Fact-Finding in the Resolution of International Disputes – From the Hague Peace Conference to the United Nations

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MAN AND BEAST**
by Hesiod

c. 800 B.C.

Now I will tell you a fable for the barons; they understand it.
This is what the hawk said when he had caught a nightingale
with spangled neck in his claws and carried her high among the clouds.
She, spitted on the clawhooks, was wailing pitifully, but the hawk, in his masterful manner, gave her an answer:
“What is the matter with you? Why scream? Your master has you.
You shall go wherever I take you for all your singing.
If I like, I can let you go. If I like, I can eat you for dinner.
He is a fool who tries to match his strength with the stronger.
He will lose his battle, and with the shame will be hurt also.”
So spoke the hawk, the bird who flies so fast on his long wings.

You, Perses, should store away in your mind all that I tell you, and listen to justice, and put away all notions of violence.

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The author appreciates the contributions of several law student associates in the preparation of this paper. Messrs. William Woodhead and Dan Allred helped in the formulation of U.N. fact-finding cases. Mr. Brent Gardner aided in the preparation of material relating to the U.N. Charter. The author is grateful for financial assistance provided by the University of Utah Research Fund and for the cooperation of the United Nations Institute for Training and Research (UNITAR).

Here is the law, as Zeus established it
for human beings;
as for fish, and wild animals, and the flying birds,
they feed on each other, since there is no idea
of justice among them;
but to men he gave justice, and she in the end
is proved the best thing
they have.

The enduring quest of the peacemaker has been to substitute peaceful means of dispute resolution for violent self-help. The development of the common law — indeed the evolution of every major municipal system of law both secular and religious — has been in large part the history of this effort. During the past five centuries there has been a dramatic diminution of that area of activity in which violent self-help has been sanctioned by the common law. The same evolution occurred earlier within the civil law. While some forms of self-defense necessarily remain as an irreducible minimum of violent self-help which a system should sanction, the concept is increasingly delimited as a society matures. As a genuine community evolves, concern for the protection of its citizens leads to an increasing demand that the legally sanctioned application of violence be carefully controlled by the community.

The international community has experienced this trend as those situations in which the law previously sanctioned a state's unilateral decision to use force have been gradually reduced. For example, older law which allowed a state to use force to collect its debts is now viewed as bad precedent. The use of force in international relations has not, however, necessarily decreased as a result of this trend, since there is an obvious and substantial gap between the demands of the law and the behavior of states. Whatever the comparative incidence of international violence today, however, the point is that legally sanctioned violence has been increasingly limited (the nature of modern weaponry alone has placed certain de facto restrictions upon the use of force by states).

The horizontal and uncentralized nature of the international system has assured that this trend toward less legally sanctioned violence has been much less effective in international law than in municipal systems. There are few hierarchical, vertical, or centralizing factors in the international system to enforce its norms upon aberrant states. The international community is in fact barely deserving of the title; its system of law is, when compared to mature municipal systems, weak and undeveloped.

Within this context of relative immaturity and weakness, the international system has, nevertheless, developed some institutional procedures to accomplish the peaceful resolution of disputes. For the most part, these procedures — good offices, conciliation, inquiry or fact-finding, negotiation, mediation, arbitration and judicial settlement — have counterparts within municipal systems. While this listing of techniques ranges from
political or diplomatic to judicial, one process—inquiry or fact-finding—is instrumental to both.

Fact-finding has a common relationship to resultant conclusions of law, policy, or accommodation in dispute settlement whether the process of resolution is of a juridical or a diplomatic nature. Modern techniques of fact-finding in the process of the peaceful resolution of international disputes have an evolutionary history dating from the latter part of the last century. International commissions of inquiry have existed from before the Hague Conventions through the period of the Bryan treaties and the League of Nations to the less formal fact-finding bodies frequently created by the United Nations. This paper analyzes experience with fact-finding as a process in the peaceful resolution of international disputes in an attempt to better understand its limitations and potential.

I. THE HAGUE CONVENTIONS THROUGH THE LEAGUE OF NATIONS

The Hague Conventions of 1899 and 1907

Significant institutional development of international commissions of inquiry as a technique in the peaceful resolution of disputes began with the Hague Conventions of 1899 and 1907, although informal international commissions of inquiry had been employed before that time. Seven commissions of inquiry were established under the two Hague Conventions. The commissions all possessed the following characteristics: (1) resort to the commissions was voluntary; (2) only minor disputes were referred to the commissions; (3) each commission was ad hoc; (4) each commission was constituted so as to insure neutral dominance; (5) the report was recommendatory only; (6) commissions could investigate only factual differences.

The Hague Convention of 1899 was invoked in only one dispute—the "Hull," or "Dogger Bank," case. In 1904, during the Russo-Japanese war, the Russian Baltic Fleet fired upon a fleet of English trawlers, thinking them to be Japanese ships. France invoked the Hague Convention of 1899 by offering its good offices and proposing a resort to an international commission of inquiry. Several points regarding the nature of this dispute

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1 Professor de Martens, the primary author of the commission of inquiry provisions noted that commissions of inquiry would be helpful in resolving boundary disputes. Additionally, he viewed the commissions as providing a "cooling off" period for parties to the dispute. J. Scott, The Proceedings of the Hague Peace Conferences: The Conference of 1899, at 641, 730, 800 (1920).

2 The Hague Convention of 1907, in superseding the Convention of 1899, preserved the essential form of the commission of inquiry as established by the older convention. Changes were limited to more detailed specifications of a procedural nature.

3 By specific provision of the Convention of 1899, fact-finding commissions were to be used only in disputes "of an international nature involving neither honour nor vital interests...." Draft Convention for the Peaceful Settlement of International Disputes Presented to the Third Commission By the Committee of Examination, section 3, art. 9. J. Scott, supra note 1, annex 10, at 851. Article 9 of the Hague Convention of 1907 also provided that disputes "affecting the vital interests, the independence or honour of the two contracting parties" were excluded from procedures of inquiry. Id.


5 Hague Court Reports (Scott) 403-12 (1916).
and the implementation of the Russian-British agreement for inquiry are important. Because the dispute involved clear points of factual disagreement and carried no particular ideological or geopolitical baggage, the states parties to the dispute allowed the commission to be composed of experts (naval officers from France, Britain, the United States, Russia and Austro-Hungary) who "spoke the same language." The states involved felt free to provide the commission with terms of reference sufficiently broad not only to find the facts but also to recommend legal consequences by apportioning blame between the parties. The commission reported that the Russian fleet was responsible for the deaths of the British men and the damage to the British vessels, but it recommended that the Russian admiral in command of the fleet should not be censured as the British had demanded. The commission's report, though not binding upon the parties, was implemented by them. Russia accordingly paid damages.

Pursuant to the Convention of 1907 six commissions of inquiry were assembled from that date to the time of the League of Nations. Each case involved damage to or internment of ships on the high seas or in territorial waters. In the first case, the Tavignano, Camouna and Gaulois, Italian torpedo boats fired upon two Tunisian mahones and seized the French mail steamer Tavignano. The major issue was whether the vessels were located in Tunisian territorial waters, as claimed by France, or on the high seas, as maintained by Italy. Under the Convention, a commission was empowered:

I. To investigate, mark and determine the exact geographic point where occurred: (1) the capture of the French mail steamer Tavignano by the Royal Italian naval vessel Fulmine, on January 25, 1912; (2) the pursuit of the mahones Camouna and Gaulois by the same vessel and also by the Royal Italian naval vessel Canopo, and the firing by the latter upon the said mahones;

II. To determine exactly the hydrography, configuration and nature of the coast and of the neighboring banks, the distance mark, and the distance from these points to those where the above-mentioned deeds occurred;

III. To make a written report of the result of its investigation.\(^6\)

The specificity of these terms of reference reveals the appropriateness of fact-finding in this case; and, more importantly, the terms reveal by inference the limitations of fact-finding where there is no such specificity and simplicity of factual matters.

The other cases were distinctly similar. The Tubantia\(^7\) involved a Dutch steamer that was allegedly sunk near the Netherlands coast by a German submarine. The Tiger\(^8\) involved a dispute between Spain and Germany concerning the sinking of a Norwegian ship allegedly in Spanish

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\(^6\) Hague Court Reports (Scott) 413 (1916).

\(^7\) Id. at 417.

\(^8\) Hague Court Reports (Scott) 135 (1932).

territorial waters. Two cases, one between the Netherlands and Germany,\(^\text{10}\) the other between Germany and Denmark,\(^\text{11}\) involved the seizure of ships in neutral waters and the internment of the crews. The final and most recent case, the *Red Crusader*,\(^\text{12}\) involved the arrest of a British trawler by Danish authorities for allegedly violating a fishing agreement between Denmark and the United Kingdom.

The preceding disputes, though potentially troublesome, were relatively simple to resolve. All involved incidents at sea. No intense ideological rivalries, in any way similar to Cold War disputes, existed. No dispute represented a probe or thrust by one state in an attempt to gain a geopolitical advantage over another. No "security zone" or "sphere of interest" of any powerful state was involved. No element of colonial conflict was present. Each case involved true questions of fact, not ideologically inspired apologies for courses of conduct determined by strategic national interest. Since none of the disputes affected a vital national interest, the states permitted quasi-juridical resolution. (This is not to say that the work of the international commissions of inquiry was unimportant. Relatively simple factual disputes can lead to major conflict — witness the assassination of an archduke.)

Because of the simplicity and similarity of the disputes, the composition of the commissions was almost identical. In each case neutrals predominated. Almost all commission members were naval officers whose common qualifications were technical rather than political. Due to the relative unimportance of the cases, the states party to the disputes could afford the luxury of appointing men on the basis of their technical proficiency without otherwise seeking to protect their national interest.

**The Bryan Treaties**

Between 1913 and 1915 the United States signed over 30 bilateral treaties, all entitled "Treaty for the Advancement of Peace," with other American states and with several European states. The force behind the negotiation of the treaties was William Jennings Bryan, who made his acceptance of the office of Secretary of State dependent upon the integration of his concept of commissions of inquiry into the foreign policy of the Wilson administration.\(^\text{13}\)

While there are obvious similarities between the Hague and Bryan Commissions, the differences are more significant. Where the Hague Conventions provided for ad hoc commissions to be established by agreement between the parties, the Bryan treaties established permanent commissions within guidelines provided by the Conventions. Under the Hague Conventions, the jurisdiction of the commissions was severely limited to disputes of an incidental nature, involving neither national honor "nor vital

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\(^{10}\) G. Hackworth, Digest of International Law 462 (1940-44).


\(^{12}\) The events of this case took place in 1961 and 1962 and are discussed briefly in W. Shore, *supra* note 9, at 18.

\(^{13}\) W. Shore, *supra* note 9, at 19.
interests." In addition, the commissions' terms of reference under the Conventions were usually, though not always, limited to findings of fact rather than conclusions of law. Both limitations were removed by the Bryan treaties. Commissions were authorized to take jurisdiction over disputes of any nature that were not resolved either by diplomacy or by arbitration. Questions of fact and of law could be considered by the commissions. Additionally, the commissions could themselves initiate action. Perhaps the most meaningful difference between the Hague Conventions and the Bryan treaties was that recourse to the commission was mandatory for parties to the latter. Moreover, the parties were bound to agree to a "cooling off" period in which no party would begin hostilities during the investigation of a dispute and before a report was submitted. The real impact of these provisions, however, was moderated by the fact that, like the Hague Conventions, the reports of the commissions were recommendatory only.

Whether due to the rigidities present in the Bryan treaties — the permanent commissions, their compulsory use, the power of the commissions to initiate action — or, what is more likely, to the onset of World War I and the consequent breakdown of most pacific systems of dispute resolution, the Bryan treaties were a failure. Of the 30-odd Bryan treaties concluded, 28 entered into effect. Only 10 permanent commissions were ever established and none was ever called upon to conduct an investigation in a dispute. The treaties are important solely because of their influence upon the Covenant of the League of Nations\textsuperscript{14} and upon treaties of inquiry and conciliation entered into during the League period.

\textit{The League of Nations}

Thirty situations or disputes were handled by the League of Nations from 1920 to 1940. Most of these were border and territorial disputes stemming from the disintegration of the Austro-Hungarian, Turkish, and Russian empires.\textsuperscript{15} Franco-British solidarity accounted for the League's impressive success in resolving most of the disputes which arose in the 1920's. This solidarity, however, proved insufficient to deal with the aggressive acts of other great powers in the 1930's.

Through the Bryan treaties the institution of international inquiry evolved from commissions of inquiry toward commissions of conciliation. Under the League, inquiry was combined with conciliation into an organized system. The League's Covenant provided for an instrument of preliminary investigation in the form of the Council and the Assembly. Articles 11, 12, 15 and 17 of the Covenant provided for inquiry and conciliation in all cases except where the parties preferred arbitration or judicial settlement. The Council was in practice the dominant body in

\textsuperscript{14} The "cooling off" provision of the Bryan Treaties was the genesis for a similar provision in the Covenant. W. Shore, supra note 9, at 22; Report of Secretary General on Methods of Fact-Finding, supra note 4, at 29.

\textsuperscript{15} D. Wainhouse, \textit{International Peace Observation} 7 (1966).
instigating fact-finding and conciliation procedures and it determined the scope of authority and directed the organization of the commissions.

Most of the commissions of inquiry established within the League system had common features. The commissions were selected by and composed of neutrals — no nationals of disputant countries were used. The terms of reference of most commissions allowed them to propose a regime of settlement as well as to establish fact. Commissions usually enjoyed freedom of movement within the disputed territory. Members of commissions operated independently from their states and received no instructions from them. Most importantly, the Council always adopted the reports of its commissions and, until the Manchurian case of 1931, disputants always accepted the decision of the Council.16

The major fact-finding cases17 handled within the League system were those disputes between Sweden and Finland in 1920 over the Aaland Islands; between Yugoslavia, Albania, and Greece in 1921; between the Allied Powers and Lithuania in 1923 over Memel; between Great Britain and Turkey in 1923 over Mosul; between Greece and Bulgaria in 1925; and the Sina-Japanese dispute in 1931 over Manchuria. In addition to these cases the League Council in its early fact-finding experience handled many less significant disputes caused by the dissolution of the Austro-Hungarian, Turkish, and Russian empires.18

The Aaland Islands controversy involved a dispute between Sweden and Finland as to which state could legitimately exercise sovereignty over the Aaland Islands. The Council appointed a three-member commission of prestigious individuals from neutral countries,19 who were accountable only to the Council and not to their individual states. The commission had broad terms of reference; it was to make a thorough study of all the points involved and report to the Council. After spending six weeks in Sweden, Finland, and the Aaland Islands, the commission recommended a neutral Aaland Islands under Finnish sovereignty, with provision for the protection of the Swedish language and institutions in the Islands. Although both Sweden and Finland objected to parts of the report when the Council adopted it, each state accepted the resolution. In this case, a commission of inquiry successfully expanded into one of inquiry and conciliation and produced an acceptable regime of settlement; this was made possible by the relatively simple issue involved in a dispute of peripheral importance to the basic interests of the parties.

