Fact-Finding

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A. Introduction

1 'Fact-finding' or 'inquiry' is a recognized form of international dispute settlement through the process of elucidating facts, given that it is the varied perceptions of these facts that often give rise to the dispute in the first place. The fact-finding process is frequently employed in addition to other diplomatic dispute resolution means such as → *negotiation*, → *mediation*, → *good offices*, and → *conciliation* as well as in → *arbitration* and → *international civil litigation* (→ *Peaceful Settlement of International Disputes*). Fact-finding is a process distinct from other forms of dispute settlement in the sense that it is aimed primarily at clarifying the disputed facts through impartial investigation, which would then facilitate the parties' objective of identifying the final solution to the dispute.

2 The fact-finding process may involve an impartial and neutral body carrying out the inquiry—either a body appointed ad hoc or a standing panel available at every stage of a dispute—or a joint body consisting of the representatives of the disputing parties which conducts the fact-finding activities. Additionally, the same body charged with the establishment of the facts may be required by the parties to evaluate the facts, including a legal assessment of responsibility and relevant recommendations for the future resolution of the dispute. An example of such a model quasi-judicial and quasi-mediatory body is the International Commission of Inquiry in response to the → *Dogger Bank Incident (1904)* where the mandate enshrined both investigative and judicial functions.

B. Historical Development

3 The Dogger Bank International Commission of Inquiry was set up in accordance with Arts 9 to 14 1899 International Convention for the Pacific Settlement of International Disputes ('1899 Hague Convention I') in order to elucidate 'by means of an impartial and conscientious investigation the questions of facts connected with the incident' (International Commission of Inquiry between Great Britain and Russia Arising out of the North Sea Incident [(1908) 2 AJIL 929–30]). The 1899 Hague Convention I, together with the subsequent 1907 Convention for the Pacific Settlement of International Disputes ('1907 Hague Convention I')—adopted during the second of the → *Hague Peace Conferences (1899 and 1907)*—were the first → *treaties* to formally regulate issues relating to the peaceful settlement of international disputes. This procedure displayed many similarities to arbitration procedures, providing, however, fewer juridical consequences and maintaining its independence from other methods of dispute settlement.

4 Both 1899 and 1907 Hague Conventions I required in their respective Art. 9 that the International Commission of Inquiry should be instituted in cases involving differences of opinion on the facts and 'involving neither honor nor vital interests' of the parties in order to facilitate a solution to these cases. Furthermore, Art. 14 1899 Hague Convention I, as repeated in Art. 35 1907 Hague Convention I, strengthened this understanding of the essential purpose of commissions of inquiry by stipulating that the commissions' final reports were not to be regarded as arbitral awards. In contrast to the earlier 1899 Hague Convention I, the 1907 Hague Convention I was equipped with a much more elaborate and detailed set of procedural regulations (see Arts 11–36 1907 Hague Convention I) establishing two main stages of the proceedings: oral and written (optional), fully conducted by the elected president of the commission. Agents of the parties could participate in the oral part of the proceedings without, however, taking an active role in examining the experts and witnesses, as the president of the commission was the only one designated to carry out the interviews. However, during the written phase of the proceedings, the parties, through their agents, were allowed to submit their statements to the commission and to the adversary party. For an example of the procedure of the 1907 Hague Convention I in

practice, see *The ‘Tavignano’, ‘Camouna’ and ‘Gaulois’ Incident (France/Italy) (1912)* settled out of court between France and Italy ([1916] Scott Hague Court Rep 438).

5 In recent years, parties could also resort to the Optional Rules for Fact-Finding Commissions of Inquiry (‘PCA Optional Rules’), which provide a self-contained procedural framework for commissions of inquiry. These rules, considered as an alternative option rather than a supplement to earlier regulations, were prepared as a part of the set of optional rules of the → *Permanent Court of Arbitration (PCA)* and in relation to the non-mandatory procedural provisions of the 1907 Hague Convention I. While the latter gave a significant procedural role to the commission, the PCA Optional Rules allowed for more proactive participation of the agents of the parties during all the stages of the proceedings, including the oral stage.

