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The International Humanitarian Fact-Finding Commission

Fredrik A. Holst

With the main purpose of investigating alleged grave breaches and serious violations of international humanitarian law the International Fact-Finding Commission (the Commission or IHFFC) has been established in accordance with Article 90 of the Additional Protocol I to the Geneva Conventions of 1949. Officially constituted in 1991 this permanent body of 15 persons – nominated by the adhering nations, elected for five years and acting in their personal capacity – is on call to act when requested by states engaged in armed conflicts.

To date nearly 30 % of the countries in the world have recognized its competence and the Commission could thus become an important instrument to help States ensuring the implementation – and the respect – of the laws of armed conflict. In addition it should be noted that in the course of its first years of existence the Commission «determined and publicly announced that it considers itself equally competent to perform its functions in situations of internal armed conflict».[1]

Acting under the Additional Protocol I the Commission in 1992 adopted Rules of the International Humanitarian Fact-Finding Commission. (To manifest its purpose the word Humanitarian was added.)

The rules are divided into five parts:

- Organisation of the Commission,
- Working of the Commission,
- Enquiries,
- Methods of work and
- Amendments and Suspension.

Only the part «Enquiries» relates to the actual investigative work which may take place in the field.

When a party approaches IHFFC there are a few thresholds to climb before the latter decides to open an enquiry and to form a chamber. Rules under the Enquiry-part present formal conditions that must be met regarding the enquiry request itself. For instance a list of the evidence shall be presented by the requesting party in support of the allegations. Furthermore the Commission has to receive an expressed consent for an enquiry from the other party. Other issues such as cost sharing has to be clarified. If requirements like these are fulfilled a chamber – i.e. the team that, if need be, goes to the area in question – can be formed. A chamber consists of five members of the Commission and two ad hoc members appointed by, but not representing, the parties concerned.

The Chamber's competence to start the actual procedure is given in rule 27 which in paragraph 1, tells that *«(t)he Chamber shall invite the parties to the conflict to assist it and to present evidence within a fixed time period. It may also seek any other evidence it considers relevant and may carry out an enquiry in loco.»* Although a few other parts of this rule touch upon the competence, it lacks substantial orientation on how the Chamber shall conduct its work practically. In the light of this fact – and while awaiting its first mission – members of the Commission over the last few years have discussed the idea of training themselves (i.e. a chamber).

A wider knowledge about the Commission has also been desirable why its Secretariat recently created a web site where basic information can be found (www.ihffc.org).

The Exercise in Sweden

The idea of training members (a chamber) of the Commission – as part of the willingness to check its capability and to keep up the preparedness – was proposed by Sweden in 1997. After a positive answer it was decided

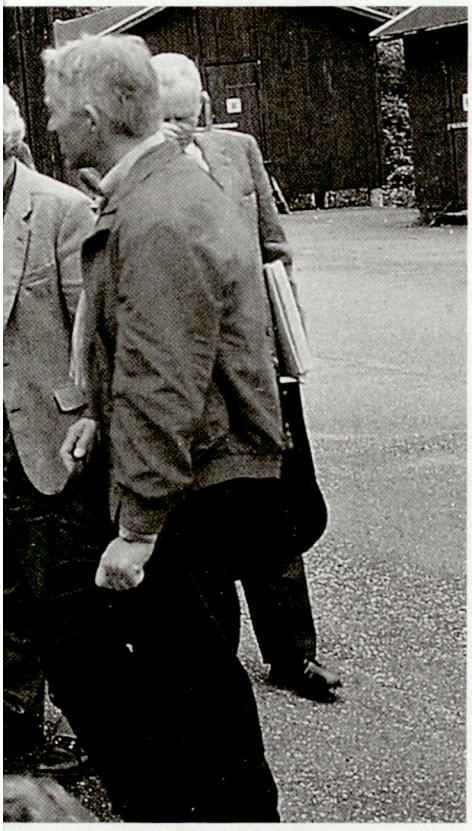


Exercise «DALECARLIA»: The Dalecarlian POW camp-commander under dis

that an exercise should take place at the Swedish Royal Life Guards' Regiment in the vicinity of Stockholm in 1998. The Swedish National Defence College – which was given the main responsibility from the Ministry of Foreign Affairs – planned and conducted the exercise together with the Life Guards and other representatives from the Armed Forces.

