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Commissions of Inquiry and the *Jus ad Bellum*

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I. INTRODUCTION

Commissions of inquiry are not among the protagonists within the *jus ad bellum* architecture. Nonetheless, historically, several international commissions have been established in different institutional settings specifically to inquire into situations involving the use of force. These include the Dogger Bank Inquiry into Russian firing at a U.K. trawler,[1] the Lytton Inquiry regarding Japanese military action in Manchuria in 1931,[2] and the 1961 Red Crusader Inquiry into a naval incident involving the United Kingdom and Denmark.[3] A few contemporary commissions have also addressed *jus ad bellum* questions, even if not all were explicitly mandated to do so. These contemporary inquiries include international commissions established by the U.N. Security Council,[4] Secretary-General,[5] and

[1] Dogger Bank Inquiry, established by St. Petersburg Declaration on November 12, 1904. *Report of the Commissioners, drawn up in accordance with Article VI of the declaration of St. Petersburgh of the 12th (25th) November, 1904 (Great Britain v. Russia), reprinted in* 2 Am. J. Int'l L. 931 (1908).

[2] Commission of Enquiry, established by Council Resolution on December 10, 1931. *Report of the Commission of Enquiry*, League of Nations Doc. C.633.M.320 (1932).

[3] Red Crusader Inquiry, established by Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark Establishing a Commission of Enquiry to Investigate Certain Incidents Affecting the British Trawler "Red Crusader," U.K.- Den., Nov. 15, 1961.

[4] Commission of Inquiry in connection with the Republic of the Seychelles, established by S.C. Res. 496, U.N. Doc. S/RES/496 (Dec. 15, 1981); Security Council Commission on Angola, established by S.C. Res. 571, U.N. Doc. S/RES/571 (Sept. 20, 1985).

[5] *See, e.g.*, Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, established pursuant to U.N. Secretary-General, Letter dated Aug. 2, 2010, from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2010/414 (Aug. 3, 2010).

Human Rights Council (HRC);[6] regional commissions[7] and national commissions.[8] The Human Rights Council in particular has been very active lately in establishing commissions of inquiry. Despite the identity of their parent body, the HRC commissions have generally made reference to areas of law beyond human rights, particularly international humanitarian law and international criminal law.

Given their direct engagement with law, commissions of inquiry have loosely been characterized as a new form of adjudication[9] offering some accountability prospects. As these commissions tend to operate in peace and security contexts, this Chapter assesses the current and potential role of commissions of inquiry in the overall legal framework regarding the use of force. The Chapter aims to locate commissions of inquiry within the greater *jus ad bellum* architecture. It portrays the diversity of the inquiry landscape and zeroes in on the Kosovo and Iraq Inquiries as concrete examples of inquiry practice operating in situations that evoked fundamental *jus ad bellum* questions. The Chapter also offers thoughts on the accountability potential of commissions of inquiry and on how they relate to other *jus ad bellum* actors.

[6] *See, e.g.*, Commission of Inquiry on Lebanon, established by Human Rights Council Res. S-2/1, The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations, U.N. Doc. A/HRC/RES/S-2/1 (Aug. 11, 2006) [hereinafter Lebanon Commission]; U.N. Fact-Finding Mission on the Gaza Conflict, established by Human Rights Council Res. S-9/1, The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip, U.N. Doc. A/HRC/RES/S-9/1 (Jan. 12, 2009) [hereinafter Goldstone Commission]; International Fact-Finding Mission to Investigate Violations of International Law Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, established by Human Rights Council Res. 14/1, The Grave Attacks by Israeli Forces Against the Humanitarian Boat Convoy, U.N. Doc. A/HRC/RES/14/1 (June 2, 2010) [hereinafter Flotilla Commission].

[7] Independent Fact Finding Committee on Gaza, established by the League of Arab States on January 26, 2009, League of Arab States, Rep. of the Independent Fact Finding Committee On Gaza: No Safe Place (2009), *reproduced in* Letter dated Oct. 1, 2009, from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2009/537 (Oct. 14, 2009) [hereinafter Arab League Commission Report]; Independent International Fact-Finding Mission on the Conflict in Georgia, established by Council Decision 2008/901, 2008 O.J. (L 323) 66 (EU) [hereinafter Georgia Commission].

[8] *See, e.g.*, Commission of Inquiry on Iraq (The Netherlands), established pursuant to Parliamentary Documents II, 2008/09, 31847 No. 1 (Neth.) and Parliamentary Documents I, 2008/09, 31847 No. A (Neth.); Iraq Inquiry, Parl. Deb., H.C. (2009) 23 (U.K.), *available at* www.iraqinquiry.org.uk [hereinafter Chilcot Inquiry], established pursuant to Parliamentary Statement of Prime Minister Gordon Brown on June 15, 2009, *available at* www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090615/debtext/90615-0004.htm.

[9] *See, e.g.*, Dapo Akande & Hannah Tonkin, *International Commissions of Inquiry: A New Form of Adjudication?*, EJIL: Talk! (Apr. 6, 2012), *available at* www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication.

Section II first presents the most relevant contemporary international, regional, and domestic commissions of inquiry and interrogates how they have construed a *jus ad bellum* dimension into their mandates. Given the Human Rights Council's activity in establishing commissions of inquiry, it is specifically examined whether, given the recent activation of the International Criminal Court's (ICC's) jurisdiction over the crime of aggression,[10] future HRC commissions of inquiry may be expected to become more active in the *jus ad bellum* domain. Next, in Section III, the Chapter offers some more concrete insights into practice by zooming in on the Kosovo and Iraq inquiries, which both dealt with situations that raised fundamental *jus ad bellum* questions. Subsequently, in Section IV, the Chapter situates commissions of inquiry within the greater *jus ad bellum* architecture in both institutional and normative senses. Finally, Section V concludes with some last reflections on whether and how commissions of inquiry can offer some form of accountability for illegal uses of force.

II. A PRESENTATION OF RELEVANT COMMISSIONS OF INQUIRY AND *JUS AD BELLUM* DIMENSIONS OF THEIR MANDATES

In the arena of international peace and security, commissions of inquiry operate on different levels and within different institutional settings. Not all of these commissions have an express *jus ad bellum* mandate. At the international level, the U.N. Security Council is the primary organ responsible for maintaining international peace and security, and it has the authority to establish commissions of inquiry in the exercise of this responsibility.[11] The Security Council has full discretion regarding the contours of mandates of these commissions. It may delegate its power to establish commissions of inquiry to the Secretary-General, who may also establish commissions on his or her own motion.[12] For the purposes of this Chapter, the most relevant

[10] *Id.* at 9; Rome Statute of the International Criminal Court arts. 8*bis* and 15*bis*, *adopted on* July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002) [hereinafter Rome Statute]; Res. ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression (Dec. 14, 2017).