6 The further resort to the fact-finding method of dispute settlement was also reflected in a number of multilateral treaties largely inspired by the 1907 Hague Convention I with one innovation: a permanently established body for inquiry instead of an ad hoc one. Such a solution was first introduced in the → *Bryan Treaties (1913–14)* and inspired a number of other agreements. The Treaty to Avoid or Prevent Conflicts between the American States of 1923, also known as the Gondra Treaty, negotiated at the Fifth International Conference of American States, was solely dedicated to the establishment of a permanent Commission of Inquiry to resolve ‘all controversies … which it has been impossible to settle through diplomatic channels, or to submit to arbitration in accordance with existing treaties’ (Art. I Gondra Treaty). Similar provisions were enshrined in a tripartite agreement among the ABC Powers: Argentina, Brazil, and Chile, in 1915.

7 The Final Protocol of the Locarno Conference of 16 October 1925 (54 LNTS 297), containing seven mutually interdependent agreements aiming to secure the post-World War I territorial settlement, initiated this process. The → *Locarno Treaties (1925)* introduced a number of bilateral arbitration procedures between Germany and, respectively, Belgium (Annex B), France (Annex C), Poland (Annex D), and Czechoslovakia (Annex E) involving a possible settlement procedure before the Permanent Conciliation Commission (‘PCC’). Article 8 Arbitration Convention between Germany and Belgium, reproduced in the other mentioned mutual agreements, indicated that the PCC’s task was to elucidate upon the questions in dispute by gathering all the necessary information to that purpose by means of inquiry. The Locarno Treaties enshrined a further reference to the procedure laid down by the 1907 Hague Convention I as well as Art. 16 Covenant of the → *League of Nations* under which any member of the League of Nations could sever any trade or financial relations with any other member which resorted to war in disregard of the provisions of Arts 12, 15, and 19 League Covenant. Article 12 League Covenant obligated members of the League of Nations to adhere to arbitration, judicial settlement, or inquiry in situations likely to result in armed conflict (→ *Armed Conflict, International*; → *Peace, Proposals for the Preservation of*). Article 15 League Covenant further elaborated on the inquiry method.

8 Interestingly, this rise in multilateral treaty-based provisions for inquiry did not actually generate a corresponding increase in the practical use of the established fact-finding bodies. The Bryan Treaties were, for instance, used only once. The Bryan-Suarez Mujica Treaty (1914) was invoked in the *Decision with regards to the Dispute concerning Responsibility for the Deaths of Letelier and Moffitt* between the United States of America and Chile, as discussed below.

C. Fact-Finding under the UN Charter

1. Article 33 UN Charter

9 Article 33 UN Charter encouraged Member States to seek the resolution of any dispute likely to endanger international peace and security by peaceful means of negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other elected means. In 1963, recalling Art. 33 UN Charter, the UN General Assembly commissioned the UN Secretary-General to look into the role of inquiry as a means for the peaceful settlement of disputes or their prevention in bilateral or multilateral conventions and in the framework of international organizations.

10 The UN General Assembly reiterated the importance of the use of fact-finding as a contribution to the peaceful settlement of disputes and the prevention of such disputes and, to that end, adopted a resolution requesting the UN Secretary-General to conduct a study regarding the progressive development of the fact-finding methods used in international relations (UNGA Res 1967 [XVIII] [16 December 1963]). The first study, entitled Report of the Secretary-General on the Question of Methods of Fact-Finding, completed on 1 May 1964, contained an outline of the past and existing treaties containing fact-finding provisions, including the → *Taft Arbitration Treaties (1911)*, as well as an extensive overview of the practice of States and some international organizations such as the League of Nations and the United Nations using inquiry for settling disputes and adjusting the situations. This study inspired the UN General Assembly to request the UN Secretary-General to produce a supplementary document focusing on the main trends and characteristics of international inquiry (UNGA Res 2104 [XX] [20 December 1965]), which was presented on 22 April 1966, 'Report of the Secretary General on Methods of Fact-Finding'). Following the studies, the UN General Assembly adopted Resolution 2329 (XXII) of 18 December 1967, one of the most important features of which was to indicate that fact-finding should be combined with an attempt to settle a dispute and not merely be an elucidation of the facts of the case.

