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The Problem of Fact-Finding in International Disputes

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The Problem of Fact-Finding in International Disputes

Thomas M. Franck and Laurence D. Cherkis*

INTRODUCTION: THE PROBLEM OF THE CREDIBILITY GAP

ANY LAWYER who has litigated motor vehicle accident cases knows that there is no such thing as a fact: there are only perceptions. He will understand all too well that there can never be an objectively true fact because the subjectivity of the perceiver, even a programmed mechanical brain or a radar machine, is always to some extent a factor in the process of perception.1

On the other hand, such a lawyer will, equally, know that the degree of credence to be given to different witnesses' accounts of factual data will vary because (1) not all persons are equally perceptive, and (2) the degree of subjective bias varies from perceiver to perceiver. Thus the account offered by the drunkard brother of the driver of one vehicle involved in an accident will "carry less weight" than that of the young archbishop with 20/20 vision who happened to be crossing the street at the crucial moment and saw it all happen. The testimony of the archbishop is still not objectively true. It may, indeed, be objectively false. But since objectivity is irrelevant to the inter-se affairs of mortal men and is appropriate only to such speculative theoretical fields as exegesis and unified-field physics, what is sought in the human decision-making process is not truth but credibility. And credibility is a conjunction of the psychological make-up, the training, and the perspicacity of

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* The authors wish to acknowledge their indebtedness to Mr. Brynmor Pollard, Chief Parliamentary Draftsman of Guyana, for his assistance in the preparation of parts of this article.

1 FRANK, COURTS ON TRIAL 15-16 (1949), where the author examines the $F$ factor in his formula — $R$ (legal rule) $\times F$ (fact) $= D$ (court's decision) — and concludes that a fact, in reality, is what the court thinks occurred between the litigants, and "the $F$ is merely a guess about the actual facts." Id. at 16.
those who observe and report, and the extent to which these qualities are apparent to those whose belief is being courted."

If this is commonplace to the legal decision-making process, it is less so in the related field of foreign policy decision-making. It is not putting the matter too strongly to say that the leaders, politicians, and diplomats who make foreign-policy decisions in national capitals, at the United Nations, in Geneva and elsewhere, are losing the confidence of the people— even their own people — to the extent that, throughout the world, the "credibility gap" is widening. The people increasingly suspect that decisions crucial to their well-being and survival are being made on the basis of factual information obtained in ways and by persons more closely resembling the drunkard brother than the archbishop.

This development is of particular concern to the international lawyer because the legal consequences one draws from the flow of events in such a dispute as that in Viet-Nam turn almost exclusively not on choice of legal theory but upon which version of the facts the lawyer superimposes his legal theory.

The Viet-Nam dispute and the Dominican crisis afford two excellent examples of the problem of the "credibility gap" — which is not primarily one of deliberate distortion of fact but of a profusion of conflicting witness and a lack of an authoritative, credible system of fact-finding:

### Dominican Conflict

<table>
<thead>
<tr>
<th>Fact Issue</th>
<th>Government Reporting</th>
<th>Private Reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Were Communists in control of the &quot;rebel&quot; movement?</td>
<td>&quot;Communist and Castroist leaders shortly thereafter got quantities of arms and ammunition from the armory at the '27th February' camp...&quot;</td>
<td>&quot;It is a matter of argument whether the order to arm the civilians was given by the rebel military commanders on their own initiative or whether they were influenced by Communists and pro-Communists.&quot;</td>
</tr>
</tbody>
</table>

"And what began as a popular democratic revolution... very shortly moved and was taken over and really seized and placed into The Communists may have played a crucial role in reorganizing the rebels on April 28 after initial defeat, but many revolutionary lead-

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2 Id. at 16-21.
3 See 20 U.N. GAOR 6, 21, 22, 57, 64-65 (1965).
5 52 DEP'T. STATE BULL. 881 (1965).
6 SZULC, DOMINICAN DIARY 18 (1965).
### Fact Issue

<table>
<thead>
<tr>
<th>Question</th>
<th>Government Reporting</th>
<th>Private Reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the United States Embassy attacked?</td>
<td>The United States Government issued a list of 54 Communists and Castroites allegedly involved in the rebellion. Three leftist parties were also said to be active in the revolt. Fidelio Despradel Roque, one of the 54, reportedly received training in Cuba.</td>
<td>Several Communists on the State Department list were out of the country during the revolt. The Soviet and Chinese Communist Parties had very small followings. The 14th of June movement, moreover, had once been right of center as a result of inter-party splits. Finally, Fidelio Despradel Roque was known to have some &quot;special connections&quot; with the United States. His wife worked for a pro-Western embassy.</td>
</tr>
<tr>
<td>Did United States troops kill Colonel Fernandez?</td>
<td>The United States version is that the rebels, led by Colonel Fernandez, attacked the empty Presidential Palace with heavy weapons, and that Colonel Fernandez was killed in the attempt.</td>
<td>&quot;But embassy officials said later that at no time had the embassy building been fired upon by machine guns . . . there were never any bullet marks on the embassy's walls.&quot;</td>
</tr>
<tr>
<td>Was Mr. Guzmán &quot;tainted&quot;?</td>
<td>Mr. Guzmán, a potential coalition candidate, was involved in irregularities as a director of the Agricultural Bank of the Dominican Republic.</td>
<td>&quot;The only certain thing is that Colonel Fernandez died at that moment, shot in the back by U.S. Marines. The rebels' version is that the Marines had fired at his group from across the street without provocation.&quot;</td>
</tr>
</tbody>
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7 52 DEPT STATE BULL. 745 (1965).  
8 SZULC, op. cit. supra note 6, at 51.  
10 52 DEPT STATE BULL. 882 (1965).  
11 SZULC, op. cit. supra note 6, at 69-70.  
12 52 DEPT STATE BULL. 871 (1965).  
13 SZULC, op. cit. supra note 6, at 45.  
15 SZULC, op. cit. supra note 6, at 248.  
17 SZULC, op. cit. supra note 6, at 276.
VIET-NAM CONFLICT

Fact Issue
Was the Viet Cong movement primarily manned and supplied by external powers?

Government Reporting
"Large and increasing quantities of military supplies are entering South Viet-Nam from outside the country. The principal supply point is North Viet-Nam, which provides a convenient channel for material that originates in Communist China and other Communist countries."18

Viet Cong units are reequipped "with a type of weapons that require ammunition and parts from outside South Viet-Nam . . . ."20

"It is thus apparent that infiltrators from the North — allowing for casualties — make up the majority of the so-called hard-core Viet Cong. Personnel from the North, in short, are now and have always been the backbone of the entire VC operation.12

Private Reporting
"No guerrilla war can succeed without the support of the people, for guerrillas must be fed, clothed, recruited, etc."29

"[T]here should be pointed out that the overwhelming majority of the weapons used by the Vietcong are American-made . . . ."21

Are United States bombings of the North restricted to military targets?

"The only targets scheduled for attack in the Hanoi area during the past 24 hours were military targets . . . ."24

Tass reported that the United States had bombed civilian areas in Hanoi.25

"[T]here had been no bombing of the city of Hanoi itself, because there had been no deliberate attacks on civilian areas . . . ."26

"This correspondent [Salisbury] is no ballistics specialist, but inspection of several damaged sites and talks with witnesses make it clear that Hanoi residents certainly believe that they were bombed by United States planes, that they certainly observed United States planes overhead and that damage

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20 AGGRESSION FROM THE NORTH 15.
21 Letter to the Editor, supra note 19.
22 AGGRESSION FROM THE NORTH 3.
## Fact Issue

<table>
<thead>
<tr>
<th><strong>Is the United States using &quot;Lazy Dog&quot; bombs?</strong></th>
<th><strong>Government Reporting</strong></th>
<th><strong>Private Reporting</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>A United States Navy flier said that the factory in Namdinh &quot;was not a target.&quot; 28</td>
<td>The town of Namdinh produces textiles and has no military value. It has been bombed into rubble by repeated attacks, and its factory bombed 19 times. 30</td>
<td>The United States &quot;used 'Lazy Dog bombs, which scattered steel pellets, against the civilian [North Vietnamese] population.&quot; 32</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Does Hanoi control the Viet Cong?</strong></th>
<th><strong>Government Reporting</strong></th>
<th><strong>Private Reporting</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Namdinh is a military target because it has shipping facilities and a large anti-aircraft position. 29</td>
<td>&quot;The Department of Defense denied... that United States forces had used 'Lazy Dogs' in bombing North Vietnam.&quot; 31</td>
<td>&quot;Most Americans have assumed that the Liberation Front is a puppet of the North... This was not the impression given by representatives of the Liberation Front or of the North.&quot; 34</td>
</tr>
</tbody>
</table>

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Given that in a democratic community — national and international — witness is the right of everyone in the private sector while decision-making is the preserve of the public sector, is there any answer to the credibility chasm which yawns between the parts of this dichotomy? The answer devised — haltingly and imperfectly — by some international and national decision-makers is to constitute a fact-finding system utilizing persons whose psychological makeup, independence, training, and reputation for perspicacity is such that their fact determinations (while not necessarily true in the objective — and irrelevant — sense) will carry a respectable warrant of credibility. 35

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33 AGGRESSION FROM THE NORTH 1.
35 There are at least three other functions that a fact-finding process can serve in addition to the one to be discussed herein: (1) to stimulate public discussion of an issue; (2) to open the procedures used in decision-making to public scrutiny and criticism; and (3) to provide a cooling-off period during which a dispute may be resolved by negotiation. The discussion here is confined to the use of the fact-finding process in closing the "credibility gap."
I. IMPARTIAL FACT-FINDING IN THE INTERNATIONAL COMMUNITY BEFORE 1917

Prior to the twentieth century, commissions to investigate and report were used sparingly, but early arbitration proceedings occasionally entailed extensive investigation by persons of acknowledged impartiality into facts underlying a dispute between sovereign entities.

