The role of modern international commissions of inquiry: a first step to ensure accountability for international law violations?

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The Role of Modern International Commissions of Inquiry

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A First Step to Ensure Accountability for International Law Violations?

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'If the minds of men can be turned even for a short time away from passion, race antagonism and from national aggrandizement to a contemplation of individual and national losses due to war and to the shocking horrors that modern warfare entails, a step and by no means a short one, will have been taken toward the substitution of justice for force in the settlement of international differences'.

Nicholas Murray Butler,
Acting Director of the International Commission to Inquire into Causes and Conducts of the Balkan Wars

22 February 1914

Acknowledgments

Writing a PhD Thesis is a lengthy, passionate and at the same time difficult task. It represents a sort of a journey which goes through different stages, a unique combination of emotional moments in which you feel pervaded by enthusiasm and passion and situations where frustration and despair seem to prevail. It is an exercise that requires dedication, passion and sacrifice. I have engaged in this journey five years ago and decided to write my dissertation while at the same time working in the field as a human rights defender. Hence, I cannot capture in few lines all those faces, situations, emotions that have accompanied me in such a path. However, to a few of them I should devote specific attention.

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List of abbreviations

CAR	Central African Republic
CHR	United Nations Commission on Human Rights
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	United Nations Economic and Social Council
EU	European Union
HRC	United Nations Human Rights Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDF	Israeli Defense Forces
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIFFMCG	International Independent Fact-Finding Mission on the Conflict in Georgia
ILO	International Labour Organisation
IS/ISIS	Islamic State
JRR	Justice Rapid Response
LTTE	Liberation Tigers for Tamil Eelam
MSF	*Médicins Sans Frontières*
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OHCHR	United Nations Office for the High Commissioner on Human Rights
OPT	Occupied Palestinian Territory
OTP ICC	Office of the Prosecutor
PNA	Palestinian National Authority
R2P	Responsibility to Protect
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNWCC	United Nations War Crimes Commission
UNTAET	United Nations Transitional Administration in East Timor
US	United States

Introduction

1 Context and Aim of the Research

1.1 Research Context

In modern times we have witnessed an exponential proliferation of international commissions of inquiry tasked with investigating and reporting about violations of human rights and international humanitarian law. However, such trend has mainly developed through the practice of ad-hoc and (often) disconnected responses to emergencies and crises situations. In other terms this phenomenon has taken place without leaning on a solid and pre-determined institutional framework and in the absence of guidelines that could lead to a uniform and harmonised practice. As it has been emphasized by certain authors

> '[t]his recent proliferation, coupled with a certain fragmentation in the procedures concerning both the establishment and implementation of [commissions], has outpaced endeavours of [commissions] policymakers to reflect on past practice. As a consequence, [commissions] policymakers and actors have struggled – and continue to struggle – with a paucity of sufficient resources and guidance'.[1]

A growing number of academics and practitioners have thus highlighted the compelling need to shed more clarity on the role and the direction taken by commissions of inquiry and identify common grounds on which commissions can be established and work coherently.

International inquires have been used and deployed in conflict and other emergency settings since the beginning of the 20th Century. In the last one hundred years they have undergone a significant process of evolution and refinement of their role and functions. While in recent years experts and practitioners have shown an increasing interest in assessing such process, a comprehensive overview of this phenomenon would help shedding more light over a number of relevant issues. In particular, it may help not only in understanding the role recently acquired by commissions of inquiry but also contribute to a number of debates on which the opinions of experts still diverge.

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1 Robert Grace and Claude Bruderlein, 'On Monitoring, Reporting and Fact-finding Mechanisms' (2012) ESIL Reflections – Volume 1, Issue 2.

In particular, what are the underlying causes of this recent surge in the dispatching of commissions of inquiry by the international community? Should commissions of inquiry be viewed as merely fact-finders or as law-applicable (and even adjudication) bodies? Should their tasks be confined to finding the facts or may they perform more dynamic and political roles such as raising alert and provoking reactions? What should be their role and position vis-à-vis those states involved in a dispute and within the broader international community's response? What is the value of the findings of commissions of inquiry? What has been (and arguably should be) the relationship between commissions of inquiry and judicial bodies, particularly international criminal tribunals? Finally, what has been the impact of the work of these commissions so far and should certain trends be rectified?

The present research represents an attempt to respond to the above-mentioned questions as well as an opportunity to address the phenomenon of commissions of inquiry comprehensively, linking lessons learnt from the past to the possibility of inspiring future models of response.

1.2 Research Aim

The aim of the research is firstly to provide an assessment of the evolution undertaken by commissions of inquiry throughout history in order to appreciate and understand their current proliferation and their present function. Also, by developing a thematic comparative study among the most significant experiences of modern commissions of inquiry, this research aims to identify the main aspects and challenges facing their work and their role in the current international community's response to atrocities. In this regard, emphasis will be given to the debates around the value to attach to the legal findings of the commissions and their contribution to the development, consolidation and enforcement of international law as well as their role in the process aimed at ensuring accountability. Based on this analysis, further objectives of this study are to measure commissions of inquiry's impact, draw lessons learnt from the practice and identify key issues, challenges and gaps that can help rectifying trends in future responses.

In conclusion this dissertation will first provide a comprehensive study of the international commissions of inquiry's phenomenon. Secondly, it will contribute to the need (emphasized by both practitioners and doctrine) for increased guidance and understanding of how inquiry mechanisms function and how they can be effectively used and deployed in future responses.

2 Research Question, Research Overview and Research Methodology

2.1 Research Question

Based on an assessment of the evolution undertaken by commissions of inquiry since the beginning of the 20th Century and on a comparative and thematic study of the most relevant inquiries' experiences, the present research aims to respond to the following question: which is the role currently acquired by modern commissions of inquiry, particularly looking at the international community's response to gross human rights violations?

2.2 Research Sub-Questions

Once having understood and highlighted the main features of modern human rights inquiries, the present research further aims to identify and discuss the following sub-questions:

- Born as mere fact-finding tool, how commissions of inquiry have progressively engaged with the law-applying function? In particular, what has been the use by international commissions of inquiry of international law? What is the value of their legal findings and their contribution in the process of development, consolidation and enforcement of international law, including through ensuring criminal accountability?

- Looking at their impact so far, what are the main challenges (particularly in terms of lack of harmonization and standardization, misinterpretation of their powers and risk of political interferences) facing the consolidation of the role of modern commissions of inquiry in international law? Is it possible to identify common gaps and lessons learnt that may help improving future performances?

2.3 Research Overview

The present dissertation is divided into three main chapters.

The first Chapter will provide an overview of the history of commissions of inquiry starting from their inclusion in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes (the 'Hague Conventions'). Such an overview will look at two angles to assess the evolution undertaken by international inquiries in the course of the 20th Century, namely the developments of the practice and the codification in international instruments.

From the first standpoint, this research will briefly touch upon the experiences of the so-called 'Hague commissions' and those inquiries set up within the 'League of Nations' framework. It will then assess the first landmark experiences of inquiries tasked to investigate the atrocities perpetrated during armed conflicts in the first part of the 20th Century, namely the 1913 Balkan Wars Commission, the 1919 Commission on the Responsibility of the Authors of the War and the 1943 United Nations War Crimes Commission. Attention will then shift to those commissions created after the establishment of the United Nations (UN) in the period between 1945 and 1990. This historic overview will conclude with an analysis of the phenomenon of proliferation of human rights inquiries in the period between 1990 and 2016, by highlighting the circumstances, causes and main actors involved.

In relation to the second angle, the dissertation will engage in a brief assessment of the major instruments of codification of inquiry as a tool under international law. Starting from the 1899 and 1907 Hague Conventions, such assessment will include references to fact-finding in the UN Charter and Responsibility to Protect (R2P) frameworks, the 1991 UN General Assembly Declaration on Fact-Finding in the Field of Maintenance of International Peace and Security as well as those soft-law attempts to regulate, codify and harmonize the practice of human rights investigations through the development of rules of procedure and guidelines. Finally the mechanism of the Humanitarian Fact-Finding Commission enshrined in Article 90 of Additional Protocol I to the Four Geneva Conventions will be briefly analysed.

In light of the overview given, the first Chapter will conclude by necessarily narrowing down the scope and subject matter of the research. In particular, this dissertation will mainly focus on those commissions of inquiry that respond to the following criteria:

- They are mandated to investigate international humanitarian law (IHL) and/or international human rights law (IHRL) violations, with the possibility of highlighting the perpetration of international crimes;
- They are composed by external experts that exercise their functions independently from the mandating organs and are assigned an ad hoc task;
- They are international in nature. Namely, they have been established by international organizations, mainly by bodies acting within the UN or regional organisations framework;
- They have mainly been established in the period ranging between 1990 and 2016.

The second Chapter represents the core of the dissertation. It will engage in an in-depth comparative thematic study of those commissions of inquiry that respond to the parameters identified in Chapter 1. The thematic areas that have been selected to compare different inquiry experiences are the following:

- Mandate received;
- Standard of proof implemented;
- Impact of cooperation/non cooperation by the parties;
- Use and combination of sources and evidence;
- Use and contribution to the development of international law;
- The contribution in ensuring accountability and the use of international criminal law.

Finally, Chapter 3 will devote attention to sum up a number of key points touched in the course of the previous chapters. It will firstly provide an assessment of the impact of commissions of inquiry analysed in Chapter 2 within the broader context of the international community's response to human rights emergencies. It will then attempt to identify the main features of the role played by modern commissions of inquiry. In its third and final section, this Chapter will assess a number of key challenges and gaps faced by the current practice and attempt to provide suggestions for rectifying certain trends. Thus, through an assessment of the more recent practice of commissions of inquiry and their impact, this study may help developing some significant lessons learnt that can prove useful in inspiring future models of commissions of inquiry, in this way providing increased guidance and understanding of how inquiry mechanisms function and how they can be effectively used and deployed.

2.4 Research Methodology

The present research has being based primarily on the review of the documents that constitute the work, practice and follow-up to commissions of inquiry and similar human rights investigations. It has also benefited from the consultation of articles, books, conferences and policy papers written by experts and practitioners on the matter.

The author has also conducted a round of informal exchanges of views and consultations with former commissioners, practitioners and experts in the field. While the views emerging from these rounds of talks may have indirectly affected the arguments and points presented in this work, the present research has not used formal interviews, the collection of data for statistic purposes or empirical evidence as tools.

Furthermore, the research has benefited from the fieldwork carried out by the author in Israel and the Occupied Palestinian Territory (OPT), which represents one of the most relevant contexts to appreciate the work and functioning of modern international commissions of inquiry. This author has spent the last four years researching and working as legal advisor for local and international OPT-based non-governmental organisations. He has closely followed the work and developments of two international inquiries: the 2012

UN Fact-Finding Mission on Israeli settlements and the 2014 UN Commission of Inquiry on the Gaza Conflict. The extensive amount of field-work and expertise developed on the topic have been converged into two publications, which served as interim steps in the development of the research model applied in the present work:

1 'From Fact-Finding to Ending Impunity: The Report of the UN Commission of Inquiry on the 2014 Gaza Conflict and the Experience of Commissions of Inquiry/Fact-Finding Missions in the OPT', Legal Brief – Diakonia IHLRC (November 2015);
2 'International Commissions of Inquiry and Palestine: Overview and Impact', Study Analysis – Al-Haq Center For Applied International Law (2016).

