

Defining the Purposes, Mandates and Outcomes of Fact-Finding Commissions Beyond International Criminal Justice

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The use of international fact-finding commissions into allegations of serious violations of international criminal, humanitarian or human rights law has increased in recent years.¹ The United Nations Secretary-General ('UNSG') has stressed their growing importance in enhancing human rights protection and combatting impunity.² This can be explained by both increased accountability expectations and stark limitations of the emerging international criminal justice system, which focuses on individual criminal responsibility for specific charges.³ A non-exhaustive overview of international fact-finding mandates between 1992 and 2015 shows that such missions are diverse, geographically dispersed, and established by various bodies, under different circumstances. This plurality is reflected in the purposes, authorising bodies, scope, and outcomes of fact-finding missions. While a considerable number of fact-finding missions are conducted by regional and non-governmental organisations ('NGOs') – and to a lesser extent by States – interests of brevity restrict the present analysis to international bodies.

1. Purposes of Fact-Finding

There are three main purposes of establishing facts in international law: (1) to create a basis for the peaceful settlement of disputes between two or more States; (2) to supervise the execution of international agreements; and (3) to supply the information required for international decision-making under Article 34 of the UN Charter.⁴ While the third purpose is formally constrained to the Security Council ('UNSC'), a number of other UN organs also authorise fact-finding inquiries. Consequently, instead of a single specialised fact-finding body within the UN system, practice has evolved with a plethora of different fact-finding strategies originating from a variety of sources.⁵

1.1. An Emerging Trend: Fact-Finding to Secure Compliance with International Standards

The Commission of Experts for the former Yugoslavia established by UNSC Resolution 780 (1992) catalysed a new paradigm. In this case, fact-finding was used as a mechanism to secure better compliance with international standards, in a manner that sought to divorce the fact-finding structure from the will of particular States.⁶ One relevant source, the UN Special Rapporteur on Truth, Justice, Reparation and the Guarantees of Non-Repetition, suggests that this trend includes extensive truth-seeking at the international level.⁷

¹ See, for example, the International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory (UN Human Rights Council Resolution 19/17, 22 March 2012), the Fact-Finding Mission on Syria (UN Human Rights Council Resolution 16/1, 29 April 2011), and the Independent International Fact-Finding Mission on the Conflict in Georgia (mandated by the Council of the European Union on 2 December 2008). For a comprehensive overview of recent practice and relevant substantive and policy questions, see Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, pp. 1–34 (<http://www.legal-tools.org/doc/5b59fd/>). This policy brief is revised and abridged from Chapter 1 of that anthology, see Marina Aksenova and Morten Bergsmo, "Non-Criminal Justice Fact-Work in the Age of Accountability".

² Report of the Secretary General, "Strengthening and coordinating United Nations rule of law activities", UN doc. A/67/290, 10 August 2012, para. 19.

³ Antonio Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding", in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 295.

⁴ Karl Josef Partsch, "Fact-Finding and Inquiry", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, North-Holland, Amsterdam-London, 1981, vol. 1, p. 61.

⁵ Richard B. Lillich *et al.* (ed.), *International Human Rights: Problems of Law, Policy, and Practice (Casebook)*, Aspen Publishers, New York, 2006, p. 981.

⁶ Cassese, 2012, p. 303, *supra* note 3.

⁷ UN Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", 28 August 2013, UN doc. A/HRC/24/42, para. 21.

1.2. Fact-Finding as Evidence Collection for International Criminal Trials

It is important to distinguish between fact-finding as part of evidence collection in international criminal trials and fact-finding outside the criminal justice paradigm. The two processes are closely related. The fact-finding missions in the former Yugoslavia, Cambodia, Rwanda and Lebanon prompted the creation of international courts and tribunals, which subsequently gathered and processed evidence pertaining to the crimes falling within their jurisdictions. However, the goals of these two processes are different. International criminal trials deal strictly with establishing individual criminal responsibility for core international crimes, while fact-finding missions outside of international criminal justice purport to achieve diverse objectives stipulated in their respective mandates.

1.3. Applicable Standards in Fact-Finding for Criminal Trials and Other Fact-Finding Mandates

The standards applicable to these two processes are distinct. Criminal trials require proof beyond reasonable doubt as well as some degree of verification of the evidence presented at trial. Facts collected during international criminal processes are not always reliable: cultural, educational and linguistic factors can distort witness testimony, while international prosecution may even fail to obtain necessary evidence due to the lack of co-operation at the domestic level, as we have seen in the ICC. In contrast, facts collected by fact-finding missions may not be subject to the same level of scrutiny because they are normally not meant to support individual criminal convictions.