[11] This power is conferred in U.N. Charter Article 34 and is also implied from the Security Council's functions. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174 (Apr. 11); Henry G. Schermers & Niels Blokker, International Institutional Law: Unity Within Diversity ¶¶ 232–36 (5th ed. 2011); Edouard Fromageau, *Collaborating with the United Nations: Does Flexibility Imply Informality?*, 7 Int'l Org. L. Rev. 405 (2010).

[12] *See, e.g.*, Larissa J. van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions Between Fact-Finding and Application of*

inquiry created by the Secretary-General concerned the 2010 Gaza flotilla incident, chaired by Geoffrey Palmer (the Palmer Commission). This commission had a rather broad mandate, namely to "examine and identify the facts, circumstances and context of the incident" and to "consider and recommend ways of avoiding similar incidents in the future."[13] Pursuant to this highly fact-oriented mandate, the commission repeatedly emphasized its non-legal methodology.[14] Nonetheless, the commission did present its conclusions "against the backdrop of the exposition of principles of public international law."[15] Yet, the overall legal analysis and the most pertinent and extensive *jus ad bellum* interpretations and analyses were not included in the principal report but rather in an Appendix prepared by the Chair and Vice-Chair.[16]

At the national level, Turkey and Israel also launched their own inquiries into the legality of the Gaza flotilla incident. An Israeli commission was asked to investigate whether the blockade and Israel's actions to enforce it complied with "rules of international law."[17] However, it limited its analysis to human rights and international humanitarian law.[18] A Turkish inquiry was asked to examine "legal implications and consequences of these acts."[19] It included considerations of the *jus ad bellum* and other fields of international law in its analysis. Previously, domestic commissions had also operated in parallel with international commissions. For instance, the Winograd Commission established by Israel to inquire into the 2006 Lebanon War had a HRC counterpart.[20] On other occasions, Israel's Ministry of Foreign Affairs has published legal

International Law, 13 Chinese J. Int'l L. 1, 20 (2014). According to the *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*, the Security Council and General Assembly should prefer to entrust the conduct of a fact-finding mission to the Secretary-General. G.A. Res. 46/59, U.N. Doc. A/RES/46/59, ¶ 15 (Dec. 9, 1991).

[13] U.N. Secretary-General, *Rep. of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶ 3 (Sept. 2, 2011), *available at* www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf [hereinafter Palmer Commission Report].

[14] *Id.* ¶¶ 14–15, 67.

[15] *Id.* ¶ 67.

[16] *Id.* app. 1, at 76–102.

[17] Turkel Comm'n, The Public Commission to Examine the Maritime Incident of 31 May 2010, at 17 (2010), *available at* www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf.

[18] *See id.* pt. 1.

[19] Turkish Nat'l Comm'n of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, at 10 (2011), *available at* www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf.

[20] *See* Lebanon Commission, *supra* note 6; Press Release, Winograd Commission Submits Interim Report, Isr. Ministry of Foreign Affairs (Apr. 30, 2007), *available at* http://www.mfa.gov.il/mfa/pressroom/2007/pages/winograd%20inquiry%20commission%20submits%20interim%20report%2030-apr-2007.aspx.

analyses of other Israeli military operations, but these have not been styled as independent commissions of inquiry.[21] Other relatively recent domestic inquiries with an express or potential *jus ad bellum* dimension have been launched in relation to the 2003 Iraq War as further analyzed in the next Section.

Moving back to the international plane, it can be noted that the Human Rights Council has also been very active in creating commissions of inquiry to investigate and report on situations of gross human rights violations, including when committed in times of conflict. The Council's activism has been replicated by regional organizations, which have created comparable commissions of inquiry at the regional level. Yet, in contrast to the Security Council and domestic authorities, the Human Rights Council, and to a lesser extent regional organizations, are more limited as regards the design of commissions. In line with its mandate, the international commissions that the Human Rights Council establishes are predominantly human-rights oriented. Since many commissions operate during times of armed conflict, and given the interplay between human rights and international humanitarian law, some HRC commissions of inquiry have also investigated and reported on violations of international humanitarian law.[22] In a similar vein, HRC commissions increasingly invoke international criminal law as the law of enforcement of human rights and international humanitarian law,[23] in line with the idea that

[21] *See, e.g.*, State of Isr., The 2014 Gaza Conflict: Factual and Legal Aspects (2015), *available at* http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf; State of Isr., The Operation in Gaza: Factual and Legal Aspects (2009), *available at* http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf.

[22] Some HRC commissions were instructed in their mandates to investigate violations of international humanitarian law. *See, e.g.*, the Independent Commission of Inquiry on the Gaza Conflict established by Human Rights Council Res. S-21/1, Ensuring Respect for International Law in the Occupied Palestinian Territory, including East Jerusalem, U.N. Doc. A/HRC/RES/S-21/1 (July 23, 2014); Flotilla Commission, *supra* note 6; Goldstone Commission, *supra* note 6. Other HRC commissions made findings of international humanitarian law violations. *See, e.g.*, Rep. of the Ind. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012); Rep. of the High-Level Fact-Finding Mission to Beit Hanoun Established Under Council Resolution S-3/1, U.N. Doc. A/HRC/9/26 (Sept. 1, 2008) [hereinafter Beit Hanoun Commission Report]. *See also* Philip Alston, Jason Morgan-Foster & William Abresch, *The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror,'* 19 Eur. J. Int'l L. 183, 207 (2008); *contra* Daphné Richemond-Barak, *The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law*, *in* Counterinsurgency Law: New Directions in Asymmetric Warfare 3 (William Banks ed., 2013).

[23] *See, e.g.*, Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, at 76, ¶ 286 (Sept. 25, 2009) [hereinafter Goldstone Commission Report]. *See also* Larissa van den Herik & Catherine Harwood, *Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches*, *in* The

human rights protections are "significantly advanced when individuals were held to account for their acts."[24] Certain commissions have recommended the International Criminal Court as a forum for prosecutions, in the event that concerned States fail to investigate and prosecute.[25] The recent codification of the crime of aggression in the Rome Statute of the International Criminal Court may therefore impact HRC commissions' engagement with the *jus ad bellum*.[26] Such engagement might also be linked to the human right to peace[27] and the rights of victims of serious violations of international humanitarian law and human rights law to the truth and to a remedy.[28]

Nonetheless, there are limits to the extent to which HRC commissions engage with areas of law other than human rights proper. For instance, the Syrian government's call for the HRC commission of inquiry on Syria to also consider international law on terrorism, and in particular relevant Security Council resolutions,[29] was only taken up by that commission to the extent that acts of terror violated international humanitarian law and human rights law.[30] Hence, the Syria Commission only expanded its mandate to include areas of international law that have a direct interplay with human rights and thus inform the application of human rights law, or which articulate the

Transformation of Human Rights Fact-Finding 233 (Philip Alston & Sarah Knuckey eds., 2016); Catherine Harwood, *Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability* 58 Japanese Y.B. Int'l L. 71 (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627058.

[24] Rep. of the Office of the High Comm'r for Human Rights, Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict, ¶ 7, U.N. Doc. A/HRC/11/31 (June 4, 2009).

