FACT FINDING AND STATES IN EMERGENCY

Charles Garraway

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I. INTRODUCTION

In the first quarter of the 21st Century, fact-finding has almost become a mantra. Demand has never been higher, with calls for fact-finding in almost every conflict and alleged violation of the laws of armed conflict or of international human rights. Numerous commissions and other bodies have been established by various agencies ranging from the Secretary General of the United Nations to non-governmental organisations.1 There has been much academic research into fact-finding and the modalities thereof with sets of guidelines and manuals issued, such as the Advanced Practitioner's Handbook on Commissions of Inquiry—Monitoring, Reporting and Fact-Finding, issued by the Harvard Programme on Humanitarian Policy and Conflict Research.2 However, fact-finding is not a homogeneous concept. What tends to be overlooked in the wider debate is that the way that fact-finding is carried out—the modalities—will be affected by the purpose of the fact-finding mission. That in turn will affect the facts that need to be found.

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Additionally, unless the purpose is clear from the beginning, it is unlikely that there will be clarity in the findings. It is for that reason that the Harvard Manual lays such emphasis on "the mandate."  

In this article, I will be looking at what is fact-finding and in particular fact-finding under the law of armed conflict, a term that will be used in preference to international humanitarian law or the laws of war, terms which are also used in this context. Finally, I will look at the International Humanitarian Fact-Finding Commission and its role, both current and future.

II. TYPES OF FACT-FINDING

There are a number of different types of fact-finding. First there is the basic form, as represented in ordinary everyday life, something has gone wrong and needs to be put right. Whether it is an aircraft accident or the malfunction of a piece of equipment, we want to know what happened. Only then will further inquiries look into why it happened and what needs to be done to make sure it doesn’t happen again. In Service life, such inquiries are common. Their aim is to establish a sequence of events and the facts to be collected are those which would assist in that aim. One can see this illustrated in the initial inquiry into the downing of Malaysian airliner MH17 over Ukraine. 4 This inquiry simply sought to establish why the plane fell out of the sky. It did not seek to establish responsibility. Thus whilst it was important to discover whether it was an outside agency such as a missile that brought down the plane, the type of missile and the ownership of the missile were irrelevant in view of the limited nature of the inquiry.

Secondly, and at the other extreme, is what I call general fact-finding. Here, the aim is to bring to the attention of the wider public what is happening in a particular area. It is essentially a call to action by the wider international community. Whilst such an inquiry may indeed involve allegations of wrongdoing, as in the original inquiry into the Former Yugoslavia, 5 it may simply involve bringing to the world’s attention a situation that does not involve any criminal activity, such as famine or the consequences of a natural disaster. 6 Here, it may be irrelevant for the purposes of the inquiry to outline


why the matters are happening; it is the very fact that they are happening that is central to the inquiry. It is incidental that efforts are already being made to alleviate the suffering. In such inquiries, the picture is painted with a broad brush and whilst individual cases may add to the emotive appeal, it is the overall suffering that is the key element.

However, these are at the extreme ends and most fact-finding is conducted on the middle ground. Here, I would suggest there are three main types of fact-finding. The closest to "general fact-finding" is human rights fact-finding because in simple terms, it is the right allegedly violated that is the key fact. Once that violation is established, there is a burden on the State for it is the States that are the key subjects of human rights treaties to justify that violation. This of course can be done as many rights may be subject to derogation or to exceptions. However, the burden has shifted. It follows therefore that the result is the critical fact here, such as a death in custody. Once that fact has been established, the fact-finders have done their job.

At the other extreme here is criminal fact-finding. This is much more detailed and the standard of evidence required, "beyond a reasonable doubt" or its equivalent, is much higher. 7 The result is only the start of the investigation, the inquiry must go on to discover why the result happened and then who was responsible. This is not the wider State responsibility applicable under human rights fact-finding, but a much narrower concept. In the case of war crimes, it will involve going beyond the State or organisation responsible to trace the units and individuals. With the doctrine of command responsibility, it may not be necessary to identify the individual perpetrators but it will be necessary to point the finger at a specific individual, or specific individuals, who bear responsibility and then prove that case, including rebutting possible defences, to the highest standard of proof. Facts here need to be detailed and often corroborative will be sought to strengthen the case. This requires painstaking effort and in relation to international crimes, extensive resources. These are not the sort of inquiries that can be conducted in a matter of days or even weeks. Months and even years may be required to build up a case.

III. LAW OF ARMED CONFLICT FACT-FINDING

In the middle, comes fact-finding in relation to alleged violations of the law of armed conflict. Of course, such fact-finding may involve criminal fact-finding if carried out with the intention of prosecution but usually initial fact-finding is more concerned with the establishment of violations and the possibility of State responsibility. In those cases, the nature of the inquiry is

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more akin to human rights fact-finding. However, there are substantial differences which are not always appreciated.