16 Id. at 10-11.
17 For detailed analysis of these cases see D. Wainhouse, supra note 14, at 11 et seq; W. Shore, supra note 9, at 37-41; Report of the Secretary General on Methods of Fact-Finding, supra note 4.
18 Question of Albanian Frontiers, 1921; the Upper Silesian Question, 1921; Frontier Dispute between Austria and Hungary, 1922; Frontier Dispute between Hungary and Yugoslavia, 1922; Frontier Dispute between Hungary and Czechoslovakia, 1923; Frontier Dispute between Poland and Czechoslovakia, 1923. W. Shore, supra note 9, at 37.
19 A former Belgian foreign minister, a former President of Switzerland, and a former United States Ambassador to Turkey.
The dispute between Albania, Yugoslavia, and Greece in 1921 was substantially more important and represented one of the more impressive successes of League fact-finding and dispute resolution. In 1913, after the Balkan Wars, the great powers recognized Albanian independence, but World War I intervened and precluded settlement of the boundaries. After the war, there were frequent boundary skirmishes between Albania and its neighbors. In 1921, Albania appealed to the League under articles 11 and 15 to settle its frontiers and remove foreign troops from its territory. The Council appointed a commission of inquiry with terms of reference to report on the disturbances and to supervise the execution of the Conference of Ambassadors' decision concerning the settlement of frontiers.

The commission arrived at the disputed Albanian borders after the Conference of Ambassadors had announced boundaries essentially the same as those of 1913. The commission was told by the Council to observe Yugoslav evacuation of Albanian territory, to keep the Council informed on the disputants' observation of the demarcation lines, and to see that "no outside assistance [was] given in support of a local movement which might disturb internal peace in Albania."^{20}

The commission in its report to the Council went beyond its terms of reference and presented detailed recommendations for the establishment of an Albanian government. The commission reported on Albanian demography and national resources and gave broad recommendations on governmental policies designed to make possible the attainment of true nationhood. Albanian independence is directly related to this exceptionally successful commission of inquiry and conciliation.\(^{21}\)

League inquiry also helped to resolve a protracted (1919—1924) dispute between Lithuania and Poland over control of the port of Memel.\(^{22}\) In 1919 the Allied Conference of Ambassadors took Memel from Germany and temporarily placed it under Allied control prior to its transfer to Lithuania. Lithuania objected, however, to the degree of influence the Conference had granted Poland over the control of the port. A Lithuanian coup took Memel in 1923 to preempt a feared Free City status for Memel similar to that of Danzig.

The Memel dispute was brought before the League Council. The Council appointed a Commission of Inquiry which, after investigation at Memel and the capitals of Lithuania and Poland, recommended a solution essentially the same as had been recommended by the Conference of Ambassadors. This solution included Lithuanian control over Memel but provided for a harbor board with representation sufficient to insure equal rights for all users of the port. The port was declared to be "a port of international concern," though sovereignty was transferred from the Allies

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\(^{22}\) D. Wainhouse, supra note 15, at 40–42.
to Lithuania. The commission's report, which emphasized the technical aspects of the problem, was accepted as the basis of settlement by the Council of the League and the parties to the dispute. The Memel case successfully combined fact-finding and mediation.

The Mosul dispute was the aftermath of Iraq's declaration of independence which was prompted by Turkish support of Germany during World War I. Great Britain had encouraged this action by Iraq and was named as mandatory over the new state. Following World War I, the Allies and Turkey were unable to reach an agreement regarding Mosul, a territory containing many Kurds sympathetic to Turkish rule. Great Britain and Iraq claimed the territory was part of Iraq; Turkey disputed this claim. When Turkey and Great Britain failed to reach an agreement, the case was brought before the League Council pursuant to the Treaty of Lausanne. The Council appointed a commission of inquiry to investigate the dispute on-the-spot. Its report contained the relevant geographic, historical, and demographic information relating to the dispute and recommended that Mosul be incorporated into Iraq, subject to guarantees to the Kurdish population. These guarantees were insured by British mandatory administration which was to continue 25 years. This report became the basis of the settlement decided upon by the Council and the parties.

One of the most impressive examples of League peace-keeping was the Demir-Kapu dispute between Greece and Bulgaria in 1925. The frontier between the two countries had seen recurrent incidents centered around the existence of refugees on both sides of the border who had not been exchanged according to existing agreements. Following intermittent shootings by the border guards of both countries in which there were at least two deaths and other injuries, Greece prepared a major invasion of Bulgarian territory. Aristide Briand, President of the Council of the League, prevented the invasion by sending identical telegrams to both governments demanding that neither side resort to war. The Greek government received the telegram shortly before the invasion was to have commenced. The Council was convened; a cease-fire was demanded and achieved. A commission of inquiry was instituted by the Council with terms of reference sufficiently broad to allow it not only to report on the facts of the incidents but also to recommend a plan of settlement and a future course of conduct to avoid similar incidents in the future. This report was accepted by the Council and became the basis of settlement between the parties. The telegrams of Briand, the speed of convocation and action by the Council and the commission (the commission's on-the-spot investigation, negotiation, and report with recommendations to the Council were completed within three weeks of the beginning of hostilities), all contributed to the successful termination of a conflict that was sufficiently serious to have led to a Balkan or a European war. Of course, the immediate and firm support given the actions of the Council and the com-

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23 Id. at 48-53.
mission by the big powers was a prerequisite to this accomplishment, as it was to all successes of the League in the peaceful resolution of disputes.

The Manchurian conflict of 1931–33 between Japan and China resulted in the first great failure of League peace-keeping. Japan's economic and political interests in Manchuria were threatened by the extreme weakness of the central government of China and its consequent inability to maintain order in Manchuria. Its powerlessness also presented a tempting target for Japanese militarists bent on the complete economic and political subjugation of Manchuria. These factors resulted in Japanese aggression against China in Manchuria in September, 1931. The League Council began consideration of the dispute under article 11, which did not provide for sanctions. Since Chinese and Japanese reports to the Council were in deep conflict, China proposed that a commission of inquiry be immediately established. The Council would have then created a commission but refrained due to United States reticence. Since the United States, though not a member of the League, was considered to have its vital interests involved in the resolution of the conflict, the League, unfortunately as it turned out, deferred to the U.S. desire to seek a solution initially through direct negotiations between the parties.

The Japanese were successful in delaying Council action for two months, due in no small part to a U.S. desire to avoid stern action by the League against Japan. Japan, in order to gain time for its subjugation of Manchuria, delayed Council action another month by proposing the creation of a commission of inquiry and then resisting the development of its terms of reference. When the commission (the Lytton Commission) was finally formed after another month of debate, its terms of reference were very narrow, limiting it to strict fact-finding without authority to initiate negotiations between the parties or to recommend a regime of settlement. To many, this weakened commission appeared, by its nature, to condone Japanese aggression.

Almost nine months after its appointment and one year after the commencement of hostilities, the commission completed an impressive report which vindicated the position of China on all major points. By this time, however, Japanese control over Manchuria was an irreversible fact. Consequently, Japan rejected the report. In February, 1933, the Assembly adopted a resolution which accepted the findings of the Lytton Commission, called upon the parties to negotiate their differences on the basis of the report, and recommended that League members not recognize the Manchurian puppet state, "Manchukuo," created by Japan. In March, 1933, Japan resigned from the League. Japanese withdrawal from Manchuria was not accomplished until World War II.

Several obvious conclusions can be drawn from this serious failure of League peace-keeping. First, the League structure for peaceful resolution of disputes worked much more effectively when dealing with hostilities that resulted from misunderstanding than it did when faced with planned and unprovoked aggression. Second, a major power could resist League
pressure more successfully than could smaller states. Third, lack of resolve on the part of major powers generally in support of League actions led to an accomplished fact which was almost impossible to reverse later, even when the major powers then acted in concert. Fourth, if fact-finding was to have any significance, it had to be invoked before the positions of the disputants had changed to the point where a return to the status quo ante became almost impossible without the application of military force. The promptness that characterized the creation and the actions of the commission of inquiry in the Greek-Bulgarian case might have averted or at least greatly diminished Japanese aggression in Manchuria by quickly exposing unambiguous aggression to the world. Prompt action could have resulted in big power support for League sanctions soon enough to have strengthened the hand of the civilian segments of the Japanese government who opposed the militarist faction’s plan to subjugate Manchuria. In this dispute the major powers, especially the United States, appeared to be genuinely confused as to exactly what was happening in Manchuria. This case was unlike the situation where other states know that aggression without mitigating circumstances occurred but feel unable to oppose it. Whether or not the major powers would have taken a course of conduct strong enough to have deterred Japanese aggression, it is clear that in the early weeks of the Manchurian dispute the powerful European states and the United States did not appear to have sufficient facts to evaluate accurately the conflicting reports received from the parties. This ignorance could have been significantly remedied by immediate League fact-finding.

**Conclusions**

International fact-finding worked best when simple, non-strategic issues were involved between parties who, in good faith, were disputing questions of fact. All disputes handled under the Hague Conventions involved maritime incidents that did not affect the vital interests of the parties. The majority of the cases considered by the League of Nations concerned border disputes stemming from the disintegration of colonial empires. In both situations, relatively simple issues of fact were involved.

The dispute between Greece and Bulgaria over Demir-Kapu, however, though fitting within the general category of border disputes, was possessed of difficult and explosive demographic issues which made it more complex than the other cases. This dispute was successfully concluded by immediate and unanimous reaction of the major powers, through the Council, effecting a cease-fire and demanding that no military action be taken by either side despite whatever provocations might exist. This action, initially taken by Briand on his own authority, without any clear constitutional sanction or precedent to rest upon, made possible a resolution of the conflict through pacific means, with an integral role being played by the commission of inquiry.

The exception to previous League successes was the Manchurian crisis. There, the League was faced for the first time with an aggressor who had
no real coloration of disputed facts and provocations to base hostilities upon. The dispute was permeated with vital interests of both parties: for Japan, the acquisition of a natural trading area to meet the needs of a state experiencing dynamic growth; for China, the control of territory considered to be an integral part of the state. The only possible way in which League action could have been successful in avoiding Japan's seizure of Manchuria would have been for the great powers to take immediate and unanimous action against the continuation of hostilities. Had the League acted in the Manchurian crisis as it did in the Demir-Kapu dispute, the result might have been different. If Japan had been faced with the threat of sanctions unanimously imposed by the League with the full support of France, the United Kingdom, Russia and the United States, it would probably have been forced quickly to return to the status quo ante. Only in that setting of immediate cease-fire could fact-finding have played a role commensurate to that accomplished in Demir-Kapu.

The experience of the Hague Conventions and the League of Nations suggests that there are two essential elements of successful peaceful settlement of international disputes: first, the parties must, to a certain degree, accept peaceful settlement as a customary means of dispute resolution; and second, the parties must believe that there is a credible threat of community sanction to enforce those means. There is a direct correlation between these two factors. As the first increases in the depth of its tradition, the necessity of the second decreases proportionally. These prerequisites are discernible in international relations, but since they are still weak, it is predictable and understandable that states will resolve the most complex and important disputes by more traditional means of diplomacy and by threatened or actual unilateral military action.

The functioning and composition of fact-finding through the League period reflects the tentative steps which the international community was willing to take along the road to increased community resolution of disputes through means of pacific settlement. The composition of most commissions was based upon individual expertise rather than national representation. Almost all commission members operated individually, without instructions from their governments. This, of course, was an operational reflection of the simplicity and relative unimportance of the disputes entrusted to their resolution. The terms of reference of the commissions became broader as the international community gained gradual confidence in this technique of dispute resolution. The international commissions of inquiry of the Hague Conferences period gradually evolved into commissions of inquiry and conciliation under the League.

II. United Nations

In contrast to fact-finding under the Hague Conventions and the League of Nations, United Nations experience has involved many crises permeated with strong ideological and geopolitical factors of grave impor-
stance to the parties and to other states in a polarized world. It is natural that this contrast would be reflected in different structures and roles for fact-finding.

First, it could not realistically be expected that states would immediately entrust the ultimate resolution of their most critical disputes to any international body until the international system possessed more of the basic attributes of community than it now does. There is admittedly more than a little circularity here. The evolution of a community demands that it establish and utilize its own institutions. And the prerequisite to such institutions is a certain level of community-ness. The conclusion, of course, is that both community and institutions progress in some degree together in a spasmodic and often disjointed but nevertheless interrelated and mutually causative fashion.

Second, as states increasingly entrust the resolution of more important disputes to international settlement procedures, including inquiry, one would expect that the terms of reference of the commissions would, at least during the early years of such experience, be somewhat constricted from the broad powers granted commissions by the League in disputes of less importance. Terms of reference during this period would be expanded from the strict confinement of fact-finding to the broad injunction to seek solutions in inverse proportion to the importance of the dispute. This expectation would be modified over time as states gained or lost confidence in the ability of the U.N. to handle disputes of critical importance while protecting the valid national interests of the parties.

Third, if disputes involve issues critical to the strategic interests of the parties and to other states, it could be expected that individual members of fact-finding commissions would be selected as national representatives rather than as technical experts operating independently from their states. This rule, however, would be expected to erode as states experienced acceptable U.N. dispute resolution.

Fourth, and most important, with respect to cases with ideological and geopolitical consequences, states would be expected to be unwilling to submit disputes by prior approval to a pre-existing institutionalized structure for fact-finding. Rather, inquiry would be conducted on an ad hoc basis, permitting the states to tailor each fact-finding body to meet the needs of each situation. This projected norm of behavior could also be expected to atrophy if member states reacted positively to U.N. fact-finding. Certain regularization of procedures and institutions should occur as customary techniques and rules develop.

Finally, United Nations dispute resolution would be seriously, and probably fatally, crippled when faced with forceful and sustained opposition by one of its most powerful members. Even with these serious limitations, however, techniques of international fact-finding have important roles to perform in the peaceful resolution of disputes. These roles are important even though they are not universally applicable to all types of disputes between all types of potential parties.
United Nations experience with fact-finding, like that of the League, has been and will continue to be shaped and confined to some degree by malleable constitutional circumscriptions. A brief review of Charter injunctions follows, preliminary to an analysis of the experience and prospects of the United Nations in the use of fact-finding as a technique in the peaceful resolution of disputes.

