

Experts' meeting on "Fact-finding mechanisms and International Humanitarian Law"

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Agenda

- 9:00 Registration
- 9:45 Welcome speech by the
Minister of Justice Koen GEENS
- 10:00 Presentation of the day by the Chair of the morning sessions
Gérard Dive, President of the Belgian Task Force for International Criminal Justice
The three sessions ; objectives ; method
- 10:10 Session 1 : Definitions and concepts
Monitoring, reporting, fact-finding
Claude Bruderlein, Strategic Advisor to the President of the ICRC and Senior Researcher at Harvard University
Typology of monitoring, reporting and fact-finding (MRF) mechanisms and their different strategic objectives (to prevent by establishing a supportive dialogue with the alleged perpetrators; to mitigate by convincing alleged perpetrators to alter their behaviour; to correct by gathering facts in order to recommend measures to ensure accountability for the investigated incidents). Guiding principles of their action (neutrality, impartiality, independence) and how these principles relate to their mandate and shape their work in the field.
- 10:25 Questions
- 10:45 *Coffee break*

- 11:00 Session 2 : Current mechanisms
UN Commissions of inquiry
Cécile Aptel, Senior Legal Policy Adviser to the UN High Commissioner for Human Rights and Associate Professor at Harvard University and the Fletcher School
UN mandated MRF mechanisms. Trends from their mandates, ways of establishment.
- 11:20 *Examples of inquiry or fact-finding mechanisms with mandates broader than IHL issues*
Judge Philippe Kirsch
Sharing of experience and lessons learnt based on participation to inquiry and fact-finding missions in Libya, Bahrain and Myanmar.
- 11:40 *An example of a non-governmental fact-finding mission agreed by both belligerent parties to the same non-international armed conflict*
Emeritus Professor Eric David (ULB), member of the IHFFC
On his mission with Geneva Call in The Philippines. Mandate, establishment, implementation and results. Advantages of a light structure and an *ad hoc* procedure
- 12:00 *The International Humanitarian Fact-Finding Commission*
Ambassador Jürg Lindenmann, Deputy Director, Directorate for international law of the Swiss Federal Department of Foreign Affairs, Secretary of the IHFFC
Genesis of art. 90 AP-I in the 1977 context (The absence of tangible results of the procedure of enquiry as provided by the GC, no compulsory jurisdiction of the Commission, no right to initiate inquiries). Dual mandate. Implementation. In-depth thinking on the place of the IHFFC since its creation in 1991 (parallel with the multiplication of ad hoc MRF bodies during the same period).
- 12:20 Debate
- 13:00 Lunch

- 14:30 Introduction by the Chair of the afternoon session
Claire Demaret, Head, War Crimes Team, Multilateral Policy, Foreign and Commonwealth Office of the United Kingdom
- 14:40 Session 3 : A step further
Identification of solutions for the challenges and pitfalls of IHL related fact-finding work
Dr Théo Boutruche, Independent Consultant in International Human Rights and Humanitarian Law (Lebanon) and Former IHL/Human Rights Expert of the Independent International Fact-Finding Mission on the Conflict in Georgia
Taking into account the specificities of fact-finding in the context of armed conflicts, this presentation would focus on possible solutions to various issues identified in the practice of MRF bodies (co-applicability of IHL and IHRL in armed conflicts, definition and classification of an armed conflict, challenges related on certain rules on the conduct of hostilities, content of IHL applicable to NIAC, etc...).
- 15:00 *On an IHFFC⁺*
Professor Charles Garraway, member of the IHFFC
On how the IHFFC could be used as a basis for an IHL fact-finding mechanism with a possible broader mandate and lighter procedure.
- 15:20 *Coffee break*
- 15:45 Discussion
- 17:00 Conclusions by the Chair of the afternoon session
- 17:30 *Reception*

Welcome speech

Koen Geens

Minister of Justice

Thank you Mister Dive.

Judge Kirsch,

Excellencies,

Dear colleagues and friends,

I have the pleasure to welcome you all on behalf of the United Kingdom and Belgium, both States co-sponsoring this international event. I would like to express my particular thanks to the speakers and to Mr. Dive, from the Belgian Ministry of Justice, and Mrs. Demaret, from the United Kingdom and Commonwealth Foreign Office, who nicely accepted to chair our work for the morning and afternoon sessions.

It is important to underline that this international experts' conference has been organized by the Belgian Interministerial Commission for Humanitarian Law. The Commission is the consultative body of the Federal Government in relation with International Humanitarian Law and its implementation in Belgium. It is composed of experts in IHL coming from all concerned Ministerial Departments and from the Belgian Red Cross. I have also the pleasure to mention that its President, Mister Damien Vandermeersch, *Avocat général* at the *Cour de cassation*, is among us today, together with a great number of members of the Commission, whom I thank warmly for all they have done.

No surprise to see the United Kingdom and Belgium, side by side, as co-sponsors of today deliberations. Both States are engaged from the very beginning in the establishment and development of the International Humanitarian Law (IHL). They were among the very first States in the world to ratify the first convention on IHL, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, adopted in Geneva in 1864.

Our collaboration in the field of fact-finding mechanism is also very natural. We both have presented candidates for the International Humanitarian Fact-finding Commission and the Belgian and British members of the Commission are among us today. They will share their thoughts with us during the morning and the afternoon sessions. Welcome Professors Charles Garraway and Eric David. This common interest already lead us to organize in 2013, together with the active participation of the International Committee of the Red Cross, a side-event on the Fact-Finding mechanisms in relation with IHL during the 12th session of the Assembly of States Parties to the Rome Statute in The Hague. The conclusions of this well-attended side-event included the organization of an international experts' meeting permitting to deepen our thoughts on the matter. And here we are!



Let me now remind you, at the outset of this international seminar, the three objectives we have established for today's deliberations.

First, it is our goal to examine the usefulness of a fact-finding function in the framework of IHL's implementation and the specificities of such a function within the IHL framework.

Second we will try to explore possible ways of strengthening the fact-finding functions in situations where IHL is applicable.

Third, our exchange of views will include the potential role for the International Humanitarian Fact-Finding Commission in this respect.

But it is now time for me to conclude and leave the word to the experts.

I thereby formally open this international experts' meeting and give back the floor to Gérard Dive, President of the Belgian Task Force for the International Criminal Justice, who will chair this morning session.

Gérard, you have the word.



Introductory speech

Gérard Dive

President of the Belgian Task Force for International Criminal Justice



Mister the Minister of Justice,

Judge Philippe Kirsch,

Excellencies,

Dear colleagues and friends,

It is at the same time an honor and a pleasure to welcome you all for this international experts' meeting.

Today, we are around one hundred and fifty persons coming from various spheres of competence, but all interested in existing and developing rules of international law and practices relating to fact-finding functions. The audience is mainly composed of 4 categories of persons :

- First, National experts in charge of IHL questions , coming from Foreign Affairs, Justice, or Defense national Departments;
- Second, States' Representatives based in Brussels;
- Third, Representatives of International Organizations, including those setting up commissions of inquiry or fact-finding missions whose mandate and/or deployment context may imply the examination of potential IHL violations;
- And finally Academics, Specialized NGOs' representatives, and other persons coming from the civil society, directly interested in this matter.

We have organized our work today in three sessions, in order to cover the goals assigned to our seminar, as the Minister just indicated. Two sessions for this morning, with a coffee break in between, and one session for this afternoon, including a prolonged exchange of views.

The first session, a short one, will concentrate on the concepts of fact-finding in order to offer basic understandings and a common language to our work.

The second session will permit to get deep into the matter : we will mainly examine the existing rules and mechanisms, inside and outside the IHL context.

This afternoon, under the wise chairmanship of our dear colleague and friend Claire Demaret, from the Foreign and Commonwealth Office of the United Kingdom, we will explore ways forward.



But let us go step by step, and before opening the first working session of this morning, permit me to offer you some precisions on our methodology and some practical information.

First, in order to encourage openness, sharing of information and free exchange of views after the formal presentations, all the debates, questions and answers will be governed by the Chatham House rules. This means, as you know, that - after this meeting - you are free to use the information received, but neither the identity nor the functions of the speakers may be revealed, in any way.

Second, all speakers will use exclusively English for their speeches, questions, and answers, but for your potential comfort simultaneous translations into Dutch and French will be provided.

All this being said, let us begin with our first session dedicated to definitions and concepts.

On Monitoring, Reporting and Fact-Finding Initiatives (MRF)

Claude Bruderlein¹

Strategic Advisor to the ICRC President
Senior Researcher, Harvard University



Over the past few decades, commissions of inquiry have become an increasingly prominent component of international, regional, and national responses to allegations of violations of international humanitarian law (IHL) in the context of armed conflicts. This development has occurred amidst a broader proliferation of monitoring, reporting, and fact-finding (MRF) mechanisms established by various mandating bodies in different forms. Indeed, entities such as the United Nations Security Council (UNSC), the United Nations Human Rights Council (UNHRC), the Office of the United Nations Secretary-General (UNSG), regional organizations such as the European Union, and governments at the domestic level have mandated not only commissions of inquiry and fact-finding missions but also panels of experts, mapping exercises, monitoring components of peace operations, and special rapporteurs.

It appears that MRF mechanisms fulfill a critical role in the implementation of international law in times of crisis, as they gather factual information about alleged violations of international law. These activities take place often in politically charged and highly contested areas. At a more global level, one can observe the growing indeterminacy of terminology, objectives, methods related to fact-finding in practice. Such indeterminacy seems predicated on the need to maintain a flexibility of these mechanisms in the elaboration of fact-finding mandates by political bodies.

This proliferation has led to efforts to review best practices used by fact-finding practitioners, including key methodological principles and modalities of application. In this context, commissions of inquiry and other MRF mechanisms have constituted a particular area of focus for practitioners and policy makers. The growing body of policy literature that has been generated includes various documents, such as the 2013 *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, which articulates rules and principles applicable to different types of fact-finding endeavors.² The recently published document, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*:

1 The views presented in this paper are personal in character and do not represent in any ways positions or reflections of the International Committee of the Red Cross (ICRC) on the subject.

2 M. Cherif Bassiouni and Christina Abraham, eds., *Siracusa Guidelines for International, Regional and National Fact-finding Bodies*, (Cambridge: Intersentia, 2013).

Guidance and Practice — produced by the Office of the High Commissioner for Human Rights (OHCHR) — provides information about standard operating procedures and guidelines relevant to each stage of United Nations (UN) commissions of inquiry and fact-finding missions.³ Regarding fact-finding on a particular type of violation, the United Kingdom's Foreign and Commonwealth Office led a drafting process that resulted in the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*.⁴ Lately, the HPCR Advanced Practitioners' Handbook on Commission of Inquiry provides a review of the main dilemmas and challenges of fact-finding mechanisms and proposes a series of concrete recommendations for practitioners.⁵

Some experts and practitioners have noted the differences in terms of context, mandates, and modalities among various MRF bodies and have cautioned against articulating generalized procedures that might not adequately account for these distinctions. However, ongoing policy development efforts have helped to achieve a better understanding of the field of MRF and improve the quality and credibility of MRF work. A possible way to organize the various avenues related to fact-finding is to develop a nomenclature of monitoring, reporting and fact-finding activities (MRF) related to:

- **Why** should MRF initiatives be created?
What are the **objectives** of Commissions of Inquiry, Special Rapporteurs and other tools of MRF?
- **How** should these initiatives operate?
What are the **standard methods and predictable procedures** under which MRF inquiries should operate?
- **What** does an MRF initiative entail?
What types of **activities, measures and technical resources** do MRF initiatives entail?

Such nomenclature allows us then to segment the various functions of MRF mechanisms along a linear approach related to the occurrence of violations of IHL, as it intends to contribute to the prevention of such violations, mitigate their impact, or prohibit their occurrence (see Table 1).



