MVČK | Mezinárodní humanitární vyšetřovací komise – probudila se Šípková Růženka?

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Mezinárodní vyšetřovací komise je nezávislý vyšetřovací organ ustavený na základě čl. 90 Dodatkového protokolu k Ženevským úmluvám o ochraně obětí mezinárodních ozbrojených konfliktů (dále „I.Dodatkový protokol“).

K jejímu ustavení bylo třeba, aby zvláštní prohlášení uznávající její příslušnost uložilo u depozitáře Ženevských úmluv alespoň 20 států, čehož bylo dosaženo 20.11.1990, v současnosti toto prohlášení učinilo již 76 států (vč. ČR). Komise byla ustavena v r.1992 a sídlí v Bernu.

Zmíněný čl. 90 upravuje příslušnost Komise, její složení i základní procedurální pravidla pro vyšetřování vedené Komisí.

Komise je příslušná

- prošetřovat údajná závažná porušení Ženevských úmluv a I.Dodatkového protokolu (nejen ta porušení, která tyto smlouvy samy výslovně za „vážná porušení“ označují),
- napomáhat poskytnutím svých dobrých služeb k respektování Ž.úmluv a I.Dodatkového protokolu.

K vyšetřování incidentu mezi státy, které výše zmíněné prohlášení učinily, Komise nepotřebuje dalšího svolení, avšak v případě, kdy některá z bojujících stran není takovým státem, je třeba v daném případě jejího souhlasu

Nálezy Komise jsou dle uvedeného článku důvěrné a mohou být zveřejněny jen na žádost všech zúčastněných stran.

I když je Komise ustavena I. Dodatkovým protokolem, který se týká mezinárodních ozbrojených konfliktů, tak vzhledem ke skutečnosti, že společný čl.3 Ženevských úmluv upravuje konflikty nemezinárodní, je Komise příslušná i pro tento typ konfliktů.

Služeb komise však po téměř tři desítky let její existence žádný ze států nevyužil. Žádné vyšetřování nevedla Komise ani na podnět jiného účastníka ozbrojených konfliktů – nejvážněji se o jejím použití uvažovalo v r.2015, kdy byla útokem letectva USA zasažena nemocnice Lékařů bez hranic v Kunduzu; komise se však tehdy nedočkala souhlasu USA s vedením takového vyšetřování.

Odtud plyne označení Komise za „Šípkovou Růženku“.

Poprvé bylo služeb Komise využito až v r.2017, kdy prošetřovala údajné vážné porušení MHP, které Organizace pro bezpečnost a spolupráci v Evropě (OBSE) spatřovala v tom, že její vozidlo najelo 23.4.2017 poblíž vsi Pryšyb na minu, která explodovala.

Komise tehdy, a to základě dohody s OBSE, zahájila své první vyšetřování a zprávu o něm publikovala 7.9.2017 (Komise došla mj. k závěru, že se o útok na misi OBSE nejednalo). Otázkou ovšem je, na jakém právním základě vlastně toto šetření probíhalo a zda byly aplikovány zásady předvídané článkem 90 I.Dodatkového prokolu.

(Nejen) touto otázkou se zabývá příspěvek publikovaný na blogu MVČK 9.1.2018 Cristinou Azzarello a Matthieu Niederhauserem, který přinášíme níže.

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The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?

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In 2015, the International Humanitarian Fact-Finding Commission (the Commission) received a great deal of attention after Médecins Sans Frontières (MSF) called for an independent investigation following the destruction of its trauma centre in Kunduz by U.S. airstrikes. The BBC and The New York Times mentioned the possibility of an enquiry by the Commission. In a blog post at the time, Catherine Harwood wondered whether the 'Sleeping Beauty' – an expression first coined by Prof. Frits Kalshoven to describe Commission's lack of activity since its creation—would awake soon.

Despite this attention, there was no investigation carried out by the Commission. Indeed, it offered its services to the concerned parties, but was unable to act due to a lack of consent.

Two years later, in May 2017, it was announced on the Commission's website that it would, for the first time, lead an independent forensic investigation in Ukraine, following the explosion of an Organization for Security and Cooperation in Europe's (OSCE) vehicle. The Executive Summary of the report of the investigation was published last September. So, has the 'Sleeping Beauty' awoken? And why has this first investigation received so little attention?

To answer this, we will, after briefly introducing the Commission, review the facts of the case that led to the 2017 investigation, discuss the legal basis for the investigation and consider the role that the Commission can play in implementing IHL.

What is the International Humanitarian Fact-Finding Commission?