**Fact Finding and the Charter**

Article 2(3) imposes a general obligation upon members to settle international disputes by peaceful means which do not endanger international peace and security. Article 33(1) obligates disputants to settle between themselves, if possible, any dispute likely to endanger international peace. The article then lists the traditional approaches, including inquiry, for solution of disputes. In several cases the contention has been made that the parties failed to exhaust the solutions available under article 33 before bringing the issue to the Security Council. No one has suggested, however, that failure to engage specifically in the process of inquiry is a violation of article 33. Since article 33 gives the parties freedom to pursue "peaceful means of their own choice," the parties are not apparently required to exhaust all measures listed in the article before resorting to an organ of the United Nations, but are only expected to make a good faith effort to reach a solution.

The Council usually considers all matters brought to its attention; however, Council investigation does not absolve the parties from seeking their own settlement. In fact, in an exceptional case, the U.N. may require inquiry by the parties before one of the U.N. organs will consider the dispute. For example, the principle basis for not placing a dispute between France and Tunisia on the agenda was that the parties were already negotiating and they had not yet exhausted all possibilities for settlement. Additionally, the U.N. will not consider a dispute when there is clearly a disagreement as to facts and the parties have made no effort to ascertain them.

Most of the important international post-war disputes in which fact-finding has been employed have directly involved an organ of the United Nations. A distinct chronological pattern has evolved in the use of U.N. dispute resolution machinery. In the first two years of the United Nations, the member states attempted, with some success, to use the Security Council as the primary fact-finding institution. The intensification of the Cold War led to deadlock in the Council and a consequent effort to utilize the Assembly as the major fact-finding organ. The processes of inquiry in

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21 In practice, however, article 33 has been invoked in respect to matters which are either not international and/or not disputes. See II United Nations, Repertory of Practice of the United Nations Organs, 195 (1955). [U.N., Rep. of the Proc. of the Sec. Com., Supp. 1952–55, at 152–36 (1957)].

22 E.g., Corfu Channel question.


24 L. Goodrich, E. Hambro & A. Simons, supra note 26, at 261.
the Balkans and in Korea were, for example, largely controlled through the Assembly. By 1952, however, the size and the consequent unwieldiness of the Assembly led to several significant East-West fact-finding agreements which operated essentially without the United Nations. These agreements covered the evacuation of Chinese Nationalist troops from Burma, the Neutral Nations Supervisory Commission, and the International Control Commissions in Southeast Asia.

Recently, the Secretary-General has played a dominant role in peaceful resolution. Often the Council or the Assembly authorizes the fact-finding mission but vests effective control in the Secretary-General. In other cases, the Secretary-General initiates and controls the procedure from the beginning. Regional organizations, particularly the Organization of American States, also perform fact-finding functions that occasionally involve the United Nations.

The Security Council

The Council has both implied and explicit Charter authorization to engage in fact-finding. Article 24 gives the Council primary responsibility for the maintenance of international peace and security, and articles 36 through 40, which authorize and describe various Council functions, imply that the Council must have sufficient information to make proper decisions. Article 34 explicitly authorizes the Council to investigate disputes to determine their threat to international peace. While the Council may, under article 33(2) call upon the parties to undertake inquiry, this provision has never been invoked. One limitation might be, as Kelsen suggests, that article 33(2) may first require Council investigation to determine a dispute's dangerous character. If so, additional fact-finding by the parties might be superfluous and perhaps, by the passage of time, irrelevant. The only dispute in which the Council has directly referred to article 33 was between India and Pakistan.

In that case, the Council called upon the parties to settle differences by "all peaceful means, including those listed in article 33." For the most part, the Council has simply encouraged negotiations, as it did in the dispute over Soviet interference in Iranian affairs. When the Council has been unable to agree on a recommendation to the disputants, it has postponed consideration and left the parties to find their own solution.

Under article 34 the Security Council may only investigate to determine whether a dispute endangers international peace; in practice, however,
the Council has not so limited its investigations. During the Greek frontier incidents, for example, the Council, under article 34, established a commission to determine facts and the cause of the incident.\textsuperscript{33} In that case, the Syrian representative contended that the investigation was complete as soon as the commission determined that peace was endangered. Most of the delegates, however, interpreted article 34 and other articles to authorize fact-finding as long as it is necessary.\textsuperscript{34}

The Council may implement its decision to investigate by establishing some subsidiary body or commission, or by delegating this function to the Secretary-General. Article 29 provides that: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."\textsuperscript{35} During debate over the Czechoslovakia crisis, a major controversy arose concerning the difference between commissions of investigation under article 34 and subsidiary bodies with more limited fact-finding functions under article 29. During discussion of the Laotian question, the Soviet Union contended that all fact-finding bodies fall under chapters VI and VII, and that article 29 authorizes only subsidiary bodies having no connection with the maintenance of international peace and security; this argument was rejected.\textsuperscript{36} The Council has generally avoided direct reference to article 34, which has been specifically invoked only in the Greek border incidents and the India-Pakistan dispute. The Council has often conducted fact-finding operations with the express understanding that it has not relied upon article 34.

There is a disagreement as to the obligation of the parties to accept Security Council investigations. During consideration of the Greek frontier incidents, the Soviet Union argued that a decision to investigate under chapter VI is simply a recommendation and is not compulsory.\textsuperscript{37} In reply, other members argued that a distinction must be drawn between a decision under article 34 and recommendations under articles 36 and 37, since the Council needed information to proceed. The United States argued further that the Council needed certain powers to fulfill its role as conciliator and that members were obligated under article 25 to accept Council investigations even though the Council lacked any power of sanction or enforcement when operating under chapter VI.\textsuperscript{38}

Article 39, which provides that the Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression,"

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\textsuperscript{33} 1 U.N. SCOR, 2d ser., No. 28, at 700 (1946).
\textsuperscript{34} 2 U.N. SCOR 1423–24, 1426, 1602–12 (1947); See also 13 M. Whitman, Digest of International Law 400 (1968).
\textsuperscript{35} Creation of a subsidiary body under article 29 is a procedural question not subject to veto; a decision under article 34 is a substantive matter subject to veto.
\textsuperscript{36} 14 U.N. SCOR, 847th–848th meetings (1959).
\end{flushleft}
is a possible basis for fact-finding operations. The purpose of fact-finding under article 39 is much broader than under article 34, and the compulsory nature of measures taken under article 39 is unquestioned.39 The limitations of article 39 are not constitutional but political, since agreement between the permanent members of the Council, which is usually impossible, is requisite to invoke the article.

State sovereignty and domestic jurisdiction place additional restrictions on Security Council fact-finding. Article 2(1) states that: “the Organization is based on the principle of the sovereign equality of all its members.” This principle has been frequently invoked, generally without specific reference to article 2(1), in opposition to Council resolutions dealing with disputes under chapter VI. In the Greek and Hungarian cases, Soviet bloc contentions that the creation of fact-finding bodies violated the sovereignty of the states concerned did not receive majority support.40 Article 2(7) prohibits intervention “in matters which are essentially within the domestic jurisdiction of any state.” While some argue that it is not clear whether establishing a fact-finding body constitutes intervention,41 this issue arose in the Spanish, Greek, and Hungarian questions; and the general view expressed in debate was that fact-finding does not constitute intervention.42 Furthermore, article 2(7) provides that this article “shall not prejudice the application of enforcement measures under chapter VII.” Lauterpacht has argued that when a situation is “ripe for enforcement action” under chapter VII, it ceases to be within domestic jurisdiction; therefore, even though peaceful settlement techniques under chapter VI, rather than enforcement action under chapter VII, may be invoked, the exception in article 2(7) to the domestic jurisdiction prohibition is equally applicable.43

The General Assembly

Although the Charter contains no express authorization for fact-finding by the General Assembly, practice has now established that such fact-finding is a necessary prerequisite to making recommendations under articles 10, 11, and 14. The importance of fact-finding to the Assembly first became apparent during consideration of the Palestine question at the first special session of the Assembly in 1947. During consideration of the role of the Interim Committee, the Soviets questioned the propriety of giving wide fact-finding authority to a subsidiary body. Although the Soviet arguments were rejected, the Committee’s terms of reference were more restricted than was originally proposed. Subsequent to the Palestine question, the Soviets have opposed fact-finding authorized

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39 Kerley, supra note 38, at 901, 902; see 2 U.N. SCOR 1280, 1371–72, 1379, 1521 (1947).
41 L. Goodrich, E. Hambro & A. Simons, supra note 26, at 67–68.
43 Id. at 89–90.
by the Assembly with arguments based primarily on article 2(7) rather than upon the competence of the Assembly to initiate fact-finding procedures. The Assembly's position, however, has consistently been that its powers include fact-finding. Accordingly, the Assembly has delegated fact-finding functions under article 23, which provides that: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." As there are no Charter provisions governing the structure of subsidiary organs, the Assembly has either established collegiate organs or appointed a single individual to perform fact-finding duties, as the particular dispute required.44

The Assembly possesses three other alternatives in instituting the process of fact-finding. First, as is most frequently done, it may authorize the Secretary-General to appoint a fact-finding body. Second, under its general powers of inquiry (e.g., articles 10 and 11 (3)) the Assembly may recommend a Security Council investigation pursuant to article 34. The Council is free, however, to accept or reject such a recommendation. Third, the Assembly can invite the disputing parties to do their own fact-finding. But while the Assembly has recommended negotiations, it has never specifically recommended fact-finding.

Although the Assembly has several ways of instituting fact-finding, its powers are not completely unfettered. First, the Assembly may only delegate to a subsidiary body the functions and authority that it possesses. This point has been raised in debate a number of times. For example, several states contended unsuccessfully that the Assembly conferred powers it did not possess when it created the U.N. Palestine Commission. Second, the Assembly may not encroach upon the powers of the Security Council. During the debates on the Interim Committee, several states objected that investigation was a function of the Security Council alone. The proponents of fact-finding countered by demonstrating that the Assembly, too, had functions relating to the maintenance of peace and was empowered to investigate before making recommendations.45 Third, a General Assembly fact-finding body must have the consent of the state before it can function in that state's territory. In numerous instances, e.g., Korea, Germany, Hungary, and the Balkans, the Assembly's subsidiary bodies have had limited effectiveness because certain parties refused them access.

The Secretary-General

The role of the Secretary-General in the settlement of disputes has increased significantly since the inception of the United Nations. The Secretary-General has two functions in the fact-finding process. First, under article 98 he may be directed by the Council or the Assembly to perform certain fact-finding duties. The Council and Assembly, faced with the problem of implementing their resolutions, have increasingly found it


desirable to delegate this responsibility to the Secretary-General. Second, the Secretary-General may initiate and direct a fact-finding operation pursuant to his duties under article 99.46

Article 98 requires the Secretary-General to perform the functions entrusted to him by the Council and the Assembly. The range of these functions is limited "only by the functions and powers of these organs."47 Both the Council and the Assembly have delegated the power of investigation to the Secretary-General on numerous occasions. For example, the Security Council requested the Secretary-General to engage in fact-finding or mediation activities in the Iranian question, the dispute over Cyprus in 1964–65, Dominican Republic Crisis in 1965, and the dispute between Portugal and Guinea in 1970. The General Assembly requested the Secretary-General to provide for an investigation of the Hungarian situation.

In addition to powers delegated by the Assembly or Council, the Secretary-General has implied powers of fact-finding under article 99, which states that: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."48 The United Nations has consistently construed this provision to allow the Secretary-General to initiate fact-finding preliminary to bringing a matter before the Council. During discussion of the commission of investigation in the Greek case, Secretary-General Lie stated that if the Council failed to act, he reserved the right to make any necessary investigations to determine whether to bring the matter to the attention of the Council under article 99.48 Secretary-General Hammarskjöld similarly interpreted his responsibility in the Lebanon question without direct reference to article 99.49 In the Yemen crisis, the Secretary-General had already arranged to send an observation mission to Yemen before the Security Council noted and approved his actions.50 The Secretary-General has also sent fact-finding missions upon the request of states to Laos in 1959,51 Tunisia in 1961,52 and to Thailand and Cambodia in 1958 and 1959. On several occasions, he has also sent delegates, with the approval of the host states, for the purpose of keeping informed. For example, the Secretary sent delegates to Lebanon and Jordan in 1958 and to Cyprus in 1964. Like the other U.N. organs, however, the Secretary-General has limited fact-finding power. Since he has no power of coercion, he must obtain the consent of the states in question to engage in fact-finding.

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47 L. Goodrich, E. Hambro & A. Simons, supra note 26, at 586.
50 18 U.N. SCOR, 1039th meeting 2 (1953).
On several occasions the Soviet Union has questioned the authority of the Secretary-General to initiate a fact-finding mission, claiming his actions related to the maintenance of international peace and security and should therefore be reserved to the Security Council. Nonetheless, the Secretary-General sent personal representatives and good offices missions to Cambodia and Thailand in 1968 through 1970, to Equatorial Guinea in 1969, and to Bahrain in 1970, all over the objections of the Soviet Union. The Soviet Union also criticized the Secretary-General for sending additional observers to Jammu and Kashmir in 1965. It should be noted that each of these missions enjoyed terms of reference which empowered them to perform functions beyond simple “observe and report” fact-finding.

Regional Arrangements and Regional Organizations

Regional arrangements and organizations also play a part in U.N. fact-finding. Resort to such entities is one of the suggested means of settlement under article 33(1). If the dispute is “local,” article 52(2) requires that members make every effort to settle the dispute through regional machinery before coming to the Council. Most U.N. cases dealing with regional organizations have concerned the Organization of American States (OAS). The Charter of the OAS requires the settlement of disputes through regional machinery which includes investigation and conciliation.

The presence of regional organizations may, however, have a restraining effect upon the fact-finding activities of United Nations organs. The right of regional organizations to bring disputes directly to the U.N. has been questioned. It has also been suggested that the U.N., especially the Security Council, should wait until the regional body has had the opportunity to settle a dispute before taking cognizance. This position was taken in connection with the Guatemalan case of 1954, and the Dominican Republic and Cuban cases of 1960. In debate over a 1963 complaint by Haiti against the Dominican Republic, some members argued that the Security Council was required to wait until regional efforts failed. Others felt that the Council did not have to wait for regional action. The majority agreed to leave initial consideration of the matter to the OAS. The majority position now is, however, that a party to a dispute has a right to be heard by either the General Assembly or the Security Council after a reasonable opportunity for regional action has been given.

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56 20 U.N. SCOR, 1247th meeting 57-59 (1965).
The Dominican crisis of 1965 precipitated a debate as to whether the Security Council should engage in fact-finding where the OAS was already actively involved. Reference was made to article 52(4) which provides that resort to regional measures does not impair articles 34 and 35. The discussion resulted in a Council resolution inviting the Secretary-General to send a representative to the Dominican Republic. This action has been criticized as obstructing the progress made by the OAS.59

Regional fact-finding also has limitations. First, regional fact-finding may be inappropriate when the U.N. finds: (1) that a powerful state is using the regional agency as a tool of coercion;60 (2) that the dispute is of such a serious nature that it requires preventive or enforcement action; or (3) that the dispute involves a state not a party to the regional body.61 Second, the United Nations may limit regional fact-finding to protect a state from aberrant regional norms.62 Third, the terms of a regional arrangement may limit fact-finding. Fourth, the terms of the Nations Charter, article 2(7) for example, limit regional fact-finding under article 103, which provides for the supremacy of U.N. Charter obligations.