3 "Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice," Office of the High Commissioner for Human Rights, 2013 (in HPCR's possession).

4 "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law," UK Foreign and Commonwealth Office, First Edition, June 2014, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf

5 HPCR Advanced Practitioners' Handbook on Commission of Inquiries, Cambridge University Press (forthcoming).

Table 1: Segmenting the activities of MRF mechanisms

Focus of activities	Situations of concern	Ongoing violations	Post-facto inquiries
"Monitoring"	- PREVENT violations by - Building relationships and - Surveying context & trends to - Express concerns of mandator	- Follow developments - Dialogue with parties	LIMITED RELEVANCE
"Reporting"	- Follow developments - Dialogue with parties	- MITIGATE impact by - Presence and proximity to - Gather info on violations and parties as a way to - Indicate responsibility and will of mandator.	- Follow developments - Dialogue with parties
"Fact-Finding"	LIMITED RELEVANCE	- Follow developments - Dialogue with parties	- PROHIBIT re-occurrence of violations by launching a - Rigorous inquiry and - Collecting evidence to - Attribute responsibility of violations for the mandator

Important aspects to underline in this segmentation are the evolving functions of the MRF mechanism before, during and after violations of IHL take place, and of their relationships with the parties to the conflict, which may indicate a level of specificity for each type of mechanism that would exclude overlapping functions. Hence, a MRF mechanism focusing on preventing violations by monitoring a sensitive situation and building relationships with the parties, can hardly be used to indicate responsibilities of violators in a mitigation phase, and will be unsuitable to collect evidence in an effort to prohibit the occurrence of such violation at a later stage. Equally, a MRF mechanism used to find facts on past violations is probably not in a position to build constructive relationships with the parties to the conflict and favor preventive measures.

Conclusion

Preventing, mitigating and prohibiting violations of international law require a multifaceted approach with multiple state and non-state actors. MRF mechanisms should be designed with a specific role and timing in mind, and equipped to fulfill this role in terms of information gathering, relationship building capacity, and legitimacy in the eyes of the parties concerned. One should also be aware that legal regimes cumulate. It is critical to review facts based on all the regimes applicable and not select one regime (e.g. IHL) at the cost of others (e.g. human rights). Such selectivity could easily lead to political manipulations by the mandators and the parties. Yet, MRF mandates are and will remain decisions by political bodies. The point is to determine how far should one allow the political use of MRF within a predictable regulated system.

United Nations' Mandated Monitoring, Reporting and Fact-Finding Mechanisms

Cécile Aptel⁶

Senior Legal Policy Adviser to the UN High Commissioner for Human Rights and Associate Professor at Harvard University and the Fletcher School



The United Nations has a long history of conducting fact-finding missions and other inquiries, notably through the establishment of commissions of inquiry.⁷ Even before the UN was formally set up, the Allied States, during the Second World War, created the "United Nations War Crimes Commission". This Commission, which operated from 1943 to 1948, was instrumental in investigating and collecting evidence of war crimes and identifying those responsible. It also advised governments on the prosecution of war crimes, notably legal and procedural matters.⁸ Its work provided an important basis for the Nuremberg International Military Tribunal.⁹ Today, fact-finding missions (FFMs) remain an important activity for the United Nations (UN). Fact-finding is viewed as intrinsically connected to the mandate and functions of UN organs to maintain international peace and security, and to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁰

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- 6 The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the United Nations. The author would like to thank Vaishali Sharma for contributing to the writing of this piece.
- 7 The terms 'international commission of inquiry' and 'international fact-finding mission' have been used to designate a variety of temporary bodies of a non-judicial nature, established either by an intergovernmental body or by the Secretary-General or the High Commissioner for Human Rights, and tasked with investigating allegations of violations of international human rights, international humanitarian law or international criminal law and making recommendations for corrective action based on their factual and legal findings: Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, UN 2015.
- 8 Terms of Reference of the Commission included "(i) To collect, investigate and record evidence of war crimes, identifying where possible the individuals responsible; (ii) To report to the Governments concerned cases where the material available appeared to disclose a *prima facie* case; (iii) To act as a Committee of Legal Experts charged with advising the Governments concerned upon matters of a technical nature, such as the sort of tribunals to be employed in the trial of war criminals, the law to be applied, the procedure to be adopted and the rules of evidence to be followed": United Nations War Crimes Commission (UNWCC) (1943-1948), UN Archives and Records Management Section, available at: <http://search.archives.un.org/united-nations-war-crimes-commission-1949> (last accessed on 9.11.15).
- 9 For reports and other documents of the UN War Crime Commission, see UN Archives and Records Management Section, available at <https://archives.un.org/> (last accessed on 9.11.15). Documents are also accessible on the legal database of International Criminal Court, available at http://www.legal-tools.org/en/go-to-database/lfolder/0_28428/ (last accessed on 9.11.15).
- 10 UN Charter, Art. 1; See also Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, General Assembly Resolution A/RES/46/59, 9 December 1991.

Which UN entities establish Monitoring, Reporting and Fact-Finding Mechanisms?

All organs of the UN are involved in fact-finding in general, and in creating commissions of inquiry (Cols) in particular, these diverse temporary bodies of a non-judicial nature tasked with investigating allegations of violations of international law and making recommendations for corrective action based on their factual and legal findings.¹¹ Cols have been established by the Security Council, the General Assembly, the Human Rights Council, the Secretary-General and the Office of the High Commissioner for Human Rights (OHCHR).

Article 34 of the UN Charter mandates the Security Council to “investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security”. On this basis, the Security Council has established Cols and FFMs since at least the 1970s. For instance, in 1979, the Council put in place a commission concerning Israeli Settlements in Occupied Territories”.¹² An example of a commission recently created by the Security Council is the one mandated in 2013 to investigate violations of international humanitarian law, international human rights law and abuses of human rights in the Central African Republic, and help identify those responsible.¹³

While Article 34 explicitly authorises the Security Council to conduct investigations, it does not exclude other UN organs from performing investigative functions. This has been confirmed by the Repertoire of the Practice of the Security Council and also by the 1991 Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security (UN Fact-finding Declaration).¹⁴ The Declaration stipulates that competent organs of the UN should undertake fact finding to have full knowledge of relevant facts.¹⁵ Furthermore, it states that fact-finding missions may be undertaken by the Security Council, the General Assembly and the Secretary-General, in the context of their duties under the UN Charter.¹⁶

The UN General Assembly first established a Col in 1973, to investigate the reported atrocities in Mozambique where members of the Portuguese armed forces were alleged to have killed the inhabitants of the village of Wiriyamu.¹⁷ Other examples of General Assembly’s work in this area include the set-up of the Group of Experts for Cambodia to examine requests by the Cambodian authorities for assistance in responding to past serious violations of

11 See footnote 1 above.

12 Security Council Resolution (1979) 446 of 22 March 1979. Also see Report of the Security Council Commission Established under Resolution 446 (1979), UN Doc 5/14268, 25 November 1980.

13 International Commission of Inquiry on the Central African Republic established by Security Council resolution 2127 of 5 December 2013.

14 General Assembly Resolution A/RES/46/59 of 9 December 1991.

15 Ibid., para 1.

16 Ibid., para 7.

17 General Assembly Resolution 3114 (XXVIII) of 12 December 1973.



Cambodian and international law;¹⁸ and of the UN Investigative Mission in Afghanistan, when the General Assembly invited the UN High Commissioner for Human Rights and the Secretary-General to investigate reports of mass killings of prisoners of war and civilians, rape and cruel treatment in Afghanistan.¹⁹

The Secretary General of the UN has also directly established Cols, both at the request of States and at his own discretion, for instance in 2000 to verify the truth of allegations that hundreds of extrajudicial executions had taken place in Togo during 1998,²⁰ and in 2006 with the establishment of the Independent Special Commission of Inquiry for Timor-Leste.²¹

Over the last few years, the UN body which appears to be the most active in this area is the Human Rights Council (HRC). In the fulfillment of its mandate to "address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon"²² the HRC has created several Cols and FFMs. Some recent examples

18 General Assembly Resolution 52/135 of 12 December 1997.

19 General Assembly Resolution 54/185 of 17 December 1999.

20 Report of the International Commission of Inquiry for Togo (E/CN.4/2001/134 – E/CN.4/Sub.2/2001/3), 22 February 2001.

21 Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, UN Doc S/2006/822, 2 October 2006. Its mandate was to establish the facts and circumstances relevant to incidents that took place on 28 and 29 April and 23, 24 and 25 May and related events or issues that contributed to the crisis, clarify responsibility for those events and recommend measures of accountability for crimes and serious violations of human rights allegedly committed during the mandated period.

22 GA res 60/251 of 15 March 2006.

include those concerning Syria (established in 2011 and still running),²³ Democratic People's Republic of Korea (2013),²⁴ Gaza (2014),²⁵ and Eritrea (created in 2014 and also still running).²⁶

These different Cols established by the HRC as well as others, including some of those established by the UN Security Council or the Secretary-General, have been supported in their work by the Office of the High Commissioner for Human Rights (OHCHR). Indeed, OHCHR has to date supported the establishment and operations of around 50 Cols and FFMs. OHCHR is comprehensive in its support and covers a wide range of areas including technical, administrative, logistics, security, developing standards etc. Some of the relevant standards existing with respect to operation of Cols/FFMs can be found in the UN Fact-finding Declaration,²⁷ and Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.²⁸ OHCHR has over the years developed and refined its tools and methodology, and offers a real repository of knowledge on how to conduct fact-finding and inquiries.²⁹

Not only does OHCHR support the functioning of independent Cols, it also carries out fact finding and investigations in the furtherance of its own mandate. OHCHR has a broad mandate which focuses on the promotion and protection of all human rights. In the fulfilment of this mandate, OHCHR directly undertakes a wide range of activities including monitoring and reporting on past and/or ongoing violations.

23 Human Rights Council res S-17/1 of 23 August 2011.

24 Established by Human Rights Council res 22/13 of 21 March 2013, to "investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea ... including the violation of the right to food, the violations associated with prison camps, torture and inhuman treatment, arbitrary detention, discrimination, violations of freedom of expression, violations of the right to life, violations of freedom of movement, and enforced disappearances, including in the form of abductions of nationals of other States, with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity".

25 Established by Human Rights Council res S-21/1 of 23 July 2014 Mandate, "to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after, to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable, and on ways and means to protect civilians against any further assaults"

26 Established by Human Rights Council res 26/24 of 27 June 2014 to "investigate all alleged violations of human rights in Eritrea, as outlined in the reports of the Special Rapporteur".

27 General Assembly res A/RES/46/59 of 9 December 1991.

28 UN Doc E/CN.4/2005/102/Add.1 of 8 February 2005. These principles emphasize the need to assure the independence, impartiality and competence of commissions of inquiry (Principle 7); the importance of clearly defining the commissions' terms of reference (Principle 8); the need to provide appropriate guarantees for persons implicated as well as for victims and witnesses testifying on behalf of victims (Principles 9 and 10); and the need to ensure adequate resources for commissions (Principle 11). These further details the advisory function of such commissions (Principle 12) and highlight the importance of publishing report of the commissions (Principle 13).

29 See notably Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, UN 2015. For a more detailed view of OHCHR's support extended in different COIs/FFMs, please see UN Secretary-General Report on Impunity, UN Commission on Human Rights, E.CN.4/2006/89, 15 February 2006. There is also a growing academic interest in this area, resulting in the development of a range of publications, including the 2013 Siracusa Guidelines for International, Regional and National Fact-Finding Bodies, and the 2015 HPCR Advanced Practitioner's Handbook on Commissions of Inquiry.