Although the focus of the present research is not limited to the context of Israel/OPT, the fact that this area has represented the object of a significant number of international investigations may well explain why the extensive research carried out in this context has provided an invaluable contribution in influencing and shaping the content of several sections of this thesis.

Finally, with regard to the analysis contained in Chapter 2, it should be stressed that this research has followed a comparative approach.

1 The Origin and Evolution of International Inquiries
A Historical Overview

1.1 INTRODUCTION

It is not easy to define and explain what international commissions of inquiry and fact-finding missions are in the framework of international law.

International inquiries were firstly conceptualised as a mean to respond to the need for independent fact checking over a dispute or incident whose consequences could endanger peaceful relationships among states. At supra-national level, it has always been an extremely challenging task to impartially ascertain facts and attribute specific conducts to identifiable actors, particularly in situations of armed conflict where circumstances appear extremely volatile and opposed and polarised narratives often intervene. However, states have also considered that an independent examination of facts and conducts could empower them with the necessary tools to respond adequately to incidents, disputes or any other crises situation arising among them.

But how can we define more precisely what an inquiry is? Authoritative scholars have considered 'inquiry' as

> 'a method to ascertain facts, whereby an impartial investigative body elucidates the facts relating to a dispute between states in order to produce a finding on the disputed facts for the purpose of a successful peaceful settlement of the dispute'.[2]

Furthermore, looking at first codification attempts, Article 9 of the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes determined that inquiries have the purpose 'to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation'. With specific regard to the recent proliferation of inquiries mandated to investigate situations of armed conflict and grave human rights violations, an interesting definition has been provided in 2015 by the Office of the High Commissioner for Human Rights (OHCHR), which define them as

2 Boleslaw A Boczek, *International Law: A Dictionary* (Scarecrow Press, 2005) 365.

> 'temporary bodies of a non-judicial nature, […] tasked with investigating allegations of violations of international human rights, international humanitarian law or international criminal law and making recommendations for corrective action based on their factual and legal findings'.[3]

It should be noted that this research will use the terms 'commission of inquiry' and 'fact-finding missions' interchangeably. In fact, despite the difference in terminology, 'fact-finding mission' and 'commission of inquiry' can be interpreted in a similar manner.

Similarly to inquiry certain authors have in fact defined 'fact-finding' as a 'method of ascertaining facts' through the evaluation and compilation of various information sources.[4]

Furthermore, similarly to Article 9 of the Hague Conventions, the UN General Assembly 1991 Declaration on Fact-finding in the Field of the Maintenance of International Peace and Security defines 'fact-finding' as 'any activity designed *to obtain detailed knowledge of the relevant facts of any dispute or situation*' (emphasis added).[5] Hence, it emerges that there are no substantial differences between 'inquiry' and 'fact-finding' as international legal means, both in terms of the content (ascertaining facts) and scope (contributing to dispute settlement and suggesting further courses of action by the international community) of such activities. This may help explaining why many legal experts and academics have started referring to the terms 'fact-finding missions' and 'commissions of inquiry' as synonyms.[6]

There are a number of angles from which to analyse how the role of independent inquiry has evolved in history.

Firstly, one should look at the practice. In this regard, a first remarkable experience is represented by the 1913 International Commission to inquire into the Causes and Conducts of the Balkan Wars (Balkan Wars Commission). The Commission was established in 1913 by the Carnegie Endowment for International Peace[7] in order to impartially investigate the truth over a number of facts and allegations related to the two Balkan Wars of 1912 and 1913 and their impact on the civilian populations. With the years the number of inter-

3 OHCHR, 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (New York & Geneva, United Nations 2015) 7.

4 Karl J Partsch, 'Fact-Finding and Inquiry' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (North-Holland, Amsterdam-London 1992) 343; Teo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 *Journal of Conflict and Security Law* 2.

5 'Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security', A/RES/46/59 (1991) para. 2.

6 Boutruche (n 4) 2.

7 The Carnegie Endowment for International Peace is a foreign policy independent think thank that commit itself, through a number of activities including conferences, researches and round-tables, to advance and strengthen international cooperation among nations.

national inquiries has proliferated and so did the number of international and regional bodies that were involved in their establishment.

Secondly, beside the developments related to the practice, it is important to keep in mind how since the beginning of the 20th Century 'fact-finding' and 'inquiries' started to be identified and codified as mechanisms in the context of international treaties and conventions. In this regard, one of the first codifications of 'fact-finding' was included in the mentioned 1899 and 1907 Hague Conventions which provided for the establishment of a specific international independent inquiry mechanism and disciplined its functioning.

With the creation of the United Nations in 1945, independent international fact-finding preserved and even increased its relevance not only as tool in interstate relations but most and foremost as part of an international response to investigate and de-escalate situations of tension. In this context, Article 33 of the UN Charter expressly lists inquiry among different peaceful means of dispute settlements, while Article 34 grants explicit investigative powers to the UN Security Council.[8] With specific regard to situations of armed conflicts, Article 90 of Additional Protocol I to the Four Geneva Conventions of 1949 has provided for the establishment of a permanent International Humanitarian Fact-Finding Commission (IHFFC).[9] As we will see in the following subchapters, the UN and regional organizations have often resorted to commissions of inquiry and fact-finding missions in the implementation of their tasks. They have done so through the establishment of ad hoc and temporary missions rather than by setting up permanent mechanisms.

However, despite the absence of a permanent institutional framework, a number of attempts were made in order to codify and clarify the modus operandi of inquiry and fact-finding mechanisms. For example, in 1970, the Secretary-General adopted the 'Model Rules of procedure for UN bodies dealing with violations of human rights'.[10] Following this line, in 1991 the UN General Assembly adopted its Declaration on Fact-finding in the Field of the Maintenance of International Peace and Security.[11]

International fact-finding has entered a new dimension with the end of the Cold War and the turning of the 21st Century. This period has been marked by a substantial re-shuffling of the international world order, a phenomenon that has inevitably affected the way in which the international community has reached to atrocities and grave human rights emergencies. In this context, an important stage in the evolution of the instrument of commissions of inquiry in international law has been the reference, included in the 2005 R2P frame-

8 Charter of the United Nations (1945) 1 UNTS XVI, Articles 33(1) and 34.

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3, Article 90.

10 'Model Rules of procedure for UN bodies dealing with violations of human rights – Noted by the Secretary-General', E/CN.4/1021/Rev. 1 (1970).

11 UNGA Declaration on Fact-finding (n 5).

work, to international independent fact-finding as one of the tools at disposal of the international community to react to situations where a State has engaged in serious IHRL and IHL violations.[12] In this regard, the years 2000s have been characterized by an exponential proliferation of commissions of inquiry and fact-finding missions mandated to investigate over human rights and international humanitarian law violations, a phenomenon that prompted the compilation of a document published in 2015 by the OHCHR entitled 'Commissions of inquiry and fact-finding missions on international human rights and humanitarian law: guidance and practice'.[13]

To conclude, there are mainly two perspectives from which to analyse the evolution undertaken through the years by international inquiry mechanisms. The first one is to assess at how these instruments evolved in the practice, the second is to analyse the codification of such mechanisms in international binding documents and soft-law instruments progressively developed to regulate them. The following sub-chapters (1.2 and 1.3) will carefully assess these two separate developments. Based on these assessments, the last sub-chapter (1.4) will identify the criteria that would help defining and limiting the scope of the comparative thematic analysis undertaken in Chapter 2.

1.2 Commissions of Inquiry: A Historical Overview of the Practice

1.2.1 An insight on traditional fact-finding: the Hague and the League of Nations inquiries (1899-1946)

What can be considered as the most traditional forms of international fact-finding were those investigations that followed the codification of the inquiry tool in the Hague Conventions of 1899 and 1907 and the creation of the League of Nations in 1920. These inquiries were conceived and framed as a diplomatic tool of dispute settlement within the context of inter-state relations. Therefore, the focus of these investigations was mainly to provide a fair and impartial account of the facts and causes that led to state disputes. Although certain authors have underlined how in the practice these commissions only partially stick to the arbitral nature designed for them in the Hague Conventions and showed an inclination towards law application,[14] it is fair to conclude that their legal analysis has been less stressed than their emphasis on qualifying the correct facts. However, even within these traditional experiences of fact-finding three different phases can be identified: these are the 'vessel inquiries'

12 'Implementing the Responsibility to Protect, Report of the Secretary General', A/63/677 (2009) para. 52.

13 OHCHR, Guidance and Practice (n 3).

14 Larissa J van den Herik, 'An Inquiry into Commissions of Inquiry: Navigating between Fact-Finding and Law-Application' (2014) 13 *Chinese Journal of International Law* 518.

inquires or the so-called 'Hague commissions'; the inquiries envisaged in the Knox and Brian treaties; and the inquiries created within the framework of the League of Nations.

1.2.1.1 The Hague commissions and the Knox and Brian arbitration treaties

The first group of commissions of inquiry were those established under the terms of the Hague Conventions. These inquiries mainly dealt with issues related to the sea and flotilla attacks. This is why they are often referred as the 'vessel inquiries'.[15] In particular, the commissions established via the Hague Conventions proved their relevance in a number of cases, the most famous being the Dogger Bank incident of 1904 concerning the damage and sinking of British fishing boats by Russian Warships in the North Sea during the Russian-Japanese War.[16] In this case, the commission was not only tasked with establishing the facts but also with making findings concerning the responsibility of the parties involved, thus promoting a successful settlement of the dispute.[17]

As it has been pointed out by some authors, the vessel inquiries

> 'breathed life into the Hague provisions and reaffirmed the distinctive potential of inquiry as a modality of dispute settlement. However, they also revealed the limits of inquiry as an independent mechanism and […] departed from the ideal model and the techniques and principles of inquiry as accepted in The Hague'.[18]

On the basis of these experiences, the possibility to set up independent inquiries was included in a number of bilateral arrangements among states. These are the so-called 'Knox' and 'Bryan' arbitration treaties, which were used for the conciliation of disputes in the period between 1913-1940 and made all reference to the creation of an independent international inquiry.[19] Certain scholars have noted how, compared to the 'Hague commissions', these inquiries were functioning as 'an arbitration in disguise' with their findings being more legal than factual in nature.[20]

15 Van den Herik (n 14) 513.
16 Boczek (n 2) 365.
17 Ibid.
18 Van den Herik (n 14) 514.
19 Boczek (n 2) 365. For a more comprehensive appraisal of the so-called 'Bryan Treaties' commissions and in particular the Letelier commission of inquiry see, van den Herik (n 14) 515-516.
20 Van den Herik (n 14) 519.

