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International Law and Fact-Finding in the Field of Human Rights

Revised and Edited Reprint

Edited by
Bertrand G. Ramcharan

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Foreword

Human rights fact-finding is at the heart of efforts for the international protection of human rights. Unfortunately, gross violations of human rights are still rampant in many parts of the world and governments responsible for them go to great lengths to deny or to hide them from detection, and often band together to avoid international scrutiny and opprobrium. Furthermore, since it began operations in 2006 the UN Human Rights Council has sought to give priority to cooperation and dialogue even when dealing with shocking violations of human rights. In these circumstances, recording and publicising gross violations being committed is often the most that can be done in the quest for justice. Its historical importance is of the highest order. Quality and professionalism are crucial.

It is a recurring phenomenon that governments responsible for gross violations of human rights frequently seek to defend themselves by highlighting and exaggerating mistakes or discrepancies, even minor ones, while side-stepping evidence presented about the violations they have committed. The method of defence resorted to in such instances is to attack the fact-finding report rather than to accept responsibility for the violations perpetrated.

For these reasons, it is crucial that careful attention be paid to the substantive and methodological integrity of fact-finding reports. The internal ground rules for each report should be explained and respected consistently. The human rights fact-finder must not give openings to unscrupulous governments to deflect attention from their responsibility for violations. The fact-finder must be professional, especially in the face of egregious violations of human rights. Protection of the victims demands this.

In light of the foregoing considerations it is valuable that Martinus Nijhoff is re-issuing this volume on the *International Law and Practice of Fact-Finding in the Field of Human Rights*, first published in 1982. At the time of its publication it sought to strengthen human rights fact-finding by identifying the ground-rules with a view to strengthening the quality and integrity of fact-finding reports.

A lot has happened in human rights fact-finding in the past three decades. There are numerous human rights fact-finding mechanisms in the United Nations and in regional organizations. There are many more international commissions of inquiry these days. The international criminal tribunals on Yugoslavia and Rwanda have helped clarify various areas of the law. The International Criminal Court will undoubtedly add to this process.

At the same time, there have been many controversies over successive fact-finding reports. What seems to be needed is a source of reference in helping to sort out the controversies and in helping fact-finders to strengthen their work.

That is the strength of this work. It provides reference points for fact-finders and for those called upon to assess their work. Fact-finders must be clear about the ground rules they are applying. Method and consistency are essential.

In providing basic ground rules for human rights fact-finding this work remains of inestimable value.

Theo van Boven,
Maastricht, 2014.

Introduction

People the world over react with cries of the heart when they hear and read about gross violations of human rights committed by Governments or Non-State actors against innocent human beings. They plead for justice for the victims. Unfortunately, justice is often elusive and is shielded by claims of sovereignty or by contentions that the perpetrators must be approached through cooperation and dialogue. It is crucial that the human rights movement record for history, and perhaps for future justice, the violations that have taken place. In this respect, the fact-finding record must be objective, fair, methodical, and balanced. Without this, the record could be tainted.

This is a challenging requirement. Some human rights NGOs, such as Amnesty International and Human Rights Watch, have internal ground rules when it comes to gathering, corroborating and evaluating evidence. Others might feel that they should just pile up the available evidence and damn the perpetrators. While understandable, the evidence they present would need to be carefully assessed.

The need for ground rules is particularly important in international or regional organizations. In the United Nations there are some fifty 'special procedures', country-oriented or thematic, who essentially engage in fact-finding.[1] There are also fact-finding exercises in regional bodies such as the African Commission on Human and People's Rights, the European Court of Human Rights, and the Inter-American Commission and the Inter-American Court of Human Rights. Human rights treaty bodies such as the Human Rights Committee, the Committee against Torture, and the Committee for the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, also undertake fact-finding activities. It is important that the reports or decisions they produce are well-founded and authoritative.

International judicial bodies such as the International Court of Justice, the International Criminal Court, and the International Criminal Tribunals for the former Yugoslavia and for Rwanda have been contributing to the clarification of evidentiary criteria and it can be expected that this process will continue. But the context is different and human rights fact-finders need to be accorded more flexibility than formal courts.