Judges in ancient Greece, sitting as arbitrators or conciliators in frontier disputes, often visited a disputed area. During boundary litigation between certain towns of Delos, the Thessalian city of Larissa, chosen as neutral arbitrator and conciliator, sent three judges and a secretary to the frontier. In other border disputes, judges took testimony from old men who had been familiar with the disputed area in their youth. Archaeological evidence, such as the location and attitude of tombs, was admitted in order to identify previous borders. In a boundary dispute between Itane and Hieraphynna, public documents, including old letters, maps, and treaties were submitted to the tribunal to aid in the location of the border.

Although the Greeks failed to develop a fact-finding system apart from their arbitration and conciliation procedures, they understood the importance of credible fact-determination in resolving "international" disputes between municipalities.

The Romans for the most part "never dreamed of an impartial arbitration of their differences with neighboring nations, for almost from the earliest time they struggled for domination." Similarly, "the Papacy, as afterward the Roman Empire, could not conceive of the idea of arbitration as we understand it." Following the decline of central authority in the Late Middle Ages and into the eighteenth century, arbitrators were primarily passive receptors in the fact-gathering process.

The signing of the 1794 Jay Treaty signalled the beginning of a "golden age of arbitration" which in turn led to the develop-

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36 RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 162 (1929).
37 Id. at 163.
38 Ibid.
39 Id. at 163-64.
40 Id. at 168.
41 Id. at 175.
ment of separate fact-finding procedures.48 This British-American Treaty, signed to facilitate the determination of the northern boundary of the United States, provided for a three-member arbitral commission which inspected the disputed sites and questioned witnesses to learn the intentions of the original negotiators.49

The movement for better settlement mechanisms was accelerated by the resolution of the 1856 Congress of Paris providing that states between which misunderstandings arise, before appealing to arms, should have recourse, so far as circumstances might allow, to the good offices of a friendly power.46 Moreover, the success of the "Alabama Claims" arbitration of 1872 further contributed to the movement by encouraging nations other than the United States and Britain to enter into arbitration agreements.46 Consequently, when the Tsar convened the First Hague Conference of 1899, the ground had been prepared for a more comprehensive peace-keeping treaty. The Conference set up the Permanent Court of International Arbitration, often described as being neither permanent nor a court.47 It also instituted, inter alia, a process which was essentially not one of arbitration but of fact-finding.

The Prussian delegation to the Conference, speaking through Professor de Martens, proposed that disputing signatories should be bound to establish a commission "for the purpose of ascertaining and declaring the circumstances which give rise to a dissension, and clearing up all the questions of fact by an impartial and thorough examination on the spot."48 Professor de Martens argued that such a commission would permit disclosure of the truth surrounding a dispute "arising suddenly and from obscure or unknown causes," and would afford time "for the subsidence of passions and for the transition of the acute stage of the dispute."49 The United States and Austria, however, blocked the Prussian attempt to make submission of fact-disputes compulsory, and the final treaty provided only that

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43 World Peace Foundation, World Peace Foundation Pamphlets, 457-73 (1926) [hereinafter cited as World Peace Foundation].
44 1 Moore, International Arbitrations 5, 16-22 (1898).
45 World Peace Foundation 461.
46 Id. at 463. The arbitration treaty is reproduced in 1 Moore, op. cit. supra note 44, at 547-53.
49 Ibid.
points of fact, the signatory powers recommend that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.\(^{50}\)

In the absence of contrary agreement, each party would follow the Convention's arbitral provisions by selecting two commissioners from the membership of the Permanent Court or from any other source. If these commissioners failed to agree upon an umpire, they were to select a third power which would make the appointment. Failing agreement over the third power, each side would select a power and both powers would choose an umpire.\(^{51}\) After setting up a commission, the parties were to specify the facts at issue, the powers of the commission, and the method of procedure. Alternatively, the parties could permit the commission to formulate its own rules.\(^{52}\) The proceedings were to be of an adversary nature, with each side permitted to speak before the commission.\(^{53}\)

The Russians wanted to require each party to furnish the commission with "all the means and all the facilities necessary for a profound and conscientious study of the facts in the case."\(^{54}\) The Rumanians, however, felt this to be a threat to national security,\(^{55}\) and the drafters ultimately asked only that "the Powers engaged in dispute supply the international commission of enquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in question."\(^{56}\) After completing its work the commission was to present each party with a copy of its report, which was to be limited to a determination of facts only. Each party was left free to act — or not to act — on such a report.\(^{57}\)

The only commission convened under the 1899 Hague provi-


\(^{52}\) Id. art. 10, 32 Stat. at 1787.

\(^{53}\) Ibid.

\(^{54}\) HULL, op. cit. supra note 48, at 286-87.

\(^{55}\) See CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORTS TO THE HAGUE CONFERENCES OF 1899 & 1907, at 53-54 (Scott ed. 1917); CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 626-35 (Scott ed. 1907) (Conference of 1899).

\(^{56}\) Hague Convention of 1899, art. 12, 32 Stat. 1787.

\(^{57}\) Id. arts. 13-14, 32 Stat. at 1788.
sions resulted from the "Hull" or Dogger Bank Incident. On October 9, 1904, a Russian fleet, believing itself under attack, fired on English fishing vessels, killing two men, wounding six others, sinking one boat, and damaging five more. A five-member commission composed of high-ranking British, Russian, French, American, and Austrian naval officers, assisted by British and Russian consultants and assessors, met in Paris in open sessions to hear arguments of fact and the sworn testimony of summoned witnesses. The disputants' agents were permitted to examine and cross-examine the witnesses and to present final arguments. The commission also accepted written statements and depositions responding to its questions. In the end, the facts found by the commission pointed to Russia having been at fault, and compensation was paid.

A second Hague Conference was held in 1907. It again rejected Russian and Dutch attempts to move toward compulsory fact-finding. It also defeated a Russian proposal to expand the powers of commissions to permit them to affix fault instead of merely implying it through findings of fact. The Conference retained the five-member commission but supplemented the 1899 provisions by requiring that a deadlock in the selection of an umpire be resolved by drawing the name of a Permanent Court panelist from a list of nominees submitted by the disputants.

The Convention also added twenty-two procedural articles to the 1899 Convention, primarily because the British and French felt that the Dogger Bank Commission had lost valuable time drafting \textit{ad hoc} procedures.

Under Article 15, a permanent registry for commissions was established at The Hague. In addition to retaining the prior discovery rule, the Convention obligated each disputant "to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission." Effect could

\textsuperscript{58} RALSTON, \textit{THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS} 433-34 (1926).
\textsuperscript{59} \textit{Id.} at 43; RALSTON, \textit{op. cit. supra} note 36, at 294.
\textsuperscript{60} HULL, \textit{op. cit. supra} note 48, at 289-91.
\textsuperscript{61} Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, art 45, 36 Stat. 2199, 2223, T.S. No. 536 [hereinafter cited as Hague Convention of 1907]. See also \textit{CAMBRIAN ENDOWMENT FOR INTERNATIONAL PEACE, op. cit. supra} note 50, at 59-60.
\textsuperscript{62} Hague Convention of 1907, arts. 51-85, 36 Stat. 2226-33. See also HULL, \textit{op. cit. supra} note 48, at 292.
\textsuperscript{63} Hague Convention of 1907, art. 15, 36 Stat. 2215-16.
\textsuperscript{64} \textit{Id.} art. 23, 36 Stat. at 2217.
\textsuperscript{65} \textit{Ibid.}
be given the new provision by invoking national law, but it re-
main uncertain whether the Convention required amendment of
national law to insure its efficacy. Commissions could also apply
to the government of a nondisputant signatory for permission to
obtain evidence within its boundaries pursuant to national law, and
such requests were not to be rejected "unless the power in question
considers they are calculated to impair its sovereign rights or its
safety." 66

Two commissions were established under these rules to investi-
gate the arrest of the Tavignano and the firing upon the Camouna
and the Gaulois, all Tunisian vessels, by Italian warships. An agree-
ment signed on May 20, 1912, instructed a commission to investi-
gate the geography and hydrography of the coast and waters where
the incident occurred. The commissioners — French, Italian, and
English — received such evidence as letters, depositions, log books,
surveys, and oral testimony. The facts developed indicated Italy
was to blame, and she was told to pay France five thousand francs,
indemnification. 67 The last commission constituted under the
Hague conventions was organized in 1921 to verify the sinking of
the Dutch ship Tubantia by German torpedo in 1916 and to deter-
mine whether the firing was intentional. The commission was
composed of naval representatives from the Netherlands, Denmark,
Sweden, and Germany, and was presided over by a Swiss. The com-
mission took pleadings, statements of fact, and expert testimony.
It decided that the Tubantia had been sunk by a torpedo fired from a
German submarine but the commission failed to determine whether
the firing had been intentional. 68

With the shortcomings of the Hague Convention apparent, Sec-
retary of State Bryan, in 1913, supplemented the scope of exist-
ning United States arbitration agreements by persuading the United
States Senate to accept a series of bilateral treaties requiring that
"all disputes . . . of every nature whatsoever, which diplomacy shall
fail to adjust" be submitted to standing five-man international com-
misions for which each treaty made provision. 69 These were to
consist of one national representative from each signatory, one non-

66 Id. art. 24, 36 Stat. at 2217-18.
67 RALSTON, op. cit. supra note 36, at 294.
68 Id. at 294-95.
69 The first treaty, Treaty with Guatemala on the Advancement of Peace, Sept. 20,
1913, 38 Stat. 1840 (1913), T.S. No. 598, set the basic format that was followed in all
subsequent agreements. 9 WORLD PEACE FOUNDATION 536-37. The text of all
treaties signed can be found in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE,
TREATIES FOR THE ADVANCEMENT OF PEACE (1920).
national chosen by each signatory, and one member chosen by common agreement. The contracting parties were bound to refrain from acts of war during the investigation. Each commission was authorized to "act upon its own initiative, and in such case it [should] notify both Governments and request cooperation in the investigation." Although the United States signed treaties with twenty-one nations embodying this prophylactic principle, the commissions were never called upon to investigate any disputes. By 1926 only the commissions established with Denmark, Portugal, and Sweden were still fully staffed.

