

## **DECLARATION ON FACT-FINDING BY THE UNITED NATIONS IN THE FIELD OF THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY**

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The United Nations General Assembly adopted the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security (hereafter referred to as “the Declaration”) in 1991 (General Assembly resolution 46/59 of 9 December 1991). It was prepared by the Special Committee on the Charter of the United Nations and on the Strengthening the Role of the Organisation, a committee established in 1974 by General Assembly resolution 3349 (XXIX) of 17 December 1974. A central part of the Committee’s mandate was to consider suggestions for the more effective functioning of the United Nations that may not require amendments to the Charter of the United Nations (hereafter referred to as “the Charter”). In its early years, the Committee gave major attention to aspects of the settlement of international disputes. As a result of that work, the General Assembly, in the lead up to the 1991 Declaration, adopted:

- (1) The Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10 of 15 November 1982), a declaration which includes inquiry as a means of dispute settlement and which calls on member States to consider making greater use of the fact-finding capacity of the Security Council.
- (2) The Declaration on the Prevention and Removal of Disputes and Situations which may threaten International Peace and Security (General Assembly resolution 43/51 of 5 December 1988), a declaration which proposed that the Security Council should consider sending, at an early stage, fact-finding or conciliation commissions as a means of preventing any further deterioration of the dispute or situation; that the General Assembly consider recommending more use of their fact-finding capabilities in accordance with Article 11 and subject to Article 12 of the Charter; and that the Secretary-General should consider making full use of fact-finding capabilities.
- (3) A decision on Resort to a commission of good offices, mediation or conciliation (General Assembly decision 44/415 of 4 December 1989).

Since 1991, the General Assembly, again on the recommendation of the Committee, has also adopted a Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security (General Assembly resolution 49/57 of 9 December 1994), United Nations Model Rules for the Conciliation of Disputes between States (General Assembly resolution 50/50 of 11 December 1995) and a resolution on Prevention and Peaceful Settlement of Disputes (General Assembly resolution 57/26 of 19 November 2002).

The Declaration is to be seen in the broader context of earlier developments in international law and practice. The account may begin in 1899, with the Hague Convention on the Peaceful Settlement of International Disputes. (Much experience of official inquiries into disputed facts already existed at the national level.) The Parties to that Convention stated that they were animated by a strong desire to work for the maintenance of general peace and that they were resolved to promote by their best efforts the friendly settlement of international disputes. Those preambular paragraphs are reinforced in the first article of the Convention, which constitutes Part I under the heading “The Maintenance of General Peace”:

“With a view to obviating, as far as possible, recourse to force in relations between States, the Signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences.” (That critical link between avoiding the use of force and resolving

disputes by peaceful means appears again in the principles stated in Articles 2(3) and (4) of the Charter.)

The Hague Convention of 1899, followed by that of 1907, is best known for the establishment of the Permanent Court of Arbitration, the subject of Part IV of both Conventions. Those provisions are preceded by two parts, which, like Article 33 of the Charter—the first provision of Chapter VI, headed the Pacific Settlement of Disputes—emphasise that arbitration, along with adjudication, is just one of the means available to States to resolve their disputes. Part II of both Conventions records the agreement of the parties that, in the case of serious disagreement or dispute, before an appeal to arms, they are to have recourse to the good offices or mediation of one or more friendly powers.

It is Part III that provides for international commissions of inquiry to resolve disputes of fact on a matter of international nature. If parties to such a dispute, involving neither honour nor vital interests, are not able to resolve it by diplomacy, they should, as far as circumstances allow, institute an international commission of inquiry to facilitate a solution by elucidating the facts by an impartial and conscientious investigation. The inquiry is to be set up under an agreement between the parties. Both sides must be heard. The report of the commission is to be limited to a statement of facts and leaves the conflicting parties' entire freedom as to the effect to be given to the statement.

