B.G. Ramcharan
(editor)

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

International Studies in Human Rights

Martinus Nijhoff Publishers

INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS

edited by

Dr. B.G. Ramcharan
Special Assistant to the Director
United Nations Centre for Human Rights
Visiting Professor of International Law
University of Ottawa

1982

MARTINUS NIJHOFF PUBLISHERS

THE HAGUE/BOSTON/LONDON

Distributors:

for the United States and Canada
Kluwer Boston, Inc.
190 Old Derby Street
Hingham, MA 02043
USA

for all other countries
Kluwer Academic Publishers Group
Distribution Center
P.O.Box 322
3300 AH Dordrecht
The Netherlands

Library of Congress Cataloging in Publication Data
Main entry under title:

International law and fact-finding in the field of human rights.

(International studies in human rights ; v. 1)
Bibliography: p.
Includes index.
1. Civil rights (International law)
I. Ramcharan, B. G. II. Series.
K3240.4.I58 1983 341.4'81 82-12577
ISBN 90-247-3042-2

ISBN 90-247-3042-2 (this volume)
ISBN 90-247-3043-0 (series)

FOREWORD

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".[1] 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 with international standards of commitments. In recent years, this question has been the subject of major studies[2], 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 practioners 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 intertwine – at times, indeed, too much – and judicial aspects cannot always 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 obtain-

ing 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

Nicolas Valticos
Former Assistant Director-General, ILO
Member of the Permanent Court
of Arbitration
Secretary-General of the Institute of International Law

NOTES

1. 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.
2. See *L'inspection internationale,* Fifteen studies of the practice of States and international organisations, ed. Georges Fischer and Daniel Vignes, Bruyland, Brussels, 1976.

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INTRODUCTION

by

Dr. B.G. Ramcharan

Fact-finding is at the heart of human rights activity. The prescription of human rights norms implies an understanding of the needs to be addressed, which in turn requires an appreciation of the factual conditions. The application and supervision of human rights norms do not take place *in abstracto* but in relation to specific circumstances and situations. This also requires an awareness of the factual conditions. Claims that human rights are, or are not, being respected, or are being violated, turn essentially on questions of fact.

The impartial determination of facts, is also an essential requirement for the mobilization of international opinion. There is great value in fact-finding proceedings as such, as a means of producing an authoritative account and evaluation of a situation which almost invariably involves issues of major public interest. The result provides a basis for influencing action both by governments and by international organizations and thus adds to the momentum of pressure for rectification of human rights abuses. Where an inquiry reveals serious problems, it also invariably leads to further action in international organizations. Disclosure is thus an essential means for keeping public opinion alerted and maintaining pressure.

The basic rules of international law applicable in fact-finding in the field of human rights are far from being clear. In the debate on fact-finding which took place in the United Nations' Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, in 1964, the "scantiness and unclearness" of rules of procedure were pointed out,[1] and it was urged that "more could be done to improve existing procedures".[2] It was said that "in the United Nations era, fact-finding had often been lacking in system and it could probably be greatly improved by better procedures".[3] The inadequacy of procedures in the OAS was also referred to.[4]

In 1974 the U.N. Commission on Human Rights and the Economic and Social Council took note of draft model rules of procedure for fact-finding in the field of human rights, which had been prepared by a working group of the Commission, and by the Secretary-General. While the Secretary-General's draft dealt with both substantive and formal issues, the text adopted by the

working group dealt mainly with procedural aspects. In recent fact-finding exercises in the United Nations, the applicable rules have given rise to difficulties. Thus, the Government of Chile often complained that the Commission on Human Rights' *Ad Hoc* Working Group on the situation of human rights in Chile did not follow the relevant rules of international law on matters pertaining to the admissibility and evaluation of evidence. Similar complaints have also been made by, or on behalf of, other governments, such as the Government of Israel, with reference to the practice of the United Nations Special Committee on human rights in the Arab territories occupied by Israel.