II. MODERN IMPARTIAL FACT-FINDING (1967)

The League of Nations Covenant contained the first provision permitting the establishment of a third-party fact-finding commission whose members would be responsible to an international organization rather than to their governments. Under article 11 of the Covenant, war or the threat of war was deemed "a matter of concern to the whole League" which "shall take any action deemed wise and effectual to safeguard the peace of nations." Article 15 further provided that when a dispute was "likely to lead to a rupture" it could be submitted to the Council or Assembly which was empowered to enjoin and then investigate the dispute. A commission report, if adopted by the Council or Assembly, could be rejected by a disputant only at the risk of sanctions being imposed under article 16.

The first dispute to involve article 15 arose between Finland and Sweden in 1921. After separating from Russia, Finland continued to assert control over the Aaland Islands although most of their inhabitants were of Swedish culture. The islanders began agitating for a return to Sweden, where their plight provoked sympathetic demonstrations. In June of 1920, the Finns landed troops on the islands, and on September 20 the League Council appointed a Commission of Enquiry and ordered it "to furnish the Council . . .

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71 Id. art. 1, 38 Stat. at 1840-41.
72 Id. art. 3, 38 Stat. at 1841-42.
73 WORLD PEACE FOUNDATION 540.
74 LEAGUE OF NATIONS COVENANT art. 9 [hereinafter cited as COVENANT].
75 COVENANT art. 11, para. 1.
76 COVENANT art. 15, para. 1.
77 COVENANT art. 16, paras. 1, 4.
having regard to the legitimate interests of all parties concerned, with a Report which will enable it to frame a final or provisional settlement . . . "78 The Commission was composed of a former Belgian foreign minister, a former Swiss president, and a former United States ambassador to Turkey.79 After six weeks of investigation in Sweden, Finland, and the Aaland Islands, the Commission recommended not only continuation of Finnish sovereignty but also that the islands be neutralized, that Swedish be continued to be taught in the schools, and that private property rights be respected.80 Both sides reluctantly accepted the report, and in 1922 participated in a multilateral nonfortification treaty.81

The settlement of the Greek-Bulgarian crisis of 1925 marked the high point for League peace-keeping operations. In October a border incident had brought the two nations to the brink of war when the League Council sent French, British, and Italian military officers to the border to observe and report.82 After the troops pulled back, the Council sent five commissioners (from Britain, Spain, Italy, the Netherlands, and Sweden) who, after three weeks in the area, recommended that the border posts be moved back from the boundary line and that a standing conciliation commission be established to settle future conflicts.83 This settlement was accepted by the disputants.84

Under French administration, the Mandate of Syria also held its “self-determination” elections of 1938 in the Sanjak of Alexandria under the supervision of an international commission, the members of which were appointed by the Council of the League.

Fact-finding procedures were also appended to the conventions establishing international adjudicatory and arbitral institutions. The Statutes of the Permanent Court of International Justice and its successor, the International Court of Justice, provide that the “Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.”85 In the Corfu

78 9 LEAGUE OF NATIONS COUNCIL MINUTES, Annex 101, at 73, 77 (1920).
79 INTERNATIONAL PEACE OBSERVATION 13 (Wainhouse ed. 1966).
81 Convention relating to the Non-Fortification and Neutralization of the Aaland Islands, Oct. 20, 1921, 9 L.N.T.S. 211.
82 6 LEAGUE OF NATIONS OFF. J. 1700, 1707 (1925).
83 5 LEAGUE OF NATIONS, MONTHLY SUMMARY 327-30 (1925).
84 INTERNATIONAL PEACE OBSERVATION 52 (Wainhouse ed. 1966).
85 P.C.I.J. STAT. art. 50; I.C.J. STAT. art. 50.
The findings of an expert commission composed of Dutch, Norwegian, and Swedish naval officers, established Albanian complicity in the peacetime sinking of a British warship.

Nevertheless, in cases such as Temple of Preah Vihear Case, involving a border dispute between Cambodia and Thailand, and in the Minquiers and Ecrehos Case, which raised the question whether Britain or France had exercised sovereignty over two groups of islets in the English Channel, the International Court of Justice resolved the factual issues without resorting to field research. In fact, neither court ever invoked its power to exercise "its functions elsewhere whenever the Court considers it desirable."

Other contemporary instruments for dispute-settlement contain provisions designed to encourage and facilitate impartial fact-finding. The General Act for the Pacific Settlement of Disputes of 1928 required its signatories "to use the means at their disposal to allow it [conciliation commission] to proceed in their territory," to summon and hear witnesses and experts under national law, and "to visit the localities in question." Similarly, under the Model Rules of Arbitral Procedure of the International Law Commission, an arbitral tribunal "may . . . if necessary, decide to visit the scene connected with the case before it." And, finally, the International Labour Organisation (ILO), which has among its purposes "the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour," is empowered to establish commissions to investigate whether "any . . . Member is securing the effective observance of any Convention which . . . [it has] ratified." The ILO's Committee on Freedom of Association, for example, investigates complaints

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87 Id. at 9.
91 I.C.J. STAT. art. 22(1), para. 1.
95 Ibid.
96 INTERNATIONAL LABOUR ORGANISATION CONSTITUTION art. 10, 15 U.N.T.S. 40, 56 (1948) [hereinafter cited as ILO CONST.].
by labor organizations against governments and other labor groups and reports to the Governing Body.97

A. Three Instances of Impartial Fact-Finding by United Nations Ad Hoc Missions

Continuing and expanding the pioneer efforts of such international organizations as the League, the Organization of American States, and the ILO, the United Nations has undertaken a number of significant fact-finding missions, three of which deserve consideration in greater detail in order to achieve better understanding of the problems, potential, and operating modes of such bodies.98

(1) The United Nations Mission to Malaysia.—With North Borneo and Sarawak about to emerge from British colonial tutelage, territorial elections in both places returned governments favorable to the British-Malayan scheme for a Federation of Malaysia. The Philippines and Indonesia, with their own politico-legal claims to the region, strongly opposed this disposition.

On August 8, 1963, the Secretary-General, acting upon the request of Malaya, the Philippines, and Indonesia, appointed a mission of inquiry operating as two subcommittees charged with ascertaining “the wishes of the people of Sabah (North Borneo) and Sarawak” and whether recent territorial elections fairly and freely


98 Article 34 of the UN Charter permits the Security Council to “investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.” This article is binding on all United Nations members. Article 36 permits the Security Council to “recommend appropriate procedures or methods of adjustment” to settle disputes. U.N. Charter art. 36, para. 1. This article, however, merely calls for a recommendation to the disputants to engage in peace observation or other techniques. Article 37 merely directs the Security Council to invoke article 36 if a dispute “is in fact likely to endanger the maintenance of international peace and security.” U.N. Charter art. 37, para. 1. Under these articles, fact-finding missions may be blocked by a permanent member’s veto. U.N. Charter art. 27, para. 3. Under article 29, however, the Security Council may establish “such subsidiary organs as it deems necessary for the performance of its functions.” This would permit the appointment of a fact-finding team and is not subject to great power veto.

U.N. Charter art. 11, para. 1 authorizes the General Assembly to “discuss any questions relating to the maintenance of international peace,” and article 14 permits the Assembly to “recommend measures for the peaceful adjustment of any situation. Such recommendations require a two-thirds vote, U.N. Charter art. 18, para. 2, so that General Assembly fact-finding missions are of major significance.

Article 99 empowers the Secretary-General to bring to the Security Council’s attention matters which threaten to disrupt international peace. Under this provision, the Secretary has appointed fact-finding missions to determine whether a dispute threatens international peace.
evidenced majority support for federation.\textsuperscript{69} The three heads of
government further agreed that it was "desirable to send observers
to witness the carrying out of the task to be undertaken by the working
teams."\textsuperscript{100}

Accordingly, Malaya undertook to extend to the Secretary-General "the necessary facilities so as to enable him to carry out his task."\textsuperscript{101} On August 12, 1963, the Secretary-General assigned eight impartial Secretariat personnel, headed by the Deputy Director of Personnel, Lawrence V. Michelmore, to the United Nations Malaysia Mission.\textsuperscript{102} Although the British and Malayans did make the concession of postponing the target date for federation from August 31 to September 16, the work of the Mission nevertheless appears to have suffered from the pressure of working against both a deadline and a predetermined result imposed by Kuala Lumpur.

Nevertheless, the Mission worked with methodological skill and thoroughness. Obviously an investigation of a social-psychological fact of general application requires for its validity the broadest possible sample-base. This requirement was substantially met. In Sarawak and in North Borneo the radio and press announced that written statements would be received and hearings held in different parts of the territory and invited representation from individuals and groups. In preparation for the hearings, the Mission studied relevant electoral laws and procedures as well as election returns. It also received memoranda from major political parties including the anti-federation Sarawak United People's Party (SUPP). These hearings were held in the population centers most accessible to outlying areas, and once underway, the hearings became the principal items discussed by the news media.\textsuperscript{103}

The Mission concluded that the authorities, upon whom they were dependent for communications, transportation, and security, did not discourage "anyone from appearing before it, that [no] witness was inhibited in his testimony . . . [and that] some of the strongest expressions of anti-Malaysia views . . . were made . . . in the locations in which security measures were visible . . . ."\textsuperscript{104} The Sarawak team consulted with all 429 elected district representatives


\textsuperscript{100} Ibid.

\textsuperscript{101} Ibid.

\textsuperscript{102} Ibid.

\textsuperscript{103} Id. paras. 4-10.

\textsuperscript{104} Id. para. 10.
and spoke with 400 persons representing sixty political, religious, and labor groups. Sixteen of the Mission's 37½ hours of hearings were devoted to consultations with elected representatives, thirteen to anti-federation groups, and only the remainder to pro-federation forces.  

One procedural defect marked the proceedings, and this concerned not the Mission but the partisan observers. Disagreements with the United Kingdom over the number and status of these observers delayed their arrival until September 1. Tape recordings of earlier hearings were made available, but the observers attended only half the hearings.

The following three examples of factual issues resolved by the Mission demonstrate characteristic "substantive" obstacles faced by fact-finding groups. It will readily be seen that they are not different in kind from the unresolved factual issues of the Dominican and Viet-Nam disputes.