OHCHR is also frequently requested by the HRC to undertake FFMs or investigations, for example in the case of Syria,³⁰ the Central African Republic,³¹ Sri Lanka,³² Iraq,³³ or Libya³⁴. Such inquiries are independently conducted by OHCHR, and, significantly, are not always carried out with the consent of the concerned State. A new trend is that some of these inquiries are mandated to operate across internationally recognized borders, as in the recent case of the HRC mandated fact-finding concerning Boko Haram.³⁵

What are the mandates of the UN-established Monitoring, Reporting and Fact-Finding Mechanisms?

The entity establishing the FFM or Col usually specifies its mandate. As a result, the mandates vary considerably from one mechanism to another.

Usually most of the Cols established by the HRC have broad mandates to investigate violations of international human rights. In addition, mandates may also contain an explicit reference to violations of international humanitarian law, especially when an armed conflict is ongoing in the situation under reference. Some mandates can be very specifically tailored, for example the International Commission of Inquiry on Guinea was mandated to investigate killings, injuries and alleged gross human rights violations that took place in Guinea on 28 September 2009. However, the temporal scope of the mandate can also extend over a much longer period, following a particular nominated date, for instance when the hostilities started. This is the case for the Syria Col, which has been continuously inquiring since 2011.

30 The Human Rights Council, in its resolution S-16/1 of 29 April 2011, requested the High Commissioner for Human Rights to “dispatch urgently a mission to the Syrian Arab Republic”.

31 The Human Rights Council, in its resolution 23/18 of 13 June 2013, requested the High Commissioner to submit a report on the human rights situation in the Central African Republic.

32 The Human Rights Council in resolution 15/1 of 27 March 2014, requested the UN High Commissioner for Human Rights to “undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission (LLRC), and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders”.

33 Human Rights Council resolution S-22/1 of 1 September 2014 established the OHCHR Investigation Mission to Iraq to “to investigate alleged violations and abuses of international human rights law committed by the so-called Islamic State in Iraq and the Levant and associated terrorist groups, and to establish the facts and circumstances of such abuses and violations, with a view to avoiding impunity and ensuring full accountability”.

34 The Human Rights Council in its resolution 28/30 adopted in March 2015 requested the United Nations High Commissioner for Human Rights to “urgently ... dispatch a mission to investigate violations and abuses of international human rights law that have been committed in Libya since the beginning of 2014, and to establish the facts and circumstances of such abuses and violations, with a view to avoiding impunity and ensuring full accountability, in coordination with the United Nations Support Mission in Libya”.

35 HRC Resolution S-23/1, 21 May 2015 requested the Office of the United Nations High Commissioner for Human Rights to “collect information from affected States and in close cooperation and consultation with them, in order to prepare a report on violations and abuses of human rights and atrocities committed by the terrorist group Boko Haram in the States affected by such acts, with a view towards accountability, and to provide an oral update, as part of an interactive dialogue, to be held at the twenty-ninth session of the Human Rights Council and to submit a report for its consideration at its thirtieth session.” On 1 July 2015, the High Commissioner for Human Rights provided an oral update on the subject to the Human Rights Council. Also see Report of the United Nations High Commissioner for Human Rights on violations and abuses committed by Boko Haram and the impact on human rights in the affected countries, UN Doc A/HRC/30/67, 29 September 2015.

The members of a Col, while carrying out the mandated investigation are expected to interpret their mandate in a comprehensive manner. For the inquiry to meet the assigned objective, information has to be gathered regarding the context and circumstances in which the alleged violations have occurred, and the legal framework that is applicable to them. In this regard, a consistent practice is to consider all relevant international legal norms and principles are usually considered.³⁶

Mandates are usually interpreted over time to adjust to new developments and encompass the relevant legal framework. For instance, the mandate of Col on Libya originally only referred to violations of international human rights. However, as it appeared that an armed conflict was ongoing, the Commission also looked at relevant provisions of international humanitarian law.³⁷

Frequently, Cols also have recourse to international criminal law. For instance, though not explicitly mandated, the Col on Libya examined the events within the framework of international criminal law, following the referral of the events to the International Criminal Court by the Security Council.³⁸ Another example is that of Col on Syria which was required to ‘establish the facts and circumstances (...) of the crimes perpetrated’, and also identify perpetrators of violations ‘that may constitute crimes against humanity’³⁹

What are the UN-established Monitoring, Reporting and Fact-Finding Mechanisms ultimately expected to produce?

Usually, public report is a key output of Cols. Whether or not explicitly mandated to do so, Cols usually include in their final report a set of recommendations. Sometimes, Cols are also mandated to identify those responsible for the violations.

The modalities of release and presentation of the report depends on the terms of the mandate. The mandating body usually specifies whom to report to and sometimes, in addition to initially mandated reporting obligations, some Cols or its members might be invited to also brief the Security Council.⁴⁰ The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity recommends that final reports be made public in full and shall be disseminated as widely as possible, although Principle 13 emphasizes that “for security reasons or to avoid pressure on witnesses and commission members, the commission’s terms of reference may stipulate that relevant portions of its inquiry shall be kept confidential”.⁴¹

36 Norms and specialized regimes of International law do not operate in a vacuum. They significantly impact each other and share a meaningful relationship. It is thus essential to interpret the different norms in light of each other, and aim to harmonise the standards. This position is supported by ILC's Study Group on 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law', UN Doc A/CN.4/L.682, 13 April 2006.

37 Report of Col on Libya, UN Doc A/HRC/19/68, 2 March 2012.

38 Ibid.

39 Human Rights Council res S-17/1, para. 13.

40 The Col on the Democratic People's Republic of Korea was mandated to provide an oral update and written report to the HRC at its 25th session. Commission chair Michael Kirby briefed an Arria-Formula meeting on the recommendations on 17 April 2014.

41 UN Doc E/CN.4/2005/102/Addl.1 of 8 February 2005.

Recommendations provided by reports are wide-ranging, and include recommendations for the establishment of appropriate accountability mechanisms, including sometimes referrals to the International Criminal Court. Recommendations can be directed at a number of actors. The final report of the COI on the Democratic People's Republic of Korea directed its recommendations at the Government, other States including China, the General Assembly, the HRC, the Security Council, the UN High Commissioner for Refugees, and the UN Secretariat.⁴² Recommendations can also be made to regional actors, as seen in the final report of the Col on the Central African Republic, where the African Union was urged to finalise its draft Conduct and Discipline Policy in relation to peace-keeping forces.⁴³ Some of the recommendations in these reports promptly yield concrete results, such as in the case of the Col on Guinea which recommended that the OHCHR open an office there, leading the way to the signature of an agreement between the Government of Guinea and OHCHR.⁴⁴

Over the last ten years or so, some Cols have also been mandated to 'identify those responsible' for the violations they document, such as in the case of the Darfur, Libya and Syria Col.⁴⁵ The lists thus compiled by Cols are usually classified and kept confidential for a range of reasons, owing notably to concerns related to principles of due process and fair trial, and protection of witnesses.⁴⁶ For instance, the Syria Col indicated in a recent report: "The long-standing position of the Commission has been that its investigation methodology does not meet the normal requirements of due process, and consequently, alleged perpetrators of war crimes and crimes against humanity should not be named."⁴⁷ Importantly, it added though: "After four years of intensive monitoring and the submission of four confidential lists of perpetrators, however, not to publish names at this juncture of the investigation would be to reinforce the impunity that the Commission was mandated to combat."⁴⁸ Upon the completion of their work, Col hand over these lists to the High Commissioner for Human Rights or the UN Secretary General.

In concluding, it is important to underline a key challenge that many Cols face: cooperation by Member States, or lack thereof. Securing cooperation is often crucial for Cols and FFMIs, as emphasized by Rule 19 of the Model Standard Rules of Procedure for Commissions of Inquiry/Fact-Finding Missions on Violations of International Human Rights Law and International Humanitarian Law. Rule 19 provides that the Commission may solicit the assistance of all

42 Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc A/HRC/25/63.

43 The International Commission of Inquiry on the Central African Republic - Final report (S/2014/928).

44 S/2009/693, para 276 (a)(ii).

45 See inter alia Report of Col on Libya, UN Doc A/HRC/19/68, 2 March 2012, para 14.

46 See for instance the Report of the Col on Libya, UN Doc A/HRC/19/68, 2 March 2012; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (last accessed 9.11.15)

47 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/28/69, 5 February 2015, para 140.

48 Ibid.

Member States able to aid it in gathering information, in particular in their own territory.⁴⁹ These Model Standard Rules have been developed by the OHCHR and provide a practical and guiding framework for the Cols and FFM. Furthermore, the UN Fact-finding Declaration also highlights the duty of States to co-operate and assist the UN Cols and FFM.⁵⁰ However, despite the need and expectation of cooperation, many Cols have met with non-cooperation from the Government in question. For instance, Col on Syria has been denied access to the country for five years now.

Cols and FFM serve a number of ends. As discussed above, their mandates allow them to establish serious violations of international human rights, international humanitarian law and international criminal law. There is also an implied need to understand the violations within the existing economic and social framework. Many Cols and FFM have indeed delved into the root causes of violence and violations, triggering transitional justice mechanisms that address the rights to truth, justice, remedies and reparations, and have thus informed more sustainable peace-building and reconciliation efforts.

49 Such assistance may consist of: "a) supplying the Commission with relevant documentation and information; b) allowing the Commission to conduct its activities in the territory of the State concerned and to collect, in the form that the Commission considers appropriate, the testimony of victims, witnesses and experts, and to interview government officials; and c) removing any obstacles to the attendance of victims or witnesses and affording any person protection, as appropriate, from any acts of violence, intimidation, threats, reprisals or any kind of discrimination on account of their cooperation with the Commission, and from any legal action as a result of such cooperation": Model Standard Rules of Procedure for Commissions of Inquiry/Fact-Finding Missions on Violations of International Human Rights Law and International Humanitarian Law, UN 2015.

50 Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, General Assembly Resolution A/RES/46/59, 9 December 1991, para 22.

Examples of inquiry or fact-finding mechanisms with mandates broader than IHL issues

Philippe Kirsch

Judge

This presentation will be articulated in three main parts. I will begin with brief descriptions of the three missions in which I took part (Libya, Bahrain and Myanmar), using the same framework: first the context and mandating authority; then the mandate itself; and finally the length and type of operation. I will then illustrate some differences among those missions. Last but not least, I will emphasize what I consider to be the most relevant common features of those and similar missions.



The Libyan Commission of Inquiry was established in January 2011, that is, very early on in the Libyan crisis, when the context was only the repression of demonstrations by the Gaddafi regime. The mandating authority was the United Nations Human Rights Council (thereafter UNHRC). The mandate was textually “*to investigate all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and, where possible identify those responsible to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable*”. That mandate was only intended to apply to human rights violations committed by the Gaddafi regime in peace time. It was renewed in June 2011 without formal changes, but in reality, its scope had considerably expanded as a result of two major changes on the ground. First, internal disturbances turned into an armed conflict which was both non international and international, triggering the application of international humanitarian law (thereafter IHL) during the conflict, alongside human rights law and international criminal law, since accountability was part of the mandate. Second, new actors came in and began to commit their own violations, starting with the belligerents in the conflicts; and then the new regime that succeeded Gaddafi.

The Commission’s work started in January 2011 and ended in March 2012, with three ground missions in Libya, neighboring countries, and Malta. At the time of the first mission, Gaddafi was still in power, though in an armed conflict situation. The mission had contacts first with the rebels in Benghazi and Tobruk, then with the Gaddafi regime in Tripoli and, throughout, with a variety of refugees and victims who were found in Libya and in neighboring countries. This first mission was rather grueling: in 25 days, some of us took 24 planes and did some 2000 kilometers in desert roads. The second and third missions were shorter. The Commission returned to Tripoli and went also to other cities in Libya it had not been able to

reach earlier because of war conditions, such as Sirte, Misrata, Tawergha and Zintan. Those last two missions involved a combination of investigations on site and political contacts with the new regime, so that it would understand what the objective of the Commission were.