The present volume is an attempt to explore this relatively uncharted area of international human rights law. It is recognized that it is not easy to determine the applicable rules, or policy, to be followed in every case and that flexibility is highly necessary in fact-finding. Nevertheless, it is felt that an attempt to clarify the applicable rules could result in more methodical fact-finding which, hopefully could strengthen the fact-finding process and enhance its impact. As was stated by the International Law Association's Sub-Committee on Equal Application of Human Rights Laws and Principles, "the level of procedural due process manifested by a fact-finding mission (has) a direct correlation with the fairness of the mission's report, as well as being an important factor in the report's credibility'. Moreover, "since fair procedures contribute to the credibility of the facts found by a mission, ...the report of a mission which had conducted itself in accordance with a high standard of due process would carry far greater weight in the organs of international public opinion thereby increasing pressure on a State violating human rights to comply with the international norms".[5]

I. Inquiry in International Law

The "main object" of inquiry, according to Oppenheim, "is the elucidation of the facts",[6] and the duty of an inquiry commission is to investigate the circumstances of a case and issue a report "limited to a statement of facts".[7] The 'Interim Committee' of the General Assembly which, in the early years of the United Nations, functioned between sessions of the General Assembly in order to make the facilities of the Assembly available in the field of international peace and security, defined the term inquiry as envisaging "the establishment of the facts involved in a dispute and a clarification of the issues in order that their elucidation may contribute to the settlement of the dispute".[8] A leading treatise on the Charter of the United Nations interprets the term "inquiry" as it is used in Article 33 of the Charter as meaning the impartial ascertainment of facts.[9]

A recent report on Peaceful Settlement of Disputes prepared for the Interna-

tional Law Association, defined the method of "inquiry" as follows: "In any dispute which it has not been possible to settle by direct negotiations and which has arisen from a difference of opinion on points of fact, the parties to the dispute may agree to have recourse to the method of inquiry and to the appointment of a commission of inquiry. The agreement establishing the commission of inquiry shall determine: (a) the issues to be examined; (b) the mode and time in which the Commission is to be formed; (c) the powers of the Commission; (d) the site of the Commission; (e) the procedure to be followed; (f) the right of the Commission to visit any place, to interrogate witnesses and experts, and to obtain documents; (g) the method of financing of the expenses of the Commission. The commission on inquiry shall elucidate the facts by means of an impartial and conscientious investigation. Its report shall be limited to a statement of facts and shall have no binding effect."

As distinct from international inquiry, the following elements of international conciliation were stated: "1. In any dispute which it has not been possible to settle by direct negotiations, the parties to the dispute may agree to have recourse to the procedure of conciliation. 2. The function of conciliation may be exercised by a State or group of States, an international body, an individual or a conciliation commission. 3. Conciliation shall be conducted in accordance with an existing agreement between the parties or a special agreement shall be concluded for the purpose. Such an agreement shall determine: (a) the issue to be submitted to conciliation; (b) the mode of selection of the conciliator or the conciliation commission; (c) the powers of the conciliator or the conciliation commission; (d) the site at which the conciliation procedure is to take place; (e) the procedure to be followed; (f) the right of the conciliator or the conciliation commission to engage in fact-finding and, for that purpose, to visit any place, to interrogate witnesses and experts and to obtain documents; (g) the method of financing of the expenses of the conciliation procedure.