(a) Had the Electoral Registers Been Properly Compiled?
—During the Sarawak hearings the SUPP alleged that in certain districts only ten to twenty percent of all qualified voters had registered. This contrasted with the government's figure of 84.6 percent registration overall. The Mission, examining the registers and hearing evidence, concluded that although isolated failures may have occurred, registration had been substantially successful and honest. In North Borneo the integrity of the registration system went unchallenged.

(b) Had the Elections Been Held in a "Free Atmosphere"?
—The SUPP alleged that twenty-six of its leaders were arrested under the guise of security measures and that the government had intimidated local SUPP officials and attempted to discredit the party by a vicious propaganda campaign. In response, the government pleaded the need to maintain security in the face of Indonesian and Communist-inspired violence. The Mission held itself unqualified to evaluate the extent to which security measures were necessary to protect Sarawak from subversion but decided that there had been no concerted drive to debilitate the SUPP.

105 Id. paras. 8-9.
107 See text accompanying notes 5-34 supra.
108 UNITED NATIONS MALAYSIA MISSION, op. cit. supra note 99, paras. 78-79.
109 Id. paras. 80-81.
110 Id. paras. 87-88.
111 Id. para. 96.
It was further alleged that the government had induced many SUPP members to resign. It was stated that illiterate people had submitted resignations written on government typewriters and stationery. The Mission concluded, after hearing both sides, that the government's conduct had failed to provoke mass resignations. It also found that even those who had resigned were not thereby inhibited from voting in secret as they pleased. In North Borneo, no such allegations were made.

(c) Had Federation Been the Principal Issue in the Local Elections?—The Mission, after investigation in North Borneo and Sarawak, answered this question in the affirmative. After discussions with political groups, candidates, and voters, it became clear that the election had turned almost entirely on this issue and that it had been widely and openly debated.

The Mission concluded that the people of Sarawak and North Borneo had registered their assent to the federation. This approval was deemed the “result of the freely expressed wishes of the territory's people acting with free knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.”

(2) The United Nations Missions to Oman.—Oman, with its principal coastal town of Muscat, is an independent territory located on the southeastern coast of the Arabian Peninsula. In 1891 the British government and the ruling Sultan of Oman signed a treaty which granted Britain a form of veto over Omani foreign policy. In 1915 British assistance was instrumental in quelling a revolt against the Sultan originating in an interior region under the administration of the Imam of Oman. In 1920 British-inspired negotiations between the Sultan and the Imam resulted in a treaty guaranteeing the interior regions “the right of self-government, or non-interference... in their internal affairs...”

In 1955 the dispute revived. The Sultan, operating with British-led Omani troops, moved into Nazwa, the Imamate “capital.”

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112 Id. paras. 90-91.
113 Id. paras. 210-13.
114 Id. para. 245.
117 Id. at 31.
It was alleged that the Sultan’s action was prompted by a British desire for oil rights in the interior. The Imam fled to Cairo, where he was able to organize his opposition. In 1957 the British lent the Sultan further ground and air support to quell another revolt in the region.118

Naturally, such events could no longer transpire without attracting the attention of the United Nations political organs. In December of 1962, despite General Assembly rejection of a draft resolution of the Special Political Committee calling for “the withdrawal of foreign forces from Oman,”119 the Secretary-General, at the Sultan’s invitation, dispatched a representative “to visit the Sultanate during the coming year to obtain first-hand information as to the situation there.”120 The Secretary-General selected the Swedish Ambassador to Spain, Mr. Herbert de Ribbing. He was accompanied by a political officer and an interpreter from the United Nations Secretariat and was admonished to determine “the presence of foreign troops in Oman, any evidence of oppression, instances of sabotage and fighting, the existence of a ‘rebel movement’ [and] the existence of any ‘rebel forces’ actually in control of a particular area . . . .”121

Again, the Mission’s procedure is informative. Mr. de Ribbing left New York on May 18, 1963 and remained in the Middle East until June 25. He was permitted to visit any place he desired.

The Mission met with about twenty Government officials, interviewed eighty-six representative individuals and explained the purpose of its visit to approximately 1,200 people assembled at meetings . . . . Many meetings with individuals or groups of prominent persons were held where no Government official was present.122

Although de Ribbing conceded that his investigation “could not be fully comprehensive,”123 he did find sufficient evidence to support a number of important fact determinations.

The final report confirmed that Britain had given substantial military support in 1957 to bolster the Sultan’s power in the Imam-

118 Id. at 75-77.
121 Id. at 11.
122 Id. at 12.
123 Ibid.
In addition, de Ribbing found that approximately sixty British officers and eight British planes were still stationed in Oman.

On the other hand, he reported an absence of overt political oppression, although noting that most persons questioned tended to deny its existence in cautious tones. Ambassador de Ribbing understandably declined to go beyond these limited determinations to draw a conclusion of fact as to whether the British presence in Oman should be regarded as aid to the recognized civil powers or as colonial intervention.

The General Assembly's Fourth Committee reopened debate upon receiving the report. Several delegations, citing a memorandum from the Committee for the Rights of Oman purporting to document the British presence and complicity in atrocities, called for a new mission on the ground that the de Ribbing Report was incomplete. Consequently, on December 11, 1963, the General Assembly established an ad hoc committee "composed of five Member States appointed by the President of the General Assembly to examine the question of Oman," and soon thereafter the president requested Afghanistan, Costa Rica, Nepal, Nigeria, and Senegal to appoint representatives to the committee. In the absence of specific directives the committee decided to investigate the "territorial, historical and political issues involved in the problem."

Believing the committee to be far from impartial, the Sultan denied it access to Oman, and this fact beclouded the Mission's operational methodology. It pursued the study of various historical and legal works concerning Oman and scheduled interviews outside its borders, in Damman, Kuwait, and Cairo, where it saw 175 persons, including members of the Revolutionary Council opposing the Sultan, as well as private individuals, students, and tribal representatives. The committee received over 150 written communications from Omani refugees and, in Damman, interviewed the deposed Imam and three members of his Higher Council.

Given its composition and role, the committee's findings were...
much more concerned with the "political" facts than was the report of Ambassador de Ribbing. Not surprisingly, considering the sources of its evidence, the findings of the former also tended to contradict some of those of the latter. The committee found, for example, that British force had saved the Sultanate from the Imam's forces in 1915 and had for a time influenced the Sultan to settle his dispute with the Imam.\textsuperscript{133} During this period, after the 1921 Treaty of Sib, the Sultan had regarded the Imamate as an autonomous region with de facto independence.\textsuperscript{134} The Mission thus concluded that subsequent encroachments on the Imamate were unlawful.

The report further determined that Britain still retained substantial influence over Oman's military and foreign affairs in 1955, at the time of the renewed troubles. Thus, when in 1955 and 1957 the Sultan reoccupied areas previously reserved to the Imamate, "the United Kingdom was associated in some way in the formulation of policy on this matter."\textsuperscript{135} This conclusion was buttressed by reference to a 1937 agreement in which the Sultan promised to facilitate the prospecting of British oil companies in hostile areas.\textsuperscript{136} Finally, the committee concluded that in central Oman "the population was solidly behind the Imam."\textsuperscript{137} Thus resolving the basic fact-issue of its investigation, the committee declared that the United Kingdom intervened to help a government of uncertain popularity defeat a popular movement in order to secure its own interests.\textsuperscript{138}

At its next session the General Assembly, acting on the ad hoc committee's findings, adopted a resolution noting that "the colonial presence of the United Kingdom in its various forms prevents the people of the Territory [of Oman] from exercising their rights to self-determination and independence . . . ."\textsuperscript{139} Subsequently, the Special Committee on Colonialism reconsidered the Oman question, and both the Fourth Committee and the General Assembly recognized the "legitimacy of [Oman's] struggle to achieve the rights laid down in the Charter of the United Nations."\textsuperscript{140}

\textsuperscript{133} Id. at 69.
\textsuperscript{134} Id. at 74-75.
\textsuperscript{135} Id. at 76.
\textsuperscript{136} Id. at 75-76.
\textsuperscript{137} Id. at 77.
\textsuperscript{138} Ibid.
\textsuperscript{140} Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 103-36, U.N. Doc. A/6300/Add. 8 (1966); Report of the Fourth Com-
THE PROBLEM OF FACT-FINDING

(3) The United Nations Mission to Viet-Nam.—On September 4, 1963, fourteen members of the United Nations requested that the General Assembly agenda include a discussion of "The Violation of Human Rights in South Viet-Nam."141 These members alleged that the Diem regime had embarked upon a systematic campaign to repress the religious and civil rights of Vietnamese Buddhists, who comprised over seventy percent of the population. It was further charged that the government had killed nine persons attempting to celebrate Buddha’s birthday and that, subsequently, pagodas had been raided and hundreds of nuns and monks arrested.142 On October 4, 1963, after the General Assembly had placed the item on the agenda, the government of South Viet-Nam invited the representatives of the United Nations to visit the country to determine the situation for themselves.143 On October 11, 1963, the president of the General Assembly requested Afghanistan, Brazil, Ceylon, Costa Rica, Dahomey, Morocco, and Nepal to appoint representatives to such a Mission. Chaired by Mr. Abdul Rahman Pazwak of Afghanistan, it also had the assistance of Dr. John P. Humphrey, Director of the Secretariat’s Human Rights Division,144 and was thus in part an expert as well as impartial body.

Although the President of the General Assembly directed the Mission to “ascertain the facts of the situation . . . as regards relations between the Government of the Republic of Viet-Nam and the Viet-Namese Buddhist community,”145 the group drafted more specific terms of reference and set out its methodology.