In Bahrain, the context was the violent repression of demonstrators in 2011, in the wake of what was called then “the Arab spring”. The mandate also included surrounding events in a charged political environment: various kinds of abuses were committed by different sides, not only by the government. The mandating authority was the King of Bahrain but the Commission of Inquiry was composed of five international experts, none of whom had any links to Bahrain. The Commission also made it clear that it would act independently. It did in fact issue its report and gave it to the King at the same time, without prior consultations. There was therefore no possibility of control or censorship. The mandate included a narrative of events. It specifically mentioned human rights violations, police brutality (arrest, torture, etc.) but also any other acts of violence. The operation lasted five months. The Chair and the staff which included a large team of 50 investigators who did most of the interviews stayed permanently in Bahrain. The other commissioners made a number of trips to Bahrain in order to interview witnesses, victims and members of the government and of the opposition.

The mission in Myanmar followed a long period of internal repression which also involved ethnic conflicts and political isolation of Myanmar from the international community. That period was followed by a loosening of the internal system, a process of reform, restoration of human rights and a gradual opening to the outside world but there remained corruption, lingering conflicts and certainly quite fragile institutions. The mandating authority was the International Bar Association (thereafter IBA). In the case of Myanmar the mandate did not bear on facts or violations, but consisted of an assessment of judicial standards and legal norms both in principle and in implementation, in the light of international standards. The operation lasted one week. It included visits to various places in Myanmar and contacts with the government, the opposition, human rights lawyers, NGOs, witnesses, etc.

In all three missions that I was involved in, the governments provided adequate cooperation.

I would now like to flag two major differences between those missions: the issue of interpretation of the mandates and the size and institutional frameworks.

The interpretation of the mandate was not an issue in Bahrain because, atypically, the mandate was discussed with the Chair of the Commission before the mission started. The mandate was therefore perfectly clear to the King, the government and the Commission itself. In Myanmar, there was no interpretation problem either because the mandating authority and the mandate holder were essentially the same. In Libya, some interpretation issues arose, notably the inclusion of international humanitarian law in addition to human rights law, as well as the emergence of new actors. However, those issues did not turn into problems. In the first case, the mission took the view that, if the UNHRC had been facing not

only human rights violations in peace time but also a situation of armed conflict, it would have included IHL violations into the mandate. Indeed, there was no criticism about that on the part of any member-state of the UNHRC. In the second case, while the UNHRC could not have intended to include violations committed by new actors in its original mandate since at the time of its adoption only the Gaddafi regime was in a position to commit violations, the mandate of the Commission was to investigate “all violations”, therefore covering violations committed by anyone.



Regarding the size and institutional framework of the missions, the basic question is: “is bigger better?” I don’t think there is a uniform answer to that question but I will give a couple of illustrations. In terms of resources and security, bigger is indeed better. We could not have done the missions we did in Libya without the United Nations (thereafter UN). Only the UN had the necessary infrastructure. About security, to have or have not an armed escort is often an issue. But if a mission really does need an armed escort, then bigger is also better. We had an armed and competent escort during the first and third missions in Libya because the very unstable situation called for it. It is hard to know whether the escort would have been an effective protection in the event of a serious attack but it certainly had a deterrent effect. On the other hand, bigger is not necessarily better when agility is required. At the time of the mission in Libya, the UN bureaucracy being quite sizeable had not yet had time to adapt fully to the practical necessity of making quick adjustments. There was a very long interruption between the first mission and the second one which was partly due to security reasons but also to a team change done through procedures tailored to hiring permanent staff, not temporary staff for *ad hoc* missions. I understand arrangements were made later by now to avoid a repetition of this kind of situation.

Despite such differences, I would also emphasize three interlinked common features to all three missions, which should also apply to other similar missions: legitimacy, professionalism and credibility.

To be effective, a mission must have legitimacy. That legitimacy comes from the composition of the mission -that is, commissioners that cannot be seen as biased- and from the mandate itself -that is, looking at violations committed by all parties to a situation.

Any mission also needs professionalism, that is, a well conducted investigation, standards of proof that are credible, a good methodology for factual and legal findings and protection of victims and witnesses. I would add that good preparations are also crucial. I cannot imagine any of the three missions being effective if the commissioners had had to arrive on the ground without the terrain being prepared and people having become familiar with what the Commission was going to do.

Finally, a mission needs credibility. Credibility means that you do not only need to do things properly but that you must also be seen as having done so. Two factors should be taken into account in order to achieve and maintain credibility. The first one is public communication. As much as some may be necessary at the beginning and at the end of a mission, I have personally tended to be very conservative on public communication during the mission. Though you are the master of what you say, you do not control the questions that will be asked. When answering a question, you can slip or be misinterpreted, sometimes deliberately. In Bahrain, this became a problem because at some point, the mission was perceived as having reached premature conclusions. That was not the case but that perception did hamper the conduct of the mission which was still ongoing. The second requirement for credibility is a good report. The report has to show that the Commission of Inquiry has indeed applied all the aforementioned professional standards. If it does not, there will be questions on the manner operations have been conducted. The report has to be written in an impartial way. It has to be clear on what exactly has been done by the Commission, on the methods it has employed and on why it has done so. One can do the best things in the world, if they are not seen as such, the credibility of the mission will suffer.

The above factors and considerations have led to considerable analysis of fact-finding missions and commissions of inquiry in the past few years, and to the production of such documents as the *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, the *HPCR Advanced Practitioner's Handbook on Commission of Inquiry*, and the *IBAHRI International Human Rights Fact-Finding Guidelines* (better known as the Lund-London Guidelines). The Lund-London Guidelines were adopted in 2009 but they are already being reviewed and revised. That illustrates how fast this area is developing.

Those of course are but my own observations, based on the circumstances of the missions I was involved in. I look forward to other views and discussion.

Report of the Verification Mission of Geneva Call on allegations that the Moro Islamic Liberation Front (MILF) used anti personnel landmines in the Philippines

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Introduction

1. Geneva Call (GC) is a foundation established by Swiss private law in 2000. Its corporate purpose requires to obtain from non State armed actors (NSAA) involved in an armed conflict a formal commitment to respect some fundamental norms of international humanitarian law (IHL). *In concreto*, GC asks the representatives of NSAA to sign a “deed of commitment” in which the NSAA undertake to always respect a specific and precise IHL norm.

When GC was established, the first norm for which GC was lobbying the NSAA in order to obtain their commitment to respect the norm was the prohibition of use anti-personnel mines (APM)⁵¹.

In 2010, GC launched a second campaign for the prohibition to use children during the hostilities and in favour of their protection against any kind of violence, more especially, the sexual violence. In 2012, GC initiated a third campaign in order to eradicate any sexual violence in an armed conflict and to ban any gender discrimination⁵².

2. On 27 August 2015, on some 90 NSAA contacted by GC, 54 had signed, at least, one deed of commitment, of which 50 for the prohibition of using APM, 17 for the prohibition to use child soldiers and 15 for the prohibition of sexual violence⁵³. Among the 54 signatories, 7 had signed two deeds of commitments and 10 signed three⁵⁴.

51 <http://www.genevacall.org/fr/mission/historique/>

52 Ibid.

53 <http://www.genevacall.org/fr/notre-approche/acteurs-armes-non-etatiques/>

54 Ibid.

3. This original initiative was designed to highlight the obligation of the NSAA to comply with IHL through a public commitment towards a specific IHL obligation. Even if this commitment is modest because it is limited to abide by three obligations – the prohibition to resort to APM, child soldiers and sexual violence –, still, through this type of action, the NSAA are supposed to become sensitive to IHL. Although IHL binds them anyway⁵⁵, GC, by inviting the NSAA to commit themselves publicly to respect some specific rules, contributes to making them aware of their obligations.

Many NSAA tend to accept these limited and specific deeds of commitment : in responding positively to a proposal from a mere NGO and committing publicly to abide by IHL rules, the NSAA have the feeling to receive some kind of international recognition.

4. Such is the institutional framework in which GC carried out a fact-finding mission in the Philippines in November 2009. We shall describe in the following pages the organisation of the mission (**I.**), its practical and logistical aspects (**II.**) and its fact-finding methodology (**III.**). Of course, for a full report of the mission, the reader should read GC's report⁵⁶.

I. The organisation of the mission

5. The Moro Islamic Liberation Movement (MILF), one of the two first NSAA to have signed a deed to never use APM has been accused by the Philippines armed forces (PAF) in 2008 to have used APM⁵⁷.

Following these allegations, GC got in touch with the MILF, the PAF, the Philippines Government and various actors involved in the peace process in the Philippines, namely, the Co-ordinating Committee for the Cessation of Hostilities (CCCH) (a Philippines NGO active for peace), the ICRC and the International Monitoring Team, a ceasefire monitoring body made up of representatives of the Governments of Malaysia, Brunei, Libya and Japan. According to the information coming from its contacts, GC obtained confirmation that the PAF alleged that the MILF would have resorted to APM but this information concerned mere allegations which were not proven and the precise detail of the facts was little-known⁵⁸.

Therefore, the conditions to make a fact-finding in the field were ripe. Here is how GC obtained the authorization to carry out an investigation on site.

6. The deed of commitment signed by the MILF provided, like all other deeds of commitment submitted by GC to the NSAA, that the MILF committed

55 See. DAVID, E., *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2012, §§ 1.215 ss.

56 Philippines Geneva Call Report, GC, 2010, 80 p. ; hereafter GC Report ; text on http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/Report-of-the-2009-Verification-Mission-to-the-Philippines-to-Investigate-Allegations-of-Anti-Personnel-Landmine-Use-by-the-Moro-Islamic-Liberation-Front.pdf

57 Ibid., pp. 7 s.

58 Ibid., pp. 8 s.

"[...] TO ALLOW AND CO-OPERATE in the monitoring and verification of our commitment to a total ban on anti-personnel mines by Geneva Call and other independent international and national organizations associated for this purpose with Geneva Call." (deed of commitment, Art. 3)⁵⁹

GC relied on this text to submit to the MILF a request for a verification mission.

7. The MILF having agreed with the request, the same request was addressed to the Philippines Government; the Philippines were not bound, of course, by the deed of commitment of the MILF but, as a State party to the 1997 Oslo-Ottawa Convention banning the APM, the Philippines had to

"take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control" (Convention Art. 9).

By relying on this provision, GC asked the Philippines' agreement for a verification mission on their territory. The Philippines agreed in April 2009⁶⁰.

8. The AFP specified the contents of their allegations: according to the AFP, APM had been used on three occasions on Mindanao Island between 30 July and 31 October 2008. On this basis, GC defined the terms of reference of the mission:

- to check if, in the three incidents , APM had been used;
- if yes, to check if the use of APM was attributable to the MILF; and,
- if yes, to check if the MILF command was aware of these facts⁶¹.

II. Practical and logistical aspects of the mission

9. A fact-finding mission cannot be improvised. A preparation work is indispensable. GC started to constitute the investigating team. Its leader should naturally be a permanent agent of GC: such was the case of Chris Rush who had already had numerous contacts in the Philippines and who led the mission.

10. The mission had to include a technical expert familiar with APM and an IHL specialist. The former was Philip Alford, a staff member of the Mines Advisory Group (MAG), a British non profit association created in 1989 by former mine-clearers of the British Army back from Afghanistan. Much moved by the ravages caused by APM, they had created the MAG in

59 Ibid., p. 9.

60 Ibid.

61 Ibid., p. 18.

order to help with their expertise mine-affected countries⁶².

Concerning the IHL specialist, GC came to the International Humanitarian Fact-Finding Commission (IHFFC), an organ set up by Art. 90 of the 1977 1st Additional Protocol (AP) to the 1949 Geneva Conventions in order to inquire with the agreement of the belligerent Parties into any grave breach to the Conventions or the Protocol⁶³. GC had firstly invited Prof. Elzbieta Mikos-Skuza but, as she was not available for the mission, GC invited the undersigned who is also a member of the IHFFC.