The Commission is one of the few mechanisms available for the implementation of international humanitarian law (IHL). It was created on the basis of Article 90 of Additional Protocol I (API) to the Geneva Conventions, applicable to international armed conflicts (IACs). Following the acceptance of its competence by 20 States Parties to API and the adoption of its rules of procedure, the Commission became operative in 1992. Today, this number has grown to 76 States Parties. The Commission's 15 members—among which there are medical doctors, judges, high ranking military experts, diplomats and international law scholars—are elected for a five-year mandate.

The Commission is an independent and impartial body. Its mandate is to enquire into facts alleged to be grave breaches or serious violations of the Geneva Conventions and API and to report its findings to the parties (see Article 90(2)(c)(i)). When the Commission has investigated into the facts, it is also competent, through its good offices, to make recommendations to the parties concerned, in view of promoting compliance with the aforementioned treaties (see Article 90(2)(c)(ii)). In all 'other situations'—meaning other situations not covered by Article 90(2)(a) (ICRC Commentary, para 3626)—the Commission shall consider ad hoc requests to institute an enquiry, subject to the consent of all parties involved (see Article 90(2)(d)). The Commission's investigations are guided by the applicable rules of IHL. Notably, it does not have a mandate to stop IHL violations, nor to hold a party accountable for violating IHL. Criminal responsibility and accountability for the alleged violations are therefore outside its scope of activity.

Although the Commission's mandate stems from API, which regulates IACs, it has consistently declared—since its establishment in 1992—that it would be ready to carry out its functions in situations of non-international armed conflicts (NIACs) as well, provided it had the consent of the parties involved. The Commission's position on NIACs is supported by the wording of Article 90(2)(c)(i) of API. In referring to 'the Conventions and this Protocol', that Article could be interpreted to include Common Article 3 of the Geneva Conventions governing NIACs.

The first independent investigation

The facts of the Investigation

On 23 April 2017, an explosion occurred in Pryshy, an area in Eastern Ukraine in the Luhansk Province, severely damaging an armoured vehicle. The vehicle—from the OSCE's Special Monitoring Mission (SMM)—was carrying three people undertaking a routine patrol. The blast killed a paramedic and injured the two others in the vehicle. The Security Service of Ukraine immediately opened a criminal investigation into the incident and the general prosecutor's office treated the event as a terrorist act. There was, however, very little mention of the incident in international news.

On 18 May 2017, the Secretary General of the OSCE and the President of the Commission signed a memorandum of understanding for the Commission to lead an independent investigation. In the agreement that followed, the two organisations approved the launch of an investigation to establish the facts through conducting a post-blast scene forensic and technical assessment within the framework of IHL. Following the OSCE's request, an Independent Forensic Investigation (IFI) was assembled and deployed by the Commission. The Vice-President of the Commission, Ambassador Alfredo Labbé, led the investigation team.

An Executive Summary of the Report of the IFI, was released to the public on 7 September 2017. The full details of the report, however, were made available only to the Permanent Council of the OSCE and the OSCE Secretary General.

The Commission's website indicates that

> *[t]he IFI undertook several investigative steps, which included the review of documents, interviews of witnesses, the inspection of the site where the incident occurred, the damaged vehicle and material collected at the site, and the conduct of a forensic medical analysis of injuries.*

Given the gap in time between when the incident occurred and when the site inspection took place, there was loss of evidence. The IFI, however, has been able to establish with reasonable probability several key facts:

> *the munition most likely to have caused the incident was a Russian manufactured TM-62M anti-tank mine fitted with an MVCh-62 pressure fuse. The mine was positioned on a slight curve in the track, which probably caused the front and rear wheels to follow slightly different paths. It is probable that the mine had been laid very recently, just one or two days before the incident. However, it is also possible that it had been there longer, perhaps several days, with multiple 'near misses' from passing vehicles. It is considered unlikely that the mines could have been in place for months or years, being subjected to hundreds of passes from heavy vehicles, yet failed to explode.*

The investigation team concluded that the anti-tank mine was not specifically aimed at that particular vehicle. This was determined because the road was not on the SMM's usual route and the patrol was unplanned. Moreover, there was little opportunity to lay mines immediately before the patrol, given that the road was used frequently by other vehicles as well. Nonetheless, the report considered any laying of anti-vehicle mines on that road as a violation of IHL because of the potentially indiscriminate damage caused by these weapons.

What is the legal basis for the investigation?

The way in which this investigation was established could raise questions as to the legal basis for the Commission's involvement in the case at hand. In particular, because it was requested by the OSCE—an intergovernmental organisation—does it comply with Article 90 API requirements?

According to Article 90(2)(a) API, High Contracting Parties can generally recognise the competence of the Commission in relation to any other High Contracting Party accepting the same obligation in a situation of armed conflict.