[25] *See, e.g.*, Goldstone Commission Report, *supra* note 23, ¶ 1969(c); Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP.1, ¶ 1225(a) (Feb. 7, 2014).

[26] For arguments in favor of insulating human rights from the *jus ad bellum*, *see* Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, *in* The Frontiers of Human Rights: Extraterritoriality and its Challenges 55 (Nehal Bhuta ed., 2016).

[27] Human Rights Council Res. 32/28, Declaration on the Right to Peace, U.N. Doc. A/HRC/RES/32/28 (July 18, 2016).

[28] G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

[29] Note Verbale dated Dec. 21, 2011, from the Permanent Rep. of the Syrian Arab Republic addressed to the Commission (Dec. 21, 2011), *reproduced in* Rep. of the Ind. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/19/69, annex II, at 26 (Feb. 22, 2012).

[30] Rep. of the Ind. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/24/46, ¶ 11 (Aug. 16, 2013); *see also* Arab League Commission Report, *supra* note 7, ¶¶ 412–22 (refusing to engage with "uncertain and undefined norms of international terrorism").

consequences of findings of violations of human rights law, and it avoided further "jurisdictional overlap" with the Security Council as much as possible. The institutional equilibrium with the Security Council was also indirectly tested by attempts to establish a HRC inquiry on Yemen. While a draft resolution to that effect was not adopted in 2015, in 2017 the HRC established a group of experts to examine "all alleged violations and abuses of international human rights and other appropriate and applicable fields of international law committed by all parties to the conflict since September 2014."[31] It is possible that this body may probe *jus ad bellum* dimensions of the conflict.[32] However, the direction to examine "appropriate" legal fields might imply a restrained approach. The HRC setting and diplomacy thus displayed a certain reservation in respect of the Security Council's prerogatives in peace and security matters.

Yet, in other instances, HRC commissions overlapped with the Security Council's working space more directly. On several occasions, HRC commissions have indeed been created for situations that encompassed *jus ad bellum* dimensions. These included the 2006 Lebanon Inquiry, the 2008 Beit Hanoun Inquiry, and the 2009 Gaza Inquiry led by Justice Richard Goldstone (the Goldstone Commission). These commissions had to grapple with the question whether and to what extent they would draw on the *jus ad bellum* in the fulfillment of their mandates. The mandate of the Lebanon Commission articulated three concrete responsibilities,[33] but the Commission indicated that it would interpret its mandate broadly in light of international law, and more specifically, human rights and international humanitarian law.[34] The broad reference to international law potentially opened the door for engagement with the *jus ad bellum*. Indeed, despite its overall focus on international humanitarian law, the Commission did make some pertinent *jus ad bellum* findings and even observed that Israel's military actions, which had already

[31] *See, e.g.*, Nick Cumming-Bruce, *Saudi Objections Halt U.N. Inquiry of Yemen War*, N.Y. Times (Sept. 30, 2015), www.nytimes.com/2015/10/01/world/middleeast/western-nations-drop-push-for-un-inquiry-into-yemen-conflict.html?_r=0; Human Rights Council Res. 36/31, Human rights, technical assistance and capacity-building in Yemen, U.N. Doc. A/HRC/36/31 ¶ 12(a) (Sept. 29, 2017).

[32] *See* S.C. Res. 2216, U.N. Doc. S/RES/2216 (Apr. 14, 2015). *See also* Tom Ruys & Luca Ferro, *Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen*, 65 Int'l & Comp. L.Q. 61, 61–98 (2016).

[33] Lebanon Commission, *supra* note 6, ¶ 7.

[34] *See* Rep. of the Comm'n of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, U.N. Doc. A/HRC/3/2, at 3, 24, ¶¶ 10, 63 (Nov. 23, 2006) [hereinafter Lebanon Commission Report].

been labeled as offensive by the Security Council,[35] had "the characteristics of an armed aggression, as defined by General Assembly resolution 3314 (XXIX)."[36] The Beit Hanoun Commission included one paragraph on the *jus ad bellum* in its report, observing that, as it was unable to visit Israel, it was not able to reach firm findings.[37] *Jus ad bellum* issues came up in quite a different constellation in the context of the Goldstone Commission. In this case, allegations of bias were made against one of the commissioners, namely Professor Christine Chinkin.[38] Prior to her appointment, Professor Chinkin had signed a statement published in the *Sunday Times* rejecting Israel's claims of self-defense and labeling the Israeli actions instead as aggression, intertwined with the commission of war crimes.[39] The disqualification petition was rejected by the members of the Goldstone Commission, indicating that the question of the legality of the Israeli military response was not an issue that fell within its mandate and the petition was thus misplaced.[40] Despite Israel's reliance on the doctrine of self-defense, engagement with the *jus ad bellum* by the Beit Hanoun and the Goldstone Commissions thus remained limited.

This rather reserved stance of the HRC commissions stands in contrast with regional approaches and, more specifically, the 2009 Fact-Finding Committee on Gaza established by the League of Arab States. Even though its mandate was phrased in quite similar terms as the HRC commissions', namely to investigate and report on violations of human rights and international humanitarian law during an Israeli military operation, the Committee articulated express, albeit reserved, views on the *jus ad bellum*.[41] Coincidentally, another regional inquiry commission, which investigated a wholly different

[35] In Security Council Resolution 1701, the Security Council called for "a full cessation of hostilities based upon, in particular, the immediate cessation by Hizbollah of all attacks and the immediate cessation by Israel of all offensive military operations." S.C. Res. 1701, U.N. Doc. S/RES/1701, ¶ 1 (Aug. 11, 2006).

[36] Lebanon Commission Report, *supra* note 34, at 23, ¶ 61. G.A. Res. 3314 (XXIX), Definition of Aggression, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

[37] Lebanon Commission Report, *supra* note 34, at 14, ¶ 46.

[38] U.N. Watch, Request to Disqualify Prof. Christine Chinkin from UN Fact Finding Mission on the Gaza Conflict (Aug. 20, 2009), *available at* www.unwatch.org/wp-content/uploads/2016/01/2207UN_Watch_Request_to_Disqualify_Christine_Chinkin_from_UN_Goldstone_Mission_on_Gaza_20_August_2009.pdf.

[39] *Letter: Israel's Bombardment of Gaza is Not Self-Defence – It's a War Crime*, Sunday Times (Jan. 11, 2009), *available at* www.timesonline.co.uk/tol/comment/letters/article5488380.ece.

[40] *Statement by the UN Fact Finding Mission on the Gaza Conflict*, Jewish Chron. London (Aug. 25, 2009), *reprinted in U.N. Goldstone Inquiry Rejects 'So-Called Petition of UN Watch'; Denies Mission is Quasi-Judicial*, U.N. Watch (Aug. 30, 2009), *available at* https://www.unwatch.org/un-goldstone-inquiry-rejects-so-called-petition-of-un-watch-denies-mission-is-quasi-judicial/.