11. GC took care of all logistical aspects of the mission: flight and hotels bookings, organisation of meetings with military officers of the AFP, representatives of the MILF, the Philippines Government and the ICRC. Chris Rush, the head of the mission played an effective role in the preparation of the appointments and the organisation of the travel arrangements in the Philippines. Concerning the latter, Chris Rush had contacted an international NGO, very active on the ground, the Non Violent Peace Force (NP) that could put at the mission's disposal not only a 4WD vehicle but also two interprets⁶⁴.

12. After that, dates for the mission had to be found while in July 2009 sporadic clashes still occurred between the MILF and the AFP, especially in the region where GC had to enquire. GC tried to obtain a truce agreement of the parties in order to ensure the safety of the mission. In August 2009, the MILF affirmed its willingness to cooperate to keep the mission safe. After some procrastination, it was agreed that the mission would take place at the end of November 2009⁶⁵. The head of the mission discussed with the AFP and the MILF the itinerary of the mission. It was agreed that each party would have two days to present its own version of the facts in the very place in which they took place but it is only on the eve of the arrival in Manila of the two other members of the mission that the Head of the mission could consider that everything was settled and that the mission could take place in a safe and effective manner⁶⁶.

The mission took place from 17 to 26 November; it went to Mindanao on the scene of blast of the APM from 19 to 24 November⁶⁷.

III. Methodological aspects

13. For each of the incidents reported by the AFP, the mission heard the witnesses presented by the parties at the rate of two talking days with the witnesses of the AFP and two other talking days with the witnesses of the MILF. The mission decided that its findings should comply with the "beyond reasonable doubt" criteria. The witnesses were heard

62 <http://www.maginternational.org/mag/en/what-we-do/mags-history/#.VeCSbaY29FV>

63 <http://www.ihffc.org/index.asp?Language=FR&page=home>

64 GC Report, pp. 10 f.

65 Ibid., p. 11.

66 Ibid., p. 12.

67 Ibid., p. 14.

individually and separately in the absence of the representatives of the adverse party. The talks proceeded as follows : the head of the mission defined the objective of the mission (to reach the truth on the events at issue) and specified that:

- the procedure was not judicial;
- the testimony would remain confidential;
- the witness could speak as he wished (freedom of speech);
- the testimony was recorded unless the witness objected (no witness objected).

14. The testimonies were received at the place of the incidents or in their direct vicinity. The questions asked by the members of the mission generally regarded the place of the witness at the time of the incident, the time of the explosion, the description of the circumstances of the incident, the colour of the smoke, the damages suffered by the victim.

15. The mission examined the remnants of the mines which were provided by the AFP. The description of the incidents enabled the mission to assess if APM had been used. The three incidents notified to the mission are described in the chronological order (they were presented to the mission in a different order).

16. *1st incident (20 August 2008)*

According to a Private of the AFP, a dog had been struck by an APM in the vicinity of a military camp; a wire had been found next to the dog; the witness himself, walking near a mango tree felt against his leg what he thought to be a grass stem; then there was an explosion and his leg was hit by a shrapnel; the MILF was in the zone.

The witnesses of the MILF said that, after 2003, the MILF had ordered not to use weapons which explode when someone steps on. They cleaned the ground and removed these kind of weapons but the witness ignored if the cleaning had been exhaustive.

The mission could not examine the remnants of the devices which exploded but it saw a mine found by the AFP in the area at the time. It was an improvised RPG (Rocket Propelled Grenade) warhead which could be activated by contact with a tripwire. This kind of device amounts to an APM as defined in the deed of commitment signed by the MILF. There was no civilians in the region at the time of the explosions. The MILF recognized that it used this kind of device before 2003 but it forbade its use from 2003.

The factual elements communicated to the mission suggested however that these devices had been placed by the MILF but this finding was circumstantial and the mission could not assert "beyond any reasonable doubt" that the APM which had exploded were attributable to the MILF⁶⁸.

68 On the incident, ibid., pp. 18-25.

17. 2nd incident (12 October 2008)

A witness presented by the AFP explained he was on patrol on a road with other soldiers when he heard an explosion 7 or 8 m away which wounded him. A soldier near the explosion was killed. 15 or 20 m further, a second explosion occurred. 9 soldiers were wounded. Then, there were gunshots but no one was hit. Two other witnesses – civilians – declared they heard an explosion followed by gunshots.

The MILF witnesses were a civilian and a military commander. The former stated that he saw armed men on the road a few days earlier. The latter declared that the mines had been placed early in the morning, they were activated on remote control and could not explode if somebody stepped on them when they were not turned on.

The mission observes that, according to the witnesses, “the explosion was triggered as the middle men in the patrol passed the device” but “there is no evidence that the device was activated by mere presence of the victim”⁶⁹; this was a classical ambush with mines activated by remote technology. Therefore, the devices were not APM as defined by the deed of commitment⁷⁰.

18. 3rd incident (17 October 2008)

Concerning this incident, the APF and the MILF presented the same witness: the wife of a wagon driver who went to the market with his cart loaded with rice bags, on 7 a.m.; the cart was on a dry dirt track which was used by the APF and local peasants; the cart was pulled by a buffalo; the victim was sitting on its top; the wife of the driver heard the explosion; when she arrived on site, her husband was seriously injured : “part of his body was totally red”⁷¹; the buffalo was beheaded and had lost its stomach; its legs were still in place; the victim was transported to the nearest hospital where he died; “The explosion left a crater approx 1 foot deep by 10 feet in diameter”⁷². Wood pieces were in the body of the buffalo, an element which gives some support to the idea that a wheel of the cart had likely activated the mine.

According to a paramilitary presented by the APF and who was on patrol around 350 m from the place of the incident, the mine should be a RPG transformed by hand into a mine. According to another military of the APF, the track used to be frequented by the APF.

A member of the mission was wondering if the explosion could have been provoked by an anti-vehicle mine considering the weight of a cart loaded with rice. The answer was negative since an APM contains 100 or 200 grams of explosive while an anti-vehicle mine generally contains 5 to 10 kg of explosive; if an anti-vehicle had been used, the buffalo and its driver would have been pulverised; that was not the case. Therefore it is likely that the mine was an APM. At the time, the region was controlled by the APF but MILF forces were also in the region. There is uncertainty, however, about the antipersonnel character of the mine “because it is impossible to know what level of pressure was necessary to trigger

69 Ibid., p. 29.

70 On the incident, ibid., pp. 26-30.

71 Ibid., p. 31.

72 Ibid., p. 33.

the device”⁷³. Similarly, it has not been demonstrated that the mine had been placed by elements of the MILF; if it is likely that the mine had been placed by forces associated with the MILF, the MILF responsibility is not established “beyond any reasonable doubt”⁷⁴.

Conclusion

19. To the best of the writer’s knowledge, the mission organised by GC is, in the history of international relations, the first example of a fact-finding mission agreed and accepted by mutual consent of two belligerent parties. What knocks the outside observer is not only the lightness and the flexibility of the mechanism established by GC but also its relative low price compared with the average price of an Art. 90 (1st AP) fact-finding mission: GC mission only consisted of three members instead of seven members of an IHFFC mission (1st AP, Art. 90, § 3, a). A single person, the head of the mission was in charge, at the same time, of the organisation, the secretariat and the “diplomatic” relation of GC with the belligerent parties. GC verification mission is therefore a model of its kind which must be actively drawn upon in the future by the IHFFC and the States which have recognised its competence.



73 Ibid., p. 34.

74 On the incident, ibid., pp. 30-34.

The International Humanitarian Fact-Finding Commission

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It is really an honour and pleasure to be here and I would like to start by thanking the organisers at the Belgian Interministerial Committee on International Humanitarian Law (hereafter IHL) and at the British Foreign Commonwealth Office for gathering us here. I have the pleasure to be here in two functions, as I chair the national IHL Committee in Switzerland and am also the Secretary of the International Humanitarian Fact-Finding Commission (hereafter IHFFC), *ex officio* since Switzerland runs the Secretary of the IHFFC (*cf. infra*). It goes without saying that I do not speak for the IHFFC and have no authority to do so. I will give a short overview of what the IHFFC is, then a few words on its history and some of the debates that have taken place when establishing it. I will end the presentation with a few thoughts on where the IHFFC stands today.

What the International Humanitarian Fact-Finding Commission is

The IHFFC is a permanent, treaty-based body as it was established by article 90 of the Additional Protocol I, which distinguishes it from many other fact-finding bodies. Its purpose is to enquire into alleged grave breaches or serious violations of IHL. It can also facilitate, through its good offices, the restoration of an attitude of respect for the Geneva Conventions and the Additional Protocols and it does so basically by establishing reports and recommendations to the parties involved. That is also a point that distinguishes the IHFFC from other fact-finding bodies. The mandators are the parties involved in a conflict, and the report goes to those parties. There are 15 members of the Commission, who are elected by the States that have recognised the competence of the IHFFC (*cf. infra*) and act in their personal capacity. That underlines the non-political and impartial nature of the IHFFC. The Commissioners come from different backgrounds, both geographically – presently all continents are represented, except for Oceania but there was a member from New Zealand for many years – and also in terms of their professional experience. Some are of course scholars in International Law and in particular in IHL, some have a military background – which, in my opinion, is extremely important for the kind of questions and issues that the IHFFC has to tackle –, some have a diplomatic background and there are also two Doctors of Medicine currently in the IHFFC – which is also something important for our mission. Of course, the Commission might need to be complemented by other people if it were to actually exercise a mandate.

The IHFFC has been operational since 1992, that is, when its first members were elected from among the States that have recognised its competence. A feature that should be underlined: it is not enough to be a State Party to the Additional Protocol I, a State must also have recognised the IHFFC. A State can do so either by making a general declaration to accept the competence of the IHFFC *is po facto* – 76 States presently have done so –, or by accepting the competence of the IHFFC *ad hoc*, in a specific case, by a special compromise – so far, none has done so. As depositary of the Geneva Conventions and the Additional Protocols Switzerland was named depositary of declaration of acceptance of competence and tasked with running the Secretariat of the IHFFC.

A history of the International Humanitarian Fact-Finding Commission

The genesis of Article 90 of the Additional Protocol I

The historical starting point of the IHFFC is that the Geneva Conventions already provided for an inquiry procedure (article 52 of GC-I, article 53 of GC-II, article 132 of GC-III, article 149 of GC-IV). That idea actually dates back to 1929. The approach of that inquiry procedure is and was that in cases of alleged violations of IHL the parties would sit together and discuss the modalities of inquiry to be set up. As can be easily imagined, once two States have reached a point of discussing IHL violations with one another, their bilateral relations might have deteriorated to a point that makes it difficult to sit together and see how a fact-finding mechanism can be established. The idea, when it came to negotiate Protocol I, was to enhance that inquiry provision to make it a permanent feature. One of the original proposals was to make an international inquiry commission that would basically do what the procedure of inquiry already provided in the Geneva Conventions but on a permanent basis and at the request of the parties or on its own initiative. There was another proposal, from Pakistan, that went a step further and proposed a permanent commission for the enforcement of IHL. The idea was to mandate that commission to take appropriate steps to soothe an issue and to bring back the party that has not fulfilled its obligations to an attitude of respect towards IHL. The wording “bring back an attitude of respect” is in one of the two mandates that the IHFFC now has, namely the conciliatory function of providing good offices. Two particularly burning issues were discussed during the international conference prior to the adoption of the Additional Protocols. The first was the issue of compulsory jurisdiction, and there was clear opposition to that idea from many States. That brought about the solution – actually inspired by the ICJ Statute’s article 36 – that a State has to make a specific declaration for accepting jurisdiction, either in a general way or *ad hoc*, in the context of a specific situation. The second burning subject was whether there should be a right for the commission to initiate proceedings *proprio motu*. That was something that was envisaged for some time but was finally abandoned on the way because there was too much fear that it could discourage States from even ratifying Additional Protocol I.