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1 See, generally, B.G. Ramcharan, *The Protection Roles of UN Human Rights Special Procedures*. Martinus Nijhoff, 2008.

From the outset it was thought that there were certain clearly established principles by which human rights fact-finding should be guided on all occasions. Among these were the independence, objectivity and impartiality of fact-finders; propriety in form and in substance; legality and due process; equity and fairness; and responsiveness to, and effectiveness in dealing with human rights violations. This was one of the central messages of *International Law and Fact-Finding in the Field of Human Rights*, first published in 1982.[2]

Since the establishment of the UN Human Rights Council it has frequently resorted to fact-finding commissions of inquiry, whose members serve with heart and dedication, but whose work, in some instances, has met with controversy over their approaches to fact-finding or evidentiary criteria. One should never seek to hem in these commissions of inquiry with rigid rules, but essential rules of fairness and due process are of great importance for the integrity and weight of their work. Proper procedure is of importance.

In 2014, for instance, a commission of inquiry presented a solid, riveting and damning report on a situation of systemic violations of human rights in an Asian country. The members of the commission are of great integrity and the highest qualifications. But at the same time as it delivered its report, it wrote to the leaders of two countries warning them that they might be held responsible for international crimes or serious violations of human rights. The question arises whether this was proper procedure. Was it for the Commission to write to the two governments concerned or should they have advised the Human Rights Council to do so – or sought its go-ahead before doing so? Presenting the evidence, with recommendations, is for fact-finders; acting on those facts is for the parent body.

When *International Law and Fact-Finding in the Field of Human Rights* was first published in 1982 it sought to advance the view that fact-finding in the field of human rights is, in principle, a quasi-judicial process, guided by the relevant rules of international law. At the same time it recognized that a flexible approach should be adopted by fact-finding bodies and that legal criteria should usually yield to humanitarian considerations. Nevertheless, the rules of procedure in international fact-finding should remain consistent with principles of due process in order to retain the credibility of the procedure.[3]

On the point at issue regarding the commission that wrote to the leaders of two governments warning them that they might be guilty of crimes against humanity, it is worth recalling the advice of *International Law and Fact-Finding*

2 Martinus Nijhoff, 1982.

3 B.G. Ramcharan (Ed.), *International Law and Fact-Finding in the Field of Human Rights*. Martinus Nijhoff, 1982.

in the Field of Human Rights: As a minimum, the reports of fact-finding bodies should contain a summary of the facts alleged, the human rights affected, the submissions of the parties, if any, the evidence obtained, the facts established and the conclusions reached. "If the fact-finding body is so empowered, it may offer appropriate recommendations. In any case, it may offer advice or views on measures which need to be taken with a view to the speedy restoration of respect for human rights." Separate or dissenting opinions may be entered by members who have participated in the inquiry in question.[4]

The need for carefully observed ground rules of human rights fact-finding is probably greater these days because the human rights movement is operating in a period when the ground is shifting under its feet. In the UN Human Rights Council the governing majority advocates approaches grounded in cooperation and dialogue, even when dealing with egregious violations of human rights. In the broader United Nations there is vigorous controversy over the Responsibility to Protect. The majority of UN members has served notice that they prefer softer approaches when dealing with human rights problems within Member States. Within the UN Human Rights Council's Universal Review Process, 'constructive dialogue' is the guiding spirit. Human rights actors must do their utmost to uphold the integrity of international human rights law and human rights fact-finders must try to navigate a course that is grounded in rules of international law. Without the law there will be no anchor.