III. Fact-Finding Experience under the Charter

"Fact-finding," as this concept has developed under the U.N. Charter and within the context of U.N. experience, can be construed to encompass anything from the classical process of strictly finding and reporting facts to verifying the observance of cease-fire agreements. This may require actions ranging from simple fact-finding insulated from any act of judgment to some process approaching arbitration. Usually, however, it has involved some form of good offices, mediation, or negotiation. These actions may be accomplished by one man, perhaps a special representative of the Secretary-General, or they might necessitate the use of hundreds of military personnel as observers.

Though the generic meaning of "fact-finding" could include peace-keeping activity of the United Nations, this paper is limited to fact-finding as a part of the process of the peaceful resolution of disputes as authorized by chapter VI of the Charter.63 The organization of cases and disputes used here is based upon the nature of the fact-finding issues involved rather than independent case study, which has been accomplished pre-

63 Peace-keeping functions such as ONUC, necessitating the invocation of chapter VII, are beyond an interest here.
It should be noted that categorization of a case by its fact-finding issues or objectives might be entirely different from a categorization of the dispute itself. For example, the Korean case was a Cold War dispute, but the fact-finding mission was primarily concerned with issues of governmental legitimacy, popular representation, and demarcation line violation. The Hungarian case involved foreign invasion and domination, but the fact-finding mission primarily concerned reporting the nature of the conflict and the extent to which human rights had been affected. This organization implies that a judgment concerning the success or failure of any fact-finding mission should be based primarily upon the fact-finding function of the mission rather than upon the resolution of the conflict. The creators of a fact-finding mission connected with a particular dispute may not realistically expect to resolve the dispute, but rather intend to publicize its facts and perhaps to raise its political cost to a participant, without any real hope of effecting a return to the status quo ante. Of course, the degree to which the fact-finding mission aids in the resolution of the dispute still may be relevant to a more general judgment of success or failure.

Although occasional examples of classic fact-finding, or "inquiry," have occurred since the establishment of the United Nations, the overwhelming number of bodies established to accomplish United Nations fact-finding have been organized ad hoc and attached to the General Assembly, the Security Council, or the Secretary-General. The Council was the major creative organ in U.N. fact-finding until Cold War tensions and consequent Soviet vetoes led to increased General Assembly direction in fact-finding efforts. From 1950 to 1956, however, most of the significant international fact-finding was done outside the United Nations until the Secretary-General became increasingly the dominant force, beginning with UNEF in 1956.

As might be expected, early fact-finding missions involved delegations given narrowly defined terms of reference while later missions have received broad and often ambiguous directions and have increasingly reported directly to the United Nations. Fact-finding in early cases drew upon the personnel and logistic support of consulates on site. Increasingly, the Secretary-General has created fact-finding and peace observation machinery from existing U.N. fact-finding and peace observation bodies, or from states such as Canada, which have long been active in such endeavors. Understandings in this regard between the United Nations and the host states are now most often formalized in status agreements.

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Since Wainhouse does not treat cases beyond 1964, more factual material will be presented on cases from that date.

65 See, e.g., note 12 supra and accompanying text.

66 See pp. 432-34 supra.
A substantial majority of the United Nations fact-finding experiences can be categorized into four groupings based on fact-finding issues: (1) issues involving violations of borders, cease-fire or truce lines, or other lines of demarcation; (2) human rights issues; (3) questions of sovereignty, including issues of legitimacy and self-determination; and (4) simple or "classic" fact-finding, similar to the Hague Convention maritime cases, involving data that is objectively quantifiable or determinable, most usually without issues which have ideological or strategic overtones.

**Fact-Finding Involving Violations of Borders, Cease-Fire or Truce Lines, or Other Lines of Demarcation**

Fact-finding in border disputes may be successfully concluded even when cooperation and access are accorded the mission by only one party. An understanding of this not at all self-evident fact is essential to both an accurate projection of U.N. fact-finding effectiveness in a particular case as well as later evaluation of fact-finding efforts. The Greek question, the first border dispute to come before the United Nations, is one of the best examples of successful fact-finding where (except for the Security Council's Commission of Investigation, which met at Sofia, Belgrade, and Athens in addition to visiting both sides of the border) access was almost completely denied the fact-finding missions by three of the four states parties to the dispute. Although limited access was allowed, the Security Council's Commission report was vetoed by the Soviet Union, and the Greek question was removed from the Council's agenda. The General Assembly then created the United Nations Special Committee on the Balkans (UNSCOB) and directed it to observe compliance with an Assembly resolution calling on the four governments—Greece, Yugoslavia, Bulgaria, and Albania—to establish good neighborly relations, establish frontier agreements, settle the refugee problems, and study the possibility of a transfer of minority groups along the border. UNSCOB's terms of reference were broad enough to allow it to conduct its work in any of the four states. The Assembly did not, however, insure the immediate failure of UNSCOB by requiring access to all four states as a prerequisite to the accomplishment of its mission.

The Communist states parties to the dispute—Yugoslavia, Bulgaria, and Albania—along with the Soviet Union, considered UNSCOB to be illegal and maintained that its functions, if performed at all, should have been accomplished by the Security Council. Accordingly, though access had been granted to the Security Council's Committee of Investigation, Yugoslavia, Albania and, except in one instance, Bulgaria denied UNSCOB access or any other form of cooperation.

Nevertheless, UNSCOB experienced substantial success in its fact-finding and border surveillance roles. The evidence cited in the UNSCOB report, proved conclusively that Yugoslavia, and to a lesser extent, Bulgaria and Albania, had become accomplices in the Greek insurgency by

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*See D. Wainhouse, supra note 15, at 232–36.*
supplying arms, munitions and other forms of support to the insurgents, as well as by providing them sanctuary along the borders. Based upon these reports, the third session of the General Assembly continued UNSCOB with its broad terms of reference and passed a resolution condemning Bulgaria, Albania, and Yugoslavia and recommending to member states that they refrain from aiding in any way groups fighting the Greek government.68

The techniques used by UNSCOB in successfully accomplishing its fact-finding functions despite its handicap of operating only on one side of the border should be noted. While the Commission of Investigation relied almost exclusively on testimony from witnesses,69 UNSCOB had broader terms of reference that enabled it to operate with a much greater variety of techniques. It maintained five observation posts on the Greek border, each composed of four observers from the delegations and six support personnel from the Secretariat. It employed mobile equipment, including aircraft, supplied mainly by the United States. UNSCOB used radio monitoring techniques, interviewed refugees, soldiers, and prisoners, and conducted direct observation from the Greek side of the borders, with incidental observation from Bulgarian territory. Monitored radio broadcasts originating in the three communist states proved conclusively that they were extending heavy financial aid to the insurgents. Radio monitoring and refugee interviews established the foreign creation and direction of the Balkan Action Committees whose purpose was to raise funds for the insurgents. Radio monitoring also established that the “Free Greece” radio station operated by Markas (the Greek communist leader)

While UNSCOB was unable to accomplish its good offices and mediatary functions without cooperation from all the parties (UNSCOB's first annual report to the Assembly in 1948 concluded that its good offices mission had failed), Howard, United Nations Special Committee on the Balkans: Comment on the Report of the Third Session of the General Assembly, 1 Docs. and State Papers 377 (1949), by proving without ambiguity that the Greek guerrillas were receiving military training, arms and war materiel, financial support, and sanctuary from the three border states, UNSCOB established that fact-finding could be successfully accomplished in a border dispute from one side of the border.

Successful resolution of the dispute itself was accomplished primarily by factors extrinsic to United Nations fact-finding. UNSCOB had no authority or means to accomplish a sealing of borders to Greek insurgents. By the occasion of the fourth General Assembly in 1950, however, the split between Stalin and Tito had resulted in the sealing of the Yugoslav frontiers and an end to foreign aid to the Greek insurgents. While this resolution of the Greek question was accomplished primarily because of Soviet-Yugoslav and Truman Doctrine, the fact-finding role of the United Nations made more probable the causative link between the Stalin-Tito feud and the later discontinuance of Balkan aid to the Greek insurgents. Tito was forced to discontinue support for the Greek insurgents when he was no longer sure of Soviet political support; but if it had not become common knowledge that in fact Yugoslavia was the major supplier of arms, munitions, and money to the Greek insurgents, that result would not have had to follow from the Stalin-Tito rupture.

By the time UNSCOB recommended its own dissolution, border violations had ceased. The Greek government's evaluation of the effectiveness of UNSCOB is seen by that government's insistence that some border surveillance group continue after the Western states no longer considered it necessary. With the discontinuance of UNSCOB in 1951, a Balkan Subcommission of the Peace Observation Commission (POC) was created under the Uniting for Peace Resolution of 1950.

It had as many as seven investigating teams which traveled through Greece and occasionally into the other three states.
was located in Yugoslavia, and that the three communist states had re­
tained the Greek children kidnapped earlier. Finally, UNSCOB estab­
lished by overwhelming evidence that the three states had trained, sup­
plied, hospitalized, and given refuge to Greek guerillas. This evidence
was obtained primarily by direct border observation and by interviews
with hundreds of soldiers, prisoners, and refugees.

The success of UNSCOB was accomplished despite handicaps which
would not be present today. UNSCOB had to rely upon member states
for logistical support since the U.N. did not have the necessary facilities
or equipment. Status agreements, now standardized, were then embargo-
and the Commission, UNSCOB, and the Balkan Subcommission of
POC (Peace Observation Commission) were all composed of representa­
tives who, unlike the "men of distinction" in the classic tradition of the
Hague Convention and the League, were accountable to their states.
This is quite understandable given the strategic importance of the Cold
War issues involved in the dispute. Observer teams were not, however,
instructed by their governments and reported directly to UNSCOB.
Again, as would be expected, as the conflict began to fade following the
Stalin-Tito split, reports from POC were made directly to the Secretary-
General and occasionally to the Assembly. The case established an impor­
tant precedent because it demonstrated that techniques of fact-finding —
radio monitoring, the use of airplanes, interviewing witnesses from states
closed to on-the-spot observation, direct frontier observation from one side
of the border, the examination of captured weapons, all done with small
observation units — could be effective even though access and other forms
of cooperation were denied by all parties but one.

The Korean crisis further demonstrated the capacity of the United
Nations to perform fact-finding from one side of a border or line of demar­
cation. In 1948, the General Assembly created the United Nations Com­
misson on Korea (UNCOK) to accomplish two major goals: the unifica­
tion of Korea under one representative government, and the withdrawal
of all foreign troops.70 One year later, this mandate was reaffirmed and
UNCOK was given a third duty of reporting on any activities that could
lead to military conflict.71 UNCOK failed in its attempts to accomplish
the first two goals, and accomplished the third goal so late that it had no
prophylactic effect. In retrospect, however, failure in the first areas would
have been almost impossible to avoid, while failure in the third area was
due to negligent performance on the part of UNCOK and the Secretary-
General. Although the General Assembly in October, 1949, directed
UNCOK to observe and report on any activity which could lead to mili­
tary conflict, UNCOK did not request the Secretary-General to provide
military observers until late March, 1950. The Secretary-General did not
dispatch the field observers until the end of May. Valuable months were
unnecessarily lost during which observers stationed on the southern side

of the 38th parallel could have reported on the preparations of the North Koreans to attack South Korea. When finally dispatched to Korea, the observers went immediately to the 38th parallel and returned to Seoul June 24, one day before the invasion, barely in time to report. Their observation disclosed that the South Korean army was deployed defensively while North Korea was prepared to launch a well organized and obviously long premeditated major attack upon the South. While not having any chance of enjoying a preventive role, this unanimous report was invaluable in countering the Soviet and North Korean assertion that the South had initiated hostilities. Most importantly, UNCOK demonstrated United Nations capacity to accomplish fact-finding functions without access to North Korea. That this was not done in timely fashion was due to bureaucratic inertia and negligent operation, not to problems inherent in the dispute or to structural limitations within the United Nations.

The crises in Lebanon and Jordan in 1958, although similar to Korea in that fact-finding was allowed only within these states, presented a somewhat different problem. The fact-finding missions, however, were not directly affected because most of the activities giving rise to the disputes were internal. United Nations fact-finding was, in fact, instrumental in avoiding a mis-characterization of the disputes which could have resulted in more serious consequences.

Lebanon and Jordan charged before the Security Council that civil strife in their states was abetted by the United Arab Republic. Lebanon asserted that armed bands from Syria crossed into Lebanon in aid of insurgent factions. After the Arab League had failed to resolve the dispute, the Security Council sent a U.N. Observer Group into Lebanon (UNOGIL) with terms of reference directing it to insure that there was no illegal infiltration of personnel or supply of arms or other material across the Lebanese borders. These terms of reference were originally broad enough to interdict border violations. The Secretary-General, however, interpreted the terms of reference narrowly and accorded UNOGIL authority only to fact-find and report.

UNOGIL submitted two reports to the Council prior to the assassination of Iraq's King, Crown Prince, Prime Minister, and other government leaders in the coup which precipitated the landings of United States troops in Lebanon and United Kingdom forces in Jordan, at the request of those governments. These reports did not sustain the Lebanese assertion that there was Syrian infiltration across the Lebanese border. UNOGIL reported sighting armed bands in the area, but could not confirm a single border violation.

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73 UNOGIL had permanent observation posts, jeeps, military observers, planes, and helicopters.
75 UNOGIL was to report to the Council through the Secretary-General.
The Secretary-General rejected U.S. and Lebanese requests that UNOGLF be transformed into a peace-keeping force, on the ground that such an action must be based on Security Council directives under chapter VII. Relying on the reports of UNOGLF, the Secretary-General concluded that the tumult in Lebanon was internally caused. In retrospect, it appears quite certain that the Lebanese civil strife was caused by domestic opposition to the incumbent regime, and that the Secretary-General's reading of the situation was correct. United Nations fact-finding permitted the Secretary-General to act upon more reliable information than that evidently possessed by the United States, which seemed to believe a foreign-directed assault was in progress.

In Jordan, Security Council action was prevented by a Soviet veto. The Assembly passed an extremely vague resolution empowering the Secretary-General to take such action as he thought best. The Secretary-General, correctly reading events in Jordan, as in Lebanon, to be dominantly internal problems, attempted to avoid placing the United Nations between contending factions involved in civil strife. He therefore resisted efforts to establish a peace-keeping force and instead provided United Nations "presence" in Jordan in the form of a Special Representative. The Special Representative, with a staff that varied from 60 to 100, monitored the Hashemite radio station in Jerusalem, patrolled the borders, and observed and reported to the Secretary-General. As in Lebanon, the crisis dissipated more from changes within Jordan than from any particular function of the Special Representative. The real United Nations accomplishment was that more precipitous action was avoided, partly because of information supplied by UNOGLF and the Special Representative.