This procedure was invoked and successfully as early as 1904-1905 in a dispute between the United Kingdom of Great Britain and Northern Ireland and Russia, which occurred when the Russian Baltic fleet fired on a British trawler fleet in the Dogger Bank area of the North Sea during the Russo-Japanese War (The Dogger Bank case). The Russian fleet, mistaking the British fishing vessels for an Imperial Japanese Naval force, sank one fishing boat, killing three fishermen, injuring numerous others, and damaging five other boats. While the dispute between the United Kingdom of Great Britain and Northern Ireland and Russia regarding the facts of the incident did concern honour and vital interests, the parties, on the suggestion of France, agreed to set up a commission of five naval officers, one named by each of the parties, another two by France and the United States, and the fifth by the agreement of those four. The agreement may be seen as going beyond the 1899 text in a second way, since it was asked to report not only "on the circumstances relative to the North Sea incident" but also on the question of where responsibility lies and the degree of blame attached to the subjects of the parties. The Commission made a number of such findings of responsibility against the Russian Admiral, while declaring that their findings were not of a nature to cast any discredit upon the military qualities or humanity of the admiral or his personnel ((1908) 2 AJIL 929). Both parties accepted the Report and Russia paid Britain damages of about £75,000.

The scant terms of the 1899 Convention required those initial commissioners to elaborate rules of procedure. The text of the 1907 Convention is much more detailed and is now further elaborated by Optional Rules for Fact-Finding Commissions of Inquiry, adopted in 1997. The 1899 and 1907 provisions have, however, been expressly invoked in only four cases, the last in 1962. A large number of bilateral treaties concluded in the early 20th century for commissions of inquiry also followed a similar path, with only one of them appearing in the public record such as their invocation in the 1949 recommendation of the General Assembly for the establishment of a panel for inquiry and conciliation (General Assembly resolution 268 D (III) of 28 April 1949); and the International Humanitarian Fact-Finding Commission elected under the 1977 First Additional Protocol to the 1949 Geneva Conventions for the protection of the victims of armed conflict. (See also the General Assembly resolutions 1967 (XVIII) of 16 December 1963 and resolution 2329 (XXII) of 18 December 1967 on the question of methods of fact-finding and the apparent lack of action under them.)

The limited invoking of standing procedures or institutions provides, however, only a small part of the picture. In fact, throughout the life of the United Nations and earlier, many instances of inquiry and fact-finding are to be found. That appears, for instance, from studies prepared by the United Nations Secretariat in 1965 and 1966 (A/5694 and A/6228). The first study discusses 21 inquiry bodies established by the General Assembly, 11 established by the Security Council and a number established by the Secretary-General. I take just one later example – the question of Bahrain. The Secretary-General on 28 March 1970 informed the

Security Council that in response to requests by the Governments of Iran and the United Kingdom of Great Britain and Northern Ireland and following extensive consultations, he had agreed to exercise his “good offices” in a matter pertaining to Bahrain. Such action, he said, had become customary in the practice of the United Nations and had proved to be a valuable means of resolving and preventing tension which could otherwise be prolonged or aggravated by premature disclosure and public debate. He quoted the agreed “terms of reference” – differing views had been expressed about the status of Bahrain; a solution to the problem had to be found to create an atmosphere of tranquillity throughout the area; accordingly, the Secretary-General was requested to send a personal representative to ascertain the wishes of the people of Bahrain. The personal representative reported that his consultations had convinced him that “the overwhelming majority of the people of Bahrain wished to gain recognition of their identity in a fully independent and sovereign State free to decide for itself its relations with other States”. The Security Council endorsed the report and welcomed its conclusion, quoting in particular the above-mentioned passage (Security Council resolution 278 (1970) of 11 May 1970). This instance, like many others, highlights the significance of the differing circumstances of the particular situation for the personnel, processes, applicable standards and roles of inquiries into facts. In this particular case, Iran had long claimed that Bahrain was part of its sovereign territory. Bahrain asserted that it was independent and in a particular treaty relationship with the United Kingdom. Accordingly, it denied that there was a dispute between Iran and the United Kingdom about its status. It followed that the provisions of the Charter, including the Statute of the International Court of Justice about disputes between Member States of the United Nations were not applicable. It was clear that all those interested – the Bahrain authorities, Iran and the United Kingdom agreed with the process. The agreed “terms of reference” did not refer to a dispute between States but did state out the standard to be applied – the wishes of the people of Bahrain. Also interesting is the Secretary-General’s reference to customary practice of the United Nations – a proposition which was challenged but which could be related to Part VI and Article 99 of the Charter.