[41] Arab League Commission Report, *supra* note 7, ¶¶ 405–11.

conflict, also deliberately and lengthily addressed the *jus ad bellum* in a more progressive, if not largely *de lege ferenda*, manner. This was the Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of the European Union in 2008. Although this mission was also mandated to investigate violations of international humanitarian and human rights law, its broader assignment was to investigate the origins and course of the conflict.[42] This set the stage for the extensive *jus ad bellum* coverage in its reports[43] resulting in far-reaching, perhaps excessive, legal interpretations.[44]

Hence, on the basis of the practice summarily analyzed in this Section, a provisional conclusion can be drawn that commissions of inquiry created by the Security Council and Secretary-General as well as domestic inquiries can be vested with mandates that include an explicit *jus ad bellum* dimension. In contrast, HRC commissions are generally focused on acts committed during an armed conflict rather than on the initiation of the conflict *per se* and in their practice they have been reserved in relation to *jus ad bellum* questions. Moreover, their parent body is not devoid of political considerations and pressures influencing its practice as regards the establishment of inquiry commissions in *jus ad bellum* contexts. Regional commissions can navigate between these extremes, but the record of the two commissions analyzed here, and particularly the Georgia Commission, demonstrates a greater keenness to broach *jus ad bellum* issues than the HRC commissions.

III. SPOTLIGHTING THE KOSOVO AND IRAQ INQUIRIES

As is apparent from the previous Section, the engagement of commissions of inquiry with the *jus ad bellum*, even if relatively sparse, can concern a variety of legal issues. Commissions have considered questions regarding the qualification of aggression, the applicability of self-defense specifically also against non-state actors, the interpretation of Security Council resolutions, and the existence of extra-Charter justifications. This Section offers some deeper

[42] Georgia Commission, *supra* note 7, art. 1.

[43] 1 Independent International Fact-Finding Mission on the Conflict in Georgia Report at 22, ¶ 19 (2009), *available at* http://echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf [hereinafter Georgia Commission Report Vol. I]; 2 Independent International Fact-Finding Mission on the Conflict in Georgia Report 244 (2009), *available at* www.caucasus-dialog.net/Caucasus-Dialog/Activities_&_Docs_files/IIFFMCG_Volume_II%20Kopie.pdf [hereinafter Georgia Commission Report Vol. II].

[44] For an appraisal, *see* Christian Henderson & James A. Green, *The Jus Ad Bellum and Entities Short of Statehood in the Report on the Conflict in Georgia*, 59 Int'l & Comp. L.Q. 129, 133 (2010).

insight into the *jus ad bellum* inquiry practice through a focus on inquiries into two distinct operations that each evoked fundamental *jus ad bellum* discussions, i.e., the 1999 NATO intervention in Kosovo and the 2003 invasion of Iraq.

A. *The Independent International Commission on Kosovo*

Inquiry practice is generally marked by *ad hoc*-ism and great diversity, as was illustrated in Section II. Within this landscape of variety, the Independent International Commission on Kosovo is, in an institutional sense, perhaps still even more unique than other commissions, as it was not integrated in any formal setting.[45] It was proposed by the Swedish Prime Minister, Hans Göran Persson, but the direct involvement of the Swedish government was restricted to initial funding and inviting the two chairpersons, Richard Goldstone and Carl Tham.[46] In addition, Sweden sought the backing of leading countries and it secured the U.N. Secretary-General's support, who ultimately also accepted to formally receive the report.[47] Despite these formal linkages, the commission members – selected by the two chairpersons – each participated in their personal capacity. Although the commission was thus not formally established as part of a concrete organizational setting, it did build on and refer to previous and coinciding formal inquiry initiatives in terms of spirit and approach, most notably those of the United Nations regarding the fall of Srebrenica[48] and the United Nations' failure to prevent the genocide in Rwanda[49] as well as the Brahimi Inquiry.[50] The Kosovo Commission formulated its mission statement very similarly to those inquiries by including, but not limiting itself to, a legal evaluation and adding a strong future-oriented focus with a lessons-learned exercise. Its mission statement read:

[45] Indep. Int'l Comm'n on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned (2000) [hereinafter Kosovo Report].

[46] *Id.* ¶¶ 21–22.

[47] *Id. See also* Richard Goldstone, *The Independent International Commission on Kosovo*, *in* 7 International Peacekeeping: The Yearbook of International Peace Operations 331, 331–332 (Michael Bothe & Boris Kondoch eds., 2001).

[48] U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to General Assembly Res. 53/35, The Fall of Srebrenica*, U.N. Doc. A/54/549 (Nov. 15, 1999).

[49] Rep. of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, U.N. Doc. S/199/1257 (Dec. 16, 1999).

[50] Rep. of the Panel on United Nations Peace Operations (Brahimi Report), U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000).

> The Independent International Commission on Kosovo will examine key developments prior to, during and after the Kosovo war, including systematic human rights in the region. The Commission will present a detailed, objective analysis of the options that were available to the international community to cope with the crisis. It will focus on the origins of the Kosovo crisis, the diplomatic efforts to end the conflict, the role of the United Nations and NATO's decision to intervene militarily. It will examine the resulting refugee crisis including the responses of the international community to resolve the crisis. The effect of the conflict on regional and other states will also be examined. Furthermore, the Commission will examine the role of humanitarian workers, NGOs and the media during the Kosovo war. Finally, the Commission will identify the norms of international law and diplomacy brought to the fore by the Kosovo war and the adequacy of present norms and institutions in preventing and responding to comparable crises in the future. In addition, the Commission will take up: the future status of Kosovo, Lessons learned for Kosovo and Lessons learned for the future.[51]

The report included a separate forty-page chapter on "International Law and Humanitarian Intervention" that addressed both questions of *jus ad bellum* as well as *jus in bello*.[52] As regards the legality of the NATO air campaign, the commission concluded that it was illegal, yet legitimate.[53] A significant chunk of the legality chapter was subsequently devoted to developing a framework for principled humanitarian intervention, articulating three threshold principles and eight contextual principles, as well as concrete suggestions for revisions of the U.N. Charter.[54] As is well known, after Kosovo the general discussion on humanitarian intervention was reframed and continued under the Responsibility to Protect concept.[55] Since the ICJ (International Court of Justice) litigation on the NATO actions was discontinued for lack of jurisdiction,[56] the report's judicial relevance and accountability potential was not further tested at that level, but it has informed parliamentary debates and may have

[51] Kosovo Report, *supra* note 45, at 24–25.

[52] *Id.* ch. 6, at 163–200.

[53] *Id.* at 186. Goldstone later indicated that the choice of the word "legitimate" was perhaps unfortunate. He clarified that what was meant was to indicate that the NATO actions were morally and politically justifiable. Goldstone, *supra* note 47, at 336.

[54] Kosovo Report, *supra* note 45, at 192–95.

[55] Int'l Comm'n on Intervention and State Sovereignty, The Responsibility to Protect (2001).