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 Government of the Republic of Viet-Nam in its relations with the Buddhist community of that country.146 [It would] seek factual evidence, . . . collect information, conduct on-the-spot investigations, receive petitions and hear witnesses.147

It did not depart from this standard. Upon its arrival, for example,

145 Id. § 5.
146 Id. Annex No. 2, § 12.
147 Id. § 13.
the Mission found that the South Vietnamese government had prepared a suggested itinerary. This was firmly rejected, and the group successfully insisted on following its own program, including the conduct of secret hearings.\(^{148}\)

To attract witnesses and publicize its purposes, the Mission prepared a statement announcing its presence and calling for testimony in person or in writing. The government agreed to publish this statement widely and in full, after securing its amendment to indicate that the Mission was in South Viet-Nam at the invitation of the regime.\(^{149}\) Its call, however, brought forth only four voluntary witnesses in Saigon and three in Huế. The Mission did speak to forty-seven other monks, nuns, prisoners, students, and laymen whose names it had received in New York and Saigon.\(^{160}\) These persons were interviewed without government officials being present. Each witness was assured that all testimony would remain confidential.\(^{161}\) The Mission also received and considered 116 written communications from individuals and groups, twelve being unsigned, with five pleading fear of government retaliation.\(^{162}\) In addition, eight high-ranking government officials, including Ngo Dinh Diem and Ngo Dinh Nhu, were interviewed.\(^{163}\)

Although the government insisted on furnishing the Mission's transportation and security arrangements, the mission succeeded in having the United Nations flag flown on transport and other facilities.\(^{164}\) One written statement received by the group indicated that the writer had tried to see the Mission while it was in Viet-Nam but was kept away by security troops guarding the place of hearings.

It cannot, however, be said that the government prevented unfavorable reports from reaching the United Nations group. The Mission received evidence from Buddhist leaders and students to support allegations of religious and political repressions and official discrimination in employment. Its report also reproduces detailed charges of government raids on pagodas and subsequent mass arrests\(^{165}\) but notes the official explanation that such measures were

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\(^{148}\) *Id.* §§ 13-16.

\(^{149}\) *Id.* §§ 23-25.

\(^{150}\) *Id.* §§ 37-48, 56.

\(^{151}\) *Id.* § 49.

\(^{152}\) *Id.* § 151.

\(^{153}\) *Id.* § 72.

\(^{154}\) *Id.* § 13.

\(^{155}\) *Id.* §§ 86-147.
necessary to combat Communist subversion and resistance to lawful authority.\textsuperscript{168}

The Mission terminated its investigation on November 3, 1963, immediately after the coup which overthrew President Diem. Consequently, the report did not evaluate the evidence or pass judgment upon the conduct of the government, and for this reason its findings were also not discussed in the General Assembly.\textsuperscript{167} Private inquiry suggests the paradoxical possibility that an evaluation of the evidence might not have produced findings as uniformly unfavorable to the Diem regime as had been anticipated.

B. Periodic Fact-Finding by the United Nations Trusteeship Council and the Committee of Twenty-Four

In addition to these three ad hoc missions, a number of organs and sub-organs of the United Nations regularly engage in fact-finding. Two of these should be mentioned briefly.

Article 87(c) of the United Nations Charter permits the Trusteeship Council to “provide for periodic visits to the respective trust territories at times agreed upon with the administering authority.”\textsuperscript{168} The Council periodically delegates one member from each of two administering states other than the administrator under investigation and one member from each of two non-administering states\textsuperscript{169} to “investigate and report as fully as possible on the steps taken in the . . . Trust Territories towards the realization of the objective set forth in Article 76(b) of the Charter . . . .”\textsuperscript{170} In addition, the Council’s petition procedure and its right to receive and review annual reports from administering authorities augment its fact-finding role.

\textsuperscript{160} Id. §§ 72-85.
\textsuperscript{167} Y.B. OF THE UNITED NATIONS 50 (1963).
\textsuperscript{168} U.N. CHARTER art. 87(c).

one of the basic objectives of the trusteeship system is to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned. U.N. CHARTER art. 76, para. b.
The role of the Trusteeship Council’s visiting inspection mission in the British-administered Tanganyika Trusteehip, shortly before that country’s independence, is illustrative.

In March 1960, the Council sent representatives from the United States, New Zealand, Paraguay, and the United Arab Republic to East Africa. At Dar Es Salaam, Tanganyika, the Mission consulted with the Governor, the Speaker of the Legislative Council, and other high officials.\(^{161}\) The Mission then split into two groups to travel throughout the country in accordance with a well-publicized schedule. During this journey the Mission met with provincial officials and inspected farms, factories, and government projects, giving special attention to the Tanganyika African National Union (TANU), the predominant nationalist party, in order to determine the quality and direction of the political leadership which would inherit power after independence.\(^{162}\) On April 20, the Mission conducted final public hearings in Dar Es Salaam and proceeded to London to confer with the Colonial Secretary. It then returned to New York with volumes of memoranda submitted by the government and by various interest groups.\(^{163}\)

The constructive final report, while welcoming Tanganyika’s rapid progress to self-government, cited the pressing need for more African civil servants, for external aid to expand Tanganyika’s narrowly based industrial and agricultural sectors, and stressed the shortage of funds available for educational facilities.\(^{164}\) The Mission received few complaints regarding racial prejudice in the land tenure system which was so controversial in nearby Kenya and the Rhodesias. It concluded that most land disputes had become intertribal rather than interracial.\(^{165}\) Its general conclusion was that "Tanganyika is proceeding smoothly and rapidly towards the ultimate goal set by the International Trusteeship System and that the problems which remain are very largely of a technical and financial nature."\(^{166}\) The Trusteeship Council’s resolution accepting the report invited the British to “take into account” the Mission’s conclu-


\(^{162}\) \textit{Id.} paras. 7, 41-48.

\(^{163}\) \textit{Id.} Annex No. 1.

\(^{164}\) \textit{Id.} paras. 102-09, 116, 117, 119, 234.

\(^{165}\) \textit{Id.} paras. 134-35.

\(^{166}\) \textit{Id.} para. 279.
sions and, notably, did not request acceleration of the British plan
for Tanganyikan independence (which came in December 1961).167

The Special Committee on the Situation with Regard to the
Implementation of the Declaration on the Granting of Indepen-
dence to Colonial Countries and Peoples (Committee of Twenty-
Four) was established by the General Assembly pursuant to the
provisions of Article 73 of the United Nations Charter in order “to
make suggestions and recommendations on the progress and extent
of the implementation of the Declaration” and to adopt procedures
toward this end.168 These have included the holding of hearings
and investigations “on the spot” in many countries as well as in New
York. Typical of these efforts is the mission to Equatorial Guinea
in 1966, to determine whether the people of that colony desired
independence and whether Spain was in default of her “obligation”
to lead the territory to independence if the inhabitants so deter-
mined.169 Having obtained Spanish approval for the visit, the Com-
mittee appointed Ambassador Gershon O. B. Collier of Sierra Leone
to chair a subcommittee which included representatives of Chile,
Denmark, Mali, Poland, Syria, and Tanzania — a group politically
balanced if not judicially impartial. On August 17 and 18, the
Mission met with officials in Madrid and received assurances that
the territory was virtually autonomous and that the “Spanish Gov-
ernment would accede to their wishes” if a majority of the people
requested independence.170

The Mission thereupon spent five days in Equatorial Guinea,
where it interviewed members of the Governing Council as well as
representatives of the Movimiento Nacional de Liberación de la
Guinea Ecuatorial (MONALIGE), who had prepared memoranda
detailing their grievances after noting the press and radio announce-
ments preceding the Mission's arrival.171 In open meetings, party
representatives asserted that the Spanish authorities had discrimi-
nated against Africans, had suppressed opposing political parties,
and had maneuvered a 1963 plebiscite to make it appear that a

167 U.N. Trusteeship C. Res. 2019 (XXXVI), 26 U.N. TRUSTEESHIP, Supp. 2, at 55,
169 Special Committee on the Situation with Regard to the Implementation of the
Declaration on the Granting of Independence to Colonial Countries and Peoples, Re-
port of the Sub-Committee on Equatorial Guinea (Fernando Po and Rio Muni), U.N.
170 Id. § 82.
171 Id. §§ 133, 179.
majority of the people accepted continued Spanish rule.\textsuperscript{172} Having been granted liberty to interview all accessible persons in the territory, the Mission subsequently met with representatives of ethnic and economic groups to determine the truth and extent of the alleged political suppression.\textsuperscript{173}

The Mission unanimously concluded that under the existing arrangement most power was still vested in the Spanish Commissioner-General and that the electoral base was too narrow.\textsuperscript{174} The Mission found evidence of both racial discrimination and political suppression\textsuperscript{175} and determined that “there is unanimity among all sections of the population in favour of the attainment of independence without delay.”\textsuperscript{176} The General Assembly accepted the Report in full and requested Spain to hold “a general election for the whole territory on the basis of a unified electoral roll,” to “transfer effective power to the government resulting from this election,” and “to set a date for independence as recommended by the Special Committee.”\textsuperscript{177}

\textbf{C. Regional Fact-Finding Bodies}

Impartial fact-finding is also a feature of several regional systems of peace-keeping. Thus the Convention for the Establishment of the Central American Court of Justice, signed in 1907 by Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, bound the signatories “to submit all controversies or questions” to a five-member tribunal composed of representatives from each nation.\textsuperscript{178} Even at that early date, the drafters wisely provided that the Court could “temporarily transfer its residence [from Costa Rica] . . . in order to insure the exercise of its functions.”\textsuperscript{179}

Under the Treaty of Rio de Janeiro,\textsuperscript{180} the OAS Council may, pending the Meeting of the Foreign Ministers, appoint a commission to investigate and report following armed or unarmed aggressive

\begin{itemize}
\item \textsuperscript{172} Id. §§ 6, 179-81, 195.
\item \textsuperscript{173} Id. §§ 271-85.
\item \textsuperscript{174} Id. §§ 288-89.
\item \textsuperscript{175} Id. § 290.
\item \textsuperscript{176} Id. § 292.
\item \textsuperscript{177} G.A. Res. 2230, 21 U.N. GAOR 2 (1967) (mimeo).
\item \textsuperscript{178} Convention for the Establishment of a Central American Court of Justice, art. I, as quoted in 2 AM. J. INT’L L. 231 (Supp. 1908).
\item \textsuperscript{179} Id. art. V, 2 AM. J. INT’L L. at 233.
\end{itemize}
acts which "might endanger the peace of America." A characteristic OAS fact-finding took place in 1950, when Haiti and the Dominican Republic exchanged accusations of subversion. Six days after these allegations, a five-member commission composed of OAS Council representatives selected by the Council chairman began its investigation. Empowered to hear witnesses and to take depositions, the commission held hearings in Washington and travelled to interview members of the governments of Haiti and the Dominican Republic as well as suspected plotters, exiles, and prisoners. After working for two months, the commission reported that the Dominican Government had indeed aided in a conspiracy against Haiti, and it absolved Haiti of any complicity in a counter-conspiracy. Consequently, the Organ of Consultation established a Special Committee for the Caribbean to supervise a settlement.