The dual-mandate

The mandate of the IHFFC is twofold. First, it is tasked to do fact-finding for grave breaches and other serious violations of IHL in international armed conflicts, and that is clearly stated in article 90-2(c).i. of Additional Protocol I. With respect to non-international armed conflicts, the matter is more complicated. Additional Protocol I does not provide for a direct basis in a non-international armed conflict. However, since consent is needed anyway, the IHFFC has declared its willingness to be available also in these situations. Second, article 90-2(c).ii. provides for a mandate to carry out good offices and try to contribute by this to the restoration of an attitude of respect towards IHL. The means for this might be different ways of communication, of conclusions on points of facts, of comments on the possibility of a friendly settlement or observations to states concerned.

The implementation

Since 1992, the Commissioners have met, worked and more specifically done work on their own Rules of procedures. The IHFFC has now adopted 40 rules *inter alia* on membership, presidency, inquiry, confidentiality and methods of work. The Commissioners are involved in measures of practical preparedness, information gathering, training, logistics, contingency planning, *etcetera*. They are active in outreach which is a decisive feature: trying to make themselves known. Another feature that the Commission does is that it keeps relations with international organisations and with NGOs alive. To sum up, even without a mandate, it has been very much active.



The place of the International Humanitarian Fact-Finding Commission today

In my opinion, the IHFFC is well positioned in the international community: it has the support of many States; it has been widely referenced in resolutions of the General Assembly and the Security Council; the ICRC is referencing to it; and so on. The big challenge so far is that the IHFFC has not had a mandate. Of course, the IHFFC has clearly recognised the fact that *ad hoc* monitoring, reporting and fact-finding bodies have multiplied recently. The Human Rights Council, in particular, has become a prominent mandating body for fact-finding missions. Tribunals have also dealt with situations in which an IHL expertise was required. So there are of course reflections and questions about why the IHFFC has not been used so far. In my opinion, one element is the denomination of the IHFFC as such: "Humanitarian" means that the threshold of an armed conflict must be reached. For actors, this is a very difficult thing to admit, that they have actually trespassed that threshold.

There are clearly advantages with the IHFFC. First, the fact that it is treaty based gives it authority. Second, the Commissioners clearly have an IHL expertise. Third, the confidentiality of the proceedings is something special that might make it attractive for the States. Fourth and last but not least, it is there on a permanent basis. States would not have to go to costly operations in establishing something *ad hoc*.

In the future, of course, the members of the Commission would like to have a mandate. At the same time, it is not as if it were desperately seeking for one. Some members of the Commision are getting involved in other types of activities in other fact-finding missions, which reinforces their experience. There is also a discussion about using the IHFFC for expertise in IHL to other bodies or organs, under or without demand, as an *amicus curiae* for instance. And there might also be new perspectives with the joint Swiss-ICRC initiative on strengthening compliance with IHL. If indeed a forum of States to regularly discuss IHL questions would see the light of the day, than it would probably find interest in a body like the IHFFC and in the expertise it has assembled.

Identification of solutions for the challenges and pitfalls of IHL related fact-finding work

Theo Boutruche

Independent Consultant in International Human Rights and Humanitarian Law (Lebanon) and Former IHL/Human Rights Expert of the Independent International Fact-Finding Mission on the Conflict in Georgia



Excellences, Ladies and Gentlemen,

I wish to sincerely thank the organizers of this Expert Meeting for the invitation to participate in this roundtable. I feel honored to be addressing such a distinguished audience on the identification of solutions to the challenges arising in IHL fact-finding work. I would do so in my personal capacity though.

Allow me first to briefly make two preliminary remarks on issues that greatly shape any attempt to map challenges and pitfalls as well as designing solutions for IHL related fact-finding: one relates to the specificities of fact-finding within the IHL framework that was discussed in previous sessions and the second one is the inherent link between factual determination and legal analysis.

As noted earlier fact-finding is commonly defined as a method to establish facts with a degree of certainty. This is therefore primarily seen as an activity and in that sense this operation includes core modalities that are not specific to IHL or to the situation of application of IHL. IHL related fact-finding work cannot be seen as a self-contained field. This may be a trend within the fragmentation of international law to portray some mechanisms as unique. Although institutionally speaking some species exist, for example with the IHFFC, key commonalities remain whatever field is considered.

Having said that, the question of the specificities of certain fact-finding work is a recurring one. When I participated in the drafting of *the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* a key issue was whether fact-finding on allegations of crimes of sexual violence was so specific that it would warrant a brand new manual. By definition fact-finding on alleged violations of certain types of norms raises particular issues that required adapting existing methods. In the same vein, some specific challenges and issues related to the context of armed conflict, the nature or type of facts to be established or the content of IHL norms do impact on some of those common standards and methodological principles.

I wish to insist on another point: the extent to which it is at all possible to distinguish between the task of ascertaining facts and that of applying legal norms to the facts to reach legal findings in terms of violations. This is particularly relevant in the field of IHL in that fact-finding may not merely be about assessing whether certain facts/incidents amount to IHL violations, but the application of IHL itself is a factual question, based on establishing certain elements pertaining to the legal definition of an armed conflict and a situation of occupation. Those determinations can be very challenging, such as when the number of armed forces deployed on a territory may not be sufficient to factually ascertain whether the criteria of The Hague Convention on establishing and exercising authority on a given territory are met to qualify it as an occupied territory under IHL.

Even fact-finding work of bodies only entrusted with a strict fact-finding mandate carries legal implications. For example the United Nations boards of inquiry set up by the UN Secretary General, such as the United Nations Headquarters Board of Inquiry on the 2014 Gaza Conflict, are "directed not to include in its report any findings of law". Similarly the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic was strictly mandated to "ascertain the facts related to the allegations of use of chemical weapons".

Even in those cases one may question whether those factual determinations can simply be about the facts. While it is true that formally no legal findings are made, legal considerations might not completely absent. Firstly the language used to describe facts has a certain legal meaning. The factual account of the steps taken by UNRWA to communicate and inform the Israeli Coordinator of the Government Activities in the Territories and the Coordination and Liaison Administration of the GPS coordinates of premises being used as designated emergency shelters and the reference to their obligations to take all actions necessary to prevent any damage to United Nations facilities hint directly at IHL language on precautions in attack. Secondly, factual descriptions may provide information to make inferences on other factual elements, though not strictly part of the fact-finding body mission. The UN Mission on the use of chemical weapons in Syria was not tasked with making factual determination on attribution as to which party used chemical weapons. However based on information about the delivery systems (i.e. munitions) used to carry the chemical agents, the trajectory and the type and density of the gas, a deduction of fact could be drawn by inference on who used those weapons, implicitly raising question of responsibility.

Apart from the above very specific examples, most of fact-finding missions and commissions of inquiry perform mandate of applying international law. This is intrinsically part of their task as they are entrusted with establishing facts on alleged violations of international human rights law (IHRL) and IHL. Therefore factual assessment and legal analysis cannot be completely separated and are intrinsically linked. On the one hand the work on the facts already informs the selection of the relevant applicable international law norms, on the other hand the content of those norms shape the nature and type of facts that are to be looked at in order to make legal findings as to whether violations occurred. The facts covered through the inquiry are framed by the elements of the very rule allegedly violated.

The IHFFC mandate is topical in this regard. It is tasked with enquiring "into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol." The ICRC Commentary of the Additional Protocol I of 1977 noted that '[i]n principle it is only concerned with facts, and essentially has no competence to proceed to a legal assessment". However some scholars argued on the contrary that the IHFFC is entrusted with a legal evaluation of facts precisely on the basis that establishing facts vis-à-vis alleged unlawful acts cannot be done but under the light of the pertinent rules of IHL. This is linked to one of the main issues in IHL fact-finding in that some IHL norms on the conduct of hostilities requires factual information that is very difficult to obtain to make legal determinations on violations. After **mapping some of the key challenges in IHL fact-finding**, I will suggest **solutions**.



It is not the purpose of this presentation to be exhaustive, it only focuses on some fundamental specific challenges in the field of fact-finding work on alleged IHL violations. Those emerge from an analysis of the practice of commissions of inquiry and fact-finding missions set-up by the UN or regional organizations.

Unlike fact-finding into human rights violations and abuses, a **one-sided mandate** restricting the scope of the mission to only certain parties to the conflict may hamper the ability of the fact-finding body to comprehensively and accurately address certain IHL rules on the conduct of hostilities that by definition require consideration for both the conduct of the attacker and that of the party being attacked. This was prominent in the Col on Lebanon report and in the creation of the 2009 Gaza Fact-finding Mission.

While not specific to the context of an armed conflict, the **security concerns, lack of cooperation** by the parties to the conflict and the **mutual distrust** are common characteristics in times of war and significantly affect the capacity of IHL fact-finding bodies to access certain areas or certain types of information, notably that available to the attacker.

Although fact-finding work is commonly based on various **sources of information** or evidence (usually classified in three categories: physical, documentary and testimonial), in practice fact-finding bodies primarily and overwhelmingly rely on **testimonies** be they direct-eye witnesses or expert testimonies. In the context of IHL fact-finding those may prove insufficient to provide the relevant facts needed to make legal determinations as to whether IHL violations were committed, especially in the field of the conduct of hostilities. They for example only shed light on a particular aspect of an attack.

At first the **standard of proof** does not appear to be an issue specific to IHL fact-finding. It is usually defined as the degree of certainty fact-finders set and at which point they can make factual determinations. In other words the type of threshold they use to consider they are convinced an incident happened a certain way. Various standards of proof are used in practice. This is a methodological imperative that lies at the heart of the establishment of facts as it explains how conclusions were reached. Fact-finders are faced with the following dilemma. While they are expected to consistently rely on the same standard of proof to make factual determinations, as such a standard of proof is spelled out as a general and abstract threshold guiding the fact-finding work. When applying a given standard of proof, numerous elements peculiar to situations of armed conflict (lack of evidence, no access to the territory) may influence one's ability to implement it in a consistent manner. The Commission of Inquiry on the Central African Republic using the standard of "reasonable grounds to believe" noted "the feasibility of different techniques of verification, cross-checking, and corroboration inevitably differs according to the context involved". This lead the Commission to dismiss some of the photographic and video materials it received. The issue of the standard of proof might also arise at the stage of the legal assessment in that it may be difficult to reach a similar degree of certainty when concluding on the violations of certain IHL norms.

The question of the **identification of relevant applicable norms also raises particular challenges**. This is notably the case for the content of IHL applicable in NIAC given the uncertain status of some of those norms. The application of international human rights law in the context of an armed conflict also proves to be very challenging for fact-finding bodies. Most of fact-finding missions commonly restate the principle of **co-applicability and complementarity between IHL and human rights law** in times of armed conflicts, such as the Darfur Commission or the Lebanon Commission as well as the standard of *lex specialis*. However, limited attention is devoted to the actual implications of this dual regime and in some cases confusions are made at the stage of classifying violations blurring the lines between those two bodies of norms, such as in the report of the Lebanon Commission. For example the Commission concludes that "[t]he deliberate and indiscriminate targeting of civilian houses constitutes a violation of international humanitarian law and of international human rights obligations." Finally, in some cases, fact-finding bodies have drawn important conclusions from the complementary principle between IHL and IHRL. The Final Report of

the Libya Commission, stresses: “international human rights law obligations remain in effect and operate to limit the circumstances when a state actor — even a soldier during internal armed conflict — can employ lethal force.” By employing an approach whereby IHRL limits the use of force against legitimate lawful targets under IHL, the Libya Commission adopts a very progressive interpretation of the interplay between IHL and IHRL regarding the use of lethal force.

