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Charity Registration Number: 208223

## International Law Summary

# UN Fact-finding and International Criminal Investigations

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22 January 2014

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## INTRODUCTION

This is a summary of a meeting of the International Law Discussion Group held at Chatham House on 22 January 2014.<sup>1</sup> The meeting was one of a series held in conjunction with Doughty Street Chambers on international criminal law milestones. Its purpose was to discuss, on the one hand, investigations by fact-finding commissions into potential human rights violations and, on the other, investigations in the context of international criminal law.

## HUMAN RIGHTS FACT-FINDING

When fact-finding commissions undertake examinations into allegations of human rights violations, it is state responsibility which is potentially engaged, rather than individual criminal responsibility as in the case of international criminal law. It is incumbent on the state to respect and uphold human rights, and it is the task of a fact-finding commission to investigate whether or not there is a serious case to answer for the state in respect of allegations of human rights violations.

The credibility of such an investigation can be affected by various issues, one of which is the context in which the mandate of a fact-finding commission is determined. For example, it can be problematic when country-specific investigations are initiated by the United Nations (UN) by way of a resolution that pre-judges the outcome of the investigation. This potentially undermines the fact-finding process itself and serves as a distraction from the central, serious issue of human rights.

The nature of the mandate is also important and needs to be reasonably clear. In the human rights paradigm, the mandate can encompass a broad range of issues and there may be some overlap with international criminal law. Further, the depth of the investigation will be a function of and limited by the amount of time it is accorded and resources with which it is equipped. The Bahrain Independent Commission of Inquiry was required to examine, in approximately four months, a range of issues relating to events that took place over several months. However, on balance, if a body is established, operates without prejudice and is able to function in circumstances where those involved are able to bring evidence without fear of retribution and reprisal, it is possible to develop a reasonably clear picture of events, particularly once patterns begin to emerge.

The composition of the body itself should not be determined in a prejudicial context. Further, membership should be impartial and objective, and not have a previous record of *parti pris* on the issue at hand.

Other issues are those of staffing and whether the organization setting up a fact-finding body is able to accord sufficient professional resources. For instance, in the case of the Bahrain Independent Commission of Inquiry, there was no secretariat.

The issue of the multiplicity of functions is another to be considered. One reason why it is not difficult to establish a reasonable case of state responsibility for individual groups of human rights violations in general terms is the possibility of observing patterns by considering information from various sources, provided that there is access to such information. It is much more difficult to establish individual responsibility, which can be an issue both for international criminal law and also for international human rights law in terms of obligations of the state to bring to justice individuals responsible for perpetrating certain human rights violations. The Bahrain Independent Commission of Inquiry was invited to establish whether there might have been instances of criminal responsibility. On this aspect, the findings of the commission were drafted very broadly as it was not possible to attribute individual responsibility on the basis of the limited information and short amount of time the commission had; it established that human rights crimes had taken place and that the level of responsibility went higher than the direct perpetrators. Accordingly, while there is a distinction between state responsibility and individual criminal responsibility, the two operate on a continuum.

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<sup>1</sup> This summary was prepared by Shehara de Soysa.

Other important issues are methodology and the standard of proof. Of importance is clarity of methodology and reasoning; less so the question of how to categorize the level of proof.

## **DISTINGUISHING BETWEEN FACT-FINDING AND LEGAL FINDINGS**

Whether or not a difficulty arises in distinguishing fact-finding and legal findings depends partly on the mandate of the mechanism dealing with the former. Formally speaking, only a court, perhaps a UN treaty body or regional human rights commission that addresses individual cases, is empowered to make a finding on a claim brought by an individual alleging human rights violations. In this instance, the finding is of legal significance. However, when examining situations and general practices, as non-governmental organizations and special rapporteurs do, it is much more difficult to make such a finding. Reasonable criticisms may be made of the ability of bodies such as the UN Human Rights Committee to express the basis on which it pronounces its conclusions, which are not as well-reasoned as some domestic judicial decisions may be. However, the question to be asked is what the purpose of the investigation is – for instance, whether for reasons of publicity or to inform an official body such as the UN Human Rights Committee.

## **INTERNATIONAL CRIMINAL LAW INVESTIGATIONS**

Investigation for the purposes of international criminal proceedings is both more difficult and a completely different enterprise to human rights fact-finding commissions; high standards of proof and serious process and procedures are required to justify a conviction. Such processes and procedures are appropriate for the ad hoc international criminal tribunals and at the International Criminal Court (ICC). Evidence must in general be brought forward publicly and proceedings comprise several stages.

