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United Nations fact-finding mechanisms

ECCHR paper on possible next steps on accountability in Sri Lanka within the United Nations System

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“(...) accountability is an essential foundation for durable peace and reconciliation in Sri Lanka.”¹

United Nations Secretary-General Ban Ki-moon, 22 June 2010

„An increased resort to fact-finding is needed, in accordance with the Charter, initiated either by the Secretary-General, to enable him to meet his responsibilities under the Charter, including Article 99, or by the Security Council or the General Assembly. Various forms may be employed selectively as the situation requires.”²

United Nations Secretary-General Boutros Boutros-Ghali, 17 June 1992

The Next Steps

The principal short-time goal remains to establish a *fact-finding mission*³ to gather more information and to secure evidence about violations of international law by all parties during the armed conflict in Northern Sri Lanka from 2005 to 2009.

Within the United Nations system, there are a number of different organs and agencies that have the competence to carry out a fact-finding mission. However, this paper does only focus on some UN principal organs and other UN entities, without being comprehensive. The Security Council is not addressed in this paper at the current stage of considerations and options within the UN system as well as the Human Rights Council as such.

1. The Secretary-General

The Secretary-General may send a fact-finding mission or establish a Commission of Inquiry. He/She may do so without a mandate from either the Security Council or the General Assembly. This power arises from Article 99 of the UN Charter, which reads as follows: *„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.”*⁴ The wording of this article is quite broad and permits some interpretation. There exist in particular two important competences of the Secretary-General established in the practice under Article 99: implementation of fact-finding missions and adoption of good offices.

¹ UN Secretary-General, Department of Public Information – News and Media Division New York, SG/SM/12967, 22 June 2010.

² Report of the Secretary-General, An Agenda for Peace, 17 June 1992, A/47/277 – S/24111, para. 25. (a).

³ On the concept of fact-finding see General Assembly Resolution A/RES/46/59 of 9 December 1991: “Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security”.

⁴ M.-C. Bourloyannis, “Fact-Finding by the Secretary-General of the United Nations”, International Law and Politics, 1990, Vol. 22, (641) 646.

The Secretary-General has dispatched a fact-finding mission in order to gather information on the following occasions (among others)⁵: the assassination of Rafik Hariri in Lebanon;⁶ after the military coup in Fiji in 2006;⁷ and to investigate the city “clean-up” operations in Zimbabwe in 2005.⁸

A fact-finding mission does not preclude a later, comprehensive international investigation – in the case of Lebanon, the Secretary-General first dispatched a fact-finding mission mandated to investigate the murder of the Prime Minister and the other victims of the attack. On recommendation of the Secretary-General's report, the Security Council then issued a resolution which established a full-scale Commission of Inquiry into the assassination and has since also assisted with the creation of a tribunal exclusively trying this case.⁹ The Secretary-General may also directly establish an international Commission of Inquiry, which he did in October 2009 in order to investigate the violence that took place in Conakry, Guinea, on 28 September that same year. The mandate of the Commission was to establish the facts, qualify the crimes committed, determine responsibilities, identify those responsible where possible and make recommendations.¹⁰

A fact-finding mission can also be sent without the consent of the state concerned. This shows the practice by the Secretary-General, i.e. in the conflict Djibouti-Eritrea, in which the Security Council “*encouraged the Secretary-General ‘urgently to use his good offices and reach out to both parties ... to facilitate bilateral discussions to determine arrangements for decreasing the military presence along the border and to develop confidence-building measures to resolve the border situation’*, the Secretary-General directed the Department of Political Affairs to dispatch a fact-finding mission to the two countries to assess the political, security and humanitarian situation in the area.”¹¹ In that case the Eritrean authorities refused to the mission to cross the Eritrean border, so that the fact-finding mission to Djibouti-Eritrea took in the end place without the consent of Eritrea. Other fact-finding missions, although mandated by another UN entity, such as the Commission of Inquiry on Darfur or the so-called Goldstone Commission on Israel and the Occupied Palestinian Territories, did not have access to all territories that were part of the fact-finding. Nevertheless, such a mission permits to gather information also outside the respective country, by meeting experts and refugees, as well as persons working within the closed

⁵ The Secretary-General established various different fact-finding missions, “preparatory“ fact-finding missions, for example in the context of supervision and observation of the election in Nicaragua in 1989/90 and in Cambodia in 1989 as well as in different matters, inter alia in the domain of proliferation of weapons (Report on the Fact-Finding Mission to the Kingdom of Cambodia, 13-20 June 2002), humanitarian affairs and human rights (Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe, Mrs Anna Kajumulo Tibaijuka, 18 July 2005), investigation of assassination (Report of the Fact-Finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, 25 February-24 March 2005) and conflict prevention (Fact-Finding Mission of Executive Secretary of United Nations Economic Commission for Europe to Kyrgyzstan, press conference of 16 April 2010).

⁶ S/2005/203, “Report of the Fact-Finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, 25 February-24 March 2005”, 24 March 2005.