In 1963 the Council of Ministers of the Organization of African Unity, obligated to "co-ordinate inter-African co-operation," appointed a seven-member commission to ascertain the facts in the Moroccan-Algerian border dispute and to recommend a solution. This commission, consisting of technical and legal experts from Ethiopia, Mali, Senegal, Ivory Coast, the Sudan, Tanzania, and Nigeria, has in ten meetings studied the conflicting historical claims and visited the disputed area but has failed to find a mutually acceptable solution to the territorial dispute. Nevertheless, the peace of the territory has remained largely unbroken since the commission's establishment, confirming the subsidiary use of fact-finding to bring the disputants into a "cooling chamber."

Fact-finding by British Commonwealth teams has also aided in easing political tensions and closing the credibility gap. In 1964 the Colonial Secretary requested eleven lawyers, politicians, and election commission members representing six Commonwealth Nations "to observe the British Guiana election" and report upon the fairness of the "administrative arrangements," the extent of "freedom of expression of different points of view," and "any other matters . . . affecting the fair and free conduct of the elections" which were being held just prior to independence in an atmosphere of in-

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181 Id. art. 6, 62 Stat. at 1683, 21 U.N.T.S. at 99.
185 See 1966 AFRICA RESEARCH BULL. (POLITICAL SERIES) 631-33; 1967 AFRICA RESEARCH BULL. (POLITICAL SERIES) 696b.
tense heat and mutual distrust between the principal political par-
8 ticipants. After visiting 200 of the 772 polling places and 34 of the
35 polling districts, and attending public meetings and hearings,
the Commonwealth team concluded that the elections had been free
and fair. Thus, despite the country's intense political conflicts,
the validity of this crucial election has not been seriously disputed
even by the losers.

The Western European community has also evolved several
systems of peaceful settlement that include fact-finding. The Euro-
pean Commission of Human Rights, established by the 1950 Con-
vention for the Protection of Human Rights and Fundamental
 Freedoms, functions as a preliminary screening and investigatory
body for the Committee of Ministers of the Council of Europe and
for the Court of Human Rights. The Convention provides that
the Commission "shall consist of a number of members equal to
that of the High Contracting Parties . . . elected by the Committee
of Ministers . . . from a list of names drawn up by the Bureau of
the Consultative Assembly [of the Council of Europe]." Inves-
tigations are conducted by seven-member subcommissions composed
of Commission members. Each party to the dispute is permitted to
nominate one Commissioner to serve on the subcommission, and
the remaining places are filled by drawing lots from a list of Com-
mision members. A subcommission may "instruct one of its
members to undertake an enquiry" or may, as a unit, "work in a
place other than the seat of the Council of Europe."

The more traditional European Convention for the Peaceful
Settlement of Disputes, signed in 1957, provides that a five-
member Conciliation Commission composed of two disputant na-

188 BRITISH GUIANA, REPORT BY THE COMMONWEALTH TEAM OF OBSERVERS ON
THE ELECTION IN DECEMBER 1964, para. 1, COLONIAL No. 359, para. 1 (1965).
189 Id. paras. 4-5, 19.
188 Convention for the Protection of Human Rights and Fundamental
 Freedoms, art. 19, Nov. 4, 1950, 213 U.N.T.S. 221 (1953) [hereinafter cited as Human Rights
Convention].
189 Human Rights Convention, arts. 28, 32, 213 U.N.T.S. 221, 229 (1953). As
190 of 1964, the Convention had been ratified by Austria, Belgium, Cyprus, Denmark, Ger-
191 many, Greece, Iceland, Ireland, Italy, Luxembourg, The Netherlands, Norway, Sweden,
192 and the United Kingdom. COUNCIL OF EUROPE, 1964 EUROPEAN YEARBOOK 430.
193 Id. art. 29, 213 U.N.T.S. at 240, and Rule 18 of the Commission, COUNCIL OF
194 EUROPE, Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1955-57, 1964
195 (1958).
195 Commission Rules 21, 58, COUNCIL OF EUROPE, op. cit. supra note 191, at 66,
196 82.
tionals and three nonnationals chosen by the disputants shall proceed in accordance with the 1907 Hague Commission of Enquiry rules. In addition, the signatories are bound to allow the commission to proceed in their territory . . . and to visit the localities in question.

D. Fact-Finding by Non-Governmental Organizations

In addition to the host of governmental institutions engaged in fact-finding, many private groups utilize commissions to report upon areas of international conflict. Three hundred and sixty-eight of these national and international organizations have been granted consultative status by the United Nations Economic and Social Council and are called upon by the Council to submit reports concerning social, political, educational, and economic questions. The Anti-Slavery Society, for example, in March 1967, reported to the United Nations Human Rights Commission that it had found slave markets operating in Saudi Arabia. Similarly, the International League for the Rights of Man maintains a far-flung and highly respected fact-reporting system that discloses violations of fundamental human rights set out in the Human Rights Declaration and the Covenants. Other important non-governmental fact-finding organizations include the International Commission of Jurists, which has prepared field studies of such matters as the erection of the Berlin Wall and the 1964 Panama Canal Zone riots, and Amnesty International, which supports on-the-spot investigations of detentions and trials which may involve imprisonment for "holding or expressing any religious, political or other opinion that does not advocate violence."

194 Id. arts. 6, 12(1), 320 U.N.T.S. 243 (1958). The 1907 Hague Rules are discussed in text accompanying notes 48-64 supra. The European Convention has been ratified by Austria, Denmark, Germany, Italy, Luxembourg, The Netherlands, Norway, Sweden, and the United Kingdom. COUNCIL OF EUROPE, 1964 EUROPEAN YEARBOOK 431 (1966).


197 N.Y. Times, March 20, 1967, p. 11, col. 3 (city ed.).


200 INTERNATIONAL COMMISSION OF JURISTS, REPORT ON THE EVENTS IN PANAMA, JANUARY 9-12, 1964 (1964).

201 1 AMNESTY ACTION 1 (1966).
E. National Commission Systems

On the level of national decision-making, machinery has also been devised for credible fact-finding, the outstanding example being the British royal commission and departmental committee system. British royal commissions are ad hoc bodies appointed by the Crown upon the advice of the cabinet to inquire into and report upon some aspect of political, social, or economic policy requiring reform. Departmental committees, which are less prestigious bodies, are appointed by a cabinet minister to investigate matters of lesser importance.

The earliest known royal commission report was the Domesday Book of 1086 which was compiled by barons, justices, and legates despatched by William the Conqueror with the awesome mission of determining the taxable value of every English estate. Although similar fact-finding commissions were employed throughout the Tudor era, they increasingly became instruments of oppressive royal justice and quasi-courts. With the rise of parliamentary supremacy they were replaced, and fact-finding by select committees of Parliament became the fashion. Only in Victorian times did royal commissions begin their role, now rehabilitated, as instruments for determining government policy in an era of increasing ministerial responsibility. Much of the factual ammunition that helped secure the great nineteenth century reforms came from these commissions.

Only the briefest generalizations may here be made about the procedures of the various royal commissions, of which there have been some twenty-two since 1949. A commission's terms of reference are to be found in its royal warrant, which specifies the matters to be investigated as well as the commission's powers. Although investigations are normally conducted without the power to require the attendance of witnesses and the production of documents, the 1921 Tribunals of Inquiry (Evidence) Act does envisage that Parliament resolve to establish a commission composed of executive appointees and confer such powers upon the commission.

\[202\] Clokie & Robinson, Royal Commissions of Inquiry 28 (1937).
\[203\] Id. at 49-50.
\[204\] Id. at 54-79.
when a matter is of "urgent public importance." The royal commissions themselves are named by cabinet order-in-council. Once established, a commission begins by interpreting its terms of reference and planning its method of operation. A staff is provided to compile documentary material, and appropriate individuals and groups are invited to submit written statements before testifying. Evidence may be kept confidential, and hearings may be public or private.

Organizationally, commissions have fallen into three approximate categories: expert, representative, and impartial. Representative commissions, composed of members of the various interest groups most concerned with the subject of the investigation, are now rarely employed, in part because they seldom produce unanimous reports but instead tend to encourage polemic restatements of prior positions rather than new insights. The twelve-member Sankey Coal Commission of 1919, established to explore working conditions in the mining industry and composed of representatives of labor and management, thus produced fully four final reports. As these findings often conflicted with each other, the credibility of facts found was much diminished.

Other commissions, such as the Sewage Disposal Commission of 1898-1915 and the Museums Commission, have been composed entirely of experts. The Royal Commission on Population included a statistician, a medical doctor, and an economist. The Commission on Unemployment Insurance of 1930-1932 was composed of a judge, a municipal councillor, a social worker, and a political economist. In general, expert commissions are used to investigate the narrower technical problems of public administration.