One of the most important fact-finding functions of the U.N. has been supervision or monitoring of various truce, cease-fire, or armistice agreements. If the U.N. fact-finding role with respect to such supervision is separated for purposes of evaluation from good offices or mediatory functions aimed at the resolution of the underlying disputes, the performance of the U.N. has been quite successful.

U.N. fact-finding concerning Palestine crises can be divided into three chronological periods. The first stage, from 1947 to July, 1949, was dominated by the problems surrounding the creation of the state of Israel. The second period, from July 20, 1949, to November 7, 1956, covers the functioning of the Mixed Armistice Commissions. The third stage, from November 7, 1956, to the 6-day war in 1967, includes the activities of the United Nations Emergency Force (UNEF).

After presidential elections were held, resulting in a new regime, tumult within the state ceased.

Cease-fire and armistice maintenance agreements — and institutions designed to monitor or enforce them — erode steadily and sometimes precipitously when there is no visible movement toward solution of the underlying dispute. This fact, however, should not lead to a rejection of cease-fire supervision mechanisms but should lead to questions concerning the effectiveness of international and unilateral attempts to deal with the basic dispute.
The United Nations Truce Commission succeeded to some of the functions of the original United Nations Commission for Palestine. It was in turn superseded by four Mixed Armistice Commissions (MAC's), which were to supervise the four armistice agreements (between Israel and Jordan, Egypt, Lebanon, and Syria, respectively) which replaced the truce arrangement in July, 1949. The United Nations Truce Supervision Organization (UNTSO), which had been created originally as part of the Truce Commission, survived the change from truce to armistice in order to provide personnel and support for the MAC's.

Several factors influenced the varying degrees of success enjoyed by the MAC's. First, the attitude of the parties toward the individual armistice treaties determined in large part the success of each particular MAC. The success of the Israel-Lebanon MAC demonstrated clearly that even small investigatory and surveillance units can be effective if the parties so desire. The Israel-Jordan MAC was also successful until the assassination of King Abdullah in 1951. In contrast, Egypt and Syria made little attempt to control their borders; and Israel, often retaliating out of all proportion to the original provocation, was a major source of border violations. Second, the Israeli-Lebanese and the Israeli-Syrian MAC's were more effective than they otherwise would have been because the boundaries involved predated World War II and were accepted by the parties. Those MAC's, therefore, did not experience the jousting for de facto boundary change that occurred along the other two (artificial) armistice lines. Third, the extremely narrow interpretation put upon their terms of reference was a factor inhibiting the prophylactic effect of all of the MAC's. They were limited to reporting armistice violations after the fact and were accorded no power to prevent them. Fourth, the MAC's had few observers to begin with and experienced a steady attrition in the number of observers until 1956. Less surveillance was therefore accomplished by the MAC's than was done under the truce. A great backlog of uninvestigated reports of armistice violations soon developed and was never eliminated during the 1949–1956 period.

The greatest factor contributing to the gradual degradation of the armistice agreement was the absence of any movement toward settlement of the substantive issues separating the disputants. The armistice itself, along with all of its institutional support, experienced a gradual atrophy from its inception. This phenomenon seems to occur in any sort of cease-fire, truce, or armistice agreement; if no visible progress is made toward the solution of the conflict, the temporary arrangements made to stop hostilities erode over time. The MAC's experienced a gradual loss of effectiveness in their surveillance and maintenance of the cease-fire until the collapse of the armistice at the time of the British, French, and Israeli attack on Egypt in October, 1956.

The United Nations Emergency Force (UNEF), created by the Assembly after a British-French veto of a Security Council resolution directing Israel to withdraw from Egypt, did not supersede the Jordanian, Leban-
ese, and Syrian MAG's. Israel, however, maintained that its armistice agreement with Egypt was terminated, and consequently that MAG ceased to exist. The Egyptian MAG was placed under UNEF. UNEF was directed to supervise the withdrawal of foreign forces from Egypt and to observe adherence to the armistice. To accomplish this objective, UNEF was deployed along the Egyptian side of the line of demarcation and international frontier and functioned with permanent observation posts, mobile patrols, and aerial reconnaissance.

Until its hasty withdrawal in 1967, UNEF effectively diminished violations of the line of demarcation and the frontier. It had significant advantages over the MAG's. First, its presence and size had an inhibiting effect upon those forces which might have precipitated border violence. Second, the status agreement with Egypt permitted substantial discretionary action on the part of UNEF. Third, the chain of command allowed UNEF a reasonable degree of tactical autonomy from the Council and the Assembly. The commander in chief reported directly to the Secretary-General, who was aided by an advisory committee composed of states providing members of the force.

A major flaw existed, however, in the structure of UNEF. Provision for its withdrawal was so ambiguous that different parties could variously conclude either that UNEF must be withdrawn upon the demand of Egypt, or that it could be withdrawn only after the Secretary-General received permission from the Assembly. It might also have been preferable to provide for a terminal date for UNEF, or for a periodic renewal upon acquiescence of Egypt, with no power in the host state to demand withdrawal until the maturation of the renewal date. Because no enforcement action was taken by the Council under chapter VII, the consent and cooperation of at least one disputant was a prerequisite for UNEF's presence. Hence, it is difficult to comprehend the position of those who fault the performance of UNEF; for when Egypt withdrew its consent to UNEF presence, there was no alternative but to leave.78

A much more legitimate criticism could be levelled at the Secretary-General, the Council, the Assembly, the parties to the dispute, and major states associated with one of the parties, for demanding more of a fact-finding and peace observation unit than could reasonably be expected. All sides seemed to be operating on the theory that the passage of time would result in a resolution of the conflict. The seemingly intractable issues of religious animosity, refugees, and bitterness remaining from the manner of the creation of the state of Israel did not diminish in impact from 1956 to 1967. UNEF experienced the same diminution in effectiveness as have other groups attempting to monitor a cease-fire, truce, or armistice line. Without progress toward the settlement of underlying substantive issues in dispute, temporary arrangements become increasingly fragile and ineffec-

78 There is more than a little hypocrisy present in the attacks by Israel upon the precipitate withdrawal of UNEF in that Israel had never permitted UNEF on its side of the border or line of demarcation.
tive. The failure of the United Nations, and member states individually, to more actively seek solutions to the underlying conflict, rather than any structural deficiency in UNEF, was the major cause of the breakdown of the armistice in 1967.

Unfortunately for purposes of later post-mortem and analysis, constructive debate on the cause of the breakdown in 1967 of the Middle East armistice agreement has been distorted by a red herring, the nature of the withdrawal of UNEF. The absence of any similar factor in the 1965 Kashmir crisis reveals clearly the basic cause of the eventual failure of a unit monitoring an armistice or cease-fire line: the absence of progress toward the elimination of the underlying dispute results in steady erosion of the prophylactic influence of the observation unit. In time, one precipitating cause or another will disrupt the agreement.

In the Kashmir dispute between India and Pakistan, the United Nations Military Observer Group (UNMOGIP) operated without new fighting since the cease-fire agreement of July, 1949, and with perhaps more efficiency and effectiveness than any other similar body. It enjoyed broader terms of reference, and more real power, than any comparable unit. UNMOGIP had three major functions: first, to investigate and settle complaints; second, to determine troop build-up and deployment; and third, to control civilian groups near the cease-fire line. While no similar group has been entrusted with information as potentially devastating to a state as that included in the second category, both sides scrupulously provided such information to UNMOGIP. In turn, UNMOGIP operated with remarkable fairness to both sides and enjoyed the trust and cooperation of the military commanders and the political leaders of the two states. UNMOGIP was allowed to operate on either side of the cease-fire line, and it regularly rotated the observers from side to side to avoid identification or bias toward either side. In all, UNMOGIP operated under ideal circumstances in terms of administrative structure, terms of reference, cooperation of the parties, and quality of personnel.

In spite of this, however, Wainhouse reported that UNMOGIP experienced a steady decline in its effectiveness in preventing border violence. Cease-fire violations increased ten-fold between 1955 and 1964. Indian intransigence in rejecting all proposals for a plebiscite, though understand-

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58 Count Bernadotte made this all-important point at the beginning of the crisis in Palestine:

The truce is not an end in itself. Its purpose is to prepare the way for a peaceful settlement. There is a period during which the potential for constructive action, which flows from the fact that a truce has been achieved by international intervention, is at a maximum. If, however, there appears no prospect of relieving the existing tension by some arrangement which holds concrete promise of peace, the machinery of truce supervision will in time lose its effectiveness and become an object of cynicism. If this period of maximum tendency to forego military action as a means of achieving desired settlement is not seized, the advantage gained by international intervention may well be lost.


59 D. Wainhouse, supra note 15, at 371.
able, nevertheless prevented any movement toward a settlement of the substantive issues in dispute. In 1965, based upon information received from UNMOGIP, the Secretary-General reported to the Council that the cease-fire agreement of July, 1949, had broken down. A situation approaching full-scale war soon resulted, and repeated Council resolutions calling for a cease-fire were ineffective. Subsequent reports by the Secretary-General to the Council through the end of December, 1965, indicated that numerous complaints of cease-fire violations continued though both governments had agreed to a cease-fire. A restoration of the cease-fire did not occur until after the Tashkent meeting between the President of Pakistan and the Prime Minister of India. A formal agreement of withdrawal was signed February 17, 1966.

The importance of movement toward a political solution of the underlying dispute in maintaining a cease-fire can be seen by comparing the United Nations' experiences in Palestine and Kashmir to its experience in Indonesia. The Indonesia experience was the first instance of U.N. mediation between states and the second time that the U.N. had created machinery to supervise a truce. There was substantial violence, especially during two Dutch "police actions" against the Indonesian Republican forces, but this was not protracted. Most of the violence occurred in the earlier stages of United Nations involvement during the tenure of the Consular Commission and the Good Offices Committee (GOC) before the establishment of the Security Council's United Nations Commission for Indonesia (UNCI). Prior to UNCI, GOC had not established significant machinery or techniques of truce supervision. GOC had been almost completely concerned with political and economic reporting to the Council. UNCI, equipped with more extensive apparatus, probably helped prevent sporadic outbursts of violence. Even so, the truce supervision machinery was inadequate. U.N. personnel were inexperienced; the organization had little equipment of its own and was forced to depend upon the parties to the dispute for much of its transportation. Facilities had to be provided by members of the Security Council having consular representatives in Indonesia.

Without question, the major factors limiting hostilities between the antagonists were political. First, both sides were in agreement upon the major factor in the Indonesia crisis: that the Dutch would eventually leave and the Republican forces would assume control of the country pursuant to the Linggadjati Agreement. Though intense disagreements occurred over its implementation and subsidiary issues, both sides characterized the conflict as one derived from a colonial relationship which could not indefinitely continue. Second, with substantial help from the Consular Commission, GOC, and UNCI, real and visible progress in

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the form of the Renville and Round Table agreements was made toward
the resolution of problems separating the antagonists. Without this, the
ad hoc and untested machinery of truce supervision would have been
unable to maintain the cease-fire and accomplish with relative dispatch
the demobilization of Dutch forces and the transfer of authority. Had the
political problems proven to be intractable, as in Palestine or Kashmir,
truce supervision would have been nearly impossible. The colonial nature
of this war, fought within one territory, with the population generally
hostile to foreign troops, resulted in an absence of any clearly defined
areas of control for either side. Consequently, natural cease-fire lines
could not be effectively established or monitored.

Fortunately, political movement was possible and was accomplished
with sufficient dispatch to avoid stalemate and eventual attrition of the
integrity of the cease-fire agreement, as happened in Kashmir and Paleo-
tine.

The United Nations fact-finding roles in the Middle East, Kashmir,
Hungary and Indonesia, extracted for purposes of analysis from the
overall process of dispute resolution, were quite successful in that they
accomplished most of what presumably could be expected of them. United
Nations fact-finding in Korea must, in balance, be considered a failure;
the only partially redeeming aspect of Korean fact-finding was that the
observer's report, coming out prior to the North Korean invasion, was
able to substantiate its nature.

Four other fact-finding operations dealing with border disputes deserve,
in more unqualified terms, to be adjudged failures; two for reasons beyond
the capacity of the United Nations to alter, and two in which the result
could and should have been different.

A centuries old border dispute between Cambodia and Thailand,
exacerbated by the interjection of Cold War rivalries into Southeast Asia,
led to U.N. fact-finding and good offices missions in 1959, 1963–64, and
1966. These missions experienced some short-term success but made no
progress toward solution of the boundary dispute. The scope of violence
in Southeast Asia became so great that the fragile techniques of inquiry
and conciliation employed were overwhelmed. In Laos, as in Cambodia
and Thailand, the Secretary-General attempted to resolve the dispute by
so-called "quiet diplomacy" aided in part by a fact-finding mission
appointed by the Council. But the fragile institutions of peaceful resolu-

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86 See U.N. Doc. S/7462 (1966), where the Secretary-General reported to the
Council that he had appointed Mr. Herbert de Ribbing as his Special Representative
in the two countries. The Soviet Union objected to this on the basis that the Council's
prerogatives over matters relating to the maintenance of international peace and
security were violated. U.N. Doc. S/7478 (1966). Argentina disputed this assertion
arguing that article 99 was a sufficient basis of authority to justify the Secretary-
87 "Quiet diplomacy" involved the appointment of special representatives, after
informal consultations with the permanent members of the Council and the govern-
ments concerned, but without formal action by the Council.
tion were incapable of preserving Laotian neutrality in the face of the increasing level of violence throughout Southeast Asia.

Fact-finding in the Cambodia-Thailand and Laos disputes failed largely due to factors beyond the control of United Nations leaders and the leadership of the missions. Failures in Yemen and Guinea, however, are more instructive. In the 1962–64 Yemen dispute, the Security Council authorized the Secretary-General to provide an observation mission to monitor an agreement between the United Arab Republic and Saudi Arabia which provided that both states cease giving military support to the rival factions. The Secretary-General appointed Major General Carl Von Horn, then Chief of Staff of the U.N. Truce Supervision Organization in Jerusalem, to head the Observation Mission in Yemen (UNYOM). The critical weakness of UNYOM was that the terms of reference, unnecessarily narrowly construed by the Secretary-General, did not permit it to investigate alleged violations of the agreement or attempt any conciliation. Though UNYOM possessed a Yugoslav contingent from UNEF and an air surveillance unit from the Royal Canadian Air Force, these forces were completely inadequate to patrol the rugged mountain areas in Yemen. UNYOM, therefore, failed in its pure fact-finding function because it could not accurately inform the Council on the extent and the sources of foreign intervention.