[56] Legality of the Use of Force (Serb. and Montenegro v. Belg.), Preliminary Objections Judgment, 2004 I.C.J. Rep. 279 (Dec. 15) and related judgments entered in the cases against Canada, France, Germany, Italy, The Netherlands, Portugal, Spain, the United Kingdom, and the United States of America.

independent value,[57] although of course its findings and conclusions have been subject to the same intense debates and criticisms that have also marked the discussion on humanitarian intervention more generally.[58]

B. *The Iraq Inquiries*

Inquiries into the Iraq War have also been established, but then formally as national inquiries in several jurisdictions. In 2004, a U.S. Presidential Inquiry was established to, *inter alia*, investigate errors in the Iraq intelligence.[59] Its report concluded that the Iraq intelligence was wrong in almost all respects, and that this constituted a major intelligence failure.[60] However, it did not offer conclusions as to whether the intelligence had purposefully been manipulated.[61] In contrast, Dutch and Danish commissions of inquiry had more legally oriented mandates. In 2012, Denmark established a commission to investigate the Danish decision to participate in the Iraq War, including "whether there was a basis for the assessment of the legality of the Danish participation according to Denmark's international obligations."[62] In 2015, a new Danish government aborted the commission prematurely. The Dutch Commission of inquiry had a more fruitful ending. It was established in 2009 and mandated to investigate preparations and decision-making with regard to The Netherlands' support for the invasion of Iraq, including "matters pertinent to international law."[63] Consequently, it discussed *jus ad bellum* matters at

[57] *Cf.* Goldstone, *supra* note 47, at 339.

[58] For a fierce rejection of the report's findings, *see* David Rieff, *The Hypocrisy of Humanitarian Intervention*, *in* 7 International Peacekeeping: The Yearbook of International Peace Operations, *supra* note 47, at 351.

[59] Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, established by Exec. Order No. 13,328, 69 Fed. Reg. 6901 (Feb. 11, 2004).

[60] Charles S. Robb & Laurence H. Silberman, Comm'n on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction, Report to the President of the United States 46 (2005), *available at* http://govinfo.library.unt.edu/wmd/report/wmd_report.pdf.

[61] *Id.* at 8.

[62] Peter Otken, *Correspondents' Reports, Government Commission – Establishment of a Commission of Inquiry on the Danish Participation in the Armed Conflicts in Iraq and Afghanistan*, 16 Y.B. Int'l Humanitarian L. 1 (2013), *available at* www.asser.nl/media/1395/denmark-yihl-16-2013.pdf.

[63] Rapport Commissie Van Onderzoek Besluitvorming Irak 521, ¶ 1.4 (2010), *available at* www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/01/12/rapport-commissie-davids.html [hereinafter Davids Commission Report]. A proposal aiming at a parliamentary inquiry was rejected. The President of the inquiry commission, a former Supreme Court President, composed the commission, which included one international lawyer. *Id.* ¶¶ 1.1 and 1.3.

length in a full chapter on issues of legality of the use of force and offered extensive legal treatment of how relevant Security Council resolutions had to be interpreted, concluding that these did not offer an adequate legal basis.[64]

The Dutch Commission, also called the Davids Commission after its chair, was the first formal commission of inquiry to consider whether the Iraq War amounted to an unlawful use of force. In its 2010 report, the Dutch Commission concluded that the war was illegal under international law, because the use of force was not justified on the basis of self-defense, nor had the Security Council authorized the use of force.[65] The Dutch government's view that the Security Council had indeed authorized the use of force had been based on the "corpus" theory (also known as the "revival" theory). According to this theory, authorization could be inferred from an interconnected reading of consecutive Security Council resolutions, notably Resolutions 678 (1990), 687 (1991), and 1441 (2002). Resolution 678 authorized the use of force to implement an earlier resolution that demanded Iraq's withdrawal from Kuwait. Resolution 687 required Iraq to disarm and to cooperate with U.N. inspectors and the IAEA (International Atomic Energy Agency), and Resolution 1441 decided that Iraq had been and remained in material breach and gave Iraq a final opportunity to meet its disarmament obligations as specified in Resolution 687. The Council also resolved that if Iraq failed to meet its obligations, it would convene to consider the situation and warned that Iraq would face "serious consequences" in case of continued violation.[66] The words "material breach" were used in analogy to Article 60 of the Vienna Convention on the Law of Treaties on the termination or suspension of treaties, thereby implying that Resolution 687 would be suspended and hence the authorization of Resolution 678 would revive. However, the Davids Commission rejected the revival theory, referencing statements made at the adoption of Resolution 1441 that it contained no "hidden triggers" and no "automaticity."[67] The Commission further observed that Resolution 1441 did not include the words "all necessary means,"[68] so that it did not, without further authorization, permit States to use military force to compel Iraq to comply.[69] The Commission also found that the consequences of a material breach involving the use of force and the right to take forcible measures rested solely with the Security Council, so that The Netherlands was

[64] *Report of the Dutch Committee of Inquiry on the War in Iraq*, 57 Neth. Int'l L. Rev. 81, 134–35 (2010) [hereinafter *English Translation of the Davids Commission Report*].
[65] *Id.* at 134–35.
[66] S.C. Res. 1441, U.N. Doc. S/RES/1441, ¶ 13 (Nov. 8, 2002).
[67] *English Translation of the Davids Commission Report*, *supra* note 64, at 102.
[68] *Id.* at 132.
[69] Davids Commission Report, *supra* note 63, at 530, ¶ 18.

not entitled to use force by dint of its own determination that Iraq was in material breach of its obligations.[70] Interestingly, one member of the Commission added a gloss to the conclusion that there had not been an adequate legal basis. Although he agreed with that particular conclusion, he did add that, in his view, the rules of international law should not constitute the only guiding frame of a government, and that urgent demands of international politics such as the prevention of nuclear proliferation might and could also independently inform governmental decision making.[71] Although the Dutch Prime Minister Jan Peter Balkenende did not immediately embrace the Commission's reading and interpretations, the Dutch government ultimately did accept the report and its findings.

The series of inquiries into the British government's decision to go to war were, in contrast to the Dutch Commission, not mandated to directly assess the legality of that decision. An inquiry in 2003 tangentially considered the credibility of British intelligence of Iraqi weapons of mass destruction.[72] Its limited conclusions resulted in widespread public discontent. A second inquiry also examined the intelligence used to justify the Iraq War. It concluded that the intelligence was unreliable and unsubstantiated, and had been overstated by the government.[73] Public discontent continued to fuel demands for a wider inquiry, which was eventually established in 2009.[74] The Chilcot Commission had the mandate to "[consider] the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned."[75] The mandate did thus not include an *express* instruction to consider the legality of the use of force, but it was also not explicitly excluded.

[70] *English Translation of the Davids Commission Report*, at 136.

[71] Davids Commission Report, *supra* note 63, at 270 (Kanttekening Commissielid Van Walsum).

