or parties might do the same. This will produce two controversial reports, both of which might be false. Will the Commission be freed from the obligation not to publish its report?

One can argue that the Commission should not publish its report, even if in response to faulty ones published by a party or the parties to the conflict. This is because the Commission is bound by the clear wording of Article 90(5)(c). Additionally, Article 90 does not bar a party or the parties from publishing the report and does not lay down any consequences if this situation occurs.

On the other hand it can be counter argued that, within the boundaries of morality, this obligation shall cease to continue. Moreover, the intention of the drafters was clear on the issue of why they imposed such an obligation on the Commission. The drafters’ intention was expressed in the speech of the delegate of Switzerland who stated that, “such publicity was completely contrary to the spirit of humanitarian law, since it could only furnish material for propaganda and false accusations from each side, without being help to the victims to be protected. On the contrary, discreet diplomacy was called for.”¹⁷⁷ Accordingly, if there were pre-existing false accusations, discreet diplomacy is utterly ineffective. As such, the rationale for the obligation is undermined and no longer exists. Within such parameters, the Commission can, and should, publish its report.

6. The Commission’s Own Rules

Article 90(6) stipulates that:

175. Advisory Opinion No. 10, Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10, at 20-26 (Feb. 21).

176. Advisory Opinion No. 12, The Interpretation of Article 3(2) of the Treaty of Lausanne, 1925 P.C.I.J. (ser. B) No. 12, at 6-25 (Nov. 21).

177. Official Records, *supra* note 21, at 214.

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 inquiry, a person who is not a national of a Party to the conflict exercises them.¹⁷⁸

The aforementioned paragraph emphasizes that the rules to be adopted need to respect the conditions laid down in the present paragraph and in the article as a whole, and takes into account the requirements inherent in situations of armed conflict.¹⁷⁹

On July 8, 1992, the Rules of the International Humanitarian Fact-Finding Commission were adopted. These rules comprise five parts, encompassing forty rules dealing with the organization of the Commission, the working of the Commission, enquiries, the methods of work, and amendments and suspension.¹⁸⁰

Recognizing the central role of the President, the continuity of his/her function is explicitly referred to.¹⁸¹ This role is one that, in reality, the President of the Commission has probably never played, as it appears that neither the President nor the members of the Commission or even the Commission itself exists on the map of the international community as a permanent humanitarian fact finding body.

The present paragraph emphasizes that the President of the Commission shall be replaced if his/her State is a party to a conflict submitted to the Commission to investigate it. This replacement shall take place in case of an enquiry. On the other hand, if the Commission is offering or performing its good offices, nothing in Article 90 asserts that the President shall be replaced. It might be helpful if the State of the President of the Commission is a party to a conflict and the Commission is offering its good offices in this situation. However, it should be noted that should the other party or any of the parties to the conflict raise objections regarding this issue, the President should be replaced.

7. Expenses and Funding of the Commission

Differentiating between two categories of expenses, Article 90(7) provides as follows:

The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The

178. Protocol I, *supra* note 23, art. 90(6).

179. SANDOZ, *supra* note 28, at 1051.

180. Rules of the IHFFC, *supra* note 27.

181. *Id.*

Party or Parties to the conflict requesting an inquiry 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 fifty percent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty percent of the necessary funds.¹⁸²

The first type of expense is the administrative expenses of the Commission. These shall be met by contributions from the States that have recognized the compulsory competence of the Commission pursuant to Article 90(2)(a), and by voluntary contributions. It was argued that this obligation might discourage States from accepting the compulsory competence of the Commission.¹⁸³

The second type is the expenses of the enquiry Chambers, which must be provided by the parties to the conflict. In other words, they are to be provided by those who are using the services of the Chambers: "The requesting State has to advance the necessary funds and is reimbursed by the adverse Party to the extent of fifty percent, irrespective of whether his allegations were true or not."¹⁸⁴ This procedure is also subject to criticism, as it is not plausible that a State involved in an armed conflict will direct a part of its finance to enquiry, while it has other obligations and more important issues to be financed. However, it might be suggested that the Commission should declare that the expenses of the Chamber would be a nominal amount or it can offer its services free, but this is subject to the financial ability of the Commission.