Finally and as illustrated above **certain IHL substantive norms** pose significant challenges to fact-finding work. The way norms regulating the conduct of hostilities are designed requires considering specific facts that are particularly difficult to establish which in turn impact the ability to make a sound legal assessment in line with the content of the norms. Fact-finding work must cover all components of these rules in order to be able to reach a legal conclusion. Such components relate to factual elements that pertain to various aspects and perspectives related the way weapons were used, the nature of the target, and the effects of the attack. Most importantly there is also a constant need to take into account two perspectives. The first one concerns the issue of time. The legality of an attack depends on an *ex ante* evaluation by the attacker, while the facts are established *ex post*. The second perspective is about the actor involved, the attacker or the defender. For example the concept of military objective depends on the plans of the attacker and the perceived conduct of the defender. Similarly those characteristics may hamper the ability to make legal findings on whether a given incident amounts to a deliberate attack on civilians rather than an indiscriminate attack in violation of the principle of proportionality. The obligations under the norms on precautions in attack further illustrate that challenge. Not least because there are among the few IHL norms carrying positive obligations. The rules refer to the obligation to take only feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. Feasibility is commonly defined as what was practically possible at the time of the attack. This is essential in order to assess whether precautionary measures were required, making those obligations relative in nature. Fact-finders must therefore know that the definition of feasibility depends on both humanitarian and military considerations for which facts must be established. If an attacker prevents the remaining population of a village from leaving and launches an attack the next day, a key issue revolves around whether allowing the population to leave first would have compromised the success of the military operation. This is linked to the nature of the target, as only fighters or combatants could have used this precautionary measure to escape.

This brief overview of challenges raises far-reaching consequences for IHL fact-finding work. Far from being exhaustive the following remarks only suggest **some tentative solutions** in relation to the mandate, the methodology and the characteristics of IHL norms.

First and foremost, if an IHL specific fact-finding mechanism is to be effective, it needs to be able to investigate the conduct of all relevant parties to the conflict, even if seized of a particular incident. Restricting the mandate to enquire about a particular alleged violation shall not prevent the fact-finding body to cover all aspects of that allegation as a matter of fact and law. Procedures should also be in place to ensure parties to the conflict can communicate information to the fact-finding body, even in cases where the belligerents

officially refused to cooperate. This also includes protocols to allow individuals, notably in the military, to come forward through a confidential procedure.

The composition of the fact-finding mechanism must reflect the necessary expertise required to overcome methodological and legal challenges. Alternatively this mechanism must benefit from adequate resources to conclude cooperation protocols with institutions that have the relevant expertise. For example, the use of remote sensing technology (RST), depending on the context, may provide valuable information. RST consists of gathering data on an object or an area from a long distance through the use of instruments such as photographic camera and radar, the most common remote sensors carrier being a satellite. This can be useful not only to establish certain facts but also to compensate the lack of access to information from the attacker. Satellite may only be relevant for certain types of violations. They are commonly used to monitor violations in six core areas: to identify shell craters; burned houses; large military equipment; damaged agricultural fields; mass graves; and expanding cemeteries (*ad hoc* burials and graveyards). Radars may also complement satellite imagery, to detect disturbed soil for example in the case of allegations of mass graves. Other methodologies include the verification of the location and time of visual material (photos and video) found online to assess credibility of information as developed by the Forensic Architecture project at the University of London or the analysis of patterns of destruction to draw inferences on military tactics.

It is also important to note that despite significant constraints related to an ongoing armed conflict, the investigation into certain types of incidents such as the use of a particular weapon, may be possible if appropriate resources are mobilized. The variety of evidence collected by the UN Mission on the use of chemical weapons in Syria is a prime example.

Finally, it is imperative the IHL fact-finding mechanism justify the rationale behind the reference to certain norms of IHL or certain interpretations, as well as specifically articulate the implications of applying IHRL. This is as much as an issue of credibility as the factual part of its work.

Again, I'm aware these remarks only scratch the surface of those complex issues but I would be happy to discuss further in the second part of this session. I thank you very much for your attention.

ON AN IHFFC +

Charles Garraway

Professor, member of the IHFFC



It is indeed an honour to be here and in particular to be the final speaker. I have been asked to do some “blue sky thinking” on the International Humanitarian Fact-Finding Commission (IHFFC). My own position is that I have been a Member of the Commission since 2006 and was Vice-President from 2012 until earlier this year. I stepped down from that role at the last Annual Meeting and will be retiring from the Commission at the next elections in 2016. Although not quite on my last legs as a Member, I am happy to take the opportunity of looking forward to times when I will no longer be playing an active role – though I will always be an active supporter of the Commission. I will therefore be speaking very much for myself.

We have heard from Ambassador Lindenmann on the current structure and role of the IHFFC. The first question that I want to ask is whether there is anything in the existing structures that acts as a disincentive to use of the Commission. I will take three items.

1. The scope of the Commission is too narrow. The Commission was designed as a conflict-resolution mechanism; hence the emphasis on confidentiality. It was never designed as an accountability mechanism and it is there that the modern emphasis is to be found. In addition, as a treaty body, it is limited in scope to alleged violations of the 1949 Geneva Conventions and the First Additional Protocol of 1977. There is no treaty mandate for examining other breaches of international humanitarian law (IHL) or international human rights law. Even our role in Non-international armed conflicts is questionable.
2. The foundation of the Commission is too weak. Unlike the Human Rights Council which is embedded in the United Nations, the IHFFC is a stand-alone body with no supporting organisation. It therefore lacks a support foundation for logistics and security. The Secretariat is the Swiss Ministry of Foreign Affairs, an unsatisfactory situation in the current climate. Whilst I do not wish in any way to criticise the excellent work that our Secretariat – and in particular Ambassador Lindenmann – does, it is limited by its nature as it cannot be seen to be acting in a manner that would cast doubt on the independence from States of the Commission itself. What seemed sensible in 1977 does not work in the 21st Century and were the treaty to be rewritten now, nobody would ever suggest such a proposal – least of all the Swiss Government.

3. The Commission is inadequately funded. Missions are to be paid for by the parties involved. This is both a disincentive to States to use the Commission and also an effective bar to involvement in non-international armed conflict. A non-State actor cannot be expected to fund a Mission of this sort and for all the funding to be found from the State party would cast doubt on the impartiality of the Mission.

So much for the problems; what about the answers?

First, fact-finding is a multi-faceted operation with many different types. I believe that there is a role for conflict resolution, confidential style fact-finding though it should complement, not be in competition, with accountability mechanisms. It is not one or the other. They are different tools in the same toolbox, requiring different forms of investigation. However, if the Commission is to be relevant in modern day fact-finding, it must have a wider scope and be able to investigate violations of IHL across the board and not just be limited to the 1949 Conventions and the First Protocol. I do not suggest that necessarily the Commission should become a human rights investigation body but, with its expertise across the board in IHL, the Commission could cooperate with other bodies such as the Office of the High Commissioner for Human Rights to provide specific assistance where required. IHL is a specialist area and not a sub-set of human rights law. There is much more room for IHL and human rights investigative bodies working together and providing a greater breadth of expertise. This may mean the use of Commission Members as individuals working with other bodies, rather than the use of the Commission as a whole, but we have already heard how that can work from Professor Eric David.

Secondly, there needs to be an institutional base established where the Commission can find a home. This may come out of the Swiss-ICRC Initiative on Strengthening Compliance with IHL. If a standing body were to be established in some form, this would be an obvious "parent" for the Commission. The Commission is already working to build an administrative structure to work with the Swiss Secretariat and to fulfil some of the roles that the Swiss MFA – for perfectly valid reasons – cannot fulfil. The detail of how this would all work is still to be mapped out but I think a solution is there if the political will is also there.

On funding, again the situation is clear. Mission funding must be part of the normal budgeting procedures and spread across a wider area. It cannot be left to the individual parties themselves.

Those are three big items but in themselves, even if the political will for reform is there, it will not be sufficient. Some of the problems are contained in the treaty language of Article 90 itself. It will be difficult therefore to make the reforms within the treaty structure. It may therefore be necessary to consider a new body – I will call it IHFFC + - that can sit alongside

the existing structure but with a wider mandate and a wider membership. This would have to be a voluntary body as I cannot see any appetite for treaty changes. It could incorporate the wider scope, the support base and the funding criteria without affecting the existing body. The IHFFC, as currently established, could continue with its narrow role and the Members would be *ex officio* Members of the new body. However, because the membership of the new body would not be limited to those States that have made an Article 90 Declaration or even to those Parties to Additional Protocol I, Members could be sought from a wider base.



I have looked into the long term. But what of the short term? What can the Commission do now to make itself more relevant? I think there are a number of options. First it needs to expand its membership. There are huge geographical gaps, particularly in Africa and Asia. The Commission needs to promote itself more. This again has budgetary implications and it is ironic that promotional activities is the only part of the IHFFC budget that is capped in our financial regulations – at a figure agreed in 1991! The strength of the Swiss Franc has helped but this needs to be looked at as a matter of urgency. If the spread of Member States is widened, this will also affect the pool of candidates for election to the Commission. It needs a wider geographic spread and, with respect to some of my colleagues, some younger Members. I am standing down myself on grounds of age. I know that Oscar Wilde said that with age comes wisdom but he continued “sometimes age comes alone”. Fact-finding is an arduous occupation as Professor David can testify and a level of fitness, both physical and intellectual, is required.

Finally, and this contributes to the promotional activities, the Commission needs to be seen as a major source of expertise in IHL into which other bodies can tap. This could mean involving itself in activities outside its ordinary mandate such as making third party interventions on issues of IHL before national, regional or international courts and Commissions of Inquiry, or even to UN treaty bodies in the context of General Comments. The Commission should show itself as a repository of expertise and encourage others to use that expertise. This may be principally in the use of individual Members but it will increase the relevance of the Commission in the modern world.

Do I think there is a need for a fact-finding body with specific expertise in IHL? To quote one of our party leaders in the recent elections in UK "Hell, yes"! If IHL is to continue to be relevant in the 21st century, it needs a fact-finding expertise. Do I think there is a future for the IHFFC? I give the same answer – but there must be a willingness to explore new options. I know that the Commission itself is prepared to look at all such options. It will activate all that are within its power, if they offer positive opportunities. However, the fundamental reforms can only be implemented by States and it is to you, the representatives of States that we look. You created the Commission and our future is in your hands.



Biographies

Koen Geens

Minister of Justice

Koen Geens has been the Belgian Minister of Justice since October 2014, after serving as Minister of Finance from March 2013 to October 2014. He studied law at the Catholic University of Leuven (KU Leuven), where he graduated in 1980. One year later he also received a Master of Laws degree from Harvard University. From 1981 to 1985 he was a PhD fellow for the National Fund for Scientific Research. From 1985 until 1986 he worked as an assistant at the Faculty of Law of the KU Leuven. He received his Doctor's degree of Law in 1986, for which he was awarded twice. From 1990 onward, Koen Geens has had several academic functions and rendered many social and scientific services. Meanwhile he continues teaching at the KU Leuven, where he became lecturer in 1986 and senior full professor in 1993, and now is a part-time professor whilst being a federal Minister. Koen Geens is the author of many works in the field of Corporate Law, and a member of the editorial staff of several legal series and law reviews.



Gérard Dive

President of the Belgian Task Force for International Criminal Justice



Master in Law (1991) and LLM in International public and private Law (1993), *Université Libre de Bruxelles (U.L.B.)*.

After a brief carrier at U.L.B. as researcher in human rights and international humanitarian law, Mr. Dive became civil servant in the Belgian Ministry of Justice in 1997. Since then, he was member of the Belgian Delegation at the Rome Conference adopting the Rome Statute of the International Criminal Court (ICC), in Prepcom I and II and at all sessions of the Assembly of States Parties of the Rome Statute. He has also participated since then at all Conferences of the Red Cross and Red Crescent Movement and at the EU COJUR-ICC.