Impartial commissions are now favored for most issues, al-

207 11 Geo. 5, c. 7; Gosnell, supra note 206, at 101.
208 DEPARTMENTAL COMMITTEE ON THE PROCEDURE OF ROYAL COMMISSIONS, REPORT, Cd. No. 5235, at 9 (1910).
209 Gosnell, supra note 206, at 100.
210 Ibid.
211 WEBB, METHODS OF SOCIAL STUDY 142-57 (1932).
212 SANKEY COAL COMM’N, REPORT, Cmd. No. 359 (1919).
213 ROYAL COMM’N ON SEWAGE DISPOSAL, REPORT, Cd. No. 7821 (1916); ROYAL COMM’N ON NAT’L MUSEUMS AND GALLERIES, FINAL REPORT, Cmd. No. 3401, at 1-4 (1929).
214 ROYAL COMM’N ON POPULATION, REPORT, Cmd. No. 7695, at 1-4 (1949).
215 ROYAL COMM’N ON UNEMPLOYMENT INSURANCE, FINAL REPORT, Cmd. No. 4185, at iii (1932).
though a mixture of impartial and representative membership, with a preponderance of the former, continues to be employed. The Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, for example, included a number of British Privy Councillors, a former colonial governor, a lady novelist from Kenya, a Canadian constitutional lawyer, a Rhodesian judge, as well as an African chieftain, an African trade unionist, and an African politician.218

Although many commissions are composed of three to five members, some broad inquiries may require greater manpower, although the increased membership has not always been beneficial. The twenty-seven-member Royal Commission on Labour was criticized for its inability to develop a coherent research program,217 but the twenty-six-member Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland produced an exhaustive, coherent report with only marginal dissent. In most cases, however, smaller commissions have proven cheaper, faster, less obtrusive, and more likely to produce a well-researched, unanimous report.218

The commission system of fact-finding has been addressed to international issues with considerable success. The Palestine Commission of 1937 travelled to the strife-torn area and conducted thirty public and forty private sessions in Jerusalem, utilizing power specially conferred on it by the Palestine government to compel production of evidence.219 The Commonwealth team observing the 1964 British Guiana elections included representatives from India, Canada, Nigeria, Malta and Trinidad, and Tobago and, as noted above, engaged in active field-observation.220 The East Africa Royal Commission, during its two trips to Kenya, Uganda, and Tanganyika, also stressed the value of “informal talks with large numbers of people” in throwing “some light on the human problems with which we are concerned.”221

In the field of overseas and international policy-making, royal
commissions have investigated colonial and Commonwealth administration, the conduct of the Boer war in South Africa, the failure of the Dardanelles military campaign, and the economic problems of Newfoundland, as well as the causes of civil strife in Palestine and Malta. Important and highly controversial policy innovation has been facilitated by credible fact determinations which make traditional preconceptions untenable in a way policy rhetoric could not. The East Africa Royal Commission's voluminous report thus became the basis of a radical new policy of integrated land tenure in Kenya's former White Highlands. The facts, as found by the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, became the basis for the painful but inevitable decision to disband the Rhodesia-Nyasaland Federation. While serving primarily to test the fact assumptions underlying a government policy, commissions have also served to apportion blame for a particular failure and to bring about important changes of political and administrative policy and public opinion.

The royal commission system is not, of course, without its pitfalls. Ministers can influence the outcome of an inquiry by their selection of commissioners and by their drafting and interpretation of the commissions' terms of references. Some commissions have "ground exceeding slow." Indeed, this would at times appear to be a vice deliberately exploited by governments seeking to delay reform. Nevertheless, in the foreign policy area, British governments during the past century and a half have found that an impartial, respected commission, while scarcely a substitute for the day-to-day decision-making responsibility of the government, can be highly useful in respect to a limited number of very controversial or very fundamental issues in raising the level of the informational component in official decision-making and private debate. It can also be helpful in closing the credibility gap between the public and private sectors of decision-making.

United States presidents may establish commissions under a va-

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222 ROYAL COMM'N ON THE WAR IN SOUTH AFRICA, Cd. No. 1789 (1904).
223 ROYAL COMM'N TO INVESTIGATE THE DARDANELLES OPERATIONS, Cmd. No. 371 (1919).
224 NEWFOUNDLAND, ROYAL COMM'N OF GOV'T ON THE ECONOMIC SITUATION, REPORT, Cmd. No. 4788 (1935).
225 PALESTINE ROYAL COMM'N, REPORT, Cmd. No. 5479 (1937).
226 ROYAL COMM'N ON MALTA, REPORT, Cmd. No. 3993 (1932).
227 WHEARE, GOVERNMENT BY COMMITTEE 72-75 (1955).
228 Id. at 90.
riety of constitutional directives: to "take care that the laws be faithfully executed," to "require the opinion, in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices" as Commander in Chief; under the foreign relations power; under the "emergency power"; and as an officer authorized to recommend legislation to Congress. Yet United States executive commissions have been of relatively minor significance, particularly when compared to the numerous and powerful investigating committees that have been established by the legislative branch of the federal government. However, the few executive commissions which have been appointed have filled a useful role.

One of the most efficient and convincing commissions to be appointed was President Roosevelt's Special Inquiry Committee To Study the Rubber Situation. It was established to find means of obtaining alternative supplies of rubber following Japanese successes in Southeast Asia early in World War II. Credibility here played a particularly important and complex role. President Roosevelt needed the support of a highly credible committee to overcome opposition to the gasoline rationing necessary for rubber conservation. Consequently, on August 6, 1942, he appointed Bernard Baruch chairman and added Dr. Karl T. Compton, president of the Massachusetts Institute of Technology, and Dr. James B. Conant, President of Harvard University. The President directed them to make "a quick but adequate survey of the entire rubber question." The committee immediately assembled a technical staff of twenty-five and sent it through the country to gather information on stockpiles, requirements, and synthetic rubber manufacturing processes. Representatives of government and industry were heard, and the committee was furnished with much documentation. On September 10, 1942, the committee duly recommended a massive conservation plan to avoid "both a military and civilian collapse." The prestigious report was submitted to Congress, and gasoline rationing was instituted soon thereafter.

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231 MARCY, PRESIDENTIAL COMMISSIONS 65 (1945).
232 Id. at 1.
234 Id. at 1.
235 MARCY, op. cit. supra note 231, at 69.
Perhaps the most notable American experiment with the commission system of fact-determination originated in joint executive-legislative initiative. As a result of demands made in and out of Congress, both the Senate and House Committees on Government Operations in 1953 recommended the establishment of a Commission on Organization of the Executive Branch of the Government (the Second Hoover Commission). The act establishing the Commission charged it with the duty "to promote economy, efficiency, and improved service in the transaction of the public business" in all executive agencies. The President, President of the Senate, and the Speaker of the House were each directed to select two men from public and two from private life to serve on the twelve-member panel. In addition to Mr. Hoover, the appointees included Herbert Brownell, Jr., James A. Farley, Joseph P. Kennedy, and Senator John L. McClellan. The Commission was vested with powers of subpoena and summons, although it proved prestigious enough to have no difficulty in obtaining information without resorting to coercion.

The Commission appointed specialized task forces with responsibility for examining sub-topics such as budget and accounting, medical services, procurement, and personnel and civil service. Nearly two hundred persons manned these task forces, including Supreme Court Justices, three governors or former governors, college presidents, admirals, and members of professional groups such as the American Bar Association and the American Medical Association. The task forces themselves often subdivided and hired experts of their own, including economists and accountants.

The thoroughness of this process is typified by the Subcommittee on Depot Utilization, which submitted its report only after visiting "more than 30 major storage activities throughout the United States" and consulting with nine representatives of the warehousing industry.

The reports of the task forces were next reviewed by teams of

239 MaNeIl & Maetz, THe HOoVeR REpORt 1953-55, at 16, 19 (1956).
240 Ibid.
commission members selected by Mr. Hoover on the basis of their expertise. These, in most instances, revised or rejected the task force recommendations as the result of differences of judgment or on the basis of further information gathered by the task force. The Commission as a whole then reviewed these drafts, settled upon final formulations, and included any dissents by other commissioners in a final report made up of 519 recommendations, 274 of which were implemented.

Another type of presidential fact-finding commission is illustrated by the President's Commission on the Assassination of President Kennedy, which took the form of a board of inquiry. The Warren Commission was appointed on November 30, 1963, pursuant to an Executive Order directing it to "evaluate and report upon the facts relating to the assassination... and the subsequent violent death of the man charged with the assassination." The Commission, financed by the President's Emergency Fund, was granted subpoena and summons powers by Congress and the power "to prescribe its own procedures." The seven-member body engaged a general counsel and fourteen assistants, in addition to a staff of historians, investigators, and attorneys. It was authorized to take depositions upon oath or affirmation from witnesses designated by the Commission. Hearings were conducted in private unless a witness requested otherwise. Hearsay and secondary documents were admitted as evidence. At both the deposition proceedings and the hearings, a witness was entitled to his own counsel to advise him on his rights, to make "brief objections to questions," and to clarify testimony by questioning the witness.

Although the Commission and its staff privately interviewed 552 witnesses, the bulk of its factual information was supplied by various agencies. The FBI conducted 25,000 interviews and sub-

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242 MACNEIL & METZ, op. cit. supra note 239, at 20-22.
243 U.S. Senate Comm. on Gov't Operations, Action by the Congress and the Executive Branch of the Gov't on the Second Hoover Comm'n, 85th Cong., 2d Sess. 1, S. Doc. No. 1289 (1958). Forty-four additional recommendations were awaiting implementation as of 1957. Ibid.
248 Id. at 501.
249 Id. at xiii-xiv.
250 Id. at 501, 503.
mitted over 2,300 reports. The Treasury Department's Secret Service, the State Department, and the Central Intelligence Agency furnished answers to questions formulated by Commission counsel after study of preliminary agency reports.251 In addition, Walter E. Craig, American Bar Association president, represented the deceased assassination suspect. He was afforded access to "all working papers, reports, and other data in Commission files" and was permitted to cross-examine witnesses.252

The final report was submitted on September 24, 1964, followed by volumes of exhibits and transcripts of testimony. It concluded that Lee Harvey Oswald and Jack Ruby had each acted alone.253 Initially, at least, the Report has fulfilled its function. It examined an issue of great political, social, and historical importance. A group of men of credibility, competence, and impartiality beyond reasonable challenge supervised and participated in an encompassing, fair, and relatively speedy operation of fact-finding. This operation yielded a theory which, if not beyond question, has thus far withstood effective challenge. At a time when doubt and suspicion might have rent the nation, it produced a credible finding of fact which the populace, by and large, has found itself able to accept. Although the assassination of a President in somewhat murky circumstances would seem charged with political passion, it has not been possible, despite much effort and some evidentiary support, to fan a great public debate, let alone a deep rift between public and private sectors of the community. This is an important distinction between the assassination crisis and the Viet-Nam crisis. Might the distinction not in part be attributed to the difference in methods of fact-finding used in the two situations?