⁷ SG/SM/10955, “Secretary-General Dispatches Fact-Finding Mission to Fiji”, 20 April 2007.

⁸ Anna Kajumulo Tibaijuka, Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina, 18 July 2005.

⁹ S/RES/1595, 7 April 2005.

¹⁰ S/2009/693, 18 December 2009, p. 2.

¹¹ S/2008/602, 12 September 2008, para. 2.

territory which are able to travel, i.e. because of their dual citizenship.

In absence of the possibility of a fact-finding mission, the UN Secretary-General has the option to continue exercising his/her good offices. Given the lack of written specifications or constraints on his/her role in this area, this offers him/her considerable discretion in his/her use of powers.

2. The High Commissioner for Human Rights

According to the Resolution creating the post of the HCHR, the High Commissioner's responsibilities shall be *“to carry out the tasks assigned to him/her by the competent bodies of the United Nations system in the field of human rights and to make recommendations to them with a view of improving the promotion and protection of all human rights.”*¹² He/She is responsible for UN human rights activities under the *“direction and authority of the Secretary-General”*. The Secretary-General therefore has the authority to recommend that the HCHR take action on the Sri Lankan situation.

The OHCHR can conduct its own fact-finding missions or it can offer support to fact-finding missions established by the Human Rights Council or the Secretary-General. The former was done in February 2008, when a fact-finding mission was sent (established under the Rapid Response Unit of the OHCHR) to inquire into the violence and allegations of grave human rights violations following the presidential elections in Kenya in December 2007.¹³ Another example of a High Commissioner-implemented fact-finding mission is the one sent to Western Sahara in 2006, following street protests and demonstrations in several towns that resulted in numerous injuries, hundreds of arrests and allegations of torture.¹⁴ It does not, however, appear as if the HCHR is bound to the HRC for permission to send fact-finding missions.

Another option would be fact-finding missions conducted by the Special Rapporteurs on, for example, Extrajudicial Killings, Internally Displaced Persons, the Protection of Human Rights while Countering Terrorism, and the Independent Expert on Minorities.

3. The General Assembly

The General Assembly has, like the Secretary-General and the Security Council, the competence to conduct fact-finding missions. It may receive and consider reports from the Security Council and other United Nations organs, and could - based on these reports - *“provide for recourse to fact-finding in its resolutions relevant to the maintenance of international peace and security.”*¹⁵

¹² A/RES/48/141, 20 December 1993, § 4(b).

¹³ OHCHR Annual Report 2008, p. 152. Report from OHCHR Fact-Finding Mission to Kenya, 6-28 February 2008.

¹⁴ Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf 15/23 May and 19 June 2006, 8 September 2006.

¹⁵ A/RES/46/59, 9 December 1991, Annex § 11.

“The Assembly may also take action if the Security Council fails to act, owing to the negative vote of a permanent member, in a case where there appears to be a threat to the peace, breach of the peace or act of aggression. The Assembly can consider the matter immediately with a view to making recommendations to Members for collective measures to maintain or restore international peace and security”.¹⁶ In order to do so, the General Assembly may hold a special session, which could be convoked by the Secretary-General at the request of a majority of Member States.

A working group could also be created: such have been established and used to gather facts before, without the cooperation of the state concerned (in the cases of Hungary after the 1956 uprising and South Africa during apartheid).¹⁷ Such a group would also perform an investigative function. However, this is dependent on a majority of the Member States wishing such action to be taken regarding Sri Lanka.

4. Inter-Agency Fact-Finding Mission

There is also a possibility of fact-finding being conducted by an inter-agency mission. Judging by practice, it appears that such missions may have different origins. For example, when evaluating the health situation in Malawi, the Inter-Agency Standing Committee (IASC) decided to send a mission in order to assess the severity of the food crisis 2002.¹⁸

In other instances of humanitarian crises fact-finding missions have been sent mainly by the agencies working in the field, such as the mission to Afar and South Welo on the return of Ethiopian nationals from Eritrea, led by the UNDP Emergencies Unit for Ethiopia.¹⁹ In another instance 2004, a UN inter-agency mission consisting of technical staff from UNICEF, WHO and FAO under the leadership of OCHA was carried out to the town of Kailek in South Darfur. There the objective was to “assess the security and humanitarian conditions in Kailek town, with the intention of soliciting a concrete plan of action from the local authorities to alleviate the situation of the IDPs in that location.”²⁰

If the field offices can undertake their own coordinated fact-finding missions, or if the IASC can decide on such an undertaking, it is possible that it is an option more likely to succeed than an international commission of inquiry. Such a fact-finding mission might deal more with more specific issues of the conflict, as opposed to a full-scale international inquiry, but they would not exhaust such a possibility – such reports could be used to prompt an international commission of inquiry.

¹⁶ A/RES/377(V), 3 November 1950.

¹⁷ Sydney D. Bailey, 'UN fact-finding and human rights complaints', *International Affairs*, 2 (1972), pp. 250-266.