While the Yemen mission failed in part because of insufficient support from the Secretary-General, the fact-finding mission to Guinea was crippled by its own lack of leadership. On November 22, 1970, the Secretary-General received word from the Permanent Representative of Guinea that his state had been invaded, allegedly by Portuguese armed forces. The President of Guinea requested the assistance of United Nations military forces to stop the invasion. An emergency meeting of the Council approved the appointment of a Special Mission to Guinea, to be appointed after consultation between the President, members of the Council, and the Secretary-General. The terms of reference directed the Special Mission to proceed to Guinea, appraise the situation, and report to the Council. The Special Mission\(^3\) was empowered, as is customary, to establish its own procedures. Unfortunately, the Special Mission allowed itself so little time (3 days) to select witnesses and conduct its interviews that there is serious question as to the value of its findings.\(^8\) On the first day, November 26, 1970, the Mission spent all but two hours listening to denunciations of the attack by two Guinean officials. Three scenes of battle were viewed at the conclusion of the day. The second day was spent interviewing foreign ambassadors, other foreign residents of Guinea, and prisoners taken by the Guinean armed forces. While Guinea alleged that

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3\(^{\text{Composed of five non-permanent members of the Council.}}\)

8\(^{\text{The Special Mission concluded that a force of 350–400 men, under the direction of and with the participation of Portugal, landed off the coast of Conakry, attacked the city, and departed by ships on the morning of November 23, 1970. Report of the Security Council Special Mission to the Republic of Guinea established under Resolution 289, 25 U.N. SCOR, 1558th meeting (1970).}}\)
it had captured 60–70 prisoners, the Special Mission allowed Guinean officers to select seven prisoners for interviews which were conducted in the presence of a ranking Guinean officer. The third day was largely spent in interviews with Guinean officials.

It is requisite to successful fact-finding that the sources of evidence and the manner in which it is obtained are such that it is clear to concerned parties that the conclusions drawn from the information can be expected to be accurate and fair. If this is not done, it becomes impossible to accomplish a major goal of fact-finding: objective parties should be convinced that, whatever policy conclusions or judgments result from the facts, the facts themselves have been fairly and objectively determined. The Special Mission could have promoted accuracy and confidence in its report by: 1) spending more time in Guinea; 2) interviewing all of the prisoners taken by Guinea or at least selecting for themselves representative witnesses at random; 3) conducting all interviews of prisoners privately to avoid or at least diminish the likelihood of intimidation by the presence of the captors; and 4) examining all arms and support equipment captured by Guinea.

Fact-Finding and Human Rights

United Nations fact-finding in cases involving human rights issues would seem, by the nature of the problems, to be more effectively stymied when access and cooperation are denied by one side. In contrast, border disputes, by their very nature, are such that the events in question often take place within sight of the border. Hence, border observation posts and other techniques of border surveillance can be employed to overcome denial of access to the other side. In disputes involving allegations of the denial of human rights, however, the events in question normally take place beyond border areas. At first impression, therefore, denial of access by one side would seem to cripple or defeat a fact-finding mission. The first U.N. fact-finding experience concerning issues of human rights seemed to bear out this prognosis. Later cases clearly established, however, that fact-finding in human rights cases can be successful even though access to the states in question has been denied.

The United Nations Commission to Investigate Conditions for Free Elections in Germany\(^\text{90}\) was given a mandate which, \textit{inter alia}, instructed it to investigate "[t]he constitutional provisions in force in these areas and their application as regards the various aspects of individual freedom, in particular . . . freedom of movement, freedom from arbitrary arrest and detention, freedom of association and assembly, freedom of speech, press and broadcasting . . . ."\(^\text{91}\) Unfortunately, the terms of reference specifically directed the mission to obtain access into all parts of Germany, including the Soviet zone, and into all sections of Berlin. Therefore, access was a

defined prerequisite to successful operation of the mission, even though the substantive fact-finding and mediation responsibilities of the mission might not have required it. The Commission unanimously reported that access had been arranged with the Allied High Commission of Germany, the Federal Republic, the Allied Kommandatura in Berlin (for French, U.K., and U.S. sectors) and the West Berlin government, but had not been accomplished with the authorities within the Soviet zone of Germany or within the eastern sector of Berlin. No attempt was made, therefore, to accomplish the purposes of the Commission relating to human rights. After submitting a supplementary report, the Commission adjourned sine die.

Although the Commission could not have helped to bring about free elections or directly affect human rights in Germany because it had no access, subsequent U.N. experience has demonstrated that fact-finding relating to human rights can be accomplished through proper terms of reference and the ingenuity of the fact-finders even without access. The Hungarian crisis of 1956 demonstrated more impressively than the border dispute cases the ability of the United Nations to perform fact-finding functions even when denied access to the state in question. Unlike Greece, Korea, UNEF, and Lebanon, where access was allowed U.N. fact-finders by one side, the Hungarian dispute, originally between that state and the Soviet Union, saw the United Nations fact-finding mission denied access or cooperation by both parties. That the United Nations was able to successfully accomplish its fact-finding mission is impressive and instructive.

On November 4, 1956, following the second and final Soviet armored attack on Budapest, an emergency special session of the General Assembly passed a resolution calling for Soviet withdrawal and requesting the Secretary-General to investigate on-the-spot. After the fall of the Nagy government, the Secretary-General requested and was refused access for U.N. observers. The Secretary-General later named a three-man observer group which considered on-site inspection to be essential to the completion of their mission; when entry into Hungary was denied in January of 1957, they discontinued their efforts. Subsequently, the General Assembly established the Special Committee on the Problem of Hungary. The Committee was instructed to report to the Assembly on the nature of the Soviet intervention and its effect on the human rights of the Hungarians. The Committee's terms of reference were broad enough to allow it to accomplish its purposes without access to Hungary, though access was requested and denied. After access to Hungary was
refused, the Committee relied on two sources of information to meet its mandate, the testimony of witnesses and documents. The Committee interviewed 111 witnesses, most of whom were eyewitneses. The refugee witnesses included many civilians, the military commander of Budapest at the time of the invasion, the minister of state in the Nagy government, the mayor of Budapest, and many other high ranking former members of the military and the government, several of whom were present in the parliament building with Prime Minister Nagy during the crisis. The Committee also received reports from Belgium, France, Italy, the Netherlands, the United Kingdom, and the United States containing relevant information, including transcripts of the testimony of refugees. Other documentary evidence acquired included transcripts of Hungarian radio broadcasts monitored during the invasion.

The Committee made three reports to the Assembly: an interim report, a formal and unanimous report on June 12, 1957, concluding that the Soviet Union had invaded Hungary in response to a spontaneous national uprising, and a supplemental report on the executions of Nagy, Pal Maleter, and their associates. The Committee’s reports exposing the widespread denial of human rights led to the passage of a resolution sponsored by the United States and 36 other states declaring that the events preceding and precipitating the Soviet invasion constituted a spontaneous national uprising. The Soviet Union and the Kadar regime in Hungary were both condemned.

The work of the Committee, established several weeks after the fall of the Nagy government, could not have been and was not expected to accomplish a return to the status quo ante. It did, however, compile, in massive and persuasive form, a complete documentation of the nature of the Hungarian uprising which precipitated the Soviet intervention. The reports irrefutably established and publicized the national uprising, the Soviet invasion, and the denial of human rights, including the executions of Nagy, Maleter, and others, to the effect that the political costs to the Soviets of the invasion were greatly increased. Of particular relevance here is the fact that these reports were accomplished without access to Hungary or the Soviet Union.

The case much more obviously and tragically demonstrates the inability of the United Nations, or any nation or other grouping of nations, to prevent aggression within the “sphere of interest,” or as it is euphemistically termed today, the “security zone,” of a great power. But that point, while a valid reminder as to the limited nature of the criteria here used to determine success or failure of a fact-finding mission, does not negate the real though limited utility of the fact-finding mission itself when judged on the

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basis of its own objectives, not upon the ability or the inability of the United Nations to resolve ultimately the dispute.

The Hungarian fact-finding model has been frequently employed when cooperation and access have been denied. The Angolan crisis of February, 1961, is an example. The Security Council and Assembly jointly established the Subcommittee on the Situation in Angola, a fact-finding body appointed by the President of the Assembly. This body was directed (in now standard and appropriately ambiguous language that does not demand access to a state to perform the mission) to "examine the statements made before the Assembly concerning Angola, to receive further statements and documents, to conduct such inquiries as it may deem necessary and to report to the Assembly as soon as possible." Portugal considered the Subcommittee to be illegal and refused it entry into Angola. The chairman of the Subcommittee was, however, invited to Lisbon in a "personal capacity" to receive the Portuguese explanation of events in Angola. The Subcommittee visited the Congo (Leopoldville) and received both eyewitness and documentary evidence from Angolan refugees, specialized agencies of the U.N., and the government of Portugal. The two reports issued were highly critical of Portugal, but were not as concrete and definitive as in the Hungarian case. While a broad and probably quite accurate picture was presented of the events in Angola, the remoteness of some of the areas where alleged violence occurred and the uneven quality of the testimony received made the report less specific and reliable than the report on events in Hungary.

When the United Nations has been given cooperation and access, the common human rights fact-finding mission has consisted of a special representative of the Secretary-General, with supporting staff. This form was used in the Middle East following the hostilities in 1967. In this dispute, the Security Council declared its concern over the human rights of refugees, civilians within territory occupied by the Israelis and detainees, and prisoners of war. The Secretary-General was asked to see that the humanitarian principles of the Geneva Conventions were strictly observed, and to report to the Council. The Secretary-General appointed Mr. Nils-Goran Gussing as his Special Representative with a directive to report on

302 Particularly in African territories held by Portugal, Rhodesia, and South Africa.
304 Three types of situations involving race relations and human rights in South Africa have resulted in U.N. fact-finding activities. The first, in 1946, involved people of Indian origin in South Africa. This was later joined on the Assembly agenda with the issue of apartheid. The third situation has involved South-West Africa. In each case, access was generally denied the fact-finding bodies although the chairman and vice-chairman of the committee concerned with South-West Africa were allowed by South Africa to visit Pretoria and South-West Africa, under carefully controlled conditions. As a result, the committees have been forced to receive evidence in the manner of the Hungarian and Angolan cases.
the condition of the civilian population and prisoners. The Special Repre­
sentative was allowed access to the states involved. He and his staff
accepted testimony in the form of interviews with general and local gov­
ernment officials, with spokesmen from local populations, with refugees
and prisoners, and with representatives of other United Nations agencies.
Complete freedom of movement was granted the Special Representative
and his staff, but all interviews were conducted in the presence of repre­
sentatives of the government. Documentary evidence was also accepted
from various groups and governments. The report,\textsuperscript{305} while apparently
presenting a generally accurate picture of the conditions of civilian popu­
lations and prisoners in occupied territories, itself recognized its limita­
tions. The intensity of feelings on the part of witnesses presented the Spe­
cial Representative with great variance between accounts of the same
events; all sides attempted to use the mission as a propaganda springboard
to buttress their various positions; the time limitation placed upon the
mission precluded verification of much of the testimony; and the Special
Representative was all too often at the mercy of governmental representa­
tives in relation to much of the evidence received.

The fact-finding modality used here, and the general problems which
were encountered, were similar to those involved in the dispute between
Guinea and Portugal in 1970. The differences in success were not caused
by the nature of the fact-finding missions (border dispute as opposed to
deprivation of human rights), but were largely due to better organization
and administration in the Gussing mission.

\textit{Questions of Sovereignty}

A third major category of United Nations fact-finding includes those
cases concerned primarily with some aspect of sovereignty. In the majority
of these cases — Germany, Kashmir, Bahrain, Korea, West Iran, Indo­
nesia, Congo, Cyprus, and the Dominican Republic — the fact-finding
issues all related to questions of popular representation, self-determination,
and the relationship of minorities to the government or the state. Occa­
sionally, a secondary function in such cases was the accomplishment of a
transfer of power from an outgoing regime to its successor. This might
include aiding in the demobilization of forces, providing some govern­
mental services during the transition, and training personnel within the
new government. In addition, emerging United Nations competence
within the security zones of the superpowers is a factor of some impor­
tance. Only two cases — Equatorial Guinea and Palestine — fall with­
out this grouping, or, if the questions of sovereignty are seen as a con­
tinuum, they must be considered at the two polar positions. Equatorial
Guinea represents the most simple — if not ludicrous — case involving a
question of sovereignty while Palestine presented the most complex and
serious of questions.

\textsuperscript{305} Report of the Secretary-General under G.A. Res. 2252 (ES-V) and S.C. Res.
U.N. Successes

Success\textsuperscript{106} in United Nations fact-finding on issues relating to sovereignty has been due to several factors. First, the issues in some cases have been so simple, or the stakes so small, that it might have demanded some ingenuity on the part of the fact-finders to fail. Second, the issues, if important, did not involve the central national interests or national security of the disputants. Third, the Security Council, by working with complete unanimity, has occasionally managed to exploit the coercive potential of the United Nations in some cases involving vital interests of the parties and other interested states.

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Equatorial Guinea presents an example of successful fact-finding where the issues involved were simple and not without comic opera overtones. In February, 1969, the Secretary-General received a telegram from the President of Equatorial Guinea requesting a United Nations peace force to repel Spanish violation of Equatorial Guinean sovereignty by armed assault.\textsuperscript{107} The purported violence occurred when Equatorial Guinea requested that the number of Spanish flags displayed at the Spanish diplomatic mission be reduced to that number enjoyed by other embassies. According to Spain, the Spanish consul did not reject the Guinean demand but informed them that such a demand must be made through proper diplomatic channels. Following this, on February 23, representatives of the Guinean press entered the consulate grounds and violently removed a flag. At no time, according to Spain, was there a mobilization of the 260 man Spanish force stationed in Equatorial Guinea. Spain requested the Secretary-General to send a representative to Equatorial Guinea to insure the protection of Spanish nationals and to determine the facts of the dispute.\textsuperscript{108}

Subsequent to a demand by the President of Equatorial Guinea that a U.N. peace force be sent and that all Spanish forces be withdrawn,\textsuperscript{109} the Secretary-General named Mr. Marcial Tamayo as his personal representative, with terms of reference to “lend his good offices in order to help in the solution of the difficulties...”\textsuperscript{110} Tamayo met with the President of Equatorial Guinea and the Spanish ambassador and effected a withdrawal of Spanish military forces, something Spain had consistently stated her willingness to do if Spanish civilians also wishing to depart could do so.

\textsuperscript{106} It should be noted that a fact-finding mission may enjoy success on one issue and failure upon another, both within the same dispute. Separate issues can be categorized as having been successfully or unsuccessfully resolved. No attempt has been made to categorize the entire mission as being successful or a failure.
\textsuperscript{107} Cable from the President of Equatorial Guinea to the Secretary-General, U.N. Doc. S/9034 (1969).
\textsuperscript{109} Cable from the President of Equatorial Guinea to the Secretary-General, U.N. Doc. S/9037 (1969).