[72] Lord Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G. (2004), *available at* https://fas.org/irp/world/uk/huttonreport.pdf.

[73] Comm. of Privy Counsellors, Review of Intelligence on Weapons of Mass Destruction (2004), *available at* http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/14_07_04_butler.pdf.

[74] Mark Phythian, *The Politics of Commissions of Inquiry into Security and Intelligence Controversies in Britain*, *in* Commissions of Inquiry and National Security: Comparative Approaches 55, 67 (Anthony Stuart Farson & Mark Phythian eds., 2011). Phythian writes that the Chilcot Inquiry was "conceded from a position of weakness." *Id.* at 68.

[75] Sir John Chilcot, Chairman of the Iraq Inquiry, Statement at a News Conference (July 30, 2009), *available at* www.iraqinquiry.org.uk/the-inquiry/news-archive/2009/2009-07-30-opening/statement-by-sir-john-chilcot-chairman-of-the-iraq-inquiry-at-a-news-conference-on-thursday-30-july-2009 [hereinafter Statement by John Chilcot].

In June 2010, Sir John Chilcot specifically invited international lawyers to offer their analysis of the arguments relied on by the U.K. government regarding the legal basis for the use of force against Iraq. Although ample advice was offered by individuals of the highest caliber,[76] ultimately, the Chilcot Report did not articulate a direct view on legality. It did make findings with legal implications, such as the finding that "the UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted," and thus that "military action at the time was not a last resort."[77] It also found that the circumstances in which the government decided that there was a legal basis were "far from satisfactory," and that by acting in the absence of majority support, the United Kingdom had undermined the Security Council's authority.[78] Bypassing judgment on the revival theory, the Chilcot Report noted that pursuant to the legal view presented by the government, the invasion would only have been lawful if indeed there had been evidence of further material breaches by Iraq.[79] It thus framed the matter as a factual question, and sidestepped the core legal question. Notwithstanding this approach, the Chilcot Report is still relevant also from a legal perspective. It may of course be used and referenced by other actors including even the International Criminal Court. The specific question of the legality of the use of force in Iraq in 2003 does not fall within the Court's jurisdictional parameters, as Prosecutor Bensouda pointed out in response to an article by *The Telegraph* published just prior to the release of the Chilcot Report.[80] Yet, as she had earlier also indicated, "the findings of the relevant investigations conducted by the UK authorities" can be taken into account by the ICC Prosecutor to inform her decision making more generally as regards the situation of Iraq.[81]

From an accountability perspective, inquiries can thus have independent value by stating facts and elucidating processes and decision-making practices surrounding the given use of force. In addition, inquiries may lead to or

[76] *See generally* Dapo Akande, *Iraq Inquiry to Publish Submissions on International Law*, EJIL: Talk! (Oct. 22, 2010), *available at* www.ejiltalk.org/iraq-inquiry-to-publish-submissions-on-international-law; Comm. of Privy Counsellors, The Iraq Inquiry (2016), *available at* http://www.iraqinquiry.org.uk/the-report. *See also* Philippe Sands, A *Grand and Disastrous Deceit*, 38 London Rev. Books, July 28, 2016, at 9–11.

[77] Statement by Sir John Chilcot, *supra* note 75, at 1.

[78] *Id.* at 4.

[79] *Id.* at 5.

[80] Office of the Prosecutor, Statement of the Prosecutor Correcting Assertions Contained in Article Published by The Telegraph (July 4, 2016), *available at* www.icc-cpi.int/Pages/item.aspx?name=160704-otp-stat.

[81] Office of the Prosecutor, Report on Preliminary Examination Activities ¶ 44 (2015), *available at* www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf.

inform other accountability processes at domestic or international levels, of political or juridical nature.

IV. LOCATING COMMISSIONS OF INQUIRY IN THE GREATER *JUS AD BELLUM* ARCHITECTURE

Notwithstanding the variety of commissions of inquiry, generally speaking, a commission's report is nonbinding and prepared for, and delivered to, its parent body. Nonetheless, as the previous Section also illustrated, inquiry reports may have wider normative ramifications and they can sensitize other institutions and international mechanisms. In particular, at the international level, inquiry findings can initiate or inform international judicial action before the International Court of Justice or prospectively at the International Criminal Court. Moreover, through its findings, a commission may contribute to creating a certain normative consensus or it may highlight an absence of such consensus.

A. *Institutional Implications*

Inquiry reports interact with judicial proceedings in two key ways: first, as a form of evidence; second, as a driver for judicial proceedings. First, established "inquiry facts" may be invoked in judicial proceedings by one of the parties and relied on by courts. Specifically, *jus ad bellum* inquiry findings can assist in proving that an attack has taken place[82] and whether a State reasonably and correctly relied on intelligence. Moreover, "inquiry facts" may also be useful for necessity and proportionality tests.[83] For instance, the Winograd Commission's finding that the Israeli government did not consider all options before launching a major operation in Lebanon in 2006 might imply that a military response was not strictly necessary in accordance with the rules of self-defense. In a different context, findings of domestic commissions with respect to the reasonableness of reliance on intelligence to justify the invasion of Iraq are also relevant in greater discussions on the legality of the Iraq War.

[82] *See, e.g.*, Oil Platforms (Iran v. U.S.), Merits Judgment, 2003 I.C.J. 161, 195–98, ¶¶ 71–76 (Nov. 6).

[83] Theodora Christodoulidou & Kalliopi Chainoglou, *The Principle of Proportionality From a* Jus ad Bellum *Perspective*, *in* The Oxford Handbook of the Use of Force in International Law 1187, 1198 (Marc Weller ed., 2015). *See, e.g.*, Gerry Simpson, *The War in Iraq and International Law*, 6 Melbourne J. Int'l L. 167, 182 n.94 (2005); J. M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 Conn. J. Int'l L. 47, 90 (2006).

In previous cases at the International Court of Justice, parties have submitted fact-finding reports in support of their claims, and the Court has accepted these documents as evidence. For instance, in the *Armed Activities* case, reports were submitted by a Special Rapporteur of the Commission on Human Rights, the Secretary-General on MONUC (Mission in the Democratic Republic of Congo), U.N. panels of experts, and non-governmental organizations.[84] The Court cited several fact-finding reports as credible and corroborative evidence of serious violations of international humanitarian law and human rights.[85]

International criminal courts and tribunals have also drawn on inquiry reports, albeit with more care and subject to principles of criminal law. The International Criminal Court has acknowledged fact-finding reports at different phases of the trial process as well as in ancillary proceedings.[86] Since the Kampala Amendments have entered into force, giving the International Criminal Court jurisdiction over the crime of aggression,[87] inquiry reports might thus also be used in this context.