1.2.1.2 The League of Nations commissions of inquiry

In the first decades of the 20th Century international organizations also started paying greater attention to inquiry as tool for dispute settlement purposes. In particular, the League of Nations (1920-1946) referred to international inquiries' services at least six times in its history.[21] The inquiries were mainly established by the Council acting pursuant to Articles 11, 12, 15 and 17 of the Covenant of the League of Nations and involved matters of different character far wider than maritime disputes.[22] The most prominent example was the so-called 'Lytton Commission' charged to investigate Japan's role in the 1931 Manchurian crisis.[23]

As it has been emphasized by scholars, these inquiries have departed from the Hague model in a number of respects.[24] Not only were they dealing less with isolated incidents and more with broader situations of international concern but they have also been paving the way for the trend of progressively detaching international inquiries from states' control. In this regard it should be noted how the League of Nations inquiries were composed of commissioners not appointed by the concerned states and they were instructed to present their recommendations directly to the League of Nations organs.[25] As it has been noted by van den Herik,

> '[t]hese commissions functioned in the pre-defined institutional setting of the League of Nations, and […] endeavoured to facilitate the political settlement of a dispute by offering an authoritative account of the facts that could serve as a basis for further institutionalized diplomatic engagement by the League'.[26]

1.2.2 Commissions of inquiry investigating violations of international law in context of armed conflicts: the pioneering experiences (1913-1943)

We have already mentioned how a number of commissions of inquiry were set up, following the first codification of this mechanism in the 1907 Hague Convention and in the League of Nations framework, mainly to settle disputes arising between States. These commissions were primarily tasked with elucidat-

21 Boczek (n 2) 365.

22 For a more comprehensive analysis of commissions of inquiry established by the League of Nations particularly in relation to the role of the Special Mandates Commission see, Susan Pedersen, *The Guardians: The league of Nations and the Crises of Empire* (Oxford University Press 2015). See also, van den Herik (n 14) 517-518.

23 On the work and legacy of the Lytton Commission see, Tyler Dennett, 'The Lytton Report' (1932) 26 *The American Political Science Review* 1148; Arthur K Kuhn, 'The Lytton Report on the Manchurian Crisis' (1933) 27 *American Journal of International Law* 96.

24 Van den Herik (n 14) 518.

25 Ibid.

26 Ibid 519.

ing facts and responsibilities over issues where the respect of human rights and the laws of war were not directly at stake. This should not come as a surprise given that at the time the whole human rights law architecture, which was gradually developed following the establishment of the United Nations in 1945, was not yet in place and the discipline applicable to armed conflicts was limited to the so called 'law of the Hague'.[27] However, when looking at the first half of the 20th Century, it is possible to identify an isolated number of 'pioneering' commissions charged to investigate the treatment of civilians and violations of international law in situations of armed conflict. Although some of them cannot be considered as fact-finding bodies *stricto sensu*, the work of these commissions should be carefully examined given their outstanding contribution to the development of international law and in laying the foundations for further IHL/IHRL fact-finding and accountability efforts. These examples include the 1913 International Commission to Inquire into the Causes and Conducts of the Balkan Wars, the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission of Responsibilities) and the 1943 United Nations War Crimes Commission (UNWCC).

1.2.2.1 The Balkan Wars Commission

The Balkan Wars Commission was established in July 1913 by the Carnegie Endowment for International Peace.[28] It was composed by eight prominent individuals (among politicians, parliamentarians, journalists and university professors) from Austria, Germany, France, the United States, Great Britain and Russia.[29] The members of the Commission were divided between those sedentary and those dispatched as field presence to the Balkans. The field team spent five weeks in the affected areas visiting sites including Belgrade, Thessaloniki, Athens, Sofia and Istanbul. The Commission immediately faced a number of challenges and obstacles due to states' lack of cooperation. In particular, the Government of Serbia decided not to cooperate and refused to meet with the commissioners, while the Government of Greece posed certain obstacles in terms of collaboration and access to the territory.[30]

The report, published in the summer of 1914, was divided in seven chapters: 'The origin of the two Balkan wars'; 'The war and non-combatant popula-

27 For a better understanding of the distinction between 'law of the Hague' and 'law of Geneva' in international humanitarian law see, François Bugnion, '*Droit de Genève et droit de La Haye*' (2001) 844 *International Review of the Red Cross* 901.

28 For an appraisal of the Balkan Wars Commission see, Frances Trix, 'Peace-mongering in 1913: the Carnegie commission of inquiry and its report on the Balkan wars' (2014) 5(2) *First World War Studies* 147.

29 Trix (n 28) 150-151.

30 For more details on the challenges faced by the commissioners in terms of cooperation by the parties, access to the territories and field-work see, Trix (n 28) 151-152.

tion'; 'Bulgarians, Turks and Servians'; 'The war and nationalities'; 'The war and international law'; 'Economic consequences of the war'; and 'Moral consequences of the war'.[31]

In general, the Commission's work displayed in detail a reality where all parties to the conflicts (although Bulgarians were considered responsible to a lesser extent)[32] were responsible for atrocities and grave violations of the provisions of the laws of war, as enshrined in the two Hague Conferences of 1899 and 1907. With regard to the assessment of the causes that led to the eruption of the wars, the report supported the view that the Bulgarians were responsible for igniting the hostilities. However, certain experts have noted how that specific section of the report appears somehow confusing and failed to take into account a number of significant perspectives within the historical, geo-political and socio-economic factors fuelling the conflict.[33]

The Commission's experience as converged in its final report contained a number of relevant aspects that set the basis for inspiring future fact-finding models.

A first remarkable feature is the use and combination that the Commission makes of different sources. Although this methodology has not been scrupulously applied in all sections of the report,[34] the Commission made sure, in a number of incidents, to identify the truthfulness of each source and corroborate the accounts provided by one source with at least two additional sources. As an example, to support the credibility of the statements released by a number of Macedonian refugees in relation to the Greek army's abuses in certain villages, the commission emphasized how 'in two of the more striking stories, we obtained ample corroboration in circumstances which admitted of no collusion'.[35] In particular, an account provided in Thessaloniki by a refugee from Akangeli concerning incidents of massacres and outrages in his village was confirmed 'in almost every detail' by the story reported by another fugitive from the same village who had fled to Sofia as well as by the accounts provided by a group of refugees that also had fled from Akangeli.[36] The Commission adopted a similar approach in testing the credibility of the witness Mito Kolev, whose mother was killed by Greek troops during the assault of the Bulgarian village of Gavaliantsi. His accounts were accidentally corroborated by two refugees coming from the same village and

31 *Report of the International Commission to Inquire into the Causes and Conducts of the Balkan Wars* (Washington, Carnegie Endowment for International Peace 1914).

32 It should be emphasized how the apparent 'pro-Bulgarian' character of certain sections of the Report has been noted by certain scholars and linked with the work and personal thoughts of one of the commissioners. Trix (n 28) 153.

33 Trix (n 28) 153-154.

34 For example Trix noted how Chapter 3 ('Bulgarians, Turks and Servians') was largely based on single source accounts and data. Trix (n 28) 155.

35 Report of the Balkan Wars Commission (n 31) 100.

36 Ibid. See also, Appendix C, n 39, 41, 42.

encountered by the Commission at Samakov.[37] This led the Commission to determine that there could be 'no doubt about the truth of a story which reached us in this way from wholly independent eyewitnesses'.[38]

Another relevant example of the use made by the Commission of specific information relates to the assessment on the type of weapons employed by the Greek army in its assaults against Bulgarian villages. According to the report, the fact that guns and especially sabres were widely used in a number of different incidents related to the storming of civilian villages validated the argument that the widespread killings of civilians were the result of deliberate attacks rather than a collateral damage. In this regard, the Commission noted how 'a trooper that wounds a boy with his sword can not plead error. He must have been engaged in indiscriminate butchery'.[39]

Another important aspect of the report is the manner in which the Commission referred to particular incidents in order to unveil the existence of specific patterns of violations.[40] As an example – in displaying a number of single accounts of violations of women's honours, rapes and killings of unarmed men perpetrated by the Greek army in several Bulgarian villages – the Commission highlighted how 'this great mass of evidence goes to show that there was nothing singular in the cases which the Commission itself investigated'.[41] Case studies, such as those concerning massacres in the towns of Doxato, Serres and Demir-Hissar were also included in the report to help providing a general overview of the conduct of Bulgarian troops during the second war.[42] With regard to the treatment of prisoners of war, the Commission also referred to a number of specific incidents, such as the one involving the Bulgarian prisoner Lazarov held by the Greek army, in order to describe the magnitude and large-scale character of the violations perpetrated by all parties.[43]

Concerning the legal findings of the Commission, Darcy has emphasized how the Commission

> 'drew heavily on international law in its consideration of the lawfulness of the resort to armed force in the Balkans, the treatment of prisoners of war and other practices as occurred during the conflict'.[44]

37 Report of the Balkan Wars Commission (n 31) 101.
38 Ibid.
39 Ibid.
40 Ibid 103.
41 Ibid.
42 Ibid 78.
43 Ibid 218.
44 Shane Darcy, 'Laying the foundations: Commissions of inquiry and the development of international law', in Christian Henderson (ed), *Commissions of Inquiry, Problems and Prospects* (Hart Publishing 2016) 4.

In particular, the report determined that all parties to the conflict violated the provisions of the law of war on land and treatment of wounded, as enshrined in the Hague Conventions.[45] However the commissioners, in dealing with the questions whether peace treaties were breached or overcome by the changing of circumstances, admitted how their own findings needed to be supported by a more comprehensive and technical legal analysis. In the words of the Commission

> 'this report is not a legal study and we may leave to specialists the task of deciding whether the clause *rebus sic stantibus* can be applied to the question of revision and to the breach of the treaty'.[46]

In relation to the situation of armed conflict and hostilities, the Commission referred to a number of provisions embedded in the 1899 and 1907 Hague Conventions. Firstly, it dwelled on the issue concerning the opening of hostilities and the obligation to provide preliminary notice whose violation by the parties to the conflict appeared a matter of controversy in the report.[47] Secondly, in relation to the law and customs of land warfare, the Commission noted how the belligerents had failed in their obligation under Article 3 of the 1907 Hague Conventions to instruct their armies to comply with the provisions of the Conventions. In particular, the report echoed Mr Marten's remarks on states' level of compliance with the Conventions by concluding that 'the 1907 Convention (and likewise that of 1899) remained unknown to the Balkan armies generally [with to a certain extent the exception of Bulgaria]'.[48]

With regard to the rules concerning the actual conduct of hostilities, the report highlighted how 'faults and crimes [were] found in profusion everywhere'.[49] Provisions related to the protection of civilians, the use of certain methods of warfare and the treatment of wounded and prisoners of war were blatantly and indiscriminately disregarded by both soldiers acting under orders and criminal gangs of civilians.[50] In this area, the Commission acknowledged a number of limitations, in particular deriving from its private nature, its lack of legal expertise and the absence of any concrete follow-up measure set up by states. In this light it should be interpreted the call for the establishment of a permanent international commission within an institutionalised framework, with the support of states and international organizations, to go and oversee

45 Report of the Balkan Wars Commission (n 31) 13.
46 Ibid 209.
47 Ibid 210-211.
48 Ibid 212-213.
49 Ibid 214.
50 Ibid 215, 216, 221, 225, 227, 229, 231, 233. See also, Chapter VII ('The moral and social consequences of the war').

the respect of provisions of the laws of war by belligerents and act in both the preventive and reactive spheres.[51]

One should not disregard a number of limitations inherent to the work of the Commission in terms of legal analysis. The first one was related to the lack of legal expertise of some of the commissioners, as it was emphasized also in the report. The second one concerned the paucity of international binding instruments available at the time, particularly in the areas of international human rights law and international criminal law. When the commissioners took up their work paradigms such as 'genocide' and 'crimes against humanity' had yet to take shape, so were the set of obligations deriving from international human rights conventions. This significantly limited the legal analysis to issues concerning conduct of hostilities and the respect for the laws of war in situations of military occupation. However, a number of passages in the report suggest that the commissioners factored trends that were not regulated by the existing legal framework. In particular, the reference to 'practices of extermination, conversion and assimilation' contained in Chapter IV of the report dedicated to 'the war and nationalities' is instructive.[52] In this regard, according to the Commission, 'the object of these armed conflicts […] was the complete extermination of the alien population'.[53] To corroborate this claim, the report referred to the content of the letters sent to their beloved by soldiers serving in many of the armies involved to show that in certain instances orders to kill were given with the aim to extinguish and annihilate the alien race.[54] Such a language would have reasonably led the inquiry to make findings about the perpetration of genocide or the crime against humanity of extermination, had those concepts existed at that time.[55]

Furthermore, Chapter IV displayed a certain number of patterns, including situations where men were separated from women and killed without exception or villages burned to ashes in order to eradicate the presence of certain ethnic groups. In the view of the Commission, extermination was both a pattern and aim of these wars.[56] However, extermination was not the only policy in place in order to obliterate targeted ethnic groups. In examining the policies enforced against the Pomaks and the 'Slavic' inhabitants of Macedonia, the Commission noted how

51 Ibid 234. See also, Darcy (n 44) 5.
52 Report of the Balkan Wars Commission (n 31) 148.
53 Ibid.
54 Ibid 149.
55 In this regard it is interesting to note how in Chapter VII of the Report ('The moral and social consequences of the war') the Commission, by referring to the 'fearful legacy' of crimes against justice and humanity, seems to pave the way for the conceptualization of a new criminal offence. Trix (n 28) 157.
56 Report of the Balkan Wars Commission (n 31) 150.