It follows that when the Special Committee came to prepare and recommend the text for what became the 1991 Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, it had extensive experience to draw on, as indeed the preamble to the Declaration recalls. Much of that practice is reflected in the Handbook on the Peaceful Settlement of Disputes between States (1992), prepared by the Codification Division of the Office of Legal Affairs (see General Assembly resolution 46/58 para 2 and eg. pp 24-33 and 112-119 of the 1992 Handbook).

In the preamble to the 1991 Declaration, the General Assembly recalls the three resolutions listed earlier, along with the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970), and their provisions regarding fact-finding; it stresses the importance for the United Nations, in maintaining international peace and security, to acquire detailed knowledge about the factual circumstances of any dispute or situation; and it recognises that the full use and further improvement of the means for fact-finding could contribute to the strengthening of the role of the United Nations in the maintenance of international peace and security, the promotion of peaceful settlement as well as to the prevention and removal of threats to peace. The operative part of the Declaration begins with these general propositions:

1. In performing their functions in relation to the maintenance of international peace and security, the competent organs of the United Nations should endeavour to have full knowledge of all relevant facts. To this end, they should consider undertaking fact-finding activities.
2. For the purpose of the present Declaration, fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.
3. Fact-finding should be comprehensive, objective, impartial and timely.

4. Unless a satisfactory knowledge of all relevant facts can be obtained through the use of the information-gathering capabilities of the Secretary-General or other existing means, the competent organ of the United Nations should consider resorting to a fact-finding mission.
5. In deciding if and when to undertake such a mission, the competent United Nations organs should bear in mind that the sending of a fact-finding mission can signal the concern of the Organization and should contribute to building confidence and defusing the dispute or situation while avoiding any aggravation of it.
6. The sending of a United Nations fact-finding mission to the territory of any State requires the prior consent of that State, subject to the relevant provisions of the Charter of the United Nations.

Paragraph 6 reflects the principle of international law that States have a free choice of means of peaceful settlement (although only in respect of inquiries on site). In general, the State must provide its consent. That proposition is reflected, for instance, in the provisions of the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations relating to peaceful settlement. However, the importance of the final phrase of paragraph 6 and indeed of the savings clause (para 31) in the final paragraphs of this Declaration should not be neglected: the provisions of the Declaration do not prejudice the provisions of the Charter. The previous paragraph (30) also recognises that the parties may have agreed to other methods of peaceful settlement – an agreement that is without prejudice to the sending of a mission. The Charter provisions referred to above may empower United Nations organs to act, including by way of an inquiry into facts in a particular context, without the consent of a State involved in the dispute or situation. Instances are mentioned later.

The second part of the Declaration (paras 7-18) is based on the proposition that fact-finding missions may be undertaken by the Security Council, the General Assembly and the Secretary-General, a list which, as will appear, has been extended in practice. Earlier, the Trusteeship Council sent many visiting missions to trust territories as their populations moved towards the exercise of their rights of self-determination (Article 87(c) of the Charter). Reference may also be made to the work of the Special Committee on Decolonisation set up in 1961 to monitor the implementation of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolutions 1514 (XV) of 14 December 1960 and 1654 (XVI) of 27 November 1961). The Trusteeship Council has frequently sent missions to non-self-governing territories, in some cases for the purpose of supervising referendums on self-determination.

The organs identified by the 1991 Declaration should undertake fact-finding in relation to their responsibilities in respect of international peace and security, including, in the case of the Secretary-General, the prevention of disputes in situations threatening international peace and security (paras 7-15, see also part IV (paras 28-29)). The organ considering the possibilities of a fact-finding mission should bear in mind other efforts, including those of regional organisations or agencies. Consider, for instance, efforts set up by the Organisation of American States in 2015 in respect of migrant movement from the Dominican Republic to Haiti or those by an International Labour Organisation tripartite mission in 2016 on the freedom of association issues in Fiji. The United Nations organ chosen was to be given a clear mandate and precise requirements to be met by its report. The report should be limited to a presentation of findings of a factual nature – but recall the scope of the report in the Dogger Bank case, a practice which has been followed in later years as will appear later.