"Unless the parties agree otherwise, the main task of the conciliator or the conciliation commission shall be to clarify the points in dispute between the parties and to endeavour to bring about an agreement between them upon mutually acceptable terms. The conciliator or the conciliation commission may also institute such investigations of the facts involved in the dispute as may be necessary".[10]

It has been said that inquiry as a means for the peaceful settlement of international disputes was first provided for in the Hague Conventions of 1899 and 1907.[11] The international commissions of inquiry instituted under the two Hague Conventions had certain general characteristics: resort to them was voluntary; they could act only to settle questions of fact in disputes of an international nature involving neither honour nor vital interests; they were temporary bodies established to decide a particular question; they were so constituted as to ensure the predominance of the neutral element; and their report was in no way binding.[12]

The functions of the international commissions of inquiry provided for in the first Hague Convention of 1899 for the Pacific Settlement of International Disputes was not to pronounce verdicts; their role was limited to fact-finding and the parties were enirely at liberty to draw from the facts whatever conclusions they wished. As soon as they began to be used, however, the role of international commissions of inquiry was extended beyond the limits indicated in the Convention. For example, the commission constituted in the "Hull" or "Dogger Bank" case between Great Britain and Russia was required by the agreement for inquiry, of 12 November 1904, not only to elucidate the facts but also to establish where responsibility lay and to fix the degree of blame attaching to those persons found responsible. The second Hague Conference therefore decided that the work of 1899 still required to be completed and improved; it was necessary to endow the institution of international commissions of inquiry with a set of rules of procedure which would make their use surer and more expeditious. The institutions of international commissions of inquiry emerged from the second Hague Conference improved particularly as regards procedure. However, some States still regarded it as weak, in that it was optional and intended only for the settlement of difficulties relating to questions of fact in disputes which did not affect honour or vital interests. Those States wished to go still further. Between 1913 and 1915 they concluded the Bryan treaties or treaties along similar lines. Under these treaties, commissions of inquiry were set up which were permanent and competent to consider, *inter alia,* the legal as well as the factual aspects of all disputes, with the exception, where the case arose, of those capable of arbitration. The Covenant of the League of Nations marked a further stage in the development of the international inquiry procedure, for under the Covenant, Article 15 of which at least implicitly entrusted conciliatory functions to the Council and the Assembly, the inquiry procedure became a means of providing those organs with information, helping them to assemble the facts and data they needed to fulfil those functions. Since the establishment of the United Nations, fact-finding bodies have formed a part of the general machinery of the peace-keeping system and of the system for the protection of human rights, created by the Charter.

II. Fact-finding in the Field of Human Rights

An early writer on fact-finding in the field of human rights posed the question: "What does the word 'facts' mean?", and noted that this is a question "which is packed with philosophical elements. ...What public opinion understands by a fact-finding mission ...by the term 'an inquiry' is that the elements of a disputed situation are discovered carefully regardless of party interest, so as to permit the competent organ to base well-balanced decisions upon their findings

and be responsible only for these decisions and not for the findings of fact on which they were based."[13]

'Finding a fact' according to the American Law Institute Model Code of Evidence "means determining that its existence is more probable than its non-existence."[14] The comment on this formulation in the Model Code was as follows: "Wherever 'finds' is used in these Rules, it is the equivalent of 'finds by a preponderance of the evidence,' as that term is used in the majority of modern opinions ... It is everywhere agreed that 'preponderance of evidence' means evidence of greater convincing force. It is also agreed, when the point is squarely presented, that the production of a preponderance of evidence does not necessarily discharge the burden of persuasion ... This had led some courts to insist that the trier must find not that the existence of the fact is more probable than its non-existence but that the fact exists. Obviously no trier can know what is the historical fact when there is a dispute about it; all that the trier can do is to find where the preponderance of probability lies, and the majority of the courts expressly recognize this truth. No rule (in the Code) uses the word 'finds' to describe the action of a judge or jury in a situation where the law requires the trier to be persuaded beyond reasonable doubt."[15]

In a working paper submitted by the Government of the Netherlands to the United Nations Special Committee on the Principles of International Law on Friendly Relations and Co-operation among Nations, in 1964, it was contended that: "1. Both in the field of the settlement of disputes and in the framework of intergovernmental organization and multilateral treaties, a distinction should be made between: (a) decision-making functions; (b) inquiry, by a person or a body of recognized standing and the highest reliability and impartiality; (c) technical collection and examination of factual evidence by experts in the field. Any international fact-finding organ ... should comprise function (b) and (c), with (c) subordinated to (b). 2. It follows from the foregoing that any fact-finding body should never have decision-making functions and should always be an auxiliary or subsidiary body either to higher, decision-making organs or to the parties in a dispute. It could never operate unless under the authority of such a higher organ or on the request of the parties. Consequently, a fact-finding body could never encroach upon the authority of organs like the General Assembly or the Security Council."[16]

