

The 1991 Declaration on Fact-finding by the United Nations

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Introduction

The United Nations must rely on timely and accurate knowledge of all relevant facts when exercising its functions in relation to the maintenance of international peace and security. In particular efforts for conflict prevention require an early warning system which is capable of identifying at the earliest possible stage situations that could produce conflict. Besides collecting information through publicly available channels, the deployment of fact-finding missions by the competent United Nations organs has proven to be very useful. Fact-finding activities are also able to indicate to the parties of a conflict the concern of the Organization and thereby contribute to defusing the dispute.

These reflections form the basis for the *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security* which was adopted by the General Assembly of the United Nations on 9 December 1991 without a vote.¹ The Declaration which had been initiated during the General Assembly of 1988² resulted from the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. The Special Committee is an organ of the General Assembly and its findings were considered during the Assembly's 1989, 1990 and 1991 sessions.³ The Declaration is structured into five major parts that deal with the following topics: common principles for fact-finding by the United Nations, the prerequisites for a decision to send fact-finding missions, the conduct of fact-finding missions, the possible use of other information gathering capabilities, and escape clauses.

* Foreign Office, Bonn, Germany. The views expressed are the personal views of the writer, and do not necessarily represent the views of the Foreign Office.

1 Resolution 46/59.

2 The original co-sponsors were Belgium, Federal Republic of Germany, Italy, Japan, New Zealand and Spain. For the reasoning behind the initiative see the statement by the representative of the Federal Republic of Germany, Scharioth, on 17 October 1988 in the Sixth Committee, UN Document A/C.6/43/SR.15 at 14-16.

3 Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, UN Documents A/44/33 (1989) 7-32, A/45/33 (1990) 8-34, A/46/33 (1991) 7-11.

I. The Declaration

A. Common Principles of Fact-finding Declared by the United Nations

The Declaration defines fact-finding as any activity designed to obtain detailed knowledge of the relevant facts of any dispute, or threatening conflict, in which the competent United Nations organs need to effectively exercise their functions pertaining to the maintenance of international peace and security.⁴ Although the rest of the Declaration mainly deals with fact-finding missions, other means of information gathering are included in the definition, such as hearings at Headquarters or the already existing information gathering capabilities of the Secretary-General which are referred to in Part IV of the Declaration. Activities such as observation of cease-fires in the framework of peace-keeping operations or verification of the implementation of existing agreements would, however, not fall under that definition.

To make fact-finding a solid and reliable basis for any decision the Declaration requires it to be comprehensive, objective, impartial and timely.⁵ Specific examples for these characteristics can be found throughout the text of the Declaration.

With regard to fact-finding missions, the Declaration recommends that the competent organs of the United Nations consider their deployment, if the necessary knowledge cannot be obtained through existing means such as, for example, the information gathering authority of the Secretariat.⁶ Although this recommendation is not mandatory, it clearly illustrates the Declaration's intention to strengthen fact-finding missions by the United Nations.

However fact-finding missions will usually have side-effects that the competent United Nations organ should bear in mind when taking its decision.⁷ Fact-finding missions may aggravate a situation, if, for example, the mandate is not accepted by all sides or the work of the mission seems to be unbalanced. However, a positive consequence of the deployment of a mission is that it signals the United Nations' concern to the States involved in a conflict, and thereby contributes to building confidence.

If the United Nations decides to undertake a fact-finding mission, it needs the prior consent of the State to the territory of which the mission is being sent. The Declaration explicitly confirms this requirement⁸ which follows from the principle of non-intervention contained in Article 2 paragraph 7 of the Charter.