11 In a similar vein, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes ('Manila Declaration'; UNGA Res 37/10 [15 November 1982] GAOR 37th Session Supp 51, 261) adopted by the UN General Assembly reiterated an invitation to the Member States to seek the effective settlement of their international disputes not only through the means of inquiry in general, but also through the particular use of the capacity of the UN Security Council in that respect (UNGA Res 37/10 [15 November 1982] Annex paras I (5), II (4) (d)).

2. Article 34 UN Charter

12 On the other hand, Art. 34 UN Charter furnished the UN Security Council with a power to 'investigate any dispute, or any situation, which may lead to international friction or give rise to a dispute' in order to determine whether continuance of the dispute or situation may pose a risk to the maintenance of international peace and security. Here, the Security Council itself was empowered with the ability to institute an inquiry in any situation amounting to a dispute or potentially leading to one in the circumstances described above. Article 35 UN Charter further allowed for the relevant matter to be brought to the attention of both the Security Council and the General Assembly, the latter being able to make any recommendations with respect to the situation under consideration only upon a request from the Security Council (Art. 12 UN Charter).

13 Paragraph 12 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field ('1988 Declaration'; UNGA Res 43/51 [5 December 1988] GAOR 43rd Session Supp 49 vol 1, 276) addressed these special prerogatives and advised the Security

Council to institute fact-finding or good offices missions, among others, to effectively prevent an escalation of the conflicts and disputes.

14 The provisions of the 1988 Declaration were elaborated in the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security ('1991 Declaration'; UNGA Res 46/59 [9 December 1991] GAOR 46th Session Supp 49, 290), a non-binding document which provided a more detailed and comprehensive restatement of the current legal practices in this field (→ *Soft Law*). The 1991 Declaration once again stressed the practical relevance of the inquiry process as a means of preventive diplomacy and the increased need to resort to fact-finding in that respect, which was further highlighted by the UN Secretary-General in his → *Agenda for Peace* of 1992.

D. Fact-Finding as a Tool of the Security Council, the General Assembly, and Human Rights Bodies

15 The UN Security Council, the UN General Assembly, and the UN Secretary-General have frequently used the inquiry procedure to mandate numerous committees, commissions, missions, or panels to investigate alleged violations of → *human rights*, circumstances of deaths or assassinations of individuals, or country-focused inquiries, including frontier incidents. An early record of these uses is listed in the UN Secretary-General studies on fact-finding methods as described above (see also Bar-Yaacov 6–8, 89–197). The → *International Court of Justice (ICJ)* recognized the value of such fact-finding activities on behalf of the UN Secretary-General by using them as evidence (→ *International Courts and Tribunals, Evidence*) in its more recent → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*. Furthermore, extensive oral testimonies and documentary evidence were produced in the course of the fact-finding part of the hearings in the → *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)* ([2007] ICJ Rep 43, 91).

16 It was not until 22 March 1979 that the UN Security Council set up the first commission of inquiry. Based on Resolution 446 (1979), the commission was asked to investigate the situation in → *Jerusalem* in order to determine whether the Israeli settlement policies were in accordance with international law (see also → *Israel, Occupied Territories*). Resolution 496 (1981) requested a commission of inquiry consisting of three UN Security Council members to look into the origins and the background of mercenary aggression in Seychelles in 1981. This was followed by Resolution 780 (1992) and Resolution 935 (1994) creating commissions of experts to investigate situations in the former Yugoslavia (see also → *Yugoslavia, Dissolution of*) and → *Rwanda*, respectively. The Security Council established a commission of inquiry into the → *Burundi* genocide in 1995 (UNSC Res 1012 [1995]); into events in the Jenin Palestinian refugee camp in 2002 (UNSC Res 1405 [2002]); and into violations of international law in Darfur province in → *Sudan* two years later (UNSC Res 1564 [2004]). Similarly, the UN Security Council also requested → *peacekeeping forces* to conduct fact-finding investigations in situations of atrocities, eg the situation in → *Liberia* (UNSC Res 866 [1993]) and the situation in → *Sierra Leone* (UNSC Res 1181 [1998]). In the early 1980s, the UN General Assembly called upon the UN Secretary-General to employ fact-finding missions as a tool to examine the US allegations of chemical warfare in Afghanistan and Southeast Asia (UNGA Res 35/144C [1980]; followed by UNGA Res 37/98D [1982]). The UN Secretary-General used fact-finding investigations periodically throughout the 1980s and mid-1990s to assess allegations, for instance stemming from the conflicts between Iran and Iraq (eg UNSC Res 598 [1987]) and former Yugoslavia.