> 'we have to deal here with a mitigated form of the same principle of the conflict of nationalities. The means employed […] is no longer extermination or emigration; it is an indirect method which must however lead to the same end, that of conversion and assimilation'

an analysis that found echo, one hundred years later, in the Syria Commission's report on the Yazidi genocide.[57] In certain cases, the report emphasized how the policies of assimilation through terror and those of extermination were put into action hand-in-hand, as it was the case for the Greek administration of Macedonia.[58] Such remarks would have probably stimulated a debate on the respect for the universal right of peoples to self-determination and the protection of minorities, had those paradigms existed at the time.

The Balkan Wars Commission thus represents a first landmark experience in the practice of international commissions of inquiry mandated to investigate atrocities. Although it has been criticized for its pro-Bulgarian narrative in certain sections, it represented an unprecedented exercise of 'truth seeking' in times of armed conflict.[59] In addition, the Commission's report contained a number of aspects that were about to significantly influence future fact-finding exercises. In particular, it should be prized for its level of detail with regard to the examination of specific incidents as indicative of broader patterns, its comprehensive approach in tackling the complexities of a region that rapidly deteriorated into two different rounds of hostilities and its innovative methodology in terms of use of information and combination of sources.

Furthermore, the Commission's report contains a comprehensive analysis of the trends witnessed during the wars based on the existing international legal framework. Hence, from the point of view of the use and application of international law, the Balkans Commission 'marked a departure from previous approaches', which inevitably influenced future experiences such as the 1919 and 1943 world wars' commissions.[60] Finally, the Commission also provided an undoubted contribution to the progressive development of international law. It did it by identifying and framing 'brand new' paradigms capable of qualifying particular policies (such as the practices of extermination and assimilation) or by emphasizing specific trends (such as violations against the honour of women) that escaped the applicability of existing legal frameworks and where later conceptualised in positive law instruments.

However, looking at the immediate aftermath, the legacy of the Balkans Commission in terms of reactions and follow-up by relevant actors of the international community was poor. In this regard, it has been argued that its

57 Ibid 155. See also, 'They Came to Destroy': ISIS Crimes Against the Yazidis', A/HRC/32/CRP.2 (15 June 2016) para.96.
58 Report of the Balkan Wars Commission (n 31) 186.
59 *The Economist* (London, 18 July 1914).
60 Darcy (n 44) 4.

report came out too late and, as a consequence, there were no responses from major states while even academic and press reviews of the report were hard to find.[61] Therefore, the recommendation to set up a permanent international commission of inquiry remained on paper and states did not have the time to properly 'digest' the report's findings, as the whole process was rapidly overshadowed by the outbreak of the First World War in July 1914.[62]

1.2.2.2 The 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties

Another remarkable example of international commission mandated to investigate violations of international law in situations of armed conflicts during the first half of the 20th Century is represented by the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties'. The Commission was established at the Paris Preliminary Peace Conference in January 1919 with the purpose of enquiring into the causes and responsibilities of the First World War. In particular, the Commission was mandated to investigate five different issues: the responsibility of the authors of the war; the facts concerning breaches of laws and customs of war committed by the German Empire and its allies; the degree of responsibility at individual level for such offences; the constitution and procedure of a tribunal to try such offences; any ancillary issue.[63]

There are a number of significant factors that challenge the inclusion of the Commission of Responsibilities within the paradigm of international independent commissions of inquiry.

Firstly, the Commission was not composed by independent experts but by states' officials. Representatives appointed by each of the 'Great Powers' and by countries 'with special interests' served in fact as members of the Commission.[64] In this regard, it should be noted that at the Paris Conference the German Government had advanced the proposal for the establishment of a neutral committee of independent experts to investigate into the causes

61 Trix (n 28) 158.

62 As Trix noted, 'by the time the Report came out in May and June 1914, the public's interest had moved on'. Trix (n 28) 158.

63 *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (Carnegie Endowment for International Peace, Oxford Clarendon Press 1919) 1.

64 'Great Powers' defines those 'most influential' states that in 1907 formed the 'Triple Entente' (France, the United Kingdom and Russia) to counteract the Triple Alliance involving Germany, Austria-Hungary and the Kingdom of Italy. At the start of World War I in 1914, all three participants in the Triple Entente entered it as 'Allies' (Russia was later replaced by the United States). 'Countries with special interests' were those less influential states that entered the war as allies of the Entente and against the coalition formed by Germany and Austria-Hungary.

and responsibilities of the war. However, states part of the 'Allied Powers' and 'Associated Powers' refused, arguing that:

> 'they [the "Allies" and "Associated Powers"] do not consider that the German proposal requires any reply as the responsibility of Germany for the war has been long ago incontestably proved'.[65]

Hence, the choice of commissioners marked a first remarkable distinction from the experience of the Balkan Wars Commission where independent personalities (and not representatives of states) were appointed by different countries. Moreover, while in the case of the Balkan Wars Commission the members had been appointed by countries that did not directly participate in the wars, in Paris it was agreed that the same powers previously involved in the conflict were the ones conducting the inquiry. This of course raised immediate concerns in terms of the neutrality, impartiality and independence of the Commission. In particular, commissioners were not only appointed by those countries but also were selected among governmental and parliamentary officials. This meant that political considerations of states overrode the need for technical expertise.

The second factor pertains to the framework within the Commission was established. Contrary to the Balkan Wars Commission, the Commission of Responsibilities was not set up by the decision of an independent entity. It was created in the context of an international peace conference following the instructions of the winning powers. In particular, among the purposes behind the task to ascertain causes and identify responsibilities was the need to justify and estimate the amount of the costs for reparations. From this perspective, the Commission of Responsibilities could be considered as a sort of intergovernmental commission rather than a technical body of independent experts.

Nonetheless, there are a number of reasons why such experience needs to be considered within the framework of international commissions of inquiry. The first one pertains to its mandate that – by requesting it to investigate the circumstances leading to the war, the violations of the relevant legal frameworks and the responsibilities arising – does not depart from the standards set for other commissions.

The second, and most important reason is the legal analysis contained in the Commission's report and the role played by the Commission in the development of international law.

After two months of intensive work, the Commission of Responsibilities submitted its report on 29 March 1919 in connection with the peace agreements concluded by the Allied Powers with Germany and Austria. It then passed

65 Acting US Secretary of State (Frank Lyon Polk) to the Commission to Negotiate Peace, January 6, 1919, *Foreign Relations of the United States, 1919: The Paris Peace Conference vol. II* (1919) 73.

to analyse the situation in the Balkans, particularly with regard to the conduct of Bulgaria, which led to the adoption of a second report in July.[66]

The Commission's March report was divided in sections reflecting the instructions listed in the mandate. With regard to the responsibility of the authors of the war, it concluded that there was abundant evidence that the war had been premeditated by the Central Powers with the complicity of their allies Bulgaria and Turkey. The report claimed that 'Germany deliberately committed to defeat any conciliatory efforts by the Entente' and, through its deliberate acts, it 'made unavoidable the recourse to war'.[67] In addition, the Central Powers had deliberately violated the neutrality of Belgium and Luxembourg in manifest breach of their international obligations under Articles 1 and 2 of the 1907 Hague Conventions.[68]

In relation to violations of the laws and customs of war, the Commission argued that there was 'abundant evidence of outrages committed by Germans and its allies'.[69] On this point, it is worth mentioning how the Commission referred to a number of reports and memos submitted by different countries aligned with the Allied Forces. In this regard, certain doubts can be raised on the failure to rely upon more independent sources, which may have offered a more nuanced and balanced overview of the incidents analysed.

The Commission then provided an innovative list of thirty-two offenses perpetrated during the course of the conflict that it denoted as falling within the meaning of war crimes, including murder, massacres, systematic terrorism, starvation of civilians, deportation, collective penalties, deliberate bombardment of undefended places, use of asphyxiating gas and destruction of protected objects.[70] As Darcy notes,

> '[t]he Commission's view that these acts were punishable is in itself significant, given that the existing treaties of international humanitarian law had not expressly provided for criminal liability'.[71]

Furthermore, some of the acts mentioned, such as 'taking of hostage', were not expressly prohibited by international treaties existing at the time.

On this basis, the Commission concluded that

66 Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford University Press 2016).
67 Report of the Commission of Responsibilities (n 63) 12.
68 Ibid 13.
69 Ibid 16.
70 Ibid 18.
71 Darcy (n 44) 8.

> 'the war was carried on by the Central Empires together with their allies […] by barbarous or illegitimate methods in violation of the established laws and customs of war and elementary laws of humanity'.[72]

It should be emphasized how the reference to 'elementary laws of humanity' is unprecedented. This seemed to imply that, in the Commission's view, the paradigm of war crimes and violation of laws and customs of war could not be sufficient to cover some of the horrific accounts of the war. In particular, the report highlighted how some of the atrocities perpetrated were committed by Turkish forces against Turkish citizens (in particular the Armenians) and by Austrian forces against citizens of the Austro-Hungary Empire. In the opinion of certain scholars, these acts – which could not be classified as violations of the laws and customs of war *strictu sensu* because they were directed against nationals of the power responsible – 'were probably the ones that, in the commission's view, had violated the "laws of humanity"'.[73] This represented a first important step towards the conceptualization of the notion of 'crimes against humanity' as subsequently enshrined in the London Charter and further developed by the Nuremberg Tribunal's jurisprudence.

With regard to potential implications in terms of individual criminal responsibility, the Commission expressed the view that

> 'for the purpose of dealing with this point, it is not necessary to wait for proof of responsibility of single individuals, the information received are enough to trigger court's jurisdiction over such offences'.[74]

In particular, the report argued that – given the type of offences committed – no rank should have in any circumstances protected the holder of it from responsibility, even in the case of heads of state.[75] In this regard, the Commission carefully analysed and dismissed the argument for the immunity due to the principle of inviolability of a sovereign of State. According to the report, while this argument could apply on a domestic level, the situation appeared different when looking at international law. In the view of the Commission, the application of the principle of immunity in such cases

> 'would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity […] could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind'.[76]

72 Report of the Commission of Responsibilities (n 63) 19.
73 Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 *American Journal of International Law* 555.
74 Report of the Commission of Responsibilities (n 63) 19.
75 Ibid.
76 Ibid 20.