In addition to a certain informative or evidentiary value, inquiry reports have catalyzed the initiation of international criminal proceedings. For instance, Security Council commissions of inquiry on the former Yugoslavia and Rwanda preceded the establishment of international criminal tribunals for those situations. In the ICC context, inquiry reports have contributed to the initiation of proceedings in different ways. In 2005, the Security Council referred Sudan to the International Criminal Court following its receipt of an inquiry report of serious violations in Darfur.[88] In 2013, the Union of the Comoros referred the situation upon vessels in a flotilla bound for Gaza, annexing as supporting material the HRC commission's report on that incident.[89] That report was also cited in the Prosecutor's analysis of whether

[84] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, 201, ¶ 60 (Dec. 19).

[85] *Id.* ¶¶ 207, 211.

[86] *See, e.g.*, Carsten Stahn & Dov Jacobs, *The Interaction Between Human Rights Fact-Finding and International Criminal Proceedings: Towards a (New) Typology*, *in* The Transformation of Human Rights Fact-Finding, *supra* note 23, at 255.

[87] *See* Review Conference of the Rome Statute of the International Criminal Court, *The crime of aggression*, Res. RC/Res.6 (June 11, 2010).

[88] *See* S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (citing Rep. of the Int'l Comm'n of Inquiry on Darfur, U.N. Doc. S/2005/60 [Feb. 1, 2005]).

[89] Gov't of the Union of Comoros, *Referral Under Articles 14 and 12(2)(a) of the Rome Statute Arising from the 31 May 2010, Gaza Freedom Flotilla Situation* (May 14, 2013), *appended to* Letter from Ramzan Aritürk & Cihat Gökdemir, Attorneys, Elmadağ Law Firm, to Fatou Bensouda, Prosecutor, Int'l Criminal Ct. (May 14, 2013), *available at* www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf.

to proceed with an investigation.[90] The Prosecutor cited the Georgia Commission's report in the request to open an investigation of war crimes and crimes against humanity allegedly committed in and around South Ossetia.[91] In the future, inquiry reports might also lay the groundwork for prosecutions of the crime of aggression.

The utility of inquiry reports as sources of evidence and as catalysts of prosecutions render them an attractive resource for bodies concerned with ensuring accountability for violations, such as the Human Rights Council. Once the International Criminal Court gains jurisdiction over the crime of aggression, the Human Rights Council might be emboldened to establish inquiries with mandates encompassing *jus ad bellum* dimensions. Nonetheless, forays into the *jus ad bellum* might be perceived as overstepping the Human Rights Council's mandate as illustrated in the previous Section, and commentators have already questioned the Council's jurisdiction to consider matters beyond human rights, in respect of international humanitarian law.[92] However, if an alleged act of aggression is linked with serious human rights violations, the Human Rights Council might treat the violations as sufficiently connected to warrant investigation. Thus, a new *jus ad bellum* space might open up for the Human Rights Council. Alternatively, or in addition, the Security Council might also consider establishing inquiries as a preliminary step before referring aggressor States to the International Criminal Court.

While commissions may theoretically play a role in inducing compliance with the *jus ad bellum* and promoting the use of enforcement mechanisms in response to alleged violations, surrounding political dimensions should not be overlooked. At the international level, most commissions are established by political bodies, and in national jurisdictions, decisions to establish commissions rest with the executive or legislative branches of government. Thus, a critical mass of political will is necessary to establish an inquiry, and, accordingly, political factors can stymie efforts for their establishment.

[90] Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report (2014), *available at* https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53%281%29-Report-06Nov2014Eng.pdf.

[91] Office of the Prosecutor, Situation in Georgia: Request for Authorisation of an Investigation Pursuant to Article 15, No. ICC-01/15–4 (Oct. 13, 2015), *available at* www.legal-tools.org/uploads/tx_ltpdb/doc2087876.pdf.

[92] *See, e.g.*, Richemond-Barak, *supra* note 22.

B. *Normative Implications*

In addition to institutional linkages with judicial bodies, it may be considered whether commissions' *jus ad bellum* findings have normative authority beyond their institutional settings. Of course, inquiry reports are not binding, and commissions are not adjudicative bodies. Many commissions acknowledge this point expressly. For instance, the Palmer Commission wrote:

> We observe that the legal views of Israel and Turkey are no more authoritative or definitive than our own. A Commission of Inquiry is not a court any more than the Panel is. The findings of a Commission of Inquiry bind no one, unlike those of a court. So the legal issues at large in this matter have not been authoritatively determined by the two States involved and neither can they be by the Panel.[93]

Nonetheless, commissions' reports may still possess a certain normative authority. In this respect, Akande and Tonkin write that commissions' reports "may end up being just as authoritative, in the public eye and in relevant political and legal bodies, as proper judicial processes."[94] Although many scholars impliedly accept that commissions possess some kind of normative authority, this has not been theorized in depth. Some scholars treat commissions as "quasi-judicial" bodies. For instance, in Russell Buchan's chapter on inquiries into the Gaza flotilla incident, he explains that he used the term "quasi-judicial" because those commissions

> [S]atisfy the definition outlined by [José] Alvarez in his seminal work on this topic. For Alvarez, a quasi-judicial body is a body that can be "characterized by some serious attempt, primarily through rules for the type of expertise required of the dispute settlers, their method of selection, or their tenure in office (or all three), to recognize the 'independent' status of the third party decision-maker from the governments involved in their creation." … The four bodies under consideration in this chapter can be regarded as quasi-judicial because their members were selected on the basis of their professional standing; namely, their expertise in international law and/or experience and knowledge of international relations. Consequently, there was a serious attempt by their creators to establish bodies that were capable of independently adjudicating the dispute.[95]

[93] Palmer Commission Report, *supra* note 13, at 10, ¶ 14.

[94] Akande & Tonkin, *supra* note 9.

[95] Russell Buchan, *The Mavi Marmara Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies*, *in* Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects 479,

Other scholars characterize commissions as a type of scholarship. For instance, Koutroulis refers to fact-finding reports as "subsidiary sources of international law as manifestations of legal doctrine. At best, they can be regarded as informed doctrine, due to the expertise of the missions' members."[96]

Commissions' contributions to the clarification and incremental development of international law may also be explained on the basis of sociological accounts, where international law is conceived of as an argumentative practice.[97] These scholars theorize actors' contributions to law making using concepts such as "semantic authority,"[98] "legal legitimacy"[99] and "de facto authority."[100] For instance, citing Jan Paulsson,[101] Koutroulis argues that the value of a fact-finding mission's legal analysis depends on whether markers of legal legitimacy are evident in its establishment and work products. Such markers include "the quality of legal reasoning as well as on the authority, impartiality, and independence of the members of the mission."[102] Koutroulis observes that many fact-finding reports lack detailed legal reasoning in support of findings, and hypothesizes that this may result from the absence of express mandatory permission to apply the *jus ad bellum*, as well as a "conscious focus on behalf of the members on the dispute settlement function of the mission."[103] Other scholars have impliedly invoked markers of legal legitimacy when evaluating the persuasiveness of commissions' reports. For instance, Henderson and Green considered the Georgia Commission's "'brushstrokes'

481 n.14 (Derek Jinks, Jackson Maogoto & Solon Solomon eds., 2014) (quoting José E. Alvarez, International Organizations as Law-makers 459 [2005]).