The difficulty lies in the lack of tools at the disposal of the international courts and tribunals to discharge their weighty mandate. In contrast, many different investigative powers are vested in US federal prosecutors including the ability to procure search warrants, subpoena records, conduct wire taps and compel witnesses.

In contrast, investigators and prosecutors at the international criminal courts and tribunals are entirely dependent on cooperation from other bodies, particularly states. This dependence occasions difficulties and tensions. While investigators and prosecutors might be inclined to preserve the crime scene to the best possible extent, the absence of powers and tools at their disposal entails dependence on others with better access to situation countries, including non-governmental organizations and commissions of inquiry, to gather information on the ground and share it. One example of the difficulties this creates is the difference in standards by which fact-finding and criminal investigations might be guided, particularly since information is tested in the context of judicial proceedings differently from outside the court. The interplay of the two processes is complex and can result in problems, especially from the perspective of the court.

In terms of fulfilment by courts and tribunals of their mandate – the establishment of individual criminal responsibility – without recourse to tools at the disposal of domestic investigators and prosecutors, there has been an incredible upward trajectory of accomplishments. The precedent created by the Nuremberg Trials was followed by 50 dormant years. The modern movement of international criminal law began in 1993 with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), followed the next year by the establishment of the International Criminal Tribunal for Rwanda (ICTR), and later by the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the Serious Crimes Panels (East Timor) and the ICC. The accomplishments of the last 20 years have exceeded expectations. It was not thought when the ICTY was established that it would hold a large number of trials and hand down convictions, that Charles Taylor would be arrested and surrendered or that the ICTR would arrest and prosecute most of its indictees.

However, there is a concern that past successes might not be an indicator of future ones and that if more is not done to support the ICC in terms of its investigations, it will become overstretched,

undertaking investigations and prosecutions in different situation countries (currently eight) and with the same budget as the ICTY. Further, the nature of the international attention and focus that helped the ad hoc tribunals to succeed is no longer present.

The ICC will never enjoy the tools at the disposal of domestic investigators and prosecutors, partly owing to the budget, which is tightly controlled by the Assembly of States Parties to the Rome Statute. Having more resources and more investigators would ameliorate matters, as accountability and international criminal justice come at a serious price.

However, more critical than the budget is political commitment and political will. Essential to the survival of the ICC is a deeper and renewed political commitment to ensuring its success. The international community must be willing to apply pressure to states to cooperate with it – this was the model for the success of the ICTY.

At a more practical level, the ability to compel witnesses to attend the ICC and give evidence is suggested as a realistic proposal. Provision was not made for this in the Rome Statute as this was considered to be a step too far for states to accept.

## **PROBLEMS POSED BY INTERACTION BETWEEN FACT-FINDING AND INTERNATIONAL CRIMINAL LAW INVESTIGATIONS**

The main problem that arises when fact-finding commissions ‘hand over’ to international criminal investigations is the multiple interviewing of witnesses. This inevitably entails conflicting statements, not because the witness is not truthful but owing to varying perspectives and standards of investigation. There is also the risk of taint of witnesses. Finally, the collection of physical evidence and documents poses problems in terms of chain of custody and integrity of evidence.

The first prosecutor of the ICC was heavily criticized for over-reliance on preceding investigations by NGOs and commissions, as well as human rights reports. Such criticisms were voiced by both commentators and judges. Of late there has been an effort within the prosecution to conduct investigations that are more thorough and to uncover higher-quality, more reliable information. However, a problem is posed by the court’s reliance, at least for lead purposes, on information emanating from other inquiries, and from states. Further, this poses a risk that a certain narrative becomes fixed early in the investigative process as to the course that events took and the attribution of responsibility. This can be difficult to rebut and test, and is another reason why fact-finders should be of the highest possible quality.

## **IMPACT OF THE DIFFERENT MANDATES AND PURPOSES OF FACT-FINDING AND INTERNATIONAL CRIMINAL LAW INVESTIGATIONS**

The function of a fact-finding commission is to examine whether there is a case for which judicial proceedings might be appropriate, as was the case of the International Commission of Inquiry on Darfur, which undertook a preliminary investigation into what was potentially a case for referral by the UN Security Council to the ICC.