Conclusion

As illustrated in this article, Article 90 of Protocol I is a complex provision, which gives rise to many interesting questions. The most basic point to be made about this provision is that, while it was intended to provide a permanent enquiry mechanism, it ended up as a provision devoid of practical use. This resulted from the heavy machinery that is necessary for the enquiry procedure to be instigated and to function. Despite such heavy machinery provided in this provision, hope for the resuscitation of Article 90 remains. The basic motivating ideas behind the inclusion of Article 90 were elucidated through a detailed discussion of the drafting history of Article 90. Additionally, several suggestions based on the interpretation of Article 90 were offered.

The first suggestion concerns the nomination and the election of the

182. Protocol I, *supra* note 23, art. 90(7).

183. BOTHE, *supra* note 49, at 546.

184. *Id.*

members of the Commission. As the Commission might be called upon to enquire or perform good offices in a conflict in which a non-State party is involved, it is more equitable not to restrict nomination of members to the parties to the Protocol.

The second suggestion relates to a situation wherein a State that has not recognized the compulsory competence of the Commission requests an enquiry. It does so alleging that a State that has recognized the compulsory competence of the Commission committed a grave breach or a serious violation. As illustrated above, a literal reading of Article 90 and the ICRC commentary would lead to the introduction of an element of inequality. The suggestion that an agreement can be made between the two States to grant equality and the inclusion of this in the Rules of Procedure of the Commission will broaden the competence of the Commission. Moreover, it will bring Article 90(2)(a) within the framework of the objectives of the Geneva Conventions and Protocols and the norms of the humanitarian law.

The issue of the acceptance of the Commission's compulsory competence according to Article 90(2)(a) and whether or not it can be made with reservations was discussed. It was established that reservations are not allowed. In discussing the Commission's area of competence, it was concluded that the term "serious violations" can be interpreted broadly to include both grave breaches and other violations of a serious nature. It was further suggested that the Commission needs to clarify the exact connotation of the term "serious violations." This, in fact, is imperative insofar as it concerns the Commission's area of competence. Vagueness, ambiguity, or lack of definition concerning terms related to the area of competence of the Commission could function to discourage States from acceptance of the Commission's competence.

The argument emphasized that, irrespective of any request, the Commission should offer its good offices. Moreover, the offering and performance of good offices should not be confined to the parties to the Protocol and the Conventions. The article further argued (contrary to the viewpoint of one author) that the offering and performance of good offices not be limited to serious violations. That is, it is imperative that these good offices be offered and performed in instances of minor violations, noting that these ultimately can lead to more serious violations.

The Chamber of enquiry, its composition and how the enquiry should be conducted was considered in section 4. It was suggested that the Chambers of enquiry should embrace members from the neutral surrounding countries to the conflict, or from the same civilization and legal system. This is simply because it is indispensable to take the

diverse cultures of the parties to the conflict and their national legal systems into account, since they are consistent with the relevant international standards. More to that point, it was suggested that the two ad hoc members who are to be elected by the parties to the conflict should have the same qualifications as the members of the Commission (acknowledged impartiality and high moral standings). Additionally, it was recommended that an agreement granting the members of the Chambers the suitable immunities and privileges should be concluded.

Section 5 dealt with the different aspects regarding the report of the Commission, involving the situation if the parties published the report of the Commission that included false or misleading information. In this situation, it was suggested that the imposed obligation on the Commission that bars it from publishing the report should cease to continue.

The above proposals can only operate efficiently if the Commission increases its activity level in the international forum. In doing so, the Commission should convene conferences that aim to clarify its competency and the benefits to be gained from its acceptance. This could possibly convince more and more countries to accept the Commission's competency. However, if the Commission's members refuse to recognize its current impotency and are satisfied with the status quo, mummification will prevail. In such an instance, the Commission will become the dead letter predicted by the Syrian delegate in the 1977 Diplomatic Conference.