A scenario was created in which domestic struggles in Sweden led to an uprising in the northern part of the country. A fictitious break-away republic called «Greater Dalecarlia» seized control of the north, at the parallel of Stockholm international airport (Arlanda). The revolutionary government in Mora sought recognition as it claimed it had control of the territory and support from the people. Soon after the Swedish Government had mobilized its Armed Forces in order to defend the nation, nearby countries Fjordland and the United Lakes recognized Greater Dalecarlia. Media reports and statements from witnesses claimed that the means and methods of warfare had reached a level beyond what could be acceptable from a humanitarian point of view.

When Greater Dalecarlia among other things claimed that Swedish aircraft had pursued indiscriminate area bombing and when Sweden claimed that advancing Dalecarlian troops had tortured farmers and school children, the enquiry procedure of Article 90 was set in motion and the members of the IHFFC Chamber decided to carry out an investigation of the situation on site.



ith members of the IHFFC.

Before the exercise members of the Commission questioned and discussed whether the alleged acts really constituted grave breaches or serious violations, due to the fact that the initial evidential support was rather weak. This shows that lodged requests are and will be seriously scrutinized. From the planning point of view the lack of details was mostly for «exercise reasons». One shall also remember that even if the threshold is relatively high it is up to the requesting party to decide what facts it thinks constitute grave breaches or serious violations. *(«[The request] shall state the facts that, in the opinion of the requesting party, constitute a grave...»,* IHFFC Rule 20:2)

The exercise was held in early September (1998). Two days (and nights) for practice and one day for report writing, discussing experiences, feedback and a shorter seminar which was held at the National Defence College. Participating from the Commission – i.e. the Chamber – were three experienced lawyers from New Zealand, Poland and Russia and two medical doctors from Algeria and Switzerland. In addition the Secretariat was represented with one lawyer.

From the scenario five atrocities especially worth investigating could be identified. The exercise staff – having suspected what would be the main concerns of the Chamber – had prepared a fairly realistic environment including important persons such as military commanders, witnesses and victims, troops on patrol, a P.O.W. camp where alleged crimes had taken place etc. This «Exercise Crew» was more or less on call, ready to be interviewed and/or visited by the Chamber on short notice.

After having leveled the opinions of the main issues the Chamber had no problems to structure its work. Although the individually very experienced members had not been working together before they approached their task in a methodological and swift way. Worth mentioning is that more technical evidence such as medical records, photographs etc. had been presented at this stage. Thus, the Chamber soon knew what its priorities were, i.e. when to deal with what or with whom. One important decision was taken regarding the methods of work namely that the Chamber, when going into the area, should work on one front only. In that respect it considered that the pros would overcome the cons. It is indeed very time-consuming to have everyone to go to the same spot instead of splitting each other. The impressions and the knowledge gained is however invaluable and hard to transfer. Splitting the ad hoc members could also cause problems. Although they are appointed by – and not representing – the respective party, with consent from the other, they might have attitudes in favor of either party.

After having listed in what order it wanted to meet with the local military leaders, witnesses and to visit the POW camp, preparations for the visits and interviews commenced. All visits and interviews belong to the «collecting information process» why it of course is important to know what to ask for. Talking about the process it should be mentioned that the purpose of the whole work by the Chamber is to provide the Commission with what could be called a preliminary report (finding of facts) which includes recommendations based on the findings of the allegations. The Chamber is also expected to present its views in general regarding the compliance of the laws of armed conflict. Later, the Commission, based on the result of the Chamber's work, shall draw up a report to be transmitted to the parties concerned.

During the first day the Chamber visited the local military commanders on each side of the boundary. It also interrogated a school teacher who had witnessed torture of children. After each meeting discussions were held in order to evaluate what had been said and to improve the questioning technique.

The second day started with a visit at a Dalecarlian POW camp. This turned out to be the highlight of the whole exercise. A very well prepared platoon (with both male and female soldiers) acted as prisoners of war. Their leaders acted as camp comman-

Zusammenfassung

Die «International Humanitarian Fact-Finding Commission (IHFFC)», gegründet 1991, besteht aus 15 Personen, die aufgrund ihrer persönlichen Kompetenz von den Mitgliedsstaaten nominiert wurden. Bei bewaffneten Konflikten untersucht die IHFFC etwaige Verstösse gegen das Kriegsvölkerrecht, sofern die betroffenen Staaten dies verlangen. Dabei können sowohl Befragungen von Zeugen, eigene Untersuchungen als auch In-loco-Studien durchgeführt werden.