In an important work published in 2014, Geoff Dyer presents *The Contest of the Century*, a book about the new era of competition between China and the USA. An important part of this contest, he writes, is over the ground rules of international relations, particularly on issues such as human rights. Dyer writes:

> If the twentieth century saw fierce ideological battles between fascism and liberal democracy and between capitalism and communism, then one of the central dividing lines in this century will be the issue of state sovereignty. As China has become more powerful over the last decade, Washington and Beijing have started to compete over the basic rules at the heart of the international system, about the duties and responsibilities of what is sometimes called 'the international community'. In part, it is a battle for the soul of the United Nations, where many of these disputes are played out, but it is also a bigger discussion about the role of human rights in international affairs. In one corner, the U.S. and Europe urge greater intervention in states that are conducting massive abuses

4 Ibid, p. 185.

> against their citizens; in the other corner, China and Russia defend a belief that absolute sovereign rights are the bedrock for a stable international system...Beijing would like to use its new influence to set the tone for how international politics will be organized and to check what it sees as Western moralising and meddling.[5]

Dyer added, in fairness, that China believes it is creating a more equitable world, a 'democracy between nations' in which each state is treated equally by the rest of the international community: "Whereas the West values human rights and transparent governance, China places emphasis on stability. Beijing argues that only when a poor country has a solid government, whose sovereignty is respected by other nations, can it then introduce the sorts of coherent, long-term policies needed to promote growth and reduce poverty."[6]

One thing has become crystal clear: the human rights movement must seek to act with scrupulous objectivity in the new political environment. This is particularly true of human rights fact-finders. This is where we think that *International Law and Fact-Finding in the Field of Human Rights* remains as valuable today as when it was first published three decades ago. It continues to be a source of reference on core issues of fact-finding.

On the sources of law applicable, for example, it advised that these include sources indicated by any particular constitutional or treaty regime within which the fact-finding body may have been established; sources expressly mentioned in the constitutive instrument; relevant legal pronouncements of parent organs; the laws of the State concerned, in so far as they are consistent with the international standards; the sources of law enumerated in Article 38 of the Statute of the International Court of Justice namely, international conventions, international custom, the general principles of law, judicial decisions and the teachings of highly qualified publicists; and the binding parts of international human rights standards. It added that the international standards of human rights are fully invokable by fact-finding bodies.

On sources of information and evidentiary issues, *International Law and Fact-Finding in the Field of Human Rights* advised that the rules of evidence applicable to any fact-finding exercise depend in the first place upon any relevant provisions in the constitutive instrument initiating the exercise. If the constitutive instrument gives the fact-finding body the power to draw up its

5 G. Dyer, *The Contest of the Century. The New Era of Competition with China – and How America Can Win*. New York. Knopf, 2014, pp. 201–202.

6 Ibid, p. 204.

own rules of procedure, then the fact-finding exercise will be governed by such rules of evidence as are included in the rules of procedure.

In the absence of any, or sufficiently express, provisions in the constitutive instrument, fact-finding bodies should be guided by the following general principles, both in drawing up their rules of procedure and in their practical operations:

- The standard of proof is usually a 'balance of probability'. Probability in this sense may be defined as an evaluation of the likelihood of a past event having happened, given the facts and assumptions expected or adopted for the purposes of the evaluation. However, in adversarial contexts, the standard 'beyond all reasonable doubt' may be applied.
- Fact-finding exercises in the field of human rights often being more inquisitorial than adversarial, there is usually no onus or burden of proof upon any particular complainant. However, upon the establishment of a prima facie case that breaches of human rights have occurred, a burden of proof may rest upon the government concerned to show that this was not the case or that government agents were not responsible for such violations.
- Flexible admissibility criteria should be applied. A fact-finding body is free to employ for enlightening itself all the kinds of evidence that it deems necessary. It has the unlimited right of admitting all methods of proof that may be considered in conscience as sufficient and necessary.
- As regards the communication of evidence to the government concerned, a fact-finding body should, as a general rule, communicate to the government concerned for its comments such evidence as it may receive. However, it always possesses a discretion as to whether or not to communicate a particular piece of evidence to the government and may decide not to do so, in order to protect the source of information or to protect other persons from reprisals.
- As regards the evaluation of evidence this is a matter that rests exclusively within the competence of the fact-finding body, or after it has submitted its report, upon its parent organ (if any).

International Law and Fact-Finding also offered detailed guidance on on-site observation and hearings. These included:

- Freedom investigation
- Freedom of movement
- Guarantees of safety and security as well as of privacy and security of premises, possessions, records.

