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COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS

EDITED BY CHRISTIAN HENDERSON

FOREWORD

The Hon. Michael Kirby AC CMG

Chair of the UN Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea

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In October 1904 naval ships of the Imperial Russian Fleet in the Baltic Sea left their home ports on their way to the Far East to participate in a war with the Empire of Japan. Approaching the Dogger Bank area of the North Sea, and allegedly basing their action on 'intelligence' reports, the ships opened fire on a harmless collection of British fishing vessels, causing death and destruction.[1]

When the news broke in England, the Russian excuse that they had mistaken the fishing boats for torpedo-carrying Japanese warships was dismissed contemptuously. Few believed that anyone claiming to be a mariner could make such a mistake, especially thousands of miles from the warzone and given the huge disparities between the sizes of the ships concerned. In consequence, there was a real risk of war. As a result of French intervention, the parties concerned agreed to convene a commission of inquiry under the *Hague Convention* of 1899. The commission met in Paris. Its investigations unveiled the nervousness of the Russian sailors and the rumours that unleashed the attack (which

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[1] R.N. Lebow, "Accidents and Crises: The Dogger Bank Affair" (1978) 31 *Naval War College Review*, 66. The incident is referred to by Sir Frederick Pollock, *The League of Nations* (Stevens, London, 1920, 51

was soon followed by other disasters enroute to the warzone, when real vessels of Japan's navy trounced the Russians in combat.

The commission of inquiry met and reported promptly. Its findings were prudently written in an understated style. They even included face-saving remarks about the Russian admiral. Russia paid compensation, substantial for the times, to the families of the dead fishermen. A memorial, of which there were shortly to be many more, was erected in Kingston upon Hull. War was avoided. Honour was saved. The *Entente* between France, Russia and Britain was preserved to await the Great War which lay just around history's corner.

Ironically, the Great War itself also involved a proposed commission of inquiry. Everyone knows that the war arose following the murder of Grand Duke Franz Ferdinand and his Duchess, following shots fired in Sarajevo in June 1914. The immediate *casus belli*, however, was the refusal of Serbia (that agreed to many other terms) to bow to Austrian demands about the constitution of a commission of inquiry to investigate the Sarajevo incident.[2] One commission of inquiry worked perfectly. The other never got off the ground. Unimaginable suffering, reaching right up to the current age, might have been avoided if only time had allowed wiser counsel to prevail in 1914. The mechanism was promising, given the successful recent demonstration. However, the execution was imperfect, overtaken by events and squabbling over the details.

The idea of creating commissions of inquiry to investigate dangerous incidents of international circumstances was in the air much earlier,

[2] C. Clark, *The Sleepwalkers: How Europe Went to War in 1914* (Harper, London, 2013).

indeed at the Congress of Vienna (1814-1815). After the prolonged and costly Napoleonic wars, the European powers, "tired out with war",[3] sought to establish effective institutional means to resolve dangerous conflicts and to restrain wars and the causes of war. The central idea was that the law of nations would provide an effective alternative to unbridled power. In the century of substantial peace that followed Vienna, many international arbitration treaties emerged. Eventually, the *Hague Convention* of 1899 was adopted, designed to promote peaceful solutions to conflicts. The success of the Dogger Bank Inquiry was in the minds of President Woodrow Wilson and other leaders when they gathered at Versailles and Paris following the Armistice of 1918, to create the League of Nations. The *Covenant of the League of Nations* was agreed to. Yet Wilson predicted in 1918 that peace would only be assured if it was built on foundations of law and justice:[4]

> "*It must be a justice that plays no favourites and knows no standard but the equal rights of the several peoples concerned."*

The League Council used good offices, mediation, conciliation and commissions of inquiry in various combinations. Occasionally, these mechanisms produced useful results.[5] And yet the League failed and war returned to Europe. When the *Charter* of the United Nations was agreed in 1945, it expressly envisaged the utilisation by the Security Council, in any dispute the continuance of which was likely to endanger the maintenance of international peace and security, of a search for a solution by nominated means. The second of these stated means was

[3] Pollack, above n.1, .
[4] President Wilson quoted by Pollock, above n.1 at 241.
[5] J.G. Starke, *An Introduction to International Law* (Butterworths, London, 5th Edition, 1963), 384. J.G. Starke QC, an Australian, was reputed to be the last surviving officer of the Secretariat of the League of Nations at the time of his death in 2006.

"inquiry".[6] Moreover, the Security Council was expressly authorised to "investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuation of the dispute or situation is likely to endanger the maintenance of international peace and security".[7] The Council was empowered to decide what measures should be taken, as deemed necessary for the performance of its functions.[8] Clearly these provisions envisaged the establishment and use by the Security Council of commissions of inquiry. So it was no surprise that they were created.

The broad powers of the Secretary-General[9] also envisaged such a facility. Whilst there is no express grant of the power of inquiry to the General Assembly, the ambit of that body's functions, together with the necessarily implied powers to discharge its responsibilities, extended to the conduct of inquiries. These included by the initiation of studies and the making of recommendations (amongst other things) for "promoting international cooperation… and assisting in the realisation of human rights and fundamental freedoms for all".[10]

The creation by the General Assembly of the Human Rights Commission, and later the Human Rights Council, also envisaged the establishment of commissions of inquiry when deemed necessary to discharge their respective functions. Given the preceding history in the 19th Century, in the League of Nations and in the necessities presented on the creation of the United Nations in 1945, it would have been

[6] United Nations *Charter*, art. 33.1.
[7] *Charter*, art. 34.
[8] *Charter*, art. 39.
[9] Under the *Charter*, art. 97 (chief administrative officer of the Organization; "performance of such other functions as are entrusted to him"). See also art. 101.3 "highest standards of efficiency, competence and integrity".
[10] *Charter* art. 13.1(b) see also art.14.

astonishing if the new organisation had not moved quickly to create commissions of inquiry where that mechanism was deemed appropriate and necessary.