In Part III of the Declaration, three provisions deal with the giving or refusal of the consent of a State to receive a fact-finding mission (paras 19-21). Three more deal with the providing of full assistance to the mission and its privileges and immunities. The final three paragraphs impose important obligations on the fact-finding mission:

25. Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way. Their members have an obligation not to seek or receive instructions from any Government or from any authority other than the competent United Nations organ. They should keep the information acquired in discharging their mandate confidential even after the mission has fulfilled its task.

26. The States directly concerned should be given an opportunity, at all stages of the fact-finding process, to express their views in respect of the facts the fact-finding mission has been entrusted to obtain. When the results of fact-finding are to be made public, the views expressed by the States directly concerned should, if they so wish, also be made public.

27. Whenever fact-finding includes hearings, appropriate rules of procedure should ensure their fairness.

Since 1991, there have been many inquiries engaged in fact-finding in relation to international disputes or situations, set up within the United Nations and beyond.

What follows is a selection, which places some emphasis on inquiries into alleged breaches of international humanitarian law and international human rights law. The basic principles stated in 1991 may be seen as reflected in many of those cases. Also observable are major variations in the membership, procedures and mandates of different bodies, variations resulting from the character of the issues they are to address. Some have also seen a failure to learn from earlier experience and to consolidate that experience. It should be noted, however, that in 2015 the Office of the High Commissioner for Human Rights did issue an updated version of *Guidance and Practice on Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*; recall, too, the 1992 Handbook prepared by the Codification Division of the UN Secretariat mentioned earlier.

The Security Council, in a number of situations, notably in respect of Yugoslavia and former Yugoslavia in the early 1990s, Rwanda in 1993 and Darfur in 2005, has exercised its powers under Chapter VII of the Charter, to authorise the Secretary-General to establish Commissions of Inquiry, the reports of which led to the establishment by the Council, again acting under those powers and without the consent of the States in question, of tribunals in the first and second cases and the reference of the situation in the last to the International Criminal Court.

Among other inquiries under Security Council authority since 1991 are those relating to massacres in Liberia (1993), “ethnic cleansing” and other matters in Abkhazia and Georgia (with the Secretary-General taking the lead) (1993), Burundi (1993), Central African Republic (2013) and Cote d’Ivoire (2004). Many other inquiries, some mentioned later, have been carried out under the authority of the General Assembly, the Secretary-General and the Human Rights Council.

Although it is not mentioned in the 1991 Declaration, the International Court of Justice routinely resolves factual issues when exercising its powers to decide international legal disputes between States and has the power to initiate inquiries as in the Corfu Channel case in 1949 and a territorial and maritime dispute between Costa Rica and Nicaragua in 2017. In addition, findings of an inquiry which has already been undertaken may assist proceedings in the Court. An instance is provided by the Genocide Convention case brought by Bosnia Herzegovina against Serbia. The Court in 2007 declared that it had “gained substantial assistance from” a report prepared by the Secretary-General on “The Fall of Srebrenica”. It had earlier said that the value of the reports submitted to it by the Parties depended, among other things, on “(a) the source of the item of evidence (either partisan or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)”. The Court applied that approach to the report, concluding that “the care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it”. In that case the Court also concluded that it should, in principle, accept as highly persuasive findings of fact made by the International Criminal Tribunal for

former Yugoslavia unless, of course, they have been reversed on appeal. That conclusion was again based on the rigorous processes of the Tribunal lending to final findings.