¹⁸ WHO, Health Assessment Mission in Malawi (19 April–10 May 2002).

¹⁹ UNDP, UN Inter-Agency Fact-Finding Mission to Afar and South Welo on Ethiopian Nationals Returning from Eritrea, 16 – 19 October 1998.

²⁰ United Nations Inter-Agency Fact Finding and Rapid Assessment Mission: Kailek Town, South Darfur, 25 April 2004.

The Principal Aims

The long-term goal of a fact-finding mission is to create further steps towards accountability depending on the results of such a fact-finding mission. The information gathered may then be used to push the issue further along in the UN system, to take it to the International Criminal Court or to serve as evidence for cases tried under universal jurisdiction in single states. Even if such evidence would not be used immediately for prosecutions, it is still essential and of utmost importance that it is gathered now, before it is lost, in order to establish a thorough record of events. Such records would also be important should there be a genuine attempt at a “truth and reconciliation” effort within Sri Lanka.

Accountability for crimes under international law is not only essential for a reconciliation process within the country, in which all parts of the society have to face the past, but also to enforce international laws. Especially grave breaches of the Geneva Conventions are considered as war crimes and every state is under the legal obligation to investigate and prosecute those crimes. In a case of total impunity for the atrocities committed in Sri Lanka, other states would feel supported in conducting a similar military campaign against separatist groups within their territory – once again, the civilian population would in the end pay the price.

1. Security Council actions

Regardless of who undertakes the fact-finding mission, such reports, if finding that there have been serious violations of international law, should be submitted to the Security Council.

Security Council Resolution 1366 “[i]nvites the Secretary-General to refer to the Council information and analyses from within the United Nations system on cases of serious violations of international law, including international humanitarian law and human rights law and on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development and expresses its determination to give serious consideration to such information and analyses regarding situations which it deems to represent a threat to international peace and security.”²¹ Thus, if a fact-finding mission is conducted by any body within the United Nations system and the Secretary-General is informed, he can report on the findings of the mission to the Security Council, which from there on could decide between a number of different actions:

Establishing a Commission of Inquiry: the Security Council could create a further and more thorough investigation of the situation, as was done with Lebanon, with the aim to ensure accountability. Based on this, a tribunal could be established. The Security Council also established the International Commission of Inquiry on Darfur in 2004,²² which set out to investigate four key issues: “(1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of

²¹ S/RES/1366, 30 August 2001, § 10.

²² S/RES/1564, 18 September 2004, § 12.

*ensuring that those responsible for such violations are held accountable.*²³ A similar mandate could also be created for Sri Lanka.

A referral to the International Criminal Court: the Security Council could decide to refer the situation of Sri Lanka to the ICC under Article 13(b) of the Rome Statute of the International Criminal Court, thereby giving the Court jurisdiction over individuals and events in the war. This would resolve the issue of impunity. Such a referral has already been made by the Security Council in the case of Darfur and it was based on the report of the International Commission of Inquiry.²⁴

Creation of a tribunal: The creation of an international tribunal for Sri Lanka by the Security Council under Chapter VII of the UN Charter (as in the case of the former Yugoslavia and Rwanda) would be unlikely – partly due to resistance within the Security Council to actions taken against Sri Lanka, and partly due to the costly and lengthy procedure these tribunals have turned out to be. UN practice since the creation of the ICTY and ICTR indicate that UN-assisted tribunals often located in the states concerned, such as the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia, would be far more likely.²⁵ This offers an opportunity to ensure accountability within Sri Lanka, by making use of the existing Sri Lankan justice system but with UN assistance. In a recent report on the possibilities of prosecuting pirates operating off the Somali coast, the Secretary-General suggested a number of different tribunal options, some of which could potentially be adapted to Sri Lankan circumstances. These include the establishment of a special chamber within the national jurisdiction (with or without UN assistance) or an international tribunal based on an agreement between the state concerned and the UN.²⁶ However, all options involving the state concerned directly depends on the political will within this country to cooperate openly and effectively with the United Nations.

2. Universal Jurisdiction (outside the UN system)

Any fact-finding reports could also be used as evidence for trying Sri Lankan cases under universal jurisdiction, meaning that prosecutors in any country can bring cases against individuals responsible for crimes against humanity and war crimes committed in the context of the Sri Lankan conflict. However, because international law confers immunity to serving state officials, this places restrictions on who may be prosecuted, risking that only “small fish” get punished while the “big fish” are rewarded with impunity. Lastly, states possess only limited resources for trying mass atrocities. As a consequence, only a small number of cases could be conducted. A comprehensive approach on accountability has to involve international and/or national judicial mechanisms.

²³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, 25 January 2005, p. 2.

²⁴ S/RES/1593, 31 March 2005.

²⁵ S/2010/294, 26 July 2010, Annex I.C, pp. 44-51.

²⁶ *Ibid.*, pp. 1-5.