- Inviolability of premises and accommodation
- Privacy of interviews or hearings
- Protection of witnesses
- Privileges and immunities of the members of the Group and secretariat staff.
- Maintenance of records.
- Press communiques.

On hearings, *International Law and Fact-Finding* advised the following:

- Hearings, be they in an inquisitorial or adversarial context, should be conducted in a quasi-judicial manner.
- After establishing their identity, witnesses should be required to make an oath or affirmation to tell the truth.
- Witnesses should preferably give an oral account of their story instead of reading out prepared statements.
- Witnesses should be examined by the Chairman or members with a view to checking for reliability, veracity, or corroboration.
- The fact-finding body may decide whether the hearing shall be public or private.
- Due attention should be paid to the need to protect witnesses against reprisals. If necessary, hearings may be conducted in locations or in circumstances designed to protect witnesses.
- The fact-finding body decides for itself on witnesses whom it wishes to hear and may call witnesses of its own volition.
- A fact-finding body may advise on interim measures of protection if necessary or may suggest that urgent measures be taken in order to ensure respect for human rights.
- In hearings in an adversarial context, the principle of equality of arms should be respected.
- Appropriate arrangements should be made for maintaining records.

We believe that the guidance provided by *International Law and Fact-Finding in the Field of Human Rights* has stood the test of time and remains as valid as it was when advanced. We therefore welcome the re-issuance of the book at a time when the need for objective standards of human rights fact-finding has become particularly relevant in a world in which the political ground is shifting visibly.

Bertrand G. Ramcharan

Geneva, 2014.

Foreword to the Original Edition

Fact-finding is not a new phenomenon in international law. As is well known, the Hague Convention of 1907 already dealt with international commissions of inquiry, but they were then seen merely as a means of settling certain kinds of disputes between States. In the last few decades the question has assumed quite a different dimension, with the establishment of international organisations and the adoption by them of standards aimed at improving the lot of individuals and requiring the organisations and States to promote their implementation. Implementation of such standards does not necessarily require fact-finding, since national legislation often suffices to give effect to international instruments when the machinery of the State is both willing and able to secure observance of the law.

Nevertheless, the implementation of international standards not infrequently raises questions of fact. This happens particularly in the field of human rights, where international action seeks to give effective protection to individuals in their daily lives and must therefore be able, in case of doubt or controversy, to ascertain the facts. Today fact-finding is thus frequently called for as part of the action taken by the international community to secure respect for human rights.

Seen in this light, the question has taken on a wider significance, but at the same time engenders greater difficulties. It is no longer a matter of ascertaining the facts in cases which merely involve the interests of two States. As was pointed out by an ILO commission of inquiry in 1962, the purpose of inquiry is to gather "thorough and objective information" on issues of "public importance."[7] Inquiries are no longer confined to disputes "involving neither honour nor essential interests," as was the case with the provisions of Article 9 of the 1907 Convention relating to the institution of international commissions of inquiry. On the contrary, issues of major importance to both the international community and the State concerned are often at stake. What type of action can be taken in such cases to meet the requirements of the international community while taking account of the susceptibilities of the State involved?

The problem is not confined to international action in the field of human rights. Fact-finding may be needed, in varying measure, in all procedures through which it is sought to check the conformity of particular situations

7 See International Labour Office: *Official Bulletin*, Vol. XLV, No. 2, Suppl. II, April 1962, p. 9, paragraph 15, and p. 228, paragraphs 705 and 706.

with international standards of commitments. In recent years, this question has been the subject of major studies,[8] and the International Law Institute has placed international commissions of inquiry on the agenda of its last session (August–September 1981).

These preoccupations have many features in common, yet fact-finding in the field of human rights has a special importance, and also encounters special difficulties, both because of the subject-matter and because of the importance attached to it by public opinion, which regards it as the acid test of the effectiveness of international organisations. Fact-finding in respect of human rights is however all the more difficult, because it frequently concerns the action and essential interests, if not indeed the very structure, of the States involved, who are therefore less inclined to accept international intervention in such matters. The issues often have political aspects and are the subject of discussion in political bodies, a factor which necessarily complicates their examination. Lastly, although the United Nations have primary responsibility for the protection of human rights as such (and especially civil and political rights), human rights problems are also frequently dealt with by other organisations, whether universal (such as the International Labour Organisation, which has played and continues to play a pioneering role in this field) or regional (such as the Council of Europe and the Organisation of American States). Consequently, fact-finding on questions concerning human rights has been undertaken by various organisations and bodies in differing contexts, and the methods used have not always been similar.