The 2015 Guidance and Practice report mentioned earlier summarises the practice of inquiry bodies under five headings – role, mandates, operational aspects (including rules of procedure and the protection of witnesses), report and recommendations, and follow up. The annexes list relevant international legal and methodological standards and manuals; model standard rules of procedure and details relating to 50 inquiries supported or deployed by the Office of the United Nations Human Rights Commissioner in respect of situations in Africa, Asia, the Americas and Europe. The model standard rules of procedure, in Annex II, provide a helpful guide for those establishing and participating in fact-finding inquiries as do a number of other instruments, some listed in annex I and others in the recommended readings which follow. Important features are:

- the solemn declaration of independence, impartiality, loyalty and conscience the members of the commissions are to undertake;
- the methods of inquiry, including provisions about confidentiality, reducing the risk of harm of those who came into contact with it, and complying with relevant international standards;
- cooperation with other bodies and with member states, particularly in respect of collecting information in the territory of the State involved.

## **Related Materials**

### ***A. Legal Instruments***

Hague Conventions of 1899 and 1907 (Text of the Conventions available on the website of Yale Law School's *Avalon Project*).

Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 26 June 1945.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Geneva, 7 December 1978, United Nations, *Treaty Series*, vol. 1125, p. 3.

### ***B. Jurisprudence***

International Commission of Inquiry between Great Britain and Russia arising out of the North Sea Incident, Finding of the International Commission of Inquiry Organized under Article 9 of the Convention for the Pacific Settlement of International Disputes of 29 July 1899, *American Journal of International Law*, vol. 2, p. 929.

International Court of Justice, *Corfu Channel case (United Kingdom of Great Britain v. Albania)*, Judgment of 4 April 1949, *I.C.J. Reports 1949*, p. 4.

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p.43.

International Court of Justice, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018.

### ***C. Documents***

General Assembly resolution 268 D (III) of 28 April 1949 (Panel for Inquiry and Conciliation).

General Assembly resolution 1514 (XV) of 14 December 1960 (Declaration on the granting of independence to colonial countries and peoples).

General Assembly resolution 1654 (XVI) of 27 November 1961 (The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples).

General Assembly resolution 1967 (XVIII) of 16 December 1963 (Question of methods of fact-finding).

Report of the Secretary-General on Methods of Fact-Finding: study prepared in pursuance of resolution 1967 (XVIII) of the General Assembly (A/5694, 1 May 1964).

Study prepared by the Secretary-General in pursuance of General Assembly resolution 2104 (XX) (A/6228, 22 April 1966).

General Assembly resolution 2329 (XXII) of 18 December 1967 (Question of methods of fact-finding).

Security Council resolution 278 (1970) of 11 May 1970.

General Assembly resolution 2625 (XXV) of 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

General Assembly resolution 3349 (XXIX) of 17 December 1974 (Need to consider suggestions regarding the review of the Charter of the United Nations).

General Assembly resolution 37/10 of 15 November 1982 (Manila Declaration on the Peaceful Settlement of International Disputes).

General Assembly decision 44/415 of 4 December 1989.

General Assembly resolution 43/51 of 5 December 1988 (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).

General Assembly resolution 46/58 of 9 December 1991 (Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization).

General Assembly resolution 46/59 of 9 December 1991 (Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security).

General Assembly resolution 49/57 of 9 December 1994 (Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security).

General Assembly resolution 50/50 of 11 December 1995 (United Nations Model Rules for the Conciliation of Disputes between States).

General Assembly resolution 57/26 of 19 November 2002 (Prevention and peaceful settlement of disputes).

#### ***D. Doctrine***

H. Waldock, *International Disputes: The Legal Aspect*, Europa Publications, London, 1972.

N. Bar-Yaacov, *The Handling of International Disputes by Way of Inquiry*, Oxford University Press, London, 1974.

United Nations Office of Legal Affairs, Codification Division, *Handbook on the Settlement of Disputes Between States*, United Nations, New York, 1992.

B. Ramcharan (ed.) *International Law and Fact-Finding in the field of Human Rights*, Nijhoff, Boston, 2014.

Harvard Humanitarian Initiative Program on Humanitarian Policy and Conflict Research *HPCR Advanced Practitioner's Handbook on Commissions of Inquiry*, Cambridge University Press, Cambridge, 2015.

United Nations Office of the High Commissioner for Human Rights, *Guidance and Practice on Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*, United Nations, New York, Geneva, 2015.