17 The initial reluctance to establish any fact-finding missions combined with the evident lack of intention to follow up actively on the findings of the inquiry teams resulted in substantial criticism of Security Council fact-finding empowerment. Commentators pointed out not only the meager financial support for the conduct of such procedures, but also the questionable quality of the final reports. The most disconcerting point appears to be a noted lack of impact on the Security Council's decision-making processes even in cases where excellent studies were provided by the fact-finding experts (→ *International Organizations or Institutions, Decision-Making Process*). The only positive example in that respect is the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General of ([25 January 2005] UN Doc S/2005/60 Annex), which contained the suggestion that the Security Council refers the case to the → *International Criminal Court (ICC)*. The Security Council followed up on this recommendation, clearly dismissing the US suggestion to create a separate tribunal for Darfur.

18 Similar criticisms are voiced in relation to the inquiries conducted on behalf of the UN General Assembly and the various UN human rights bodies. The continual lack of resources, both logistical and financial, as well as the limitation of the mandates, contribute to the overall generally negative assessment of the practice of UN bodies in the field. This continues to be an area of concern with the criticism over the setup and findings of the recent Report of the United Nations Fact-Finding Mission on the Gaza Conflict ([25 September 2009] UN Doc A/HRC/12/48), as well as of the earlier Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1 ([23 November 2006] UN Doc A/HRC/3/2), both commissioned by the UN Human Rights Council (→ *United Nations Commission on Human Rights/United Nations Human Rights Council*).

E. Assessment

19 Fact-finding procedures employed initially in relation to frontier disputes or to maritime incidents—eg the above-mentioned Dogger Bank Incident and the → *Red Crusader Incident (1961)*—have been steadily on the decline in the past decades. Despite the noted encouragement coming from the UN General Assembly, States have been reluctant to make use of the fact-finding method of dispute resolution. International organizations, generally, have positively reappraised and utilized the inquiry procedures in a variety of situations, though, in a different, more political context and with varied results. In particular, the UN found it a particularly useful diplomatic tool in preventing international disputes in the field of the maintenance of international peace and security (→ *Conflict Prevention*; → *Diplomacy*). Moreover, Art. 90 → *Geneva Conventions Additional Protocol I (1977)* (1125 UNTS 3) relating to the protection of victims in international armed conflicts provides for the establishment of the permanent → *International (Humanitarian) Fact-Finding Commission* at the disposal of parties to an armed conflict in order to investigate serious violations of international humanitarian law, such as → *crimes against humanity*, → *genocide*, and → *war crimes*. The commission, which is also competent to use good offices to restore respect for → *compliance* with law, has been operational since 1991 in theory, and so far, 72 States have recognized its competence. However, it is believed that the necessity for the → *consent* of the States involved to employ the services of the commission may have hampered its use as the commission has yet to investigate a case.

20 On the other hand, mandatory use of fact-finding in cases of disputes concerning the interpretation or application of a treaty was introduced in Art. 33 Convention on the Law of the Non-Navigational Uses of → *International Watercourses*. Corresponding provisions on

special arbitration can also be found in Art. 5 Annex VIII United Nations Convention on the → *Law of the Sea*.

21 Furthermore, as recent practice shows, fact-finding as a method of dispute settlement is often used as an alternative to adjudication. It is made use of in the international commercial arbitration system as incorporated in multilateral trade and investment treaties (→ *Commercial Arbitration, International*). Since the 1978 enactment of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes ('ICSID Additional Facility Rules'), the → *International Centre for Settlement of Investment Disputes (ICSID)*—under the auspices of the World Bank (→ *World Bank Group*)—has been authorized to institute fact-finding proceedings *sensu stricto*, ie to examine and report only with regard to disputed facts (Art. 16 ICSID Additional Facility Rules). Settlement of disputes in the → *World Trade Organization (WTO)* system also uses regulations allowing for the inquiry procedure, in particular Art. 15 Understanding on Rules and Procedures Governing the Settlement of Disputes ([adopted 15 April 1994, entered into force 1 January 1995] 1869 UNTS 401), which provides a panel procedure in the interim review stage (→ *World Trade Organization, Dispute Settlement*; → *World Trade Organization, Enforcement System*).