For all who undertake investigations there is potential to ‘queer the pitch’; it is a problem that cannot be solved, only managed. It cannot be solved for a good reason, namely that it is desirable for multiple inquiries to be undertaken. With respect to the ICC, there is one perspective, that a situation it has under investigation it should be its exclusive preserve. However, in reality, elimination of other inquiries parallel to the work of the court would not be welcomed, as they pertain to other paradigms than individual criminal responsibility, and further, the court only has the capacity to deal with a small number of cases. Accordingly, there is a need for other accountability mechanisms and other kinds of fact-finders that examine a situation more broadly, for instance for the purposes of establishing state responsibility.

In terms of management, there needs to be both sensitivity on the part of fact-finding bodies to the potential to ‘queer the pitch’ and care taken to ensure the integrity of particular types of evidence.

On the part of the courts, there is a need for an effort to establish, early in the process, links with different groups and agreements for the sharing of their information. Such relations might also enable the different actors to operate in a complementary fashion. While a laudable aspiration, the conclusion of such agreements is not without its logistical difficulties.

It is important for confidence and credibility of human rights investigations that those undertaking an investigation, especially one that could conceivably lead to criminal prosecution, be conscious of the need to undertake interviews professionally and to avoid posing leading questions.

## FACT-FINDING AND INTERNATIONAL HUMANITARIAN LAW

Fact-finding commissions are perhaps structurally problematic, not least because today fact-finding is undertaken with a human rights emphasis. However, there is a difference between human rights fact-finding, examining whether or not there is a serious case to answer for the state, and international humanitarian law (IHL) fact-finding, which entails the more difficult balancing of military necessity with humanity. If caution is not exercised, there is a risk that IHL will be subsumed in some way into human rights law.

The custodian of IHL, the International Committee of the Red Cross, is ideologically committed to confidentiality, thereby depriving its procedures of the possibility of evolving into a transparent IHL investigation. The only other specialist IHL mechanism is the International Fact-Finding Commission established pursuant to Article 90, Additional Protocol I to the Geneva Conventions, which is limited by the fact that it is applicable in the case of international armed conflict, and to which recourse has never been had. The international community erred in not defining the jurisdiction of the commission more broadly and deeply, and though states have recently had the opportunity to establish some form of IHL body, there has been no appetite to do so. This has left a void for other organizations not specializing in IHL to undertake this work. Indeed, international human rights bodies and courts have found themselves applying IHL because of its *lex specialis* status in relation to certain norms of international human rights law. The Goldstone Report and the Fact-Finding Mission on Syria are two recent instances of human rights fact-finding pronouncing IHL violations.

## INTERNATIONAL AND REGIONAL ORGANIZATIONS AND DOMESTIC MECHANISMS

It is not surprising that regional human rights exercises have enjoyed a reasonable degree of success in comparison with the universal human rights machinery, on the basis that the former allow matters to be dealt with internally, from within a culture. In theory a set of regional international humanitarian bodies would be desirable but it is not certain that there is official will to assemble more costly machinery, even at the regional level, which could perform what would otherwise be an important role.

It is the hope of the ICC that states will prosecute cases, but regional bodies could also be a solution if there were sufficient political will. The discourse about the alleged bias of the ICC against Africa is sometimes said to be merely a smokescreen to conceal the avoidance of accountability.

There are large parts of the world outside the jurisdiction of the ICC and some of the 122 states parties to the Rome Statute are not very cooperative. Though the court has had some success in encouraging domestic accountability, more needs to be done. While there is sometimes the attitude that there should be no other ad hoc international criminal mechanisms and that they pose a threat to the ICC, it is unrealistic to expect that domestic jurisdictions will have the capacity to undertake all the prosecutions that are required. What is needed is a middle-ground solution, entailing international support for domestic accountability mechanisms. For this, political will is imperative and perhaps lacking in the present climate, in which accountability is not necessarily a political priority.

It is perhaps possible to observe the beginnings of a movement at the international level towards partnership between national human rights institutions and international bodies. An example is what has emerged from the Optional Protocol to the Convention Against Torture; there is an international body working with national prevention mechanisms to assist the latter to undertake some of the preventive work that is otherwise undertaken by a regional body.

Many of the developments, aside from the establishment of hybrid institutions, may be seen as displacement activity: bodies have been set up for the purposes of avoiding intervention of a more militaristic nature and perhaps with the hope that they have a deterrent effect. Such mechanisms function most effectively when buttressed by UN Security Council commitment to at least the level of political coercion that an ad hoc court might bring. There is no reason why the ICC should not be successful if the Security Council were to lend its support.