The report thus contained the landmark and unprecedented determination that all persons that (regardless of the rank) had been responsible for committing grave breaches of law and customs of war and laws of humanity were eligible to criminal prosecution.[77] Such position has, in the following decades, become the centre of an intense debate, which has involved determinations by several international tribunals.[78]

In dealing with the establishment of an appropriate tribunal, the Commission openly discussed the question regarding the illegality of aggressive war. It distinguished in fact between two kinds of acts that could trigger criminal prosecution: the act of provoking and initiating war and the grave breaches of laws and customs of war and laws of humanity. With regard to the 'premeditated war of aggression', the report acknowledged that such act was not defined as an offence under current positive law. This conclusion was reached notwithstanding that those attacks infringing the neutrality of Belgium and Luxemburg were carried out in contravention of international treaties. On this issue, the report resorted to a cryptic formula by noting how

> 'the violation of international law was thus an aggravation of the attack against the independence of states which is the fundamental principle of international right'.[79]

The Commission also pointed out that, given the complexities behind the issue of the authorship of a war, a tribunal competent for war crimes would not have been the most suitable body to prosecute such an offence.[80] Accordingly, the Commission did not recommend the investigation and prosecution of the

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77 Ibid. See also, Darcy (n 44) 6.

78 In particular, it should be firstly recalled the 2002 landmark decision by the International Court of Justice in the contentious case between the Democratic Republic of the Congo and Belgium. More recently, the findings contained in the Commission of Responsibilities' report have been referred by the jurisprudence of the ICC, both by the Pre-Trial Chamber in its decision following the refusal by Malawi to arrest Sudanese President Omar Al Bashir and in the separate opinion of Judge Eboe-Osuji to the Pre-Trial Chamber March 2016 decision in the *Ruto* case. However, the ICC judges may have misinterpreted the Commission's findings, particularly when it comes to assess the alleged customary nature of the immunity waver. In particular, the Commission's report expressed the need to include a specific clause in the peace agreements in relation to the prosecution of the Kaiser, in order for Germany to accept it. Hence, the need to seek Germany's consent may imply that the immunity for Head of States existed at the time as part and parcel of customary law. See, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Rep. 2002; ICC, *Prosecutor v. Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (Pre-Trial Chamber I) Case No. ICC-02/05-01/09 (12 December 2011) para. 23; ICC, *Prosecutor v. Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal (Trial Chamber V(A)) Case No. ICC-01/09-01/11 (5 April 2016) paras. 246-250.

79 Report of the Commission of Responsibilities (n 63) 22.

80 Ibid 21.

acts that ignited the First World War before a criminal tribunal. However, it requested the Peace Conference to formally condemn these practices and the creation of another ad-hoc inquiry 'to deal as they deserve with the authors of such acts'.[81]

In relation to the prosecution of grave breaches of the laws and customs of war and laws of humanity, the report determined that the Allied and Associated Powers could set up themselves ad hoc tribunals to prosecute domestically such offences. The Commission separated the material authors of those breaches from those individuals responsible for planning, organising and commanding the crimes.[82] For the latter, the report recommended to the Peace Conference the establishment of a High Tribunal composed of national judges from the different Allied and Associated countries. Interestingly enough, the applicable law for the hypothetic tribunal was defined as 'the principles of the law of nations as they result from the usages established among civilised people, from the laws of humanity and from the dictates of public conscience', a wording that narrowly mirrored the 'Martens Clause' enshrined in the 1899 Hague Conventions.[83]

The Commission of Responsibilities' records in terms of research and gathering facts have been remarkable. In particular, it reviewed incidents involving more than 20,000 persons, contemplating the prosecution of around 12,000 people for possible war crimes.[84] However, a number of legal innovations included in the report were strongly objected by the American and Japanese delegations.[85] In particular, the United States (US) criticized the reference to 'laws of humanity' as they were not reflecting positive law existing at the time. Hence, according to the US delegates, the prosecution of such violations would have contravened the principle of *nullum crimen sine lege*. Mindful of a potential 'boomerang effect', the US representatives did make reservations also in relation to the proposal of prosecuting heads of state and

81 Ibid 22-23.

82 Ibid 23-24.

83 Ibid. The so-called 'Martens Clause' was based upon the declaration made by the Russian delegate at the 1899 Hague Peace Conference Friedrich Martens. The clause, included in the preamble of the 1899 Hague Conventions, recites as follow: 'the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience'. Convention (II) with Respect to the Laws of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988 (29 July 1899).

84 Cherif Bassiouni, 'The United Nations Commission of Experts Established pursuant to Security Council Resolution 780 (1992)' (1994) 88 *The American Journal of International Law* 785.

85 The issue has been emphasized by Darcy who has noted how 'there was considerable divergence amongst the Commission's members on some of the key legal questions with which it was confronted'. Darcy (n 44) 5-7.

officers for command responsibility. Finally, certain objections were raised against criminalising the action of moving war and the establishment of an international tribunal. In this regard, some authors have noted how the US reversed many of these positions less than thirty years later by supporting the establishment of the Nuremberg and Tokyo tribunals.[86]

The following Treaty of Versailles only partially endorsed the recommendations included in the Commission's report. Article 227 of the Treaty provided for the prosecution of the former German Emperor but only for 'supreme offence against international morality and the sanctity of treaties', thus excluding any reference to laws and customs of war and laws of humanity.[87] The 'Kaiser' was in fact never prosecuted given that the Netherlands, where he had fled after the end of the war, refused to extradite him.[88] The recommendation to create an international tribunal to investigate and prosecute 'those most responsible' for the offences was not endorsed, while Germany agreed to hand over its nationals to be prosecuted by the Allied and Associated Powers for violations of the laws and customs of war (any reference to laws of humanity was removed) in their own military courts and tribunals.[89]

However, no prosecutions were conducted in any of the 'Allied and Associated Powers' countries. Germany succeeded in convincing the Allies that prosecuting German individuals abroad would have harmed the fragile stability of the country.[90] As an alternative, it was agreed to try suspects in Germany. In this regard, a list of 896 people was provided to the German authorities to start investigations.[91] Due to Germany's reluctance to prosecute a large number of its own military officials, the Allies agreed to reduce the number to 45 to be tried by the Criminal Senate of the Imperial Court of Justice based in Leipzig. Of these suspects, only twelve individuals were actually tried and six of them acquitted. Looking at the magnitude and large-scale dimension of the offences reported by the Commission, this record appears as extremely poor. Nevertheless, according to some experts, the Leipzig experience served 'as an important historical precedent for war crimes trials'.[92]

On a separate track, efforts aimed at investigating and prosecuting Turkish perpetrators suffered the same faith. Although Turkey had offered guarantees

86 Meron (n 73) 556.

87 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), (1919) Ts. 4, Art. 227. According to Darcy, the Treaty of Versailles included a watered-down version of the Commission's proposed tribunal also in light of the objections field by the US and Japan representatives. Darcy (n 44) 7.

88 Meron (n 73) 557.

89 Treaty of Versailles (n 87) Art. 228.

90 Meron (n 73) 557.

91 Bassiouni (n 84) 786.

92 Ibid. Furthermore, according to Mullins, such experience contributed 'to put on record before history that might is not right, and that men whose sole conception of the duty they owe to their country is to inflict torture upon others, may be put on their trial'. Claud Mullins, *The Leipzig Trials* (London, H.F.G. Witherby 1921) 231.

that it would ensure prosecution for those nationals involved in the commission of offences, the so-called 'Istanbul trials' ended up showing a poor record of convictions. In particular, the vast majority of alleged perpetrators escaped criminal accountability and Turkey did not recognize that crimes against humanity were committed against Arminian citizens of the former Ottoman Empire.[93] Furthermore, the Treaty of Lausanne, signed in 1923 by the Allies and Turkey, provided for an amnesty in relation to offences committed during the war.[94]

To conclude, while from a fact-finding and truth seeking angle the Commission of Responsibilities may have lacked the neutral and independent approach inherent to the work of the Balkans Commission, its contribution in terms of development of international law has been undisputed. As Darcy noted,

> 'the 1919 Commission was required not only to consider existing international law […] but also to propose how the law might evolve in the context of a potential judicial mechanism to try offences'.[95]

In this regard, the experience of the 1919 Commission concurred in framing a number of international criminal law paradigms. It also had the undisputed merit to set the basis for a number of debates – including whether or not to differentiate between war crimes and violations of laws of humanity, whether to prosecute aggression and to overcome immunity arguments in case international crimes were committed – that significantly influenced future international criminal justice efforts.[96]

However, the whole follow-up process to its recommendations, particularly in terms of enforcement mechanisms, was weakened by political considerations and did not lead to tangible results. This particularly considered the failure of the world's powers to adequately tackle the issue of accountability in the peace treaties and looking at the outcome of the Leipzig and Istanbul trials. In other terms,

93 Meron (n 73) 558.

94 Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey (1923) 28 LNTS 11, Declaration of Amnesty.

95 Darcy (n 44) 5.

96 In particular, according to certain authors the 'Versailles list' of war crimes served as 'inspiration for improving international efforts' concerning international criminal accountability. Dan Plesch and Shanti Sattler, 'A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943-1948 and its associated Courts and Tribunals' (2014) 25 *Criminal Law Forum* 20; Darcy (n 44) 9.

'while the contours of war crimes law had been increasingly well established […], persons violating that law faced only a hypothetical possibility of criminal sanction'.[97]

1.2.2.3 The United Nations War Crimes Commission (1943 – 1948)

1.2.2.3.1 Introduction

On 20th October 1943 – in a time when the Second World War was still raging but the course of events had turned in favour of the Allied forces – representatives from the Allied Nations convened in London and decided to establish a United Nations War Crimes Commission. The Commission was given the initial mandate to investigate and record evidence of war crimes, while also identifying where possible the individuals responsible. In addition, it was requested to report to the Governments concerned cases 'where adequate evidence was expected to be forthcoming'.[98] The UNWCC was composed of delegates from the 'participating powers' with diverse backgrounds in fields such as military analysis, politics, international law, administration, and academia.

It would be incorrect to classify the UNWCC as a fact-finding body. As it will be described below, its functions were limited to the examination of information and legal assessments while its investigative powers and the collection of facts, however initially granted, ended up not being performed. In this regard the UNWCC can be defined more as an examining body rather than a fact-finder. This detaches the UNWCC from the role generally exercised by commissions of inquiry. At the same time, the UNWCC was not given any adjudication role. It was rather envisaged as a body to provide information and advice to states on how to act regarding investigation and prosecution of alleged war criminals.

However, there are a number of reasons why the UNWCC should form part of this historic overview. In particular, as we will see in the course of this analysis, its use of the existing legal frameworks, its contribution to the development of international law and the way its relationship with criminal justice mechanisms was constructed were all prominent aspects of its operations. These same elements still represent key issues in the debate on the role currently exercised by international fact-finding mechanisms.

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97 Meron (n 73) 558. Similarly, Bassiouni has emphasized how, 'apart from helping to lay the legal foundations for international criminal justice in the future, the Allies' experiment in retributive justice following the First World War was a dismal failure'. Cherif Bassiouni, 'World War I: 'The War to End All Wars' and the Birth of an Handicapped International Criminal Justice System' (2002) 244 (253) *Denv. J. Int.L. L.&Pol.'Y* 290.