Although there was general agreement that, as a rule, the consent of a receiving State is imperative, this question played a major role during the discussions in the Charter Committee. Differences existed, in particular, as to how prominent this principle should appear in the Declaration. The initiators of the Declaration were of the opinion that the prerequisite of consent of States would be better placed in the preamble, since their basic approach was not to restate legal principles.⁹ Other delegations, however, considered the question of consent as being so important that it had to be confirmed in the operative part.¹⁰

There is indeed only one exception where the consent of a State can be substituted, and that is by a binding decision of the Security Council acting under Chapter VII which the Members of the United Nations have agreed to accept and carry out.¹¹

4 Paragraph 2.

5 Paragraph 3.

6 Paragraph 4.

7 Paragraph 5.

8 Paragraph 6.

9 Report of the Charter Committee UN Document A/45/33 (1990) 15.

10 *Ibid.*, at 18.

11 Article 25 of the Charter.

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With regard to the requirement of prior consent the Declaration requires more than a simple confirmation of the legal situation. The intention behind the Declaration is to induce Member States to adopt a more positive attitude, and it expressly requests them to endeavour to follow a policy of admitting fact-finding missions to their territory.¹² Although previous drafts of the Declaration used more explicit language,¹³ this general policy recommendation still constitutes one of the cornerstones of the Declaration. It appeals to States to cooperate with the United Nations so that the instrument of fact-finding can gain increased importance in the field of preventive diplomacy. It is thus directly related to the recommendation addressed to the United Nations organs to make more use of fact-finding missions.

If a State, in the spirit of the Declaration, requests on its own initiative the United Nations to send a fact-finding mission to its territory, this would of course imply the consent of that State. In that case the competent organ of the United Nations should react without undue delay.¹⁴

If the consent of a State has been requested by the United Nations to receive a fact-finding mission within its territory, that State should consider that request as soon as possible and inform the said organ without delay.¹⁵ If it comes to a negative conclusion, that State should, if it deems it appropriate, indicate the reasons for its decision. Such an explanation might help to remove existing reservations which might concern the composition of the mission or specific aspects of the mandate. These provisions also underline the general policy of the Declaration to induce States to adopt a more positive attitude towards receiving fact-finding missions.

Although the text of the Declaration contains no explicit provision concerning the termination of fact-finding missions, it should be interpreted such that the withdrawal of the consent given by a State would result in the cessation of the activities of the fact-finding mission in its territory.¹⁶

B. The Decision to Send a Fact-finding Mission

The Security Council, the General Assembly, and Secretary-General of the United Nations, all have certain responsibilities for the maintenance of international peace and security. While they all are competent to undertake fact-finding, Part II of the Declaration emphasizes the role of the Secretary-General as the organ with the necessary flexibility for both the undertaking and the carrying out of fact-finding missions.¹⁷

The Security Council – with its primary responsibility in this field¹⁸ – and the General Assembly are requested to consider recourse to fact-finding. Both organs may entrust the conduct of a fact-finding mission to *ad hoc* subsidiary bodies. However, the Declaration recommends that

12 Paragraph 21: 'States should endeavour to follow a policy of admitting United Nations fact-finding missions to their territory.'

13 Report of the Charter Committee, *supra* note 9, at 9: 'States should follow a policy of not refusing to admit United Nations fact-finding missions to their territory.'

14 Paragraph 18.

15 Paragraph 20.

16 See Report of the Charter Committee UN Document A/46/33 (1991) 11.

17 Cf. in this regard the comprehensive study by Bourloyannis, 'Fact-finding by the Secretary-General of the United Nations', 22 *New York Journal of International Law and Politics* (1991) 641-669.

18 Article 24, paragraph 1 of the Charter.

they should give preference to the Secretary-General to carry out this task.¹⁹ This reflects a widely shared view that the Secretary-General is, in most cases, the organ that is best suited to carry out a fact-finding mission.²⁰ This recommendation recognizes the difficulty of finding a common accord on the composition of fact-finding missions which are to be comprised of nationals from several States.²¹

The Secretary-General for his part may designate a special representative or a group of experts which report to him. For this purpose the Secretary-General is requested by the Declaration to prepare and update lists of experts in various fields who may be available for fact-finding missions.²² The Declaration also mentions the possibility of emergency fact-finding missions and asks the Secretary-General to maintain and develop appropriate capabilities.