The most significant result of the affair, however, was the departure from Equatorial Guinea of all Spanish doctors and medical technicians, leaving the country without any medical services. This result, foreseeable from the beginning, was only partially remedied by U.N. assistance. Clearly, Spain had little incentive to remain; Equatorial Guinea had emotional and intangible values to gain and very tangible losses to incur by Spanish withdrawal. Not without precedent, the emotional factors prevailed. The precipitating cause — the number of flags flown at the Spanish consulate — was unimportant and uncontested; successful resolution of the dispute was all but insured.

A second and similar reason for success is that the issue, though important, has not involved vital national interests, security, or ideology of the disputants. Furthermore, alliance structures have usually not been involved. Accordingly, the disputants have usually been willing to consider more direct, if not binding, third party participation in the settlement of the dispute. The good offices mission to Bahrain\footnote{An archipelago of over thirty islands, of which only five are inhabited, lying midway in the Persian Gulf, 15 miles at the nearest point from Saudi Arabia, 18 miles from the tip of the Qator peninsula and 150 miles from the coast of Iran.} presents a good example of such fact-finding. In this case, the United Kingdom and Iran disagreed as to the status of Bahrain; the former considered it to be an independent Arab state, the latter maintained that it was part of Iran.\footnote{The U.K. had maintained treaty relationships with Bahrain as an independent Sheikdom since 1820. Bahrain was admitted as an associate member of UNESCO in 1966, of FAO in 1967, and WHG in 1968.} Both states requested that the Secretary-General exercise his good offices, determine the wishes of the people of Bahrain, and recommend a course of action. Both sides further agreed to abide by the recommendation, subject to its endorsement by the Security Council. On March 20, 1970, the Secretary-General appointed as his Special Representative Mr. Vittorio Guicciardi to lead the good offices mission.\footnote{Note by the Secretary-General, U.N. Doc. S/9726, at 2 (1970).} His terms of reference, agreed upon by the disputants, directed him to ascertain the wishes of the people of Bahrain. The mission, conducted in Bahrain, invited, with the help of the media, all persons and any organizations to make known to the Special Representative their wishes concerning the status of the country. Although the Special Representative was given a list of organizations and institutions from which he might select several to sample public opinion, he wisely decided to receive representatives from all interested organizations and institutions. In addition, the Representative received testimony from all individuals who desired to express their opinions. He also personally visited several villages to insure that opinion there was consistent.
with volunteered testimony. The Special Representative concluded that the overwhelming majority favored an independent sovereign state.\(^{115}\)

(3)

A third basis for fact-finding and mediatory success in a dispute is that the U.N., due to the confluence of several factors, may be able more effectively to coerce support for peaceful resolution. The utilization of this power, however, may largely depend on the quality of initial fact-finding. If a fact-finding mission presents an accurate characterization of a dispute, it may prevent the superpowers from inaccurately viewing events as possessing ideological overtones or strategic factors affecting them. As a result, concerted action may be possible, allowing the U.N. to act in its corporate capacity under its chapter VI and especially its chapter VII powers. The Indonesian case illustrates this point. In this dispute, the Consular Commission’s first report\(^{116}\) characterized the conflict as a nationalistic guerrilla war waged by the Republican Indonesian forces, with the support of virtually all educated Indonesians, against the colonial Netherlands regime. On the basis of this report, the Security Council unanimously viewed the conflict as being part of the difficult but inevitable process of decolonization. Unanimous Council action was also prerequisite to the intense pressure put upon the Dutch to accept the recommendations of the United Nations Commission for Indonesia (UNCI),\(^{117}\) successor to the Good Offices Committee, leading to final political settlement between the Netherlands and the Republican forces. Council unanimity led to a resolution which seemingly extended de facto power of arbitration to UNCI.

It would be difficult to overestimate the value of the information provided by UNCI. Had the Soviet Union or the United States interpreted the events in Indonesia as being part of the Cold War, with ideological content and consequences for that struggle, a protracted war with substantial foreign intervention might have resulted. The tragedy of Vietnam offers striking contrast to what may happen if Cold War antagonists become confused by an ideological red herring and categorize what is dominantly (though not exclusively) conflict resulting from the last death throes of the colonial system as if it were (dominantly) a conflict fought within the arena of the Cold War.

**U.N. Failures**

The United Nations has also experienced varying degrees of failure\(^{118}\) in fact-finding involving issues which relate to popular representation, self-


\(^{118}\) See note 106 supra.
determination and the relation of minorities to the government. These failures have resulted from many causes. First, the U.N. may have been attempting to accomplish mutually incompatible goals. Second, the issues involved in the dispute may have been so complex and intractable that failure was almost inevitable. Third, solution of the issues in dispute may have required fact-finding through plebiscite or national elections, functions frequently beyond the capacity of the U.N.

Mutually incompatible functions when performed simultaneously by the United Nations may cause fact-finding operations to fail, especially when they involve issues of sovereignty which often cut close to the sinews of national existence. For example, simultaneous U.N. fact-finding and peace-keeping operations may result in the failure of the former. United Nations fact-finding in the Congo was ineffectual due to the dominant role played by the United Nations Operation in the Congo (ONUC) in its peace-keeping activities. ONUC, as the major peace-keeping force in the Congo crisis, established the United Nations as a direct participant rather than as a neutral and unbiased third party. The omnipresence of ONUC made it impossible for the Conciliation Commission (the U.N.'s fact-finding organ) to establish a separate identity. It, therefore, was seen by the parties as having lost objectivity and neutrality. Whatever the fairness of this judgment, the fact remains that a prerequisite to successful fact-finding and mediation is not only the actual objectivity and neutrality of the fact-finders, but the perceptions of the parties regarding these crucial characteristics.\footnote{This does not necessarily lead to the conclusion that ONUC's activities were undesirable or unsuccessful. It may (or may not) be that peace-keeping was more valuable than fact-finding and mediation. But it is hard to dispute the conclusion that the two are incompatible when the peace-keeping operation is as large as ONUC.}

The simultaneous implementation of seemingly incompatible functions may not, however, be the major factor accounting for the failure of a particular fact-finding mission. For example, the failure\footnote{U.N. peace-keeping in the Cyprus dispute has largely been successful. It should be noted once again that a judgment of success or failure here refers only to the fact-finding and mediation efforts of the United Nations.} of fact-finding mediation efforts in the Cyprus Case was due to the intractability of the underlying issues rather than the incompatibility of United Nations roles. The United Nations Peace-Keeping Force in Cyprus (UNCICYP), while substantial, never dominated the stage sufficiently to submerge within it the identity of other United Nations actors. Also, unlike the Conciliation Commission in the Congo, the Cyprus mediator, whose selection had been approved in advance by all parties, came from a state not contributing a military contingent to the peace force. Consequently, the mediator established an identity apart from UNFICYP. His inability to achieve a stable peace was caused by the seeming impossibility of settlement when the two

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most obvious solutions — integration of a minority into the majority to accomplish a unitary state, or the partition of the state into distinct confederated or entirely separate units — were both rejected by one or the other party. The causes of failure in Cyprus, therefore, were more analogous to similar causes in the Kashmir dispute rather than those producing fact-finding failures in the Congo.

(3)

The United Nations has been similarly ineffective in accomplishing fact-finding or mediation through plebiscite or national election in disputes which involve questions of sovereignty. In such cases, a state party to the dispute or an ally is often in a position to prevent a plebiscite or an election. India, for example, although promising to allow a plebiscite early in the Kashmir dispute, has consistently been able to prevent such a solution. The Soviet Union and North Korea refused to allow the United Nations to monitor national elections throughout Korea for a constituent assembly. Indonesia, after achieving national independence under the banner of self-determination, refused to allow the United Nations Temporary Executive Authority (UNTEA) to conduct a plebiscite to determine the relationship of West Irian to Indonesia. Fact-finding functions within each of these cases were accomplished but the central role of determining by election or plebiscite the will of the people regarding allegiance to competing governmental entities was in each case thwarted.

The United Nations Military Observer Group for India and Pakistan (UNMOGIP) and its predecessor, the United Nations Commission for India and Pakistan (UNCIP) were immediately successful in achieving, and for a substantial time maintaining, a cease-fire. The Commission compiled impressive reports on the political and economic conditions in the states of Jammu and Kashmir including an analysis of the attitudes of organization leaders and individuals concerning their allegiance towards India and Pakistan. This information, in part supposedly preliminary to a plebiscite, served only a limited purpose because India successfully avoided such a result. Movement toward effective mediation was never accomplished due to the intractable nature of the racial, religious, and national issues in the conflict.

In Korea, the United Nations Temporary Commission on Korea (UNTCOK) and its successor, the United Nations Commission on Korea (UNCOK), were unable to effect Korean independence through national assembly elections. The Soviet Union considered the United Nations activities in Korea to be violative of the Charter and refused to cooperate. Elections within South Korea were held, however, and a government was established under United Nations supervision. This result provided a governmental entity which could oppose subsequent attack from North Korea, but probably eliminated whatever chance there might have been to effect national unification by more protracted negotiation.

In that part of the Indonesian crisis involving the status of West Irian, UNTEA was effective in providing interim governmental services in West
Irian prior to Indonesian control but was never allowed to conduct a plebiscite to determine the will of the people regarding national union. Although Indonesia had previously agreed to a United Nations conducted plebiscite, it repudiated the agreement when effective control was assured. The United Nations, therefore, could not assure that the transfer of governmental control which it peacefully accomplished reflected the will of the local populace.


Of particular importance to fact-finding in cases involving questions of sovereignty is the relationship of the conflict to the security zones or spheres of interest of the two superpowers. Both superpowers have attempted with uneven results to establish U.N. jurisdiction to deal with disputes within the security zone of the other while at the same time limiting or denying such competence within its own region or area of interest. Each superpower has attempted to establish primary, if not exclusive, jurisdiction over disputes occurring within or between states members of regional organizations that the superpowers dominate.

In the Hungarian case, as has been previously noted, the United Nations, though denied access to Hungary by Hungarian and Soviet authorities, was able successfully to perform fact-finding functions sufficient to establish the nature of the strife within Hungary and to document the effects of the Soviet invasion upon Hungarian sovereignty.

In the civil war within the Dominican Republic, the Soviet Union was the dominant force asserting United Nations fact-finding competence. In this crisis, at the request of the government of the Dominican Republic, the United States landed troops there on April 28, 1965, for the announced purpose of protecting its citizens and the citizens of other countries. A Special Committee of the Organization of American States was dispatched to the Dominican Republic in May in a fact-finding and mediatory capacity. An Inter-American Peace Force (IAPF) replaced and absorbed the United States forces. Over strong United States opposition based upon the alleged necessity of exhausting regional remedies before appealing to the United Nations, the Security Council passed a resolution which authorized the Secretary-General to send a representative to the Dominican Republic. The Secretary-General appointed Mr. José Antonio Mayobre of Venezuela as his Special Representative. Mr. Mayobre, formerly a high official in Romulo Betancourt's Acción Democrática Party and sympathetic to the "constitutionalists," was given simple fact-finding powers to observe and report to the Council. The day after the Special Representative arrived in the Dominican Republic (May 20, 1965), his powers were increased by a Council decision directing him to

111 See pp. 455-58 supra.

seek a suspension of hostilities and an extension of free movement for the Red Cross in caring for the wounded.

In addition, the Special Representative served on occasion as an intermediary between “constitutionalists” and the Special Committee of the OAS. He investigated numerous complaints of cease-fire violations, and submitted a series of reports to the Council on the situation within the Dominican Republic. The OAS officials considered the reports to be slanted toward the position of the “constitutionalists.” This could, however, be accounted for on bases other than personal bias. First, the Special Representative, especially at the beginning of his mission, received little cooperation from the IAPF and the Imbert faction. As a result, he was left with little data other than that supplied by the “constitutionalists.” Second, the Special Representative might have considered, with good cause, the reports of the OAS to be slanted against the position of the “constitutionalists,” thus requiring some special effort to obtain their points of view in order to provide some balanced understanding of the situation in the Dominican Republic.

Whatever the fact-finding value of the reports of the Special Representative, he performed very limited mediatory functions leading to a settlement of the dispute. Successful mediation was accomplished largely by the Special Committee of the OAS.

The Soviet Union, along with Archbishop Makarios, was also successful in establishing United Nations competence in the Cyprus dispute. The United States and Western European states attempted unsuccessfully to keep the dispute within NATO. The Secretary-General was authorized by the Council (in the form of a resolution drafted in the office of the Secretary-General) to establish a peace-keeping force, appoint a commander who reported directly to the Secretary-General, and determine the composition of the force. In addition, he was empowered, after consultation with the governments of Cyprus, Turkey, Greece, and the United Kingdom, to appoint a mediator who also reported directly to the Secretary-General. Hostilities were eventually terminated though a political solution to the dispute has been stalemated.

In general, the fact-finding and mediatory competence of the United Nations within regions of interest of the superpowers has increased, but its effectiveness in such areas is still limited. The United States and Western European countries have been more reticent than the Soviet Union to deny the United Nations access to states within their regions. Even though the Soviet Union and other Warsaw Pact states have not permitted United Nations fact-finders access in disputes within that region, a much more effective fact-finding operation was accomplished in the Hungarian case than in either the Dominican Republic or in Cyprus. Still, state practice and U.N. precedent have a long way to go before that status is reached in which a state could be protected from aberrant regional norms through a requirement of prior Security Council approval before a regional organization could employ force against a state within the region.
to enforce regional homogeneity. With the exception of the Cyprus peace-keeping activity, United Nations experience within the regions of special interest to the superpowers has been limited to fact-finding operations, with and without access to the state in question, but always in the form of investigation after the fact, never with prophylactic power to deter intervention.

Palestine — A Continuing Crisis

In complex situations, the success of fact-finding concerning issues of sovereignty might not be determinable until the crisis is resolved. The Palestine question is such a dispute. This crisis presented the U.N. with its most difficult fact-finding challenge. The Palestine crisis represents U.N. fact-finding at the most extreme end of the continuum of the issue of sovereignty. For here, United Nations fact-finding led directly to the creation of a new state and the displacement of thousands of persons previously inhabiting the new state's territory. Over a dozen different U.N. fact-finding bodies have dealt with some aspect of the Palestine question since the United Kingdom first brought the matter before the world body in April of 1947. The most important U.N. fact-finding ever done was accomplished during the period beginning before the creation of the state of Israel through the truce preceding the armistice agreements. This was the period in which the issue of Israeli sovereignty was determined. The period included the accomplishments of the Special Committee on Palestine (UNSCOP), which led directly to the partition of Palestine and the creation of a Jewish state, as recommended by the majority report of the Committee; the U.N. Commission for Palestine, which became the mandatory power after British withdrawal and established frontiers and a provisional council of government; the Truce Commission and the U.N. Mediator, who replaced the Commission after its failure and dissolution, and was in turn replaced by the Palestine Conciliation Commission; and finally the work of the U.N. Director of Relief for Palestinian Refugees. This first period of U.N. fact-finding ended with the replacement of the truce by armistice agreements. While complete failure (e.g., the problem of refugees) and partial success can be identified within limited reference points, an accurate analysis of the success or failure of the United Nations in its fact-finding leading to the creation of the state of Israel cannot now be made since ultimate resolution of the conflicts stemming from that decision has not been accomplished. The soundness of the ultimate decisions affecting rights of self-determination cannot be meaningfully evaluated until the ongoing crisis in Palestine is finally resolved.