98 The United Nations War Crimes Commission (ed.), *History of the United Nations War Crimes Commission and the Development of Laws of War* (London, His Majesty's Stationary Office 1948) 3.

The UNWCC's work covered a temporal period that has no equivalent in terms of its duration. It commenced its activities at the end of 1943 with the war still on-going and ended only in March 1948. In this regard, historians have pointed out how the UNWCC underwent different phases.[99] In particular, the importance of the preliminary stages of its involvement has been emphasized, particularly in relation the period prior to the collapse of the Nazi regime. According to historical records,

> 'through the work of the Commission and other agencies, the United Nations had ready to their hands when the time came, a more or less practical scheme for the prosecution and punishment of war criminals, which was capable of being completed and put into effect when the Nazi resistance collapsed'.[100]

The UNWCC essentially operated under a model of dispersion of efforts and responsibility rather than on a centric approach of investigations and prosecutions. While the issue of the establishment of a single war crimes prosecution agency was contemplated by the UNWCC, it was set aside given its incompatibility with the principle of sovereignty of national institutions.[101]

During its five-year mandate, the UNWCC engaged in the preparation and development of a coordinated accountability system requiring the cooperation of different countries. It provided support to national prosecutions of Nazi criminals as well as to the framing of a system for prosecuting 'the most responsible', which culminated in the establishment of the Nuremberg and Tokyo tribunals. Thanks to its internal discussions and stimulating debates, it helped clarifying a number of substantial and procedural issues related to international criminal law and criminal responsibility. Finally, through its proactive attempts to interact with brand-new international organisations, it also laid the basis for a number of proposals, which where further developed with the adoption of the UN Charter and the idea of establishing a permanent international criminal court.[102] The heritage of the UNWCC's work was included in 22 volumes of reports detailing its activities. Overall, it examined 8178 charges involving 36,000 persons and issued 80 lists of war criminals.[103]

The comprehensive mandate received and the manner in which it was discharged renders the UNWCC a rather unique experience in the history of international fact-finding. As it was pointed out by historians,

99 History of the UNWCC (n 98) 137.
100 Ibid 3.
101 Ibid 5.
102 Ibid 138-139.
103 Ibid 150.

> 'the influence of the Commission came, therefore, to be exercised indirectly, as a counsellor of the governments, as an impulse for their action and as a forum for international discussion'.[104]

Nevertheless, it is still worth to compare the UNWCC with past and future models of inquiry.

1.2.2.3.2 Linkage with the 1919 Commission

In this light, the success of the UNWCC in inspiring retributive actions undertaken at national and international level can be seen as a lesson learnt from the failure of the 1919 Commission of Responsibilities. At the time the UNWCC was established, states had in fact probably realised how the decision to dismiss most of the recommendations formulated in the 1919 Commission's report had resulted in the side-lining of a number of unresolved issues. In this regard, it was clear how delivering independent justice in 1919 would have probably helped clarifying the facts and settling a precedent that could have deterred future violations. It was also acknowledged how the failure to address the root causes of the First World War combined with the unwillingness of ensuring accountability for the perpetrators were among the main factors fuelling that nationalistic resentment which rapidly led to a new spiral of conflict.

This does not only explain the decision to establish the UNWCC in 1943 but also the robust support and follow-up provided to its work in terms of the activation of domestic and international judicial remedies. As it was underlined by certain scholars,

> '[t]here was a clear sense since the early days of the Commission that 'the real significance of the punishment of war criminals, is only clear when it is viewed with the construction of a new International Order'.[105]

Also, there have been structural and substantial differences between the Commission of Responsibilities and the UNWCC.[106] In particular, it has been pointed out that the UNWCC's mandate

104 Ibid.

105 UNWCC, Sub-Committee II, Report on the Constitution of and the Jurisdiction to be Conferred on an International Criminal Court', (submitted to the London International Assembly by Dr J.M. de Moer), SC II/3, 25 February 1944, 4, as referred in Carsten Stahn, 'Complementarity and Cooperative Justice Ahead of Their Time? The United Nations War Crimes Commission, Fact-Finding and Evidence' (2014) 25 *Criminal Law Forum* 3.

106 For a more comprehensive parallelism between the two experiences see, Harry Rhea, 'The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its contribution to International Criminal Justice after World War II' (2014) 25 *Criminal Law Forum* 147.

> 'was focused strictly on the determination of the responsibility of individuals, rather than inquiry into to the origins of war. This gave it a more neutral and targeted mandate. Moreover, its framework encompassed new institutional ways to target accountability',

including coordination with domestic systems of investigations and prosecutions.[107] Indeed, the way the UNWCC interpreted its mandate deepened even more the gap existing with the 1919 Commission.

1.2.2.3.3 Nature of the UNWCC and contribution to future accountability models
While the UNWCC most probably benefited from the lessons learnt of the 1919 Commission of Responsibilities, it also significantly contributed to inspire future accountability efforts. However, in order to appreciate such contribution it is important to assess firstly the Commission's main functions. Based on the mandate received, the UNWCC created three different committees to deal respectively with investigation, enforcement and issues involving substantive law (Committees I, II and III).[108] However, while 'investigating' was initially included among its primary functions, the UNWCC never really performed it. With the creation, by different Allied countries, of 'National Offices' entrusted with collecting evidence concerning war crimes, the investigative powers of the Commission became in fact extremely curtailed. As it has been pointed out by legal experts, the UNWCC rapidly turned out to be more an 'examining body' rather than a fact-finder.[109] Its work was mainly focused on assessing the information and evidence submitted by different governments and including individuals linked with specific charges into different lists. In this regard, Stahn has emphasized how

> 'the role of the Commission might be best characterized as a sort of international pre-trial examination, which involve[d] elements of preliminary examination and confirmation of charges'.[110]

Such pre-trial role may also explain the uniqueness and diversity of the UNWCC if compared with the experiences of modern commissions of inquiry. In particular, its role was essentially of an advisory nature is assessing whether the evidence submitted by states was sufficient to build *prima facie* cases in courts.[111]

The UNWCC was also responsible for preparing different lists of perpetrators according to the charges formulated and to the level of authority and leadership played. This distribution also helped the setting up of a comprehensive

107 Stahn, 'Complementarity and Cooperative Justice' (n 105) 2.
108 History of the UNWCC (n 98) 139.
109 Stahn, 'Complementarity and Cooperative Justice' (n 105) 5.
110 Ibid 6.
111 Ibid 7.

accountability strategy in which domestic courts were responsible for the prosecutions of low-level and mid-level perpetrators while major war criminals were tried by the Nuremberg and Tokyo international military tribunals. As we will see in the course of the next Chapter, the listing of alleged perpetrators has been recently included more systematically among the instructions provided to international human rights inquiries.[112] In relation to the selection of cases, the Commission focused its attention on those incidents that a) could reasonably lead to a war crime accusation in domestic courts; and b) were of a 'reasonable importance' thus satisfying the 'gravity' requirement.[113] In this light, the Commission elaborated a set of guidelines to National Offices with regard to the information and material to be provided for the purpose of listing suspected war criminals.[114]

The fact that certain literature has compared the UNWCC's procedure for activating domestic criminal jurisdiction with modern International Criminal Court (ICC) triggering mechanisms perfectly explains the hybrid character of the Commission, fluctuating in a blurred space between adjudicative and fact-finding mechanisms. Looking in particular at its powers in re-evaluating evidence submitted by National Offices and in identifying cases deserving criminal prosecution, the UNWCC can in fact be considered a sort of external pre-trial filter.

Indeed, what was probably the UNWCC's most distinctive contribution to future criminal justice mechanisms was its role in supporting the enforcement of international criminal law in domestic courts. In this regard, Stahn, in emphasising how 'the innovative feature of its operation [was] its targeted focus on the centrality of domestic jurisdiction in the adjudication of cases', has wondered whether the UNWCC had envisaged the principle of complementarity *ante-litteram*.[115] The UNWCC's emphasis on domestic remedies is corroborated by the fact that, while its dialogue with national offices was constant and based on structured paradigms, its interaction with the Nuremberg and Tokyo tribunals remained limited to exchanges of information, informal meetings and occasional trial monitoring.

While such a model has been side-lined with the progressive development of the UN accountability framework involving the establishment of a number of international tribunals during the 1990s, in recent years completion strategies within the ad hoc tribunals and the enshrinement of the complementarity principle in the ICC Statute have put domestic remedies back at the centre of the attention, thus reinforcing the legacy of the UNWCC.

112 In particular, see the examples of the commissions of inquiry on Darfur, Guinea, Gaza, Libya, Syria, North Korea and Eritrea.
113 Stahn, 'Complementarity and Cooperative Justice' (n 105) 11.
114 Ibid 10.
115 Ibid 9.

Much has been written on the UNWCC, its role and contribution in advancing accountability and international law.[116] Accordingly, this dissertation will analyse the experience of the Commission through the lens of those thematic areas inspiring the comparative study that will be developed in the next Chapter. In particular, the following analysis will assess the work of the UNWCC from the point of view of its contribution to the development of international law; its interaction with criminal tribunals; its impact over the response by the international community; the use of sources and evidence and the standard of proof implemented.

1.2.2.3.4 Contribution to the development of international law

A first important area to measure the impact of the UNWCC is related to its contribution to questions of substantive law, and in particular to the development of concepts such as war crimes, crimes against humanity and crimes against peace through the work of the so called 'Legal Committee' (Committee III).

Since its initial meetings it was clear that the Commission could not confine its mandate to the traditional notion of war crimes. In this regard, the work of the UNWCC can be seen in continuity with the attempt by the 1919 Commission of Responsibilities to conceive criminal accountability in a broader sense than the responsibility for violations of laws and customs of war. As it was expressed by one of the commissioners during a preliminary meeting, it was important for the UNWCC to detach itself

> 'from legalist notions, whereby crimes could only be punished if they fell within the definition of war crimes. That would defeat the whole object of the peoples. The reason for this departure was that the offenders had gone right outside the realm of law'.[117]

Hence, with regard to war crimes, the initial discussion was focused on how to define this category *strictu sensu*. It was noted that a number of acts perpetrated during the war were not falling within the traditional notion of war crimes. Many states believed that violations such as 'taking of hostages' or 'infringement of fundamental rights on discriminatory grounds' could simply not go unpunished given the absence of positive law.[118] Starting from this basis, the proposals on the table were either to provide a broader list of offences or to articulate a comprehensive definition of war crimes that could

116 See, as an example, William A Schabas – Carsten Stahn – Joe Powderly – Dan Plesch – Shanti Sattler, 'Symposium: The United Nations War Crimes Commission and the Origins of International Criminal Justice' (2014) 25 *Criminal Law Forum*.

117 UNWCC, Unofficial preliminary Meeting (26 October 1943) London, Statement Lord Atkin, 2; Stahn, 'Complementarity and Cooperative Justice' (n 105) 13.