Da die Kompetenz der IHFFC bisher noch nie in Anspruch genommen worden ist, erhielten die Mitglieder der Kommission im September 1998 in Schweden Gelegenheit, ihre Arbeit anhand eines fiktiven Szenarios einzuüben: Die fiktive Republik «Gross-Dalecarlia» erklärt ihre Selbstständigkeit, wird von den Nachbarstaaten anerkannt, aber vom Mutterstaat Schweden angegriffen und meldet der IHFFC, dass die Kriegführung die Grenzen der Humanität überschritten hat.

Während dreier Tage untersuchen drei Anwälte und zwei Ärzte der IHFFC das Kriegsgeschehen: es wurden Zeugen, Opfer, Armeeverbände und ihre Kommandanten verhört und Ortsbesichtigungen durchgeführt. Die Übung legte einige Fragen offen, welche noch gelöst werden müssen: Wie kann die Kommission Zeugen schützen? Wie soll anonym zugeführtes Beweismaterial behandelt werden? Wie gründlich soll und darf die IHFFC arbeiten?

Einige noch offene Fragen werden wahrscheinlich erst in einem realen Einsatz der IHFFC ihre Antwort finden.

Die Kommissionsmitglieder fanden schnell rationelle Methoden und Arbeitsroutinen trotz vielfältiger Störmomente, die seitens der Veranstalter ins Szenario eingespielt wurden.

Um aber die Kommunikation zwischen der Kommission und der lokalen Bevölkerung, insbesondere den Kontakt mit Behörden und Angehörigen der Streitkräfte zu erleichtern, muss in Zukunft sprachkundiges Verbindungspersonal hinzugezogen werden.

Die IHFFC ist ein Gremium, das sehr wohl die Kompetenz hat, Untersuchungen im Namen des humanitären Völkerrechts anzunehmen und auch durchzuführen. Die Leistungsfähigkeit des Gremiums wurde in der Übung «DALECARLIA» unter Beweis gestellt.

der and guards. After some hesitation among the members of the Chamber a very good work was done where both prisoners and guards were interrogated. Here the Chamber worked on different fronts and e.g. the doctors talked with female and sick prisoners. The last visit of the exercise was to a field hospital where the chief medical officer was interviewed. During this visit the Chamber and especially its chairman was surprised by «international journalists» who among other things claimed he had had improper relations(!) during his stay in Sweden. This and other moments, such as passing checkpoints, were put into the exercise in order to make it as realistic as possible.

Issues of Special Concern

Beside already mentioned questions regarding e.g. methods of work, several others of special concern arouse during the exercise. One of the most discussed issues regarded confidentiality and protection of e.g. witnesses. Although *«No personal data shall be published (in the Commission's report) without the expressed consent of the person concerned»* (IHFFC Rule 29), one foundation stone in the work of the Chamber is that *«All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission»* and *«Each Party shall have the right to challenge such evidence»* (AP I, 90:4.b and c). In other words, it is not clear whether witnesses can be promised anonymity and/or granted protection.

Another interesting question is how to deal with «unquestioned evidence» i.e. what to do if someone just hands over material – maybe anonymously – to members of the Chamber? Is it beyond the scope of the rules to include such evidence? The Additional Protocol I only mentions in article 90:4.a, that *«(t)he Chamber may ... seek such evidence as it deems appropriate...»*

Related to the search for evidence was the question of how deep the IHFFC shall go in its work. Is it enough to «only» get confirmation of transgressions? The answer was and is «yes» since the IHFFC surely would not be accepted if it acted like a prosecutor or an investigating judge searching for evidence or guilt «beyond reasonable doubt».

Also practical experiences were made. For instance the Chamber learned that it would have appreciated to have liaison officers that could assist the members in various situations. For instance to bridge language problems, to explain the mandate and the powers of the Chamber and to assist when claiming freedom of movement.

Concluding Remarks

Without being boastful the Exercise Staff has learned that the exercise was to the satisfaction of the members of the IHFFC. Focus was, more than to find the truth behind the alleged war crimes, to help the Chamber to find methods or routines and, if needed, to guide it. The Chamber however soon found its methods and could then concentrate on the allegations and related issues and questions. Some questions to which answers were found. Some to which answers will remain unanswered until the IHFFC performs its functions in real situations.

Finally, to answer the initial question of this article, it must be concluded that the International Humanitarian Fact-Finding Commission is a body ready to act in the name of international humanitarian law and thus has the capacity to accept an invitation and to carry out an enquiry.

[1] Frits Kalshoven, *Protocol II, The CDDH and Colombia*, page 612 in *International Law: Theory and Practice*. K. Wellens (ed.), Kluwer Law International, 1998.

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