He represents the Minister of Justice within the Interministerial Commission for Humanitarian Law where he chairs the Working Group "Legislation" since its establishment in 2000.

Head of the Unit for international Humanitarian Law (Ministry of Justice) since 2006.

Head of the Central Authority for Cooperation with the ICC and all others International Criminal Tribunals since 2006.

During the Belgian EU Presidency in 2010, he chaired the COJUR-ICC and the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (of which he is Belgian co-focal point together with the Deputy Federal Prosecutor).

Since 2014, he is the first President of the new Belgian Task Force for International Criminal Justice, an active network of 24 ministerial and judicial authorities sharing Belgian responsibilities and competences in relation with international justice.

Officer of the Order of the Crown since 2008.

Claude Bruderlein

Strategic Advisor to the President of the ICRC and Senior Researcher at Harvard University



Claude Bruderlein is Strategic Advisor to the President of the International Committee of the Red Cross (ICRC) as well as Senior Researcher at the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR). He holds faculty appointments at the Harvard School of Public Health and the Harvard Kennedy School of Government where he is Faculty Affiliate of the Middle East Initiative of the Belfer Center for Science and International Affairs. Claude Bruderlein is currently Chair of the Harvard Expert Group on Monitoring, Reporting and Fact-finding.

Mr. Bruderlein is a Swiss lawyer engaged in international humanitarian action since 1985. He worked in humanitarian assistance and protection with the International Committee of the Red Cross (ICRC) in Iran, Israel and the Occupied Territories, Saudi Arabia, Kuwait and Yemen as well as in Geneva a legal advisor to ICRC operations. In 1996, he joined the United Nations in New York as Special Advisor on Humanitarian Affairs. He worked particularly on humanitarian access in Afghanistan and North Korea as well as the humanitarian impact of sanctions at the Strategic Planning Unit of the Executive Office of the UN Secretary General. He also served as independent expert on the impact of sanctions for the UN Security Council in the Sudan, Sierra Leone, Burundi and Iraq. In September 2003, he was appointed as a member of the Independent Panel on the Safety and Security of the United Nations Personnel in Iraq.

His areas of focus include strategic planning and crisis management, humanitarian response in the Middle East and international cooperation in the humanitarian sector.

Cécile Aptel

Senior Legal Policy Adviser to the UN High Commissioner for Human Rights and Associate Professor at Harvard University and the Fletcher School



Cécile Aptel is the UN High Commissioner for Human Rights' Senior Legal Policy Adviser, and also a Visiting Associate Professor at Harvard University, and Associate Professor at Tufts' Fletcher School of Law and Diplomacy.

She has worked for the UN for 20 years, in different legal and policy positions, including the International Criminal Tribunals for the former Yugoslavia and Rwanda, the International Independent Investigation Commission and the Office of Internal Oversight Services. Prof. Aptel has consulted for several other international and non-governmental organizations, notably the International Centre for Transitional Justice, where she established and directed the Program on Children and Transitional Justice, and was awarded the Jennings Randolph Senior Fellowship by the United States Institute of Peace in 2010. She has taught widely on international criminal law, humanitarian law, human rights law, and child protection, notably at the Centre for Human Rights of the University of Pretoria, where she is Extraordinary Professor, the Geneva Academy, and Oxford.

Philippe Kirsch

Judge



Canadian lawyer and diplomat who served as a judge of the International Criminal Court from 2003-2009 and was the Court's first president. Prior to his election as an ICC judge, he served as Chair of the Committee of the Whole of the Rome conference which created the Court, and later as Chair of the Preparatory Commission for the ICC. He is currently Chair of the Assembly of States Parties' Advisory Committee on Nominations of ICC judges.

Until 2003 he worked with the Canadian Department of Foreign Affairs and International Trade. He occupied a number of legal positions, including Legal Adviser to the Department. He was also Ambassador and Deputy Permanent Representative to the United Nations and Ambassador to Sweden. He was twice Agent of Canada in cases before the International Court of Justice. He chaired a number of UN treaty-making bodies dealing in particular with various forms of terrorism, as well as conferences on international humanitarian law in the context of the Red Cross and Red Crescent Movement.

After leaving the ICC he was Judge ad hoc at the International Court of Justice in a case between Belgium and Senegal about the conduct of criminal proceedings against Hissène Habré, former dictator in Chad.

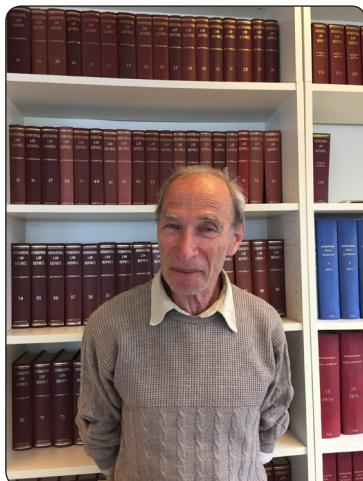
He was Chair of the UN Human Rights Council's Commission of Inquiry for Libya, member of a commission of inquiry in Bahrain and of an IBA fact-finding mission in Myanmar. Subsequently member of the Drafting Committee of the Siracusa Guidelines for International, Regional and national fact-finding Bodies, International Institute of Higher Studies in Criminal Sciences, Siracusa (2013), and member of the Group of Professionals on Monitoring, Reporting, and Fact-finding, Program on Humanitarian Policy and Conflict Research, Harvard University, 2012-2015.

National decorations: Officer of the Order of Canada; Grand Cross of the Order of the Crown of Belgium; Commander of the Crown of Oak of the Grand Duchy of Luxembourg. About twenty academic, human rights and Foreign policy awards.

Eric David

Emeritus Professor in International Law, Université Libre de Bruxelles (ULB),

Member of the International Humanitarian Fact-Finding Commission (IHFFC)



Eric David has taught public international law and various branches of public international law since 1973 at the *Université Libre de Bruxelles* (ULB), and in several universities abroad.

Emeritus Professor since October 2009 he is still in charge of the Law of Armed Conflicts courses. He has published numerous academic articles.

His best-known book called "*Principes de droit des conflits armés*", awarded with two prizes in 1994, has been re-edited five times and was twice translated into Russian.

Eric David practiced and is still practicing, in concrete terms, international law through consultations for intergovernmental and non-governmental organisations or through his activities as counsel before the International Court of Justice or as expert to International People's Tribunals (Russell Tribunal).

Since 2007, he is member of the International Humanitarian Fact-Finding Commission, established by Additional Protocol one to the 1949 Geneva Conventions.

He has an experience of fact-finding inquiries on the fields in relation with the respect of human rights and international humanitarian law (Palestinian Occupied Territories, 1982, Rwanda, 1996, Philippines, 2009). He is a member of the "*Conseil de la transmission de la mémoire*" created in 2009 by the Communauté française (entity part of the Federation in Belgium).

Jürg Lindenmann

Ambassador, Deputy Director, Directorate for international law of the Swiss Federal Department of Foreign Affairs, Secretary of the IHFFC



Ambassador Jürg Lindenmann, Dr. iur., Attorney-at-law (Berne), is Deputy Director of the Directorate of International Law at the Swiss Federal Department of Foreign Affairs (FDFA) and Head of Division I (Human Rights, International Humanitarian Law and International Criminal Jurisdiction, Diplomatic and Consular Law). He also serves ex officio as Secretary of the International Humanitarian Fact Finding Commission.

Before August 2009, he served as the Deputy Legal Advisor of the FDFA and Head of the Unit "Development of International Law" within the Directorate of International Law. Between 1992 and 1999, he had served as legal officer and Deputy Head of Section (Human Rights and Council of Europe) in the International Affairs Division of the Federal Office of Justice.

His professional experience relates to a variety of issues concerning general international law, human rights, international criminal law and institutional law. He has been representing Switzerland in numerous meetings and conferences in particular within the Council of Europe, the United Nations and the International Criminal Court (ICC). Among other issues, he has been working on the establishment of the International Criminal Court as member or head of the Swiss delegations to the Ad hoc-Committee and the Preparatory Committee on the Establishment of an International Criminal Court (1995-1998), to the Rome Conference of the International Criminal Court (1998), the Preparatory Commission of the International Criminal Court (1999-2002) and the meetings of the Assembly of States Parties to the International Criminal Court (since 2002).

He has been teaching "International Criminal Law / International Criminal Jurisdictions" at the University of Fribourg between 2002 and 2009 as well as at the Law Faculty of the University of Lucerne in 2008 and had a teaching assignment of "The Law of International Organizations" at the University of Berne from 2006 to 2011.

Claire Demaret

Head, War Crimes Team, Multilateral Policy, Foreign and Commonwealth Office of the United Kingdom



As Head of War Crimes Team, Claire Demaret leads the Foreign Office section responsible for international humanitarian law compliance and enforcement as well as international criminal justice, including the International Criminal Court. Claire Demaret served as Deputy Head of Mission and Consul at the British Embassy in La Paz Bolivia from 2009-2013, and as Second Secretary in Pyongyang, DPRK from 2008-9. Within the Foreign and Commonwealth Office she has held positions in the United Nations Department working on human rights issues, and in the Middle East and North Africa Department working on reform and the G8 Broader Middle East initiative.

Theo Boutruche

Independent Consultant in International Human Rights and Humanitarian Law (Lebanon) and Former IHL/Human Rights Expert of the Independent International Fact-Finding Mission on the Conflict in Georgia



Theo Boutruche holds a joint Ph.D. in Laws/International Relations from the Graduate Institute of International and Development Studies (Geneva, Switzerland) and the Faculty of Law of Aix-Marseille (France). Currently an independent consultant in international human rights and humanitarian law based in Lebanon, he was previously the Post-Conflict Legal Adviser at REDRESS and the Amnesty International Researcher on the Democratic Republic of Congo (DRC). He also worked as an Associate Human Rights Officer within the UN Office of the High Commissioner for Human Rights. As a consultant or staff of various organisations he conducted research, fact-finding work and trainings in conflict and post-conflict settings such as the occupied Palestinian territory, Lebanon, Iraq, Georgia, DRC, Uganda, and Kenya. He was the IHL/Human Rights Expert of the Independent International Fact-Finding Mission on the Conflict in Georgia. He is also a member of the Harvard Group of Professionals on Monitoring, Reporting and Fact-finding and contributed as an expert to the drafting of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence. His Ph.D. thesis "The Prohibition of Superfluous Injury or Unnecessary Suffering in International Humanitarian Law" was awarded the ICRC Paul Reuter Prize for IHL. He has published several articles and chapters in books on international law issues, including on the challenges to fact-finding and on the role of victims in human rights fact-finding.

He created and manages The Art of Facts – A LEGAL BLOG on Fact-finding and Armed Conflicts, at: www.theartoffacts.org

He is currently teaching at Notre-Dame University in Lebanon and has taught international law, human rights law and IHL in different universities, most recently at the University College London.

Charles Garraway

Professor, member of the IHFFC

Charles Garraway is a Fellow at the Human Rights Centre, University of Essex and Member (Vice-President 2012-2015) of the International Humanitarian Fact-Finding Commission. He served for thirty years as a legal officer in the United Kingdom Army Legal Services, as a criminal prosecutor and as an adviser in the law of armed conflict and operational law. On retirement in 2003, he worked for the Foreign Office on transitional justice issues in Iraq before taking up the Stockton Chair in International Law at the United States Naval War College, Newport, Rhode Island for the year 2004/5. He was a Visiting Professor at King's College London from 2002 to 2008, teaching the Law of Armed Conflict, and an Associate Fellow at Chatham House from 2005 to 2012. He worked for the British Red Cross from 2007 to 2011 and now works as an independent consultant. He was appointed CBE in 2002 and awarded an Honorary Doctorate by the University of Essex in 2012. From 2008 to 2013, he was the General Editor of the United Kingdom Manual on the Law of Armed Conflict.





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