22 The employment of the fact-finding procedure in favour of the judicial settlement of international disputes is very well developed. It is frequently used in commercial arbitration. However, this appears to be rather a spectacular exception in the otherwise declining practice between States. Recent sources mention the → *Letelier and Moffit Claim* from 1989 as a contemporary use of bilateral treaties to that effect. In this case, the US invoked the 1914 agreement with Chile to investigate the factual situation related to the deaths of the former Chilean Foreign Minister and his colleague from the US, who were assassinated in Washington, DC in September 1976. As in the *Red Crusader Incident*, the commission of inquiry's functions were more of a judicial nature—mandated to decide on matters of law as well as the factual situation—and whose final decision was accepted as binding settlement of the dispute and a basis for the → *compensation* negotiations.

23 In recent years, however, the use of fact-finding procedures has developed most significantly in the area of human rights. Of mention are, in particular, the commissions of inquiry instituted by the → *International Labour Organization (ILO)*. Furthermore, as shown above, the UN Security Council, the UN General Assembly, and human rights institutions have employed the means of fact-finding as a preventive measure to serve predominantly political aims rather than actually to undertake any comprehensive investigations. To facilitate such practices, the UN Secretary-General compiled the Draft Model of Fact-Finding Procedure for UN Bodies Dealing with Violations of Human Rights, which was adopted by the UN Economic and Social Council in 1974 and was further updated in 1998 (UN Commission on Human Rights, 'Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights'). Recent developments show a significant progress towards joint reporting, involving a number of → *Special Rapporteurs of Human Rights Bodies* assessing all possible aspects of the investigated situation, eg in the report on the Situation of Detainees at Guantánamo Bay, conducted by the Chair of the Working Group on Arbitrary Detention and four other special rapporteurs ([27 February 2006] UN Doc E/CN.4/2006/120), or more recently, the Combined Report on the Human Rights Situation in Palestine and other Occupied Arab Territories ([20 March 2009] UN Doc A/HRC/10/22).

24 Similarly, on the regional level, fact-finding is regarded as a useful diplomatic tool by international organizations. The European Commission of Human Rights and the → *European Court of Human Rights (ECtHR)* conducted a number of the judicial investigations including hearings of witness and the on-the-spot inquiries already in the 1970s (eg in the inter-State case *Ireland v United Kingdom* (ECtHR) Series A No 25, as well as in the numerous cases brought by individuals against Turkey in the mid-1990s). The → *Inter-American Commission on Human Rights (IACommHR)* has developed a comprehensive set of procedures for on-site fact-finding missions while the → *Organization for Security and Co-operation in Europe (OSCE)*, formerly known as the Conference on Security and Co-operation in Europe, had already introduced in July 1992, in the Helsinki, Summit Document: The Challenges of Change ([adopted 10 July 1992] (1992) 31 ILM 1385) the special conditions of fact-finding and rapporteur missions as tools for crisis management and conflict prevention. In order to investigate the causes and the course of the 2008 conflict in Georgia, the European Union Council of Ministers set up an Independent International Fact-Finding Mission on the Conflict in Georgia (Council Decision 2008/901/CFSP of 2 December 2008 [2008] OJ L323/66), with reference to Arts 13 (3) and 23 (1) Treaty on European Union [Arts 26 (3) and 31 (1) TEU of today]).

25 Means of inquiry are equally frequently employed by → *non-governmental organizations* such as the → *International Law Association (ILA)* (see 'The Belgrade Minimum Rules of Procedure for International Human Rights Fact-Finding Missions' [(1981) 75 AJIL 163]), the → *International Bar Association (IBA)* (see the 1999 'IBA Rules on the Taking of Evidence in International Commercial Arbitration' and the 2009 'Lund-London Guidelines on International Human Rights Fact-Finding Visits and Reports'), and the → *International Commission of Jurists (ICJ)*.

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