118 History of the UNWCC (n 98) 171-172.

envisage such 'new trends'.[119] An ad hoc subcommittee was established, which agreed to use as reference the list drawn by the 1919 Commission of Responsibilities while leaving open the possibility of including additional offences. On this basis, in May 1944, the Legal Committee formulated a number of recommendations suggesting further violations to be included in the war-crimes list. The UNWCC endorsed these recommendations; in particular it agreed not to be bound by a closed list of war crimes and to examine future cases based on general sources of international law and principles of penal law.[120]

Speaking about crimes against humanity, the UNWCC realized almost immediately the need to close any impunity gap in relation to those crimes perpetrated before the outbreak of the war or against so called 'enemy nationals', thus not falling within the category of war crimes *strictu sensu*. While the progressive approach taken on this point by the Commission of Responsibilities was objected by a number of states' delegates in 1919, it was felt in 1944 that the criminalisation of those conducts running 'against founding values of civilisations' could not be disregarded once again by arguments of positive law, given the unprecedented scale of atrocities perpetrated by the Nazi regime against some of its own citizens.[121]

Such position was synthesized in a proposal of resolution formulated in 1944 by the Legal Committee, which isolated a specific type of criminal offence within the broader definition of war crimes.[122] In particular, the new type was defined as encompassing

> 'crimes committed against any person without regard for nationality, stateless persons included, because of race, nationality, religious and political belief, irrespective of where they have been committed'.

Interestingly, such formulation was later embedded in Article 6 of the Nuremberg Charter, which expressly labelled it as 'crimes against humanity'.[123]

The inclusion of crimes against humanity as a separate type of offence in the Nuremberg Charter on 8th August 1945 represented a fundamental breakthrough in consolidating the jurisdiction of the Commission over such a crime. In this regard, it can be argued that the activity of the UNWCC and the London Charter (and, subsequently, the Judgment delivered by the International Military Tribunal) had been mutually supportive in advancing the process

119 Ibid 170.
120 Ibid 172.
121 Ibid 75. In particular, according to the US representative such crimes demanded the application of the 'laws of humanity and, being committed against stateless persons or against any persons because of their race or religion, they were justiciable by the United Nations or their agencies as war crimes'. UNWCC, III/1, 18.3.44, Resolution moved by Mr. Pell on 18th March, 1944.
122 History of the UNWCC (n 98) 176.
123 Ibid.

of crystallization of 'crimes against humanity' as part of customary international law.

As a consequence, in January 1946, the Commission finally endorsed the Legal Committee's recommendation to include crimes against humanity within its jurisdiction as a separate type of war crime along with violations of laws and customs of war. Furthermore, a number of cases submitted by Czechoslovakia on crimes perpetrated against Czech civilians before 1939 permitted the UNWCC to consolidate the codification process of such an offence.[124] As a response to such petitions and taking into account the recent developments deriving from the Tokyo and Nuremberg Charters and the Law n. 10 of Control Council for Germany, the Legal Committee agreed to a number of conclusions that reflected a more in-depth analysis of the constitutive elements of the crime.[125] Firstly it recognized the existence of two types of crimes against humanity: a murder type and a persecution type, declaring that both such categories included offences against civilians rather than against military personnel. Interestingly enough, the Committee claimed that isolated acts could not fall within the category and required as necessary the circumstance that those crimes be perpetrated as part of a systematic pattern. The Committee further recognized that such crimes could be perpetrated both in peace and war times and acknowledged the irrelevance of the nationality of the victims for the qualification of the offence. It finally agreed that both leaders and low-level perpetrators could be held responsible for such crimes by emphasising the irrelevance of the circumstance concerning their 'legality' under *lex loci*.[126] All such conclusions were endorsed by the UNWCC in June 1946.

The UNWCC adopted the same modus operandi with regard to crimes against peace. While in fact 'crimes committed with the purpose of preparing or launching the war' were considered by the Legal Committee as falling in principle within the scope of the UNWCC's mandate, there was no consensus among delegates over their exact qualification.[127] As the matter was devolved to an ad hoc subcommittee, two reports reflecting different views among the delegates were submitted. In particular, a 'majority report' put forward the argument that crimes against peace could not be considered as an international crime because of the impossibility of imposing criminal liability on states. Contrary to this position, a 'minority report' was presented, arguing for the criminalization of the offence in light of its breaching a number of existing international treaties.[128] The matter was not ultimately decided by the UNWCC, which called for the Allies' governments to come out with a common position. When discussions resumed in 1944, many delegates had received instructions

124 Ibid 178-179.
125 Ibid.
126 Ibid.
127 Ibid 181.
128 Ibid 182-183.

from their governments to support the criminalisation of crimes against peace as a separate category of international crimes. These positions were grounded on the idea that the acts that triggered World War II were perpetrated in breach of a number of existing treaties, including the Kellogg Briand Pact of 1928. It was also deemed unacceptable to degrade aggressive war 'just [to] a mere violation of international law'.[129]

Also in this case, the inclusion of crimes against peace as a separate crime within the jurisdiction of the Nuremberg Tribunal in 1945 played an important role in advancing the codification of this category of crimes in the Commission's work. While the UNWCC's attempts to mainstream accountability in relation to breaches of the peace in the San Francisco Conference will be dealt more in depth below, it should be noted that in January 1946 the Commission formally recognized crimes against peace as a separate crime within its scope of jurisdiction.[130]

The UNWCC also discussed the crime of genocide. This term had made its first appearance in 1944, thanks to Raphael Lemkin's famous publication 'Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress'.[131] Surprisingly, the question of genocide was set-aside during the negotiations leading to the adoption of the London Charter, thus preventing the Nuremberg trial to develop the matter further.[132] Contrarily, the UNWCC discussed genocide as a crime in 1945, in relation to a number of British cases. In particular, Professor Stahn has analysed the declaration by Legal Secretary Egon Schwelb, according to which practices of discrimination in the allocation of food by Nazi authorities in Jersey could be qualified as 'one of the characteristics of [a] policy of genocide' based on 'the general principles of criminal law'.[133]

1.2.2.3.5 Contribution in identifying modes of criminal responsibility

Moving to the area of individual criminal responsibility, the UNWCC's experience actively promoted and contributed to a number of interesting debates. While paradigms such as leadership crimes and command responsibility (already discussed in 1919 by the Commission of Responsibilities) were examined in detail and applied to a number of different cases,[134] probably the most significant discussion among delegates was the one originating in 1945

129 Ibid 184.

130 Ibid 187.

131 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd edition, Foundations of the Laws of War 1944).

132 History of the UNWCC (n 98) 197-199.

133 UNWCC, Committee I, Notes on the United Kingdom Case No, 1645 (Discriminatory Measures in Jersey), I-412, 20 October 1945, as referred in Stahn, 'Complementarity and Cooperative Justice' (n 105) 14.

134 UNWCC, Preparation and Presentation of Cases of War Crimes, Memorandum adopted by the Commission on 18 April 1945, C. 87 (1), 4.

concerning membership in the so-called 'criminal organizations' (such as the Gestapo and the S.S.) and collective responsibility.[135] Two options were proposed: either reversing the burden of proof in case of crimes committed by criminal organizations by applying a presumption of guilt or criminalising the membership in criminal associations. Despite some opposing views, the argument prevailed of considering membership in criminal organizations as *prima facie* evidence for criminal responsibility at least for the purpose of listing individuals that should face trial.[136] Interestingly enough, such position was later endorsed by the Nuremberg Tribunal, which recognized the paradigm of 'criminal organizations' and applied it to certain conducts of the Gestapo, the SA and SS.[137]

While the concept of presumption of guilt in relation to the membership in criminal organizations may indeed be seen as problematic looking at modern fair trial standards,[138] it is undeniable that the debate over the attribution of responsibility linked to criminal groups has characterized also the work of more recent international criminal justice mechanisms. In particular, the development of the 'Joint Criminal Enterprise' doctrine by the ICTY jurisprudence and its partial rejection by the Extraordinary Chambers in the Courts of Cambodia (ECCC) are evidence of the compelling nature of such a debate.[139]

1.2.2.3.6 Interaction with existing institutional frameworks

Writers have emphasized that one of the main weaknesses of the UNWCC was the absence of a built-up network of international agencies, which prevented any sort of fruitful interaction.[140] Thus, the desire to connect with brand-new institutional frameworks may explain the attempts of the Commission to influence the preparatory works of the San Francisco Conference in 1945. In particular, the UNWCC developed two proposals to be considered for inclusion in the UN Charter. The first proposal provided a legal basis for the criminalization of violations of the prohibition on the use of force. The second pursued the inclusion of a reference in the UN Charter to the illegal character of the aggressive conduct by the Axis powers, which led to the outbreak of World

135 History of the UNWCC (n 98) 289ff. See also, Kip Hale and Donna Cline, 'Holding Collectives Accountable' (2014) 25 *Criminal Law Forum* 261.

136 UNWCC, Preparation and Presentation of Cases (n 134) 4; Stahn, 'Complementarity and Cooperative Justice' (n 105) 22.

137 *France et al. v. Goering et al.*, (1946) 22 IMT 203, (1946) 12 ILR 203; (1946) 41 *American Journal of International Law* 172. See also Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knofp 1992).

138 Stahn, 'Complementarity and Cooperative Justice' (n 105) 22.

139 ECCC, (Supreme Court Chamber, Judgment) Case 002/01 (23 November 2016). For the importance of the UNWCC's experience in influencing the modern debate around 'joint criminal enterprise' at the UN tribunals see also, Hale and Cline (n 135).

140 Stahn, 'Complementarity and Cooperative Justice' (n 105) 9, 26.

War II.[141] These recommendations represented a clear attempt to mainstream the language of criminal accountability in the UN Charter. Unfortunately, they were not adequately taken into account in the negotiations and the final version of the UN Charter made reference only to a general prohibition of the threat or the use of force in international relations. As it was pointed out by scholars,

> 'the two recommendations would have significantly strengthened the prohibition of the use of force and altered the UN Charter approach towards accountability and the development of international criminal justice in the second half of the 20th century'.[142]

Another relevant example of the UNWCC's involvement in the process of setting up a new international institutional architecture was its contribution to the discussions around the establishment of an international criminal court.[143] To this purpose, in February 1944 the Commission presented a number of proposals to the London Assembly, focused in particular on the need to ensure a primary role for domestic jurisdictions in a hypothetical future interaction with international accountability efforts. This approach envisaged a model of coordination between national and international justice mechanisms that found entire realisation only fifty years later with the enshrinement of the complementarity principle in the ICC Statute.

1.2.2.3.7 Use of sources and evidence

In relation to the choice of sources and evidence, the experience of the UNWCC was clearly affected by both its 'state-oriented' attitude and the paucity of international stakeholders existing at the time. In this regard, its approach differs quite significantly from the one subsequently developed in modern fact-finding.

Governmental sources were privileged over others with the result that the great majority of information was received from states, while submissions by private actors were accepted only in limited occasions. With regard to the position of individuals concerned and victims, their participation in the process was extremely curtailed as they had limited possibility of interacting with the UNWCC.[144]

In relation to witnesses' accounts, literature reviews have highlighted how the approach by the Commission towards the use of primary and secondary sources gradually shifted. While more emphasis was placed on direct witnesses' accounts at the initial stages of the work, with the consolidation of

141 History of the UNWCC (n 98) 185; Stahn, 'Complementarity and Cooperative Justice' (n 105) 15.

142 Stahn, 'Complementarity and Cooperative Justice' (n 105) 15.

143 For more information see, William A Schabas, 'The United Nations War Crimes Commission's Proposal For an International Criminal Court' (2014) 25 *Criminal Law Forum* 171.