Of course the Secretary-General, either on his own initiative or at the request of the States concerned, should independently, consider undertaking fact-finding missions.²³ He can do so on the basis of Article 99 of the Charter which vests him with particular responsibility and authority in the field of preventive diplomacy.²⁴ The Declaration requests him to pay special attention to using United Nations fact-finding capabilities at an early stage in order to contribute to the prevention of disputes.²⁵

If the Secretary-General decides to send a fact-finding mission he may inform the Security Council, although there is no legal obligation to do so. The Security Council may in turn express its support for this activity informally, in a statement or even in a resolution, as has already been the case in the past.²⁶

In order to avoid any duplication of work the competent United Nations organs should, before taking a decision, consider other relevant fact-finding efforts.²⁷ This refers in particular to those activities which are undertaken in the framework of regional organizations.

The success of a fact-finding mission will very much depend on the mandate. According to the Declaration it should be clear and contain precise requirements to be met by its report.²⁸

C. The Carrying out of Fact-finding Missions

Every State receiving a fact-finding mission has certain obligations and rights that correspond with those of the missions and their members. Part III of the Declaration gives an overview of the principles which have to be respected and which are important for the successful conduct of a fact-finding mission.

19 Paragraph 15. Such a mandate entrusting the Secretary-General with the conduct of a fact-finding mission would be based on article 98 of the Charter.

20 See Report of the Charter Committee, *supra* note 9, at 21.

21 Report of the Charter Committee UN Document A/44/33 (1989) 14.

22 Paragraph 14. Such a register had already been requested from the Secretary-General in 1967, when the General Assembly comprehensively dealt with the question of fact-finding for the first time in Resolution 2329 (XXII). A register based on nominations submitted by Member States appeared in 1968, UN Document A/7240, and was then updated in 1969, UN Document A/7751, and in 1970, UN Document A/8108.

23 Paragraph 13.

24 W. Fiedler on Art. 97, para. 16 in B. Simma (ed.), *Charta der Vereinten Nationen. Kommentar* (1991).

25 Paragraph 12.

26 Cf. Bourloyannis, *supra* note 17, at 660-661.

27 Paragraph 16.

28 Paragraph 17.

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As a principle, all States should cooperate with United Nations fact-finding missions and give them, within the limits of their capabilities, full and prompt assistance necessary for the exercise of their functions and the fulfillment of their mandate.²⁹ This rule applies to all States concerned, including for example transit States, and not only to those where the fact-finding is being carried out. It is obvious that without their practical and logistic support fact-finding missions are doomed to fail. If in particular a receiving State is not willing to provide the mission with a means of transportation, or does not permit the questioning of relevant persons, the mission will not be in a position to fulfill its mandate.

The Declaration demands that fact-finding missions should be accorded all immunities and facilities; in particular full confidentiality in their work should be assured along with access to all relevant places and persons.³⁰ With regard to the protection of those persons that are questioned by the members of the fact-finding mission, the Declaration expressly states that it expects 'that no harmful consequences will result to these persons'. Although no specific mention is made in the Declaration, the freedom of communication, primarily with the United Nations and among the members of the mission, should also be guaranteed.

While the members of fact-finding missions have an obligation to respect the laws and regulations of the receiving State, that State may not apply local rules arbitrarily and thereby hinder missions in the proper discharge of their functions.³¹

The members of fact-finding missions will usually be experts on mission in the meaning of the Convention on the Privileges and Immunities of the United Nations,³² and consequently enjoy the privileges and immunities accorded to that category.³³ If, however, a member of the mission holds the rank of an ambassador, his or her status would be adjusted accordingly.