The law of armed conflict is traditionally divided into two parts, “Hague law” dealing with the conduct of hostilities, and “Geneva law” dealing with the protection of victims.8 Hague law was always essentially a State-led process and historically goes back millennia.9 Before the Westphalian system, people developed rules on the conduct of hostilities, largely out of self-interest. These were sometimes incorporated in bilateral agreements between belligerents but more often remained unwritten, known as “the laws and customs of war.” Being a State-led process, governed by self-interest, military necessity held sway though that was tempered by human nature. For example, the St. Petersburg Declaration of 186810 banning the use of explosive projectiles under 400 grammes in weight arose from a conference called by Russia because an anti-personnel version of a bullet designed to blow up ammunition wagons had been developed and Russia did not want it to be generally available as it was not in the interests of the Imperial Russian Army.11 The key treaties in this part of the law came from the Hague Peace Conferences of 1899 and 1907, in particular Hague Convention IV of 1907 with its attached Regulations Respecting the Laws and Customs of War on Land.12

“Geneva law” on the other hand had a different genesis. Although there had always been rules protecting victims of war, again governed by State interest, the establishment of what later became the International Committee of the Red Cross, and the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 186413 set the law on a new path. Here, the concern was humanity, tempered by military necessity. The four Geneva Conventions of 194914 epitomise this trend. As stated by Peter Maurer, President of the International Committee of the Red Cross in a speech at the United Nations on 30 September 2015, “Humanity is the first and most important principle of the Red Cross and Red Crescent Movement.”15 It follows that Hague law and Geneva law have different philosophical foundations.

Although it is often argued that these two branches of the law of armed conflict merged in the 1977 Additional Protocols to the 1949 Geneva Conventions,16 the philosophical differences remain. Whilst it is correct that Additional Protocol I that dealt with international armed conflicts, conflicts between States, contained much Hague law, those provisions still need to be looked at primarily through the eyes of the State, not the victim. For example, the principle of proportionality, a term that is in fact never used in the Protocol, is described in Article 51(5)(b) as: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”17

The key words here are “expected” and “anticipated.” It is the intention of the attacker that is important. This much more reflects the balance between military necessity and humanity which has underlined the law of armed conflict, certainly for the last 150 years.18

But how does this affect fact-finding? Whereas under human rights fact-finding, it is the result that is the most significant fact and much of the subsequent findings will flow from that, this is not necessarily so under the law of armed conflict. In cases involving Geneva law, there is a similarity to human rights fact-finding in that the result will certainly be important, if not necessarily pivotal. Thus, if a prisoner of war is dead, there is a burden on the detaining power to explain that death.

However, “Hague law” remains different. As the emphasis is on the intention of the attacker, the result may not be so crucial and indeed, may be positively misleading. An example is the attack by the United States led Coalition in 1991 on the Al-Firdus bunker in Baghdad in the 1990/1991


11. See id. at 53.

12. See id. at 69–82 (citing Hague Convention (V) Respecting the Laws and Customs of War on Land, Oct. 18, 1907).


14. See LAWS OF WAR supra note 10, at 197, 222, 244, 301; see also 1949 Geneva Conventions I, II, III, and IV, infra note 39.


17. See LAWS OF WAR, supra note 10, at 489 (citing Protocol I, at art. 51(5)(b)).

18. Garaway, supra note 8, at 261.
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Persian Gulf War. Here, a target identified by intelligence as an Iraqi command and control centre was attacked. However, it turned out that it was also being used as an air raid shelter and in excess of 200 civilian casualties were the result. The issue here was not the fact of the civilian deaths—that was admitted on all sides—but whether the United States knew or should have known of their presence. Conflicting accounts can be found in the Human Rights Watch Report, “Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War,” and in the official United States Final Report to Congress, Conduct of the Persian Gulf War. Under a human rights approach, once the result has been established, the burden shifts to the State to justify that result. This is not so under a law of armed conflict approach.

It follows that fact-finding into a single incident will differ according to the mandate of the fact-finders. In a fact-finding mission, in which I was involved, it was discovered that a civilian factory had been attacked and severely damaged. Different fact-finders would have been interested in different facts. If the purpose of the mission was simply to draw attention to the damage being done to the local economy and the consequent impoverishment of the population, then the only facts required would be the damage itself. The reasons for that damage, and whether the damage was legitimate or not, would be totally irrelevant. On the other hand, a human rights fact-finding mission would need to go further. There would be a need to show not only the damage and its effects on the human rights of the local population but also who was responsible for the damage. Once responsibility had been established and if it could be imputed to a State, assuming jurisdictional issues are satisfied, the burden shifts to the State. On the other hand, law of armed conflict fact-finding has to go further still. The test here would be what was the expected “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” to be set against the “concrete and direct military advantage anticipated.”