144 Stahn, 'Complementarity and Cooperative Justice' (n 105) 16.

criminal records the UNWCC deemed sufficient to rely upon extracts from witnesses' statements provided by states.[145] This shift was accompanied by the dissemination of guidelines for governments and National Offices dealing with the collection of specific evidence and the recording of witnesses' testimonies. On this basis, multiple lists of alleged perpetrators were created according to the level of evidence available in each case. This also helped National Offices to further refine their strategic approach to investigations, by progressively improving the level of evidence brought to the attention of the Commission.[146] All such debates around the use of primary and secondary sources and the need for a homogeneous approach for the collection of evidence in criminal cases reveal once again the contiguity between the work of the Commission and many of the current debates concerning procedural standards set by modern human rights inquiries.

1.2.2.3.8 Standard of proof implemented

The contiguity can be appreciated also with regard to the standard of proof to be implemented. In this sense, it is interesting to note that the Commission adopted a standard, which can be compared with that implemented by international tribunals in pre-trial stages.[147] According to Stahn, 'this assessment combined analysis of the 'preponderance of evidence' with inquiry into 'balance of probabilities' relating to prospects of conviction'.[148] The parallelism between the standard of proof applied in pre-trial stages and that implemented by modern commissions of inquiry will be articulated throughout the course of this dissertation. For now it is sufficient to note some analogy between the standard applied by the UNWCC and the 'reasonable grounds to believe' formula, which has become the common trend in many recent fact-finding experiences.[149]

145 Ibid 19.

146 Ibid 17.

147 Ibid. In particular, the UNWCC's assessment focused on three questions: (i) Do the 'charges made disclose the existence of a war crime or crimes'? (ii) Does the information contain 'sufficient material to identify the alleged offender'??(iii) Is there 'good reason to assume that if put on trial, the alleged offender would be convicted'? Also the Commission's examination entailed several determinations, namely: (i) a 'determination whether it is *probable* that a war crime of reasonable importance has been committed'; (ii) a 'determination whether there is or will be at the time of trial *sufficient evidence* to justify a prosecution'; (iii) a 'determination of which individuals or units, if any, should be included on the Commission's Lists of Accused War Criminals, Suspects, or Witnesses'. UNWCC, Preparation and Presentation of Cases (n 134) 5; History of the UNWCC (n 98) 482.

148 Stahn, 'Complementarity and Cooperative Justice' (n 105) 16.

149 See, in particular, those commissions of inquiry established in relation to Guinea, Darfur, Libya, Syria, North Korea, Gaza and Eritrea. See also, Steven Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (2011) Geneva academy of international humanitarian law and human rights.

1.2.2.3.9 Conclusions

In conclusion, two outstanding aspects should be highlighted looking at the UNWCC's overall experience: the creation of a coordination and support mechanism for domestic accountability remedies and the contribution to the development of international law. With regard to the first area, remarkable results have been achieved both in terms of the creation of a structured framework of coordination with domestic authorities and looking at the criminal record registered at international and at domestic level. As it has been duly pointed out, one of the most precious lessons learnt from the UNWCC is the idea that 'lasting justice strategies require capable domestic jurisdictions and specialized war crimes offices'.[150]

In relation to the development of international law, one cannot dispute the outstanding role played by the Commission in defining, consolidating and innovating paradigms such as war crimes, crimes against humanity, crimes against peace and different modes of individual criminal responsibility, many of which later became part of customary international law.

However, the foundations laid down during its five-year mandate were not adequately followed up. This has been mainly due to a lack of strategic vision by international decision-makers. In fact, many of the subsequent experiences in the area of criminal accountability have focused on the need to clarify basic elements of core crimes rather than on ways to enforce their prosecution. Furthermore, the idea of ensuring adequate coordination between supranational agencies and states in enforcing accountability and empower domestic courts to prosecute international crimes has not been devoted much attention.[151]

In conclusion, the UNWCC stands as a unique experience in the history of international commissions of inquiry. Looking at the mandate received and at the manner in which it was interpreted, the Commission has no comparison with other inquiry exercises. Perhaps, for the very same reason, the UNWCC has more than other inquiry experiences perfectly incarnated the dilemma currently faced by modern commissions of inquiry in striking the right balance between mere fact-finding and adjudication powers.

150 Stahn, 'Complementarity and Cooperative Justice' (n 105) 24.

151 In particular, according to Stahn, 'the idea that an international institution would provide independent expert advice on core cases to domestic justice institutions remains underdeveloped in existing judicial structures and treaty regimes'. Stahn, 'Complementarity and Cooperative Justice' (n 105) 26.

1.2.3 The role of international inquiries in the period 1945-1990

1.2.3.1 Introduction: Fact-finding in the context of the United Nations and within the set up of the international human rights law architecture

Following the end of the Second World War and the San Francisco Conference establishing the United Nations Organization, the power of creating international inquiries and independent fact-finding bodies has mainly rested in the UN domain. In fact the UN has been vested with the primary task of maintaining peace and security, in which settling disputes among states and investigating over their respect for international norms play inevitably a prominent role.

The creation of the United Nations also prompted the adoption of the first instruments and conventions protecting and promoting human and peoples' rights, which also meant the creation of additional obligations for states under international law. However, this has not immediately implicated an active role by the UN in mandating investigations over alleged human rights violations. With the exception of a fact-finding mission jointly established by the UN Secretary General (UNSG) and the International Labour Organization (ILO) Secretariat charged with investigating practices of forced labour,[152] a more consistent involvement by the UN in the field of human rights fact-finding was registered only starting from the 1960s.

This initial hesitancy may be linked to specific limitations over the power for the UN to intervene in situations of states' internal human rights violations. In particular, according to a narrow interpretation of Article 2(7) of the UN Charter, the UN was not authorized 'to intervene in matters that were essentially within the domestic jurisdiction' of states. In this way, at its initial stage, the UN role was mainly limited to defying and codifying international human rights standards in conventions and declarations, while leaving the investigation and enforcement phases to national authorities.

This position shifted towards a more progressive approach vis-à-vis human rights concurrent to the de-colonization process and the consequent substantial expansion of the UN membership, reflected in bodies such as the General Assembly (UNGA) and the Commission on Human Rights (CHR) where the 'one-state one-vote' principle and geographical representations were playing a decisive role.

152 ECOSOC Res. 350(XII) (1951). The ILO fact-finding tools and practice deserve a separate mention and will not be analyzed in the present dissertation. For an assessment of the work and impact of those inquiries established within the ILO framework in terms of procedural fairness and due process see Thomas M Franck and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74 *American Journal of International Law* 333.

Indeed, a more committed involvement by UN organs in the field of investigating human rights violations was accompanied by an increased interest for independent international fact-finding. In this regard, according to certain authors, 'it was not until 1967 that fact-finding became firmly established as a technique assisting in the international protection of human rights'.[153]

1.2.3.2 International inquiries in the practice of UN organs

A possible way of describing the UN involvement in fact-finding in the period 1945-1990 is to refer to the activities of its different organs. While, the UN Security Council has been the only body expressly mandated to set up inquiries pursuant to Article 34 of the Charter, different UN actors have been involved in the practice of appointing fact-finding mechanisms by resorting to their implied powers, a trend that has encountered no significant opposition and has been formally acknowledged by the 1991 UNGA Declaration on Fact-finding.[154] In this regard, while the UN Security Council and Secretary General's contributions in the field have remained limited, the General Assembly and especially the Commission on Human Rights have played a more prominent role in activating independent inquiries.

Established in 1946 as subsidiary body of the Economic and Social Council (ECOSOC), the CHR always claimed that the power to appoint fact-finding bodies derived from its mandate to protect and promote fundamental human rights and freedoms. With specific regard to gross violations of human rights, a landmark development is the adoption in 1970 by the ECOSOC of resolution 1503-XLVIII.[155] The resolution authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a subsidiary organ of the CHR) to constitute specific working groups with the purpose of identifying and inquiring into the existence of gross violations of human rights.[156] On this basis, in its first years of work, the Commission was responsible for the establishment of a number of working groups charged with investigating thematic and geographic situations of human rights concern.[157]

In particular, in 1967, the CHR set up a Working Group on South Africa to investigate specific human rights violations. Its mandate, initially designed to inquire into episodes of torture and ill-treatment in detention facilities, was subsequently broadened to cover issues related to capital punishment, violations of trade unions' freedom of expression, treatment of political prisoners

153 Robert Miller, 'United Nations Fact-Finding Missions in the Field of Human Rights' (1970-1973) 40 *Australian Yearbook of International Law* 40, 42; Franck and Fairley (n 152) 308-345.

154 Larissa J van den Herik and Catherine Harwood, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry' (2014) Grotius Centre Working Paper 2014/016-ICL, 3-7.

155 ECOSOC Res. 1503(XLVIII) (1970).

156 Benedetto Conforti, *Le Nazioni Unite* (7th edn, CEDAM 2005) 261.

157 L. van den Herik and C. Harwood (n 154) 6.

and people in 'transit camps', practices of apartheid, colonialism and racial discrimination. The expansion also encompassed its geographic scope, which was extended to similar practices in Namibia, Southern Rhodesia and Portuguese-administered African territories.[158]

In the same year, the Commission established a Mission to investigate alleged human rights violations perpetrated in the context of Israel's occupation of the West Bank and the Gaza Strip following the 'Six-Day War'. Interestingly enough, the inquiries appointed for South Africa and OPT shared a similar composition, methods of operations and procedure and received similar criticism by scholars in terms of procedural fairness standards.[159]
In the following years the Commission set up a working group to inquire into the situation of human rights in Chile, a working group on disappearances and deployed an ad hoc Mission to assess the situation of human rights in Cuba.[160]

It is interesting to note how a number of these ad hoc working groups progressively evolved into the permanent Special Procedures system currently in place under the framework of the Human Rights Council (HRC), the Commission's successor.[161] This may reinforce the argument that there is no clear-cut distinction between the different methods of human rights investigations currently developed under the UN human rights umbrella, which include – inter alia – independent commissions of inquiry, investigations conducted by the OHCHR and Special Rapporteurs' reports.[162]

Moving to analyse the role of the UNGA, during the period 1945-1990 the Assembly established a considerable number of committees and special commissions to investigate an array of different situations. Its inquiries were created, inter alia, to investigate specific incidents (like in the case of the assassinations of Mr. Lumumba, Mr. Hammarskjold and the Prime Minister of Burundi), analyse long-standing policies (such as the special committees on South Africa or Palestine) or support dispute settlement.[163]

158 ECOSOC Res. 2(XXIV) (1967). For more information see, Miller (n 153) 45.
159 Miller (n 153) 43. For a critical assessment of the South Africa and Palestine fact-finding experiences see, Franck and Fairley (n 152).
160 CHR Res. 8(XXXI) (1975); CHR Resolution 20(XXXVI) (1980); CHR, E/1998/106 (1988).
161 On this point see, van den Herik and Harwood (n 154) 6.
162 See ch 1.4.
163 UN Special Committee on Palestine, UNGA Res. 106(S-1) (1947); UN Commission of Inquiry on the Circumstances of the death of Mr. Lumumba, UNGA Res. 1601(XV) (1961); UN Commission of Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Mr. Dag Hammarskjold and Members of the Party Accompanying Him, UNGA Res. 628(XVI) (1961); UN Special Committee on South Africa, UNGA Res. 1702(XVI) (1961); UN Commission on Ruanda-Urundi, UNGA Res. 1627(XVI) (1961); UN Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa (renamed UN Special Committee Against Apartheid), UNGA Res. 1761(XVII) (1962). For a more comprehensive account see van den Herik and Harwood (n 154) 4.

The Assembly also deeply engaged in the field of human rights fact-finding. In