[96] Vaios Koutroulis, *The Prohibition of the Use of Force in Arbitrations and Fact-Finding Reports*, *in* The Oxford Handbook of the Use of Force in International Law, *supra* note 83, at 605, 612.

[97] Sociological accounts have also been embraced to some extent by some legal formalists. *See, e.g.*, Jean d'Aspremont, *Non-State Actors and the Social Practice of International Law*, *in* Non-State Actors in International Law: Studies in International Law ¶¶ 2.1–2.6 (Math Noortmann, August Reinisch & Cedric Ryngaert eds., 2015).

[98] *See, e.g.*, Ingo Venzke, *Semantic Authority*, *in* Fundamental Concepts of International Law (Jean d'Aspremont & Sahib Singh eds., forthcoming 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723851.

[99] *See, e.g.*, Alvarez, *supra* note 95, at 570; Alan Boyle & Christine Chinkin, The Making of International Law 310 (2007).

[100] Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & Contemp. Probs. 1 (2016).

[101] Koutroulis, *supra* note 96, at 611 (citing Jan Paulsson, *The Role of Precedent in Investment Arbitration*, in Arbitration Under International Investment Agreements: A Guide to the Key Issues 699, 704 [Katia Yannaca-Small ed., 2010]).

[102] *Id.* at 612.

[103] *Id.* at 628.

approach to international law" undesirable, especially in light of the political importance of the report. "Whilst the Mission made it clear it was not a tribunal, it was still required as part of its mandate to address the facts under international law."[104] The authors considered that instead of systematically ascertaining and applying international law, the Commission "confused the desirable development of the law with its current content."[105] "Any arguments to make the law more 'coherent,' whilst welcome, need to be pronounced as *lex ferenda* and have no place in a Report of this nature."[106]

As regards normative authority, it can also be observed that commissions' most far-reaching legal assessments of the *jus ad bellum* have occurred in "non-official" portions of reports, particularly the Appendix to the Palmer Commission's report and Volume II of the Georgia Commission's report.[107] Although the reports are nonbinding in their entirety, relegation of legal analyses to subordinate portions of a report may result from the fact that not all commissioners agree with their content (as was the case for the Palmer Commission)[108] and thus reduce their normative weight even further.

Hence, from a positivist perspective, the main value of reports of commissions of inquiry is indirect in that they may stimulate the production of material sources of international law. States may rely on commissions' normative pronouncements for guidance in respect of disputed or unsettled issues and they may invoke inquiry reports in support of their positions.[109] As observed by Koutroulis, this process may promote normative stability, demonstrating the extent of state support or disagreement of commissions' articulations on the *jus ad bellum*.[110] Inquiry reports may therefore assist in the development of state practice and *opinio juris*. In addition, there is a growing body of scholarship critically appraising commissions' interpretations of legal rules, and judicial bodies have, on occasion, had overt regard to commissions'

[104] Henderson & Green, *supra* note 44, at 138.
[105] *Id*.
[106] *Id*.
[107] According to its preface, Volume II of the Georgia Commission's report contains a "selection of contributions by experts" that constituted the basis for Volume I, although "opinions expressed in these texts do not necessarily reflect the views of the Mission. In this regard, the views and findings as laid out in Volume I shall be considered as authoritative." Georgia Commission Report, Vol. II, *supra* note 43, at 1.
[108] Mr. Süleyman Özdem Sanberk, the Representative from Turkey, formally registered his disagreement in the Appendix. Palmer Commission Report, *supra* note 13, at 105, app. II.
[109] *See e.g.*, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections of the Russian Federation, ¶ 1.1 (Dec. 1, 2009), *available at* http://www.icj-cij.org/files/case-related/140/16099.pdf.
[110] Koutroulis, *supra* note 96, at 625.

articulations of international law.[111] Thus, commissions not only generate legal discourse, but also contribute, at least indirectly, to the production of law through the traditional sources of international law.

V. CONCLUDING THOUGHTS

The survey of practice in this Chapter shows that several national, regional, and international commissions of inquiry have interpreted rules of the *jus ad bellum* and applied them to factual situations under investigation. Some inquiries discussed this legal field briefly, raising questions about the legality of the use of force before turning to assess alleged violations of international humanitarian and human rights law. However, others, including the Georgia Commission and the Palmer Commission, engaged in a more sustained analysis. In particular, domestic inquiries may have a direct accountability effect as shown by the Iraq examples,[112] even if such commissions refrain from expressly articulating views on legality.

Some interpretations by commissions of inquiry reflected settled law and orthodox perspectives, while others might be characterized as *lex ferenda*, or were even expressly meant to develop the law as in the case of the Kosovo Inquiry. Post–September 11, 2001, States have challenged some traditional parameters of the *jus ad bellum*, including the contours of self-defense and the interpretation of Security Council resolutions. Commissions have cautiously acknowledged developments in state practice while rejecting certain aspects as illegitimate, such as the "revival" theory of interpreting Security Council resolutions, or they have made findings that the law remains unsettled, such as in the scope of the right to self-defense to respond to armed attacks by non-state actors. Although their normative pronouncements are not binding according to traditional theories of the sources of international law, findings of inquiry commissions can have considerable *de facto* significance.

Commission reports are not intended to replace judicial decisions, but rather to create an authoritative narrative of events and possibly encourage appropriate follow-up action by stakeholders. When situations are unlikely to be formally litigated, commissions' findings may be valuable as a means of moral censure and may build political pressure for non-repetition. Reports

[111] *See, e.g.*, David Re, *Fact-Finding in the Former Yugoslavia: What the Courts Did*, *in* Quality Control in Fact-Finding 279, 279 (Morten Bergsmo ed., 2013).

[112] *Cf. also* the quote included in Philippe Sands's essay of a grandfather of one of the British servicemen killed in Iraq, "we are vindicated." Philippe Sands, *A Grand and Disastrous Deceit*, *supra* note 76, at 9–11.

may, however, also catalyze the initiation of judicial proceedings and can be adduced as evidence. An open question in this regard is how the entry into force of the Kampala Amendments might affect the current scheme on aggression. As aggression can now be prosecuted as an individualized crime, the Human Rights Council might seek to establish inquiries into situations of aggression, especially where there is prolonged inaction or a stalemate in the Security Council. It is debatable what practical or normative force the findings of these commissions should have, and in particular whether findings and recommendations of commissions established by the Security Council should carry greater weight than those created by the Human Rights Council, as a result of the former's prerogatives in regard to the *jus ad bellum*. On the other hand, normative developments based on a human rights–oriented and an individualized understanding of the *jus ad bellum* and, particularly, aggression may well qualify these prerogatives and create space for a more pronounced role for other actors, including Human Rights Council commissions. The future role of commissions of inquiry in the field of the *jus ad bellum* thus seems to be undecided.