Simple Fact-Finding

A final, less important type of fact-finding has been accomplished by the United Nations. In the tradition of the early Hague Conference cases, the fact-finders in these cases were directed to simply find and report the facts.

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1 See R. Barnet, supra note 62, at 279; R. Falk, supra note 62, at 150–51; Firmage, supra note 62, at 420–21.
without exercising powers of mediation, good offices, negotiation, or arbitration. Usually, but not always, the dispute is free from difficult problems of geopolitical, ideological, or Cold War conflict. When these factors are present, the fact-finding operation is carefully circumscribed, and, therefore, given greater chance for success. This success is at the same time both caused and severely limited by the limited nature of the fact-finding mission. In more complex disputes such as Palestine, the fact-finders commissioned to determine the status of Jerusalem may experience success in their mission, but the mission may be so limited in scope that no value is accomplished toward the solution of the ultimate conflict. In the alternative, if the scope of the fact-finding mission encompasses essentially all of the issues in dispute, the dispute itself is by definition so unimportant that world peace is hardly affected. The value, therefore, of this category of United Nations fact-finding is real but quite limited.

United Nations fact-finding concerning the status of Jerusalem is one of the best examples of a complex dispute in which a carefully limited, simple fact-finding mission accomplished its purposes but had little or no impact upon the dispute. Directly after the June, 1967 war, the General Assembly on July 4 expressed its concern that the status of Jerusalem was being consciously and permanently affected by Israeli occupation and conduct aimed at the integration of Jerusalem into the state of Israel. The Assembly passed a resolution calling upon Israel to “rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.” On the 14th of July, the Assembly adopted another resolution which deplored Israel’s failure to implement the earlier resolution and requested that the Secretary-General report to the Council and the Assembly on the situation in Jerusalem.

One month later, the Secretary-General circulated a note to the Assembly and Council announcing the appointment of Ambassador Ernesto Thalmann of Switzerland as his Special Representative in Jerusalem. The Special Representative was directed to establish only the facts concerning the status of Jerusalem so that the Secretary-General might accurately report to the Council and the Assembly. After a two week on-the-spot investigation in which he was accorded freedom to move throughout the city and was able to talk privately with Israeli and Arab groups and individuals, the Special Representative provided the Secretary-General with the basic facts concerning the status of the city.

As reflected in the Secretary-General’s report to the Security Council and the General Assembly, the Special Representative found that Israel

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124 As was the case with the mission of the Special Representative of the Secretary-General regarding the status of Jerusalem following the 6-day war of June, 1967.
had no intention of relinquishing the Old City and was integrating it into the state; further, the subject was not open to negotiation or compromise. Other reported points of conflict included the clash between Israel's secular law and the Koranic law of the Arab populace, the alleged desecration of Holy Places, the impact upon the Arab population of Israel's education system, and generally, the overall impact of Israeli institutions upon the Arab way of life, language, and traditions.

The Secretary-General's report had no noticeable impact upon the continuing crisis which followed the June war. No action based upon the report was taken by the Assembly, and it is doubtful that any action could realistically have been taken which would have had any impact upon the status of the city. Furthermore, world-wide concern over the status of the city was absorbed into the general concern over the entire Middle East crisis.

In contrast to the fact-finding mission which is limited to a narrow issue of a more complex dispute, the more numerous and more effective type encompasses almost all the issues of a comparatively simple dispute, e.g., the "Hull" or "Dogger Bank," the Tubantia, Tiger Tavignano, Camouna and Gaulois, or the Red Crusader cases. Such fact-finding missions, like their counterparts above-described which operate within more complex disputes, perform simple fact-finding without a mandate to accomplish negotiation, mediation, good offices, or arbitration. These missions, however, unlike their counterparts, encompassed the entire subject of the (unimportant) dispute. Examples of such fact-finding might be in the maritime tradition of the early Hague Conference cases, such as the fact-finding associated with the Corfu Channel incident of 1946; or, the nature of the dispute, while still simple, might involve a single event (non-maritime), such as the death of Mr. Lumumba, the assassination of the Prime Minister of Burundi, or the death of Mr. Hammarskjöld.

It should be emphasized that only in this fourth category is United Nations fact-finding insulated entirely from related activities such as cease-fire observation, truce maintenance, good offices, mediation, or arbitration. In an apparent attempt to return to the simpler times of the Hague and League experience, the Netherlands has periodically proposed the creation of a permanent fact-finding body under United Nations direction.

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129 In which two British destroyers were damaged and 44 lives lost due to Albanian mines in an international waterway between Corfu and Albania.
which would be limited strictly to finding the facts and reporting. United Nations fact-finding activities concerning border disputes, human rights issues, and sovereignty cases would presumably be excluded from consideration by such an institution. It may be questioned whether a permanent organization is needed to perform the tasks least important to the maintenance of peace. For in this final category success of the fact-finding mission is assured in direct proportion to the insignificance of the subject matter of the dispute.

IV. CONCLUSIONS

Distinct though limited trends may be seen in the development of United Nations fact-finding. First, the role of the Secretary-General in fact-finding is increasing in scope and in importance. This trend, beginning with UNEF in 1956, has consistently though gradually become more pronounced. In the area of fact-finding and peace-keeping, the Secretary-General was granted even more power in the Cyprus dispute than he enjoyed in the Congo. The composition of the U.N. force was determined by the Secretary-General after consultation with the governments of Cyprus, Greece, Turkey, and the United Kingdom; the commander was appointed by and reported to the Secretary-General; and the mediator was appointed by the Secretary-General following consultation with the above named states.

In the more pure forms of fact-finding without quasi-military overtones, the role of the Secretary-General is also expanding. He is increasingly receiving broad fact-finding mandates from either the Council or the Assembly or both that allow him substantial executive control. Recent examples of this trend are the missions of the Secretary-General's Special Representative to the Dominican Republic in 1965, his Special Representative in the India-Pakistan dispute in the same year, the Special Representative of the Secretary-General on the status of Jerusalem, authorized by Assembly resolution in 1967, and the Special Commission to the Republic of Guinea authorized under Security Council resolution in 1970.

Perhaps of greater importance, the Secretary-General is increasingly initiating fact-finding missions without prior Council or Assembly authorization. These missions most often have terms of reference which go beyond simple fact-finding to good offices or mediatory functions. This was done over Soviet objection in the appointment of the Special Representative of the Secretary-General to Cambodia and Thailand in 1966, the

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134 See p. 462 supra.
135 See p. 462 supra.
136 Both were sent despite the objection of a superpower, in the first case the United States, in the second the Soviet Union. (The inability of a permanent member of the Council to check this trend by veto is an important part of this development, stemming in large part from the unsuccessful attempt of the Soviet Union to prevent the creation by the Council of the Laotian fact-finding mission in 1958.) 14 U.N. SCOR, 848th meeting, U.N. Doc. S/4216, at 8 (1959).
137 Note 53 supra.
appointment of the Personal Representative of the Secretary-General in Equatorial Guinea;\(^{138}\) and the appointment of his Personal Representative in charge of the good offices mission to Bahrain.\(^ {139}\)

The zealousness with which the Secretary-General protects this growing prerogative can be seen in an exchange of correspondence between the President of the Security Council and the Secretary-General in regard to the appointment of the Personal Representative of the Secretary-General in Equatorial Guinea. The President of the Council informed the Secretary-General by letter that he had reported to the Council on their “consultation” regarding the situation and of the appointment of the Personal Representative.\(^ {140}\) The Secretary-General responded that there had been no consultation; that he had merely informed the President of the appointment, and it was not his purpose to establish “any precedent of prior consultation.”\(^ {141}\) The Soviet Union objected to this prerogative of the Secretary-General upon the ground that such missions fell within Charter provisions concerning the maintenance of international peace and security and were therefore the exclusive domain of the Council.\(^ {142}\) The Soviets restated their position taken at the time of the appointment of a Special Representative to Cambodia and Thailand.\(^ {143}\)

Identical issues were raised in the appointment of the Secretary-General’s Personal Representative in charge of the good offices mission to Bahrain.\(^ {144}\) The Soviet Union, commenting upon the appointment without prior Council approval and noting the Secretary-General’s observation that such an appointment had become “customary” in United Nations practice, wrote:

> It is a matter of common knowledge that according to the Charter of the United Nations, questions of this kind and the decisions taken on them come within the jurisdiction of the Security Council. The statement in the note that actions such as this by the Secretary-General ‘have become customary in United Nations practice’ cannot serve to justify these actions, for it is widely known that this illegal practice was forced upon the United Nations in the past by certain Powers contrary to and in violation of the Charter.\(^ {145}\)

The Secretary-General replied that from time to time certain countries request quiet and confidential help from him and that it would not be advisable to take such matters up before the Council, or to consult its

\(^ {138}\) Note 54 supra.

\(^ {139}\) Note 55 supra.


\(^ {144}\) Note 55 supra.

members individually. The Secretary's letter concluded that "in the case in question, the good offices mission to Bahrain is engaged only in a fact-finding exercise. The facts found will, in due course, be presented to the Security Council in the form of a report from the Secretary-General. Any substantive action would be taken at that time and only by the Security Council."146

This trend of an increasingly powerful Secretary-General in United Nations fact-finding will probably continue. The classically conservative interpretation placed upon the Charter by the Soviet Union is, however, both defensible and respectable. The Secretary-General minimized and to a degree misrepresented the functions of the good offices mission to Bahrain. For here, as in other fact-finding missions he initiated, those functions necessarily included mediation and good offices in addition to simple fact-finding. Nevertheless, the Soviet position is directly contrary to the present needs of the United Nations. Growth by several United Nations organs in fact-finding competence must take place or the U.N. will atrophy and gradually die of irrelevance. Despite accomplishments in the areas of economic development, environmental and ecological improvement, and scientific and cultural exchange, the U.N. must ultimately be judged upon its ability to foster peaceful resolution of disputes.

A second major development is the United Nations' capacity to perform fact-finding functions in disputes within the security zones of the superpowers, over their objection. As previously discussed, such activities took place in the Hungarian,147 Dominican Republic,148 and Cyprus149 cases. While United Nations fact-finding in any particular case may be either unsuccessful or undesirable, the trend, which denies to the superpowers the right to avoid those norms designed to govern the conduct of all other states, can only be applauded.

Third, in a manner somewhat related to the last point, the United Nations has shown impressive capacity to perform certain types of fact-finding activity without the cooperation of one or all parties to a dispute. This capacity was demonstrated in border disputes in the Balkans,150 and, less impressively, in the related area of demarcation line violations in Korea.151 In these cases the United Nations enjoyed the cooperation of one party to the dispute. In the Hungarian dispute of 1956,152 and in the continuing problems with South Africa153 and South-West Africa,154 however, all parties denied cooperation and access to the fact-finding missions.

147 See p. 464 supra.
148 See p. 464 supra.
149 See p. 465 supra.
150 See pp. 443–45 supra.
151 See pp. 445–46 supra.
152 See p. 455 supra.
153 See note 103 supra.
154 See note 103 supra.
Despite this, those missions enjoyed substantial success. Technological developments, particularly satellites, will most probably make it possible to increase this fact-finding capacity in certain types of disputes.

Fourth, the United Nations has demonstrated an increasing capacity to police cease-fire and armistice agreements. The organizational and technical capacity of the United Nations to perform such functions — judging from its experience in Korea, Indonesia, Yemen, Kashmir, Cyprus, and the Middle East — has grown impressively. The ultimate failure of UNEF should not be allowed to obscure this point. It cannot be expected that temporary cease-fire arrangements will last indefinitely if no visible progress is made toward the solution of the underlying dispute. If such progress is not made or seriously attempted by the parties, it should be expected that the truce or cease-fire mechanism will gradually erode and eventually disintegrate.

Fifth, the institutional capacity of the United Nations to independently perform its fact-finding missions has increased. Its growth in logistic ability and the increasing amount of materiel possessed by the United Nations has made it possible for the U.N. to independently perform all but the largest fact-finding missions. Manpower is now drawn from existing peace-keeping, observation or fact-finding missions, or from United Nations personnel. Occasionally, however, personnel and equipment are requested from states which have earmarked certain military forces for such purposes. Also, an increased confidence in independent United Nations fact-finding is reflected in the decrease in instructed delegations and the corresponding large number of delegations which report directly to the U.N. There has been steady movement away from the narrowly confined terms of reference allowing only observation and reporting, toward broad directives which permit mediation. In addition, agreements between the U.N. and the host state are now routinely formalized in status agreements with provision for contingencies previously left undetermined.

Along with these welcome trends, old problems remain. In spite of the growth in United Nations fact-finding capacity, it has continued to demonstrate uneven ability to peacefully resolve disputes. It still is and will remain easier to achieve a cease-fire than to eliminate the cause of the breach of the peace. Fact-finding has an important though limited role to play in ameliorating this incapacity.

Arguments have been made for the creation of standing United Nations peace forces. Suggested outlines have also been proposed for a standing

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154 See pp. 451-52 supra.
155 See p. 453 supra.
156 See pp. 450-51 supra.
157 See pp. 462-63 supra.
158 See pp. 446-48 supra.
peace observation unit. The delay inherent in providing such substantial forces on an ad hoc basis for major operations is an impressive argument for movement in this direction. But, for fact-finding below the level of major truce observation in the nature of UNEF, the evolutionary institutional growth allowed by present ad hoc fact-finding should be allowed to continue, unaffected by an attempt to create standing institutions of the nature of that proposed by the Netherlands. Such institutional gadgetry would tend to stultify the promising trends now present in United Nations fact-finding. Institutional growth must come not by an attempted return to the simple fact-finding of the Hague Conventions, or by a resort to the excessive legalisms and rigidities of the Bryan Treaties. Rather, it must come by gradual movement of the United Nations, as its competence and the trust of the member states will allow, into more important disputes involving major powers and critical national interests. But this requires the flexibility to accommodate the needs of the states to be able to individually fashion fact-finding, mediatory, good offices, and peace observation bodies to best meet the particular crisis of the moment. This creative time in the development of a United Nations common law of fact-finding is not the time to resurrect anachronistic institutions from a more simple past.

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162 D. Wainhouse, supra note 15, at 634–46.
163 Note 133 supra.