The time is therefore ripe to review the situation and to draw the lessons from the considerable and varied experience which has gradually been accumulated. One should be grateful to Dr. Ramcharan for having stimulated and brought together in this volume a series of studies by eminent specialists and practitioners on the various aspects of fact-finding in the field of human rights and on the practice of the principal organisations active in these matters (United Nations, International Labour Organisations, Council of Europe, Organisation of American States, and non-governmental organisations).

Having myself taken part in such procedures, I should like to set out some general reflections on the problem.

In the first place, as we are on the frequently unstable terrain of international law, it is necessary, as has previously been recognised, not to confine oneself within unduly rigid categories or rules. In international law, functions inter-twine – at times, indeed, too much – and judicial aspects cannot always

8 See *L'inspection internationale*, Fifteen studies of the practice of States and international organisations, ed. Georges Fischer and Daniel Vignes, Bruyland, Brussels, 1976.

be distinguished clearly from non-judicial ones. It is therefore not always possible, in international fact-finding, to transpose internal judicial procedures in full. Nor is it always possible – or even desirable – to establish unduly detailed rules which may turn out not to be applicable in practice. If procedures are too formal and judicial and rules too detailed, they may prove not to be adapted to the great variety of situations, to the susceptibilities and objections of the States concerned, or to practical needs.

One conclusion to be drawn from this is that it is necessary to have available a variety of procedures suited to different situations, ranging from quasi-judicial inquiries to methods involving a minimum of formality such as "direct contacts," a method developed by the ILO over the past twelve years which has proved extremely useful and is now being increasingly adopted also by other organisations, particularly the United Nations.

Does this mean a purely empirical approach, with a different method in each case, marked by compromise and bargaining? Obviously not. On the contrary, even though fact-finding should not be constricted within unduly rigid *a priori* rules, it must be based on certain rules and respect certain principles, which are highlighted in the present volume.

The principles must be such that, having regard to the procedure followed and the persons entrusted with it, the fact-finding process enjoys the confidence of the international community as well as of the State concerned. It thus becomes possible more readily to obtain the co-operation of the latter, while not leaving the international community in any doubt about the integrity and reliability of the findings.

These principles must naturally be based on the principal concepts of *due process of law* in domestic procedures (such as the age-old rule "auditur et altera pars"), but they must also make allowance for the special features of this kind of international action. Thus, in the event of on-the-spot visits, it will not normally be possible for a representative of the complainant to be present, nor will it be appropriate for a representative of the party complained against to take part in interviews with private individuals. The latter party should, however, be given an opportunity to comment on allegations received in the course of such visits. Similarly, precautions have sometimes to be taken to ensure the safety of witnesses and to protect them against intimidation or reprisals (or the mere fear of reprisals). More generally, one must bear in mind that the proceedings are aimed at ensuring observance of standards adopted by the world community (or by a regional organisation): they should therefore be investigatory in nature, particularly as regards the gathering of evidence, and should seek to obtain the fullest possible information on the matters at issue.

A process as difficult as human rights fact-finding calls not only for procedural safeguards. In a divided and distrustful world, and on questions where there exist profound differences of views, fact-finding itself and the conclusions and recommendations emanating from it are more likely to find acceptance if it is entrusted to independent and impartial persons. Not only logic, but also several decades of experience lead to that conclusion.

In the last resort, as for all human institutions, the success of the difficult task of fact-finding in the field of human rights will depend on men as well as procedures. While the task is difficult, it is at times an indispensable condition for having tense situations examined objectively and honestly and for obtaining positive results. The present volume will certainly provide valuable guidance to those who in future will have to deal with such questions.

31 December 1981

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