The nature of fact-finding activity in the field of human rights is indicated by the professed approaches of some of the bodies which have been established so far. One of the early United Nations fact-finding exercises in the field of human rights approached its task as being one of "undertaking its work in a spirit of complete impartiality and objectivity, and that its prime concern was to arrive at acceptable and adequate formulae for possible United Nations assistance towards the solution of a serious problem with which a Member State was faced."[17] The United Nations mission to South Vietnam (1963), for-

mulated its terms of reference as such: "The Mission is an *ad hoc* fact-finding body and has been established to ascertain the facts of the situation as regards the alleged violations of human rights by the Republic of Vietnam in its relations with the Buddhist community of that country."[18]

The General Assembly's Special Committee on the situation of human rights in the Israeli-occupied territories, in defining the aim and purpose of its investigation, "decided, at the outset, that it must not interpret its mandate as enjoining it to conduct an investigation for the purpose of conviction and punishment of abuse. The Special Committee prefers to regard its mandate as requiring it to investigate a situation, to ascertain the facts, to determine whether there have been contraventions of the Geneva Conventions of 1949 or the Universal Declaration of Human Rights and, if it finds that there have been instances of contravention and violation of these rules of international law, designed and accepted in the interests of humanity, to express its opinion as to the means and measures by which the international community can instil in all nations a scrupulous respect for, and extract from them adherence to, these rules of humanitarian conduct even under the brutalizing influence of armed conflict."[19]

Fact-finding in the field of human rights possesses certain distinct characteristics not usually found in traditional fact-finding or in fact-finding in other areas of international law. In the first place the approach of fact-finding in the field of human rights is not primarily to adjudicate or to condemn but to assist in the restoration of human rights; in the second place fact-finding is nevertheless partisan in favour of human rights concerns. It cannot be totally neutral in this respect. Third, fact-finding in the field of human right proceeds from the basis that governments have a responsibility for guaranteeing human rights in their respective countries and, therefore, once *prima facie* evidence has been established that violations of human rights have occurred, an onus is upon the government concerned to advance evidence to the contrary, or to show that it has taken, is taking, or intends to take measures to guarantee respect for human rights and fundamental freedoms. Fourth, fact-finding in the field of human rights is frequently inquisitorial rather than adversarial, in the sense that generally there are often no parties as such to fact-finding, except in instances of fact-finding in the context of ILO complaints procedures or inter-State complaints procedures provided for in instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. Fifth, certain rules applicable to traditional fact-finding may not be suitable to fact-finding in the field of human rights. It has been pointed out that: "The practice of the United Nations with regard to inquiries into alleged violations of human rights reveals the following basic differences from the Hague system: joint initiative of the parties in dispute is not necessary for the appointment of a commission of inquiry; the state requesting an inquiry need not claim direct injury; the

consent of the accused state is not a prior condition for the conduct of the inquiry; the accused state is not necessarily consulted on the membership of the commission, or its mode of operation; the commission of inquiry is responsible not to the states in conflict, but to the United Nations organ that has appointed it; the scope of investigations includes legal, as well as factual issues; the report contains not only findings but also recommendations; action on the report is expected, not only by the state or states directly concerned, but also from the competent United Nations organs."[20]