However, to the preceding history and the express and implied powers granted by the *Charter,* was added an additional dimension. This was the significant relationship envisaged by the *Charter* between the several "common ends" recognised in the "Purposes of the United Nations" stated in Article 1. These were, relevantly, to maintain international peace and security; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples; and to:[11]

> "… achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

Although human and peoples' rights preceded the adoption of the United Nations *Charter*, it was the devastating evidence of war crimes, crimes against humanity and genocide (together with the horrifying dangers of nuclear weapons) that made the potentially dangerous interconnections between such rights and international peace and security much clearer and more urgent. Initially, it was envisaged that the United Nations *Charter* itself would include human rights provisions. [12] When that proved impossible to achieve, work was continued separately on the

[11] *Charter,* 1.1, 1.2, 1.3.
[12] Mark Mazower, "The Strange Triumph of Human Rights, 1933-1950" *The Historical Journal*, vol. 47, no. 2 (2004), 379.

Universal Declaration of Human Rights (UDHR), adopted in December 1948. Having adopted the UDHR, and the treaty law that was to follow, it became inevitable that institutions would be needed to refine the applicable rules, to provide for the receipt of complaints about derogations; to facilitate investigations; to reach and express findings, conclusions and recommendations; to determine and implement responses; to adjudicate at least some of the ensuing accusations; to punish and sanction a number of those responsible; to derive lessons from the entire process; and to record, publicise and educate others on the lessons learned.

Mandate holders were needed to discharge various steps on the pathways to these responses. At the more formal and serious end of the spectrum of mandate holders were those appointed to commissions of inquiry.

During my judicial service in Australia, I was appointed to United Nations mandates involving fact-finding and conciliation[13] and to a mandate under the Human Rights Commission.[14] However, after the conclusion of my judicial service I received, for the first time, a mandate to chair a UN commission of inquiry. I was surprised by the relative lack of materials available to the Commissioners (and for that matter to their independent secretariats) to provide academic and other insights and afford guidance on the discharge of their respective duties.[15] How helpful it would have been, in preparing for our work, to have had the collection of papers now published in this book. Woven throughout the

[13] As member of the International Labour Organization Fact Finding and Conciliation Commission on Freedom of Association in South Africa 1991-92.
[14] As Special Representative of the UN Secretary General for Human Rights in Cambodia (1993-96).
[15] Subsequently the OHCHR issued *Commissions of Inquiry and Fact-Finding Missions*.

chapters are questions which both scholars and mandate holders in future COIs may need to ask themselves and to debate and resolve. The book affords its readers a thread of Ariadne: to guide the future members of COIs and to provide those working with them a means through the maze as well as measures of protection to avoid the ever threatening minotaurs of error, prejudgment, partiality and unprofessionalism.

Several authors in their respective chapters disagree with what others have written. Of course, the starting point in each inquiry must be the precise language of the mandate. Even here those appointed to a COI may adopt different approaches because of their individual backgrounds, experience and culture. A former judge from a common law jurisdiction may place a greater store on transparency than an appointee from the civilian inquisitorial tradition. A person whose background has been diplomacy may lay emphasis on resolving underlying tensions. One whose experience has been in criminal law may emphasise accountability and the emphatic exposure of wrongdoing. Thus, many of the innovations in procedures adopted by the COI on DPRK were a reflection on my own professional experience. And yet, they were readily agreed to by the two other members of that COI, each from civilian countries and one with high experience as an advocate in that tradition. Unanimously, we considered that transparency was the antidote to our exclusion from, and non-cooperation by, the country subject to our inquiry.[16] Our mandate was express and emphatic in

[16] M.D. Kirby, "United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights" (2015) 89 *Australian Law Journal*, 714 . See also M.D. Kirby, "The UN Report on North Korea: How the United Nations Met the Common Law" (2015), 27 *Judicial Officers' Bulletin* (Australia – NSW), #8, 69. The United Nations report of the detailed findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (United Nations, Geneva, 7 February 2014) (A/HRC/25/CRP.1).

relation to accountability. We were not at liberty to ignore it or to turn a blind eye.

In international jurisdiction, as in municipal jurisdiction, inquiries are proliferating, and this book turns the spotlight of inquiry upon international inquiries themselves. If this results in the strengthening of the lawfulness, consistency and professionalism in the conduct of COIs, this will itself be an important contribution to the goal of universal human rights expressed in the UN *Charter.* That goal was spelt out in the eloquent language of Eleanor Roosevelt, René Cassin, John Humphrey and others in the text of the UDHR and in the law that has followed. For the contribution that this book makes to the evolution of global human rights we should be truly grateful.

Silent, voiceless, suffering victims do not need bleeding hearts and emotional demands from COIs. If the global protection of human rights, justice, peace and security are to be attained, the needs are different. They include lawfulness, integrity, experience, professionalism, calm analysis, and contextual appreciation and insight. To the extent that the writers in this book contribute to these goals they contribute to a better, safer and less violent world.