Since fact-finding has to be comprehensive, objective and impartial,³⁴ Part III of the Declaration provides the following specific rules to be observed in the conduct of fact-finding missions.³⁵ Fact-finding missions have an obligation to act in strict conformity with their mandate. Instructions may only be received from the competent United Nations organ. According to the principle *audiatur est altera pars* all States should be given an opportunity to express their views with respect to the material that the fact-finding mission has been entrusted to obtain – even while the mission is under way.³⁶

The work of a fact-finding mission will usually result in a report presented to the sending organ which commissioned it. This report will limit itself primarily to a description of the facts³⁷ which the United Nations organ requested. While policy recommendations should indeed be excluded, an evaluation of the findings will be hard to avoid. The details will depend on the wording of the mandate. If the mission's report is going to be published, the views of States directly concerned should also be made public.³⁸ Information acquired during the mission which is not being published has to be kept confidential, even after the members of the mission have fulfilled their task.³⁹

29 Paragraph 22.

30 Paragraph 23.

31 Paragraph 23.

32 Adopted by the General Assembly on 13 February 1946, 1 UNTS 15.

33 Paragraph 25.

34 Paragraph 3.

35 Paragraph 25.

36 Paragraph 26.

37 Paragraph 17: 'The report should be limited to a presentation of findings of a factual nature.'

38 Paragraph 26.

39 Paragraph 25.

D. Other Information Gathering Capabilities of the Secretary-General

Part IV of the Declaration is essentially a description of the actual practice of the Secretary-General in the light of his functions under Article 99 of the Charter. In order to alert the Security Council or, where appropriate, the General Assembly to a matter that in his opinion might threaten the maintenance of international peace and security, the Secretary-General is obliged to 'monitor the state of international peace and security regularly and systematically'.⁴⁰ The Declaration requests the Secretary-General to make full use of the already existing capabilities of the Secretariat and to keep under review the improvement of these capabilities.⁴¹

With 'existing means' the Declaration alludes in particular to the Office for Research and the Collection of Information which was established within the Secretariat in March 1987. Its primary tasks are to monitor global trends, to provide early warning of potential conflicts, and to undertake research on matters pertinent to both the good offices of the Secretary-General and peace-keeping activities.⁴²

As can be seen in the original drafts, it was the idea of the co-sponsors to enhance the existing capabilities by specific measures. One proposal favoured the use of United Nations information centres to collect, in their respective countries, publicly available information related to international peace and security. According to another proposal the Secretary-General should have encouraged United Nations representatives outside Headquarters to bring to his early attention any situation which may threaten international peace and security.⁴³

The majority of the members of the Special Committee on the Charter of the United Nations felt, however, that these proposals required a more thorough discussion and that the Fact-finding Declaration was not the appropriate place to deal with this subject.⁴⁴

E. Final Clauses

Part V of the Declaration contains two savings clauses. One confirming that the deployment of a United Nations fact-finding mission is without prejudice to any similar activities carried out by the States concerned.⁴⁵ The other states that nothing in the Declaration could be construed as prejudicing in any manner the provisions of the Charter.⁴⁶

II. Evaluation

On several occasions the United Nations has discussed fact-finding in the context of both its utility as a means for the peaceful settlement of disputes and its role in verifying the execution of international agreements and treaties.⁴⁷ The practical relevance of fact-finding in the field of

40 Paragraph 28.

41 Paragraph 29.

42 B.G. Ramcharan, *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch* (1991) 10; Bourloyannis, *supra* note 17, at 648-649.

43 Report of the Charter Committee UN Document A/44/33 (1989) 9.

44 Report of the Charter Committee, *supra* note 9, at 28.

45 Paragraph 30.

46 Paragraph 31.

47 Cf. the Report of the Secretary-General on Methods of Fact-finding, UN Document A/5694 (1965), which was drafted in the preparatory work for the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the

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preventive diplomacy, however, has become more evident only during recent years. This tendency is in particular reflected in the 1988 *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*⁴⁸ which recommended that the Security Council, the General Assembly and the Secretary-General consider making more use of their respective fact-finding capabilities.⁴⁹