A basic distinction between fact-finding in the field of human rights and traditional fact-finding was well brought out by a distinguished writer who stated that: "Fact-finding as a method of implementation of human rights is not in contemporary international law and international relations, a neutral activity based on the assumptions which were valid for international Commissions of Inquiry instituted under the two Hague Conventions for the Pacific Settlement of International Disputes. The promotion and encouragement of respect for human rights are a basic purpose of the United Nations and belong to the basic principles of the International Labour Organisation as well as of other international organizations. Fact-finding bodies set up by such organizations represent their purposes and principles and, for that matter, cannot afford an attitude of neutrality. As was submitted by the Fact-finding and Conciliation Commission on Freedom of Association with regard to the trade union situation in Greece, as from the moment when the Commission is seized of a case, that case is no longer a dispute between the parties but becomes a matter of public interest. This public or collective interest was well described by the European Human Rights Commission in the instance of a complaint by Austria against Italy. The Commission recorded, *inter alia,* that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe. It may be posited, in conclusion, that the task of ascertaining the facts is certainly one of a (semi-)judicial character to be performed in an impartial way with a view to disclosing the concrete and real situation. This, however, does not mean that fact-finding is a neutral and uncommitted activity. It is rather a function fulfilled in the public interest and in the light of the purposes and principles of the organization which provides the machinery for the investigation. This in the opinion of the writer implies that, inasmuch as facts pertaining to human rights are part of a broader political context, that context cannot be overlooked in formulating findings and even less still in drawing up recommendations."[21]

Professor Ermacora has pointed out that "The fact-finding methods in the field of human rights function in various forms," and suggested a three-fold classification: "The *institutionalised form* of fact-finding is found in a judicial

or quasi-judicial procedure, to which States parties submit from the very beginning by an unconditional accession to a convention which provides for fact-finding instruments. Besides this institutionalised form of fact-finding provided for in bilateral or multilateral agreements, there exists *indirect fact-finding* by so-called 'periodic reports' to which no specific consequences are linked. A third category is made up of *fact-finding instruments ad hoc* without any conventional basis. To these instruments belong fact-finding by organs of intergovernmental organizations, fact-finding by non-governmental organizations which have a consultative status with the United Nations, and the fact-finding by other organizations (founded on purely private initiative) having no formal relationship with any intergovernmental organization."[22]

In our view, *fact-finding* proper may be distinguised from *ancillary fact-finding*[23] of *fact-gathering*.[24] Fact-finding proper involves a deliberate exercise aimed at making determinations as to the existence or non-existence of fact. Fact-gathering relates to the collection or collation of facts (which may or may not be in dispute). It may take place as an independent exercise or as one aspect of a fact-finding exercise proper. Such activities, for example, take place when studies are prepared by special rapporteurs or periodic reports are submitted by governments for examination by supervisory bodies. The later types of procedure may lead to *ancillary fact-finding*.

The specific characteristics of any particular fact-finding exercise in the field of human rights will depend on the terms stated in its constitutive instrument. Subject to these terms or to any subsequent pronouncements by the parant organ, fact-finding in the field of human rights should normally follow a quasi-judicial approach. A recent ILO study has pointed out that the ILO "commissions of inquiry are essentially of a judicial nature and are designed to enable the Commission to prepare a report embodying its findings on questions of fact and containing its recommendations on any steps to be taken to meet the complaint."[25] In its comments on the United Nations draft Model Rules of Procedure for fact-finding bodies in the field of human rights, the Government of the Phillippines stated that "...the functions of the *ad hoc* bodies to which the model rules are applicable are more or less judicial in nature."[26] Similarly, the Government of Greece felt that "the judicial or quasi-judicial character of United Nations *ad hoc* bodies entrusted with the study of particuar situations alleged to reveal a consistent pattern of violations of human rights could not be contested."[27]

As in other areas, fact-finding in the field of human rights, is characterized by great variety of types. As situations of "many different kinds may arise in many different contexts, the methods of fact-finding must of necessity be of great variety ... there is still a use for traditional commissions of inquiry ... such new methods, as the appointment of special representatives of the Secretary-General of the United Nations to be present and cognizant of events in an