It was noted that the attacks had taken place at night, when the work force was absent. This indicated that care had been taken to minimise civilian casualties. Furthermore, the attacker had used precision guided munitions to attack specific areas of the factory. As such munitions are expensive—and were in short supply—this indicated that for the attacker, this was a high value target. It followed that the indications were that the balance was satisfied though it could not be established conclusively without having access to the intelligence on which the attacker relied. New and different facts now entered into the equation.

Obviously, had this been a criminal investigation and it had appeared that the balance had not been met, further facts would have been required. Who carried out the attack and who gave the orders? What knowledge did they have as individuals?

It can thus be seen that fact-finding depends on the mandate. Without a clear mandate outlining the purpose of the mission, it will be near impossible to identify the relevant facts required to be found.

IV. THE NATURE OF FACT-FINDING

Apart from the purpose of fact-finding, there is also an issue over the nature of fact-finding. Since the end of the Cold War and the inexorable rise of international criminal justice, there has been an emphasis on accountability as one of the key aspects of fact-finding. It follows from this that fact-finding must be, for the most part, public. Most current fact-finding reports are in the public domain—and indeed in the case of “general fact-finding” where the intention is to increase public awareness that is a sine qua non. However, there is a tension here in respect of criminal accountability. It has become the practice for individuals not to be named. Often their identities are held in sealed documents which are then handed over to relevant authorities.

However, it was not always this way. Fact-finding for most of the twentieth century was an essential part of confidence building. An early example came with the Dogger Bank incident on the night of 21/22 October 1904, when the Russian Baltic Fleet mistook some British warships in the


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20. Id.
24. Id.
Dogger Bank area of the North Sea (just off the coast of the United Kingdom) for an Imperial Japanese Navy force and fired on them.27 Here, the Parties used a Commission of Inquiry28 established under the 1899 Hague Convention for the Pacific Settlement of International Disputes.29 This was suggested by France in order to prevent a serious rift between London and St. Petersburg which could undermine the Entente Cordiale.30 Further examples of such inquiries can be found in the early part of the twentieth century though the practice died out somewhat during the stormy war years in the middle of the twentieth century. Fact-finding as a confidence building measure was used in South America under the so-called Bryan Treaties (named after the then Secretary of State William Jennings Bryan) based on the 1907 Hague Convention for the Pacific Settlement of International Disputes.31 These can be found as late as the 1990s.32

V. THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION

Where does the International Humanitarian Fact-Finding Commission ("IHFFC")33 fit in? The IHFFC is a treaty body established under Article 90 of Additional Protocol I to the 1949 Geneva Conventions34 as a permanent independent fact-finding mechanism. The Commission’s mandate is to: "(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol; (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol; (iii) The Commission consists of fifteen "members of high moral standing and acknowledged impartiality."35 States that have signed up to the Commission, of whom there are currently seventy-six, may each nominate one candidate and elections are then carried out.36 The Commissioners are elected for a five-year period but they are free to stand again for further terms.37 The last elections were in December, 2011.

Unfortunately, the Commission has never been used. Why is it that in an age where fact-finding is in great demand, States seem to prefer to rely on ad hoc inquiries rather than on a permanent body? The answer may rest in the history of Article 90 itself.

A fact-finding element was included within the Geneva Conventions themselves.38 An inquiry would be established "in a manner to be decided between the interested parties." The purpose was to act as a conflict-resolution mechanism and it was not agreed without considerable discussion. States, as always, were reluctant to agree to anything that might be seen to limit their own sovereignty. This procedure had never been used and so in 1977, it was decided to try to expand the provision. However, it was still controversial. As a result, Article 90 is one of the longest Articles in the Protocol.

It is important to remember the context in which Article 90 was drafted. During 1977, the Cold War was still ongoing and accountability was not a focus of attention. The intention was to provide a mechanism which would assist States to “respect and ensure respect”39 for the law of armed conflict. As a result, the system is essentially voluntary and confidential, though there is a degree of mandatory jurisdiction between States that have accepted the


34. See LAWS OF WAR, supra note 10, at 473 (citing Protocol I, at art. 90).

35. Id. at 474 (citing Protocol I, at art. 90(2)(c)(i)(ii)).

36. Id. at 473 (citing Protocol I, at art. 90(1)(b)).

37. Id. (citing Protocol I, at art. 90(1)(b)).

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40. See LAWS OF WAR, supra note 10, at 197, 222, 244, 301 (citing Common Article 1 in 1949 Geneva Conventions I, II, III, and IV).
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competence of the Commission. Reports are made to the Parties to the conflict and may only be published with the agreement of those Parties.\textsuperscript{41} Article 90 is drafted primarily for use in international armed conflicts and though the Commission has indicated its willingness to assist in non-international armed conflicts, the provisions of the Article are ill suited to such intervention and there would need to be a degree of flexibility shown. This can be done by using “good offices” rather than the formal investigation provisions.