This article began with the hypothesis that impartial fact-finding processes, functionally structured, can be useful in narrowing the scope of conflict in certain disputes. The brief survey of the experimental uses to which impartial fact-finding has been put in international, regional, and national communities does no more

251 Id. at xii-xiii.
252 Id. at xiv-xv.
253 Id. at 21.
than give the hypothesis itself sufficient credibility to warrant further research.

Such research should attempt to measure changes in attitude by parties to a dispute brought about by various fact-finding processes and to collate this impact and the kind of process employed, in an effort to establish some norms of credible fact determination. Such norms, it may be conjectured, would be equally applicable to disputes between states and disputes between public and private sectors of the national decision-making process. They would serve not only to close the credibility gap between these disputants but also as a guide for more reliable and informed major decisions.

To determine impact of various fact-finding processes, it will be necessary to measure both changes of attitude and changes of behavior. Attitudinal changes would best be tested by a "before-and-after" survey, provided the researcher can become aware of the research potential of a dispute early enough to measure attitudes before a fact-finding process is instituted and providing he is correct in predicting recourse to the process so that changes in attitude can be determined by a subsequent re-survey of the same group. A somewhat more accessible but less reliable source of attitudinal data is to be found by comparing positions taken by leading popular journals before and after an important fact-finding process has been invoked. For example, when the Church in Malta issued a Pastoral letter prohibiting its flock from voting for the Constitutionalist Party, *The Times* of London declared this to be a gratuitous feud for which the Church was responsible. However, in 1932, when a royal commission blamed the dispute on the injudicious behavior of the leader of the Constitutionals, *The Times* in a volte face, lauded the Report for clearing away "clouds of propaganda" and abandoned its advocacy of constitutional disestablishment of the church.

Another example of a change in the attitude of a leading journal occurred after the publication of the Palestine Commission Report of 1937. *The Economist*, writing prior to the report's issuance, argued for the establishment of "mixed areas" in which Arab and Jewish communes would coexist side by side, along with a "reserved area" for Palestinian Arabs. After the Commission re-

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256 **PALESTINE ROYAL COMM'N, REPORT, CMD. NO. 5479** (1937).
257 **Palestine, 123 ECON.** 716, 717 (1936).
ported that Arab and Jew could not be expected to live harmoniously in close proximity, *The Economist* abandoned its communal proposal and adopted the report’s partition plan.\(^{268}\)

Study of changes in behavior require the application of both historical and psychological methodology. What behavioral impact, for example, did the Malaysia Commission’s report have on the nations of the international community and the delegates through whom the nations act at international conferences and assemblies? It is historically noteworthy, for example, that the report “clearing” Malaysia was received and accepted by the Secretary-General of the United Nations. He publicly expressed his assent to the General Assembly on September 14, 1963,\(^{269}\) and Malaysia was given the popular accolade of election by the General Assembly to the United Nations Security Council (for a split term) on November 1, 1963.\(^{260}\) Were these two events related? Were nations and delegates swayed by the credibility of the Mission’s report? Would the results have been otherwise had there been no impartial fact determination? Only intensive, in-depth interviews can establish the causal connection, if any, of the delegates’ behavior toward Malaysia’s candidature and the Mission report. On the other hand, similar research should be applied to an instance of international

\(^{268}\) *Partition of Palestine*, 128 Econ. 57-58 (1937). Of course, not all fact-finding commissions are equally successful in altering opinions. During the Fourth Committee debate concerning the credibility of Ambassador de Ribbing’s report on Oman, the United Arab Republic, pressing for a new mission, argued that “the terms of reference of the mission invited to visit the territory had been derived from the invitation issued by the United Kingdom and the Sultan of Muscat.” Saudi Arabia asserted that de Ribbing “had been the guest of the Sultan of Muscat and could only visit the regions which the authorities of the Sultan had wished it to visit and could only meet the people whom they had wished to meet.” Iraq criticized the report and wondered whether the attitude of the people interviewed would have been different had both parties to the dispute been represented. 18 U.N. GAOR, 4th Comm. 451.

Similarly, reactions to the 1954 Trusteeship Council Mission to Tanganyika, 15 U.N. Trusteeship, Supp. 3, at 1, U.N. Doc. T/1169 (1955), which recommended acceleration of the schedule for Tanganyikan independence, were in some instances extremely negative. *The Economist* wrote that “It is fair that visiting United Nations missions should provide a sounding board of African views; but to swallow them almost whole merely exposes their naivete.” *Planning East Africa*, 174 Econ. 356 (1955). *The Observer* commented that

[T]he report itself is not altogether realistic. Its authors recommend a time-limit of less than twenty years for the achievement of self-government without apparently having considered such questions as the supply of trained administrators or the essential connection between economic and political development. Nevertheless, they have obviously endeavoured to be fair and objective and they have produced what is, on the whole, a highly encouraging picture. *The Observer*, Jan. 30, 1955, p. 6, col. 3.


behavior less favorable to Malaysia's cause. Thus it would be useful to have motivational analysis of participation in the 1964 Cairo Conference by Heads of Non-Aligned Governments which did not invite Malaysian participation, although it refrained from endorsing Indonesian condemnation of the new state and did allow Malaysia to be represented by two observers.261

Another way to approach attitudinal and behavioral research in the role of impartial fact-finding processes is to examine comparable situations in one of which the process was used and the other in which it was not. The suggested analogy between the Kennedy assassination and the Viet-Nam war is admittedly rhetorical and not scientific. A more evidently proximate set of comparisons could be made between the reaction of the United Nations to the form of independence granted Western Samoa by New Zealand and that granted the Windward and Leeward Islands by Great Britain. In both instances, tiny territories were given the power to assume full sovereignty over all their affairs, and in both instances schemes—albeit technically somewhat different—were devised by which the former colonial power, at the pleasure of the former colony, would continue to discharge certain functions in connection with defense and foreign relations.262 In the case of West Samoa, however, the United Nations, with the exception of the Soviet Union, made no objection to the scheme and gave it overwhelming approval.263 In the case of Britain's Windwards and Leewards, the United Nations produced a strong, negative reaction and refused to regard the islands as decolonized.264 Research should indicate whether the difference in behavior of United Nations member states and delegates in these two instances can be attributed to the Western Samoan arrangement's having been arrived at after a plebescite supervised by the General Assembly265 in which the fact of popular consent to the voluntary dependent status was clearly and impartially at-

264 Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/AC/109/L. 378 Rev. 1 (March 10, 1967). This resolution reaffirmed "That General Assembly resolution 1514 (XV) and other relevant resolutions continue to apply to these Territories . . . ."
tested, whereas Britain’s arrangement with the Windwards and Leewards was made in private negotiation between the governments concerned.

Further research into the impact of fact-finding processes should also endeavor to test the correlation, if any, between the credibility of a fact found and the methodology of fact-finding employed. Obviously, all fact-finding is not equally credible. For example, one might conjecture that the findings of a Warren Commission are more likely to effect changes in attitude and behavior than are the Hanoi reports of Mr. Harrison Salisbury for the New York Times. It is no comment on Mr. Salisbury, but it may be an inevitable limitation on the role of the journalist as fact-finder that his reports will be suspected of bias towards the editorial policy of the newspaper for which he works. Even the respected Mr. Salisbury was described as a “Hanoi-picked correspondent,” and the New York Times was criticized for publishing “propaganda statistics concerning alleged civilian casualties on its front page without attribution of any kind.” And it was widely noted that Salisbury’s account coincided with the editorial opposition of the New York Times to the continued bombing of North Viet-Nam.

This survey of international, regional, national, and non-governmental fact-finding processes suggests a number of hypothetical correlations between the structure of the process employed and the credibility of the facts found. They are set out, here, certainly not as conclusions to be accepted, but as hypotheses to be tested:

1. Facts found are credible in direct proportion to the faith in the appointing authority and/or the impartiality of the fact-finders felt by all the parties to the dispute at the commencement (not the conclusion) of the process.

2. Facts found are credible in direct proportion to the professional esteem and popular prestige of the fact-finders. Also, where specialized facts are at issue, the credibility of the findings increases in direct proportion to the acknowledged expertise of the fact-finders.

3. The procedure used by fact-finders bears directly on the credibility of the facts found. Specifically, credibility is increased where the fact-finders follow the essence, although not neces-

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268 Cf. “[I]f the full power of the United States is brought to bear there is little doubt that the people and production of North Vietnam can be totally destroyed, with nothing left to ‘negotiate’...” Editorial, N.Y. Times, July 3, 1966, § IV, p. 6.
sarily in technicalities, of a fair trial, viz., hear both sides, take
evidence in open sessions, and permit rebuttals, cross-examina-
tion, and summary by those giving evidence.

4. Facts found are credible in inverse proportion to the extent
of interference — both obstructive or “helpful” — by the par-
ties to the dispute.

5. The credibility of a fact-finding is diminished when it pro-
cceeds on the basis of partial evidence. Where an important
witness or group of witnesses refuses to cooperate the credi-
bility of the facts found will suffer unless the objection can be
overcome by the investigating body.

6. The credibility of a fact-finding suffers if the fact-finders re-
fuse, or consider themselves incompetent, to answer more dif-
ficult but essential subsidiary issues of fact.

7. Facts found are credible in direct proportion to the degree of
unanimity of the fact-finders. Also, if a fact-finding report
is contradicted by another fact-finding report, the credibility
of both is diminished.

8. Facts found are less credible insofar as they support the con-
tention of a party to a dispute which, prior to the finding, has
already irrevocably committed itself to that contention.

9. The credibility of a fact-finding varies in direct relation to the
erudition, logic, and thoroughness with which the process and
and findings are set out in the final report of the fact-finders.