2. Authorising Bodies⁸

2.1. UN Security Council and the Secretary General

UN organs are the main source of international fact-finding processes. Between 1992 and 2004, the UNSC authorised fact-finding inquiries into the situations in the former Yugoslavia,⁹ Burundi,¹⁰ Rwanda,¹¹ Somalia,¹² Sierra Leone,¹³ and Darfur.¹⁴ Occasionally it has requested the UNSG to initiate fact-finding, covering issues as diverse as reviews of the prosecution of serious violations of human rights in Timor-Leste;¹⁵ the assassination of the former

Prime Minister of Pakistan, Benazir Bhutto;¹⁶ illegal exploitation of natural resources in the Democratic Republic of Congo;¹⁷ and the Gaza flotilla incident.¹⁸ The UNSG has also relied on other international organisations to conduct its fact-finding activities, deploying a mission to Syria to investigate the alleged use of chemical weapons after consultations with the World Health Organization and the Organization for the Prohibition of Chemical Weapons.¹⁹ Joint fact-finding between the UNSC and the UNSG has also occurred, for example, the inquiry into the management of the UN Oil-for-Food Programme.²⁰

2.2. UN General Assembly

Despite being less active, the UN General Assembly has also requested the appointment of fact-finding missions, as it did in respect of the past serious violations of national and international law in Cambodia.²¹

2.3. UN Human Rights Council

The UN Commission on Human Rights and, subsequently, the UN Human Rights Council ('UNHRC') are responsible for a large number of fact-finding initiatives into issues including post-ballot human rights violations in East Timor, and the situation of human rights and fundamental freedoms of indigenous people in Chile. Three fact-finding missions of recent importance have been initiated by the UNHRC, including the Commission of Inquiry on Lebanon, the UN Fact Finding Mission on Gaza Conflict, and the Fact Finding Mission for the Syrian Arab Republic.²²

¹⁶ Letter from the Secretary-General to the President of the Security Council, 24 March 2005, UN doc. S/2005/203.

¹⁷ Statement of the Security Council President of 2 June 2000, UN doc. S/PRST/2000/20.

¹⁸ Statement of the President of the Security Council, 1 June 2010, UN doc. S/PRST/2010/9.

¹⁹ Letter dated 22 March 2013 from the Secretary-General addressed to the President of the Security Council, 25 March 2013, UN doc. S/2013/184.

²⁰ Security Council Resolution 1538 (2004), 21 April 2004.

²¹ Resolution of the General Assembly regarding the situation of human rights in Cambodia, 27 February 1998, para. 16, UN doc. A/RES/52/135.

²² On Lebanon, see UN Human Rights Council, Resolution S-2/1: The grave situation of human rights in Lebanon caused by Israeli military operations, 11 August 2006. On Gaza, see UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council Resolutions S-9/1 and S-12/1, Addendum: Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the *de facto* authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012, 6 March 2013, UN doc. A/HRC/22/35/Add.1. On Syria, see UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, 15 September 2011, UN doc. A/HRC/18/53.

⁸ See Marina Aksenova and Morten Bergsmo, "Non-Criminal Justice Fact-Work in the Age of Accountability", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, *op. cit.*, pp. 23–34.

⁹ Security Council Resolution 780 (1992), 6 October 1992.

¹⁰ Security Council Resolution 1012 (1995), 28 August 1995.

¹¹ Security Council Resolution 935 (1994), 1 July 1994.

¹² Security Council Resolution 885 (1993), 1 June 1994.

¹³ Security Council Resolution 1306 (2000), 5 July 2000.

¹⁴ Security Council Resolution 1564 (2004), 18 September 2004.

¹⁵ Letter from the Secretary-General addressed to the President of the Security Council, 24 June 2005, UN doc. S/2005/458.

2.4. UN High Commissioner for Human Rights

It is common for the UNHCHR to undertake fact-finding missions as part of their mandate. This was the case with the visit of Mary Robinson to Chechnya in 2000 to investigate the situation of human rights or the mission deployed by the High Commissioner to Kenya in February 2008 to investigate allegations of human rights abuses following the election.

3. Scope of the Mandate

The diversity of fact-finding missions is also clear from the scope of their mandates, which can be formulated in broad or narrow terms. Missions with narrow scope may monitor the fulfilment of a particular international obligation, such as compliance by Iraq with its disarmament obligations imposed after the Gulf War, or non-violation by Syria of the prohibition against use chemical weapons. It can be even narrower, for example, to focus on the investigation of a particular event, such as the assassination of a political leader (be it Rafiq Hariri or Benazir Bhutto), or specific attacks on UN personnel. These types of missions do not seek to collect facts as much as they serve to show the responsiveness of the international community to those situations that require its immediate attention.²³ The scope may also be limited to the establishment of particular facts, such as determining the existence of settlements. Some missions are limited temporally, rather than substantively: this is usually the case with the reports prepared by the UNHCHR as part of its investigative mandate.

However, the mandate of the mission is oftentimes broad, requiring its members to make normative assessments of the violations that have occurred. For example, the UNHRC dispatched a mission to Syria in 2011 to investigate “all alleged violations of international human rights law”. Likewise, the UNHCHR work on Sri Lanka mandates investigations into alleged serious violations and abuses of human rights and related crimes by both parties to the conflict over a nine-year period, from 21 February 2002 until 15 November 2011. The UNHRC Fact Finding Mission Report on the Gaza Conflict considered “any actions by all parties that might have constituted violations of international human rights law or international humanitarian law”. However, the Report explicitly restricted its assessment and did not attempt to identify the individuals responsible for the commission of offences. This is in contrast with the work of the UN Commission of Experts for the Former Yugoslavia, which collected information regarding the persons individually responsible for crimes against humanity and grave breaches of international hu-

manitarian law.