But is there still a place for such a body? I believe that there is. First, the Commission provides a wealth of expertise, particularly in the law of armed conflict. Most inquiries today are carried out by human rights bodies and, even when they seek to investigate violations of the law of armed conflict, they tend to approach the issue from a human rights perspective. The advantage of the IHFFC is that it has the expertise in the law of armed conflict that is sometimes lacking in human rights focused inquiries. However, the world is not cast in two dimensions only. Most armed conflicts today, certainly those of a non-international nature, begin below the armed conflict threshold as internal disturbances and tensions, thus outside the framework of the law of armed conflict. This is certainly true of Syria, where, when the Human Rights Council Inquiry was established, human rights alone were the normative international legal framework.\textsuperscript{42} Only later did matters progress to a full armed conflict—or armed conflicts. There is a need therefore for greater collaboration between the two legal communities. Members of the IHFFC could be added to inquiries established by human rights bodies to provide the necessary expertise in the law of armed conflict.

But there are also specific situations where a confidential and independent inquiry mechanism could assist States in carrying out their duty to “respect and ensure respect” for the law of armed conflict. An example might be a border incident between two States where both countries do not wish to escalate matters but there are allegations made that war crimes have been committed by one or other (or both) sides. An independent inquiry reporting confidentially to both States could be seen as a de-escalating factor. It would enable either (or both) State(s) to take appropriate action within their national legal system without escalating the matter to the international stage.

Similarly, mistakes happen in war. Not every attack that goes wrong is necessarily a war crime. The Al-Firdus bunker illustrates the difficulties there.\textsuperscript{43} The days when a State could investigate itself and satisfy civil society have gone. There is a growing need for reassurance. An independent and impartial inquiry by an international body might help here. Whilst it might seem that confidentiality would be a problem in so far as civil society is concerned, the confidentiality belongs to the Parties—not to the Commission. It follows therefore that there would be nothing to prevent the Parties, by agreement, producing an agreed summary of the report, amended to remove sensitive classified information. It would be necessary though for the Commission to also agree to ensure that the abridged report accurately reflected the findings. It is worthy of note that the request by Médecins Sans Frontières for the IHFFC to be called in to examine the attack on the hospital at Kunduz in October 2015\textsuperscript{44} must have been in full knowledge that, as the IHFFC reports to States, they themselves would not receive the report.

VI. CONCLUSION

It has been said that truth is the first casualty in war.\textsuperscript{45} But this also applies before the level of war is reached. In States undergoing any form of emergency, there is usually a battle to control the levers of power and one of the key levers is information. All sides want to control the narrative. Fact-finding is a powerful tool to prevent such control. That is why it is so often resisted and distorted. Facts may not fit the narrative. But for the fact-finding community itself, it is essential not only to ensure that the modalities are right but also that the foundations are in place for any particular initiative. That means that the purpose of the relevant fact-finding mission is clearly identified, including its legal framework. This will ensure that the mission can focus on the key facts and not be forced into a scatter-gun approach. There is no hierarchy in fact-finding but it is important that the long-term aim is identified as this will affect matters like confidentiality of reports. Not all fact-finding is necessarily for accountability purposes but all fact-finding should lead to accountability in the sense that it prepares the ground for national—or international—action to restore peace and security. All wars—and even emergencies—end. Winning the peace is often the hardest part and that will depend in large part upon the narrative that wins through. Fact-finding can contribute to the correct narrative and thus contribute to winning the peace. It will be a long haul but it is worthwhile.

\textsuperscript{41} See LAWS OF WAR, supra note 10, at 475 (citing Protocol I, at art. 90(5)(g)).


\textsuperscript{43} See HUMAN RIGHTS, supra note 21; see also Final Report, supra note 24.

\textsuperscript{44} Doctors Without Borders, Afghanistan Bombing: “Even War has Rules”, MSF.ORG (October 7, 2015), http://www.msf.org.uk/article/afghanistan-bombing-even-war-has-rules.

competence of the Commission. Reports are made to the Parties to the conflict and may only be published with the agreement of those Parties. Article 90 is drafted primarily for use in international armed conflicts and though the Commission has indicated its willingness to assist in non-international armed conflicts, the provisions of the Article are ill suited to such intervention and there would need to be a degree of flexibility shown. This can be done by using “good offices” rather than the formal investigation provisions.

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