Article 90(2)(a), however, does not mention who can submit a request to the Commission. On the one hand, the 1987 Commentary to the Additional Protocols—an authoritative interpretation of the treaty—clearly highlights that 'only States are competent to submit a request for an enquiry to the Commission, to the exclusion of private individuals, representative bodies acting on behalf of the population, or organisations of any nature' (para 3618). Moreover, the Rules of Procedure of the Commission contain a specific rule on its competence only for States, but say nothing about non-State entities.

On the other hand, according to Article 90(2)(d), in all 'other situations' the Commission can act 'at the request of a Party to the conflict'. The 2015 Report on the work of the Commission states that it considers non-State actors, including international organisations, as entitled to submit a request with legal effect, as long as they are 'concerned' parties to the conflict. This interpretation is supported by the fact that, from paragraph (2)(d) onwards, Article 90 only refers to the 'Parties' to the conflict, whereas in paragraph 2(a) and before it refers to the 'High Contracting Parties'. Under paragraph (2)(d), the Commission still needs the consent of the party or parties to the conflict concerned in order to institute an enquiry.

Ukraine accepted the Commission's competence in accordance with Article 90(2)(a) API in 1989. If we envisage that the IFI investigation has been carried out under Article 90(2)(d), one would have to assume that the Commission considered that an armed conflict existed in Ukraine at the time of the incident and that Ukraine gave its consent as a Member State of

the OSCE. In any case, as a practical matter, Ukraine must have consented to the investigation in some form, as it was carried out on its own territory.

That being said, other rules in Article 90 API do not fit with the situation discussed in this blog post. For instance, the OSCE report uses the word 'investigation' instead of 'enquiry' mentioned in Article 90. Furthermore, Article 90(5)(a) API foresees that the Commission would submit a report on the findings to the parties, while in the present case the report was presented to the Permanent Council of the OSCE. Finally, the selection of the investigation team members, in consultation with the OSCE Secretary General, is quite different from what was suggested in Article 90(3)(a) API, although this last rule remains flexible if the States concerned opt for another solution.

What, therefore, is the legal basis for the Commission to have competence to conduct such an investigation? The question remains open for discussion. Our hypothesis is that the Commission, despite the inconsistencies mentioned in the previous paragraph, accepted what it considered to be an ad hoc mandate under Article 90(2)(d) API. It is understandable why it might have done so, as this case represented a good opportunity to increase its recognition by the international community.

How can the effectiveness of the Commission be improved?

The Commission has huge potential. However, until recently, it has never had the chance to demonstrate its capabilities. There are a number of possible reasons for this. First, there has been a lack of political will from States. States have not been inclined to trigger the Commission for specific cases and have been reluctant to have certain facts and potential violations of IHL exposed. Even in the OSCE case, it is striking that the investigation was not initiated by a State.

A second possible reason for the Commission's latency is its independence. While it is its independence that protects it from undue influence, it also means that it is not part of the Red Cross and Red Crescent Movement or the United Nations system. Thus, it does not have the support of a large organisation while carrying out its mandate and it only has a very limited power of initiative.

Finally, the lack of awareness of the Commission is detrimental to its work. For instance, States might not see that its functioning is very different from other mechanisms, such as Commissions of Inquiry regularly set up by the UN Human Rights Council (e.g., the Commission's findings are not public, unless otherwise agreed by the parties). And even if the Commission's mandate is well known to States, they may have less incentive to engage with the Commission when they already are involved in other enquiries taken up by human rights' commissions.

There are ways to acknowledge these very real concerns and still move forward. Competence-wise, Article 90 API does not prohibit the Commission to make suggestions to international bodies to use its competences in specific situations. Even if the Commission does not have the right of initiative, its Rules of Procedure explicitly state in the preamble that it can 'take all appropriate initiatives as necessary in cooperation with other international bodies, in particular the United Nations, with the purpose of carrying out its functions in the interest of the victims of armed conflict'. Moreover, nothing in the text of Article 90 API prevents the Commission from gathering and analysing information and allegations on specific incidents that could lead to IHL violations, with the possibility of approaching the relevant States and calling upon their consent to start an enquiry.

Conclusion

This first mandate shows that the Commission can be effectively used to enquire into situations potentially involving IHL violations. It represents a first step into the right direction—one that could lead States to call for its expertise in similar situations. Can we then say that the 'Sleeping Beauty' is now awake? We are inclined to agree. Even if the legal basis for this investigation might be debatable, it is a positive outcome that there was an investigation and that it was carried out in its entirety.

Finally, it is worth recalling that Frits Kalshoven, president of the Commission from 1997 to 2001, hoped that the Commission's first case would not be an over complicated one to execute. He was convinced that, since the existing mechanisms for the implementation of IHL are sparse and not extremely effective, the Commission has an important role to play in that field. We believe he was right.

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Professor Kalshoven passed away on 6 September 2017, one day before the investigation team presented the report to the OSCE.

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