There are also missions that have a narrowly framed mandate but still engage in normative assessments of the alleged violations of human rights and humanitarian law, for instance, the UN Board of Inquiry to review and investigate nine incidents in the Gaza Strip and southern Israel that occurred between 27 December 2008 and 19 January 2009. It assessed the deaths of civilians in accordance with the rules and principles of international humanitarian law.

4. Outcome of the Mission

Classification of fact-finding missions according to their outcome is necessarily less straightforward, as the result may not always be foreseeable. Fact-finding missions operate in a highly politicised context, where the degree of political support that follows the issuance of a report is often determinative. Moreover, they lack predictability, as they are constituted on an *ad hoc* basis without proper continuity or institutional memory.

4.1. Criminal Prosecutions of those Responsible

Factual inquiries may result in the establishment of a court or tribunal. This strategy allows for the initiation of prosecutions of those responsible on the basis of the information collected by the fact-finding mission. Examples of such missions include the Commission of Experts for the Former Yugoslavia, the International Commission of Inquiry concerning Rwanda, the Group of Experts for Cambodia, and the International Independent Investigation Commission to assist in investigation of all aspects of the assassination of the former Prime Minister of Lebanon, Rafiq Hariri. The UN Independent Commission of Inquiry on the 2014 Gaza Conflict was expressly mandated to identify those responsible for humanitarian and human rights violations that occurred in the context of military operations conducted after 13 June 2014. Findings of such inquiries could be relevant when the Prosecutor of the International Criminal Court (‘ICC’) has opened a preliminary examination or investigation.²⁴

4.2. Mandate to Produce Recommendations

Some missions provide a list of recommendations of a humanitarian character addressed to the State concerned or the international community as a whole. For example, the highly publicised report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of North Korea established the existence of systematic, widespread and grave violations of human rights and recommended profound political and institutional reforms within

²³ M. Cherif Bassiouni, “Appraising UN Justice-Related Fact-Finding Missions”, in *Journal of Law and Policy*, 2001, vol. 5, no. 35, p. 45.

²⁴ For this example, see ICC Press Release, “The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine”, 16 January 2015, ICC-OTP-20150116-PR1083.

the country as well as referral by the UNSC of the situation to the ICC.

4.3. Development of New Mandates

Fact-finding missions may lead to further institutional developments, such as the establishment of a more lasting body with a broader mandate. The conclusions of the UNHRC 2011 fact-finding mission for Syria resulted in the creation of a body with a wider mandate and an additional task of identifying those responsible with a view to holding them accountable – an independent international commission of inquiry.

5. Challenges and Recommendations

International fact-finding commissions are inherently complex and political practices, which will benefit from rigorous methodology of work and impartial execution. Attention to several substantive developments should continue to inform further research and fact-finding mandates. The following recommendations might be helpful to practitioners and academics in the field:

- a. *Over-expansion of the scope of fact-finding missions can be addressed by establishing realistic and achievable objectives.* In many instances fact-finding ceased to be an exercise directed at establishing facts and became an endeavour to define law or to understand comprehensively root causes, circumstances, factors, context and motives of countrywide situations of repression or violence.²⁵ It is essential to pose realistic objectives that fact-finding missions are able to achieve.
- b. *Intertwining legal assessments with factual conclusions should be done with caution.* Some reports of fact-finding commissions go beyond factual conclusions and make legal pronouncements.²⁶ This gives such reports a normative flavour which is sometimes not necessarily expected of the commissions. There is a difference between expressing views on applicable law and its interpretation, and seeking to apply the law to facts. The latter will often be more problematic than the

former.

- c. *Procedural fairness in handling the information obtained by the mission should be carefully considered.* Commissions differ from judicial organs in that they are not bound by the ‘beyond reasonable doubt’ standard of proof, the principle of equality of arms, or the principle of individual criminal responsibility. Indeed, these missions often establish patterns of violations as opposed to individual conduct, and often do not elaborate on the standard of proof used in their reports. Within their parameters, commissions should manifest an awareness of procedural fairness.
- d. *Composition of the mission, its organisation and the resources available to it should be carefully scrutinised.* International commissions and inquiries could benefit from more discussion of these issues, which significantly affect the quality and impartiality of fact-finding processes.
- e. *Rigorous fact-finding methodology is important at each stage of the mission, to enhance work processes in fact-finding and analysis, including the writing of reports and conclusions.* Mediocre performance of some fact-finding missions may be explained by the lack of rigorous methodology, which could be caused by inadequate continuity in international fact-finding.²⁷ It is possible to remedy the situation by sharing knowledge and expertise.

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²⁵ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *supra* note 7, para. 40.

²⁶ Dapo Akande and Hannah Tonkin, “International Commissions of Inquiry: A New Form of Adjudication?”, in EJIL: Talk!, available at <http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/>, last accessed on 13 September 2013.

²⁷ Bassiouni, *supra* note 23, p. 41.