These provisions of the 1988 Declaration have now been further elaborated in the Fact-finding Declaration in an attempt to both enhance the fact-finding capabilities of the United Nations and strengthen the role of the Secretary-General. Although the Declaration deals mainly with the preventive aspects of fact-finding, other stages of disputes like settlement or adjustment are not excluded.⁵⁰

The Declaration which is annexed to a General Assembly Resolution has no binding effect. Rather it outlines policy recommendations for the various organs of the United Nations and its Member States. While it does not alter the express terms of the Charter, it is more than a mere descriptive re-statement of the current legal situation.⁵¹

Besides the ground laid by the 1988 Declaration on Conflict Prevention it was the Secretary-General who inspired the original sponsors to present their proposal to the Special Committee on the Charter. His reports on the work of the organization repeatedly stressed the importance of the instrument of fact-finding in the field of preventive diplomacy,⁵² and deplored the United Nations lack of independent sources of information.⁵³

As a direct consequence, the efforts of the initiators of the Declaration to enhance the fact-finding capabilities of the United Nations concentrated from the very beginning on the role of the Secretary-General. He had already started to develop more systematic information gathering capabilities, in particular in the area of humanitarian crises and mass emigrations, by involving the heads of UN agencies and field offices and establishing the Office for Research and the Collection of Information. The Secretary-General had the best experience in the increasing practical use of fact-finding missions.⁵⁴ The Declaration acknowledged and supported this particular role of the Secretary-General, thereby giving a broad interpretation of the functions accorded to him by the Charter.⁵⁵

Despite the adoption of the Declaration the significance of fact-finding for preventive diplomacy remains of topical interest. In his recent report to the Security Council called 'An

United Nations of 1970. A supplement to the report is contained in UN Document A/6228 (1966). Cf. also the Report of the Sixth Committee Questions of Methods of Fact-finding, UN Document A/6995 (1967).

48 General Assembly Resolution 43/51.

49 Paragraphs 12, 18, and 22.

50 Report of the Charter Committee A/44/33 (1989) 10. See also preambular paragraph 3.

51 Cf. Report of the Charter Committee, *supra* note 9, at 15.

52 Report of the Secretary-General on the Work of the Organization, UN Document A/42/1 (1987) 4: 'When a potentially dangerous situation is identified, a fact-finding mission can be quickly dispatched both to gain a detailed knowledge of the problem and to signal to the parties the concern of the United Nations as a whole.'

53 Report of the Secretary-General on the Work of the Organization, UN Document A/44/1 (1989): 'At present, the pool of material available to the Secretary-General consists of information provided by government representatives supplemented by the collection and analyses of published reports and comments. This is manifestly insufficient in cases where more than anticipatory diplomacy is required.'

54 Cf. Bourloyannis, *supra* note 17, at 647-651.

55 Arts. 97 to 99.

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Agenda For Peace'⁵⁶ the Secretary-General made reference to the need for an increased resort to fact-finding, picked up some of the ideas contained in the Declaration⁵⁷ and introduced some new proposals.⁵⁸ He also stressed the potential of regional organizations that should be utilized in the maintenance of international peace and security. In this connection it is of particular interest that the participating States of the Conference on Security and Cooperation in Europe in their Helsinki Document of 10 July 1992 deal explicitly with the prerequisites and conditions of fact-finding and rapporteur missions as instruments of conflict prevention and crisis management.⁵⁹ The fact-finding activities of the CSCE have already begun, and it will be interesting to see how they develop in comparison to the practice of the United Nations and the provisions of the Declaration of 1991.

56 An Agenda for Peace – Preventive Diplomacy, peacemaking and peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Document A/47/277 (1992).

57 For example the recommendation that a request by a State for the sending of a United Nations fact-finding mission to its territory should be considered without undue delay, *ibid.*, at 7.

58 One of them is the idea that the Security Council holds exceptional meetings away from Headquarters, in order not only to inform itself directly, but also to bring the authority of the Organization to bear on a given situation, *ibid.*, at 8.

59 Part III of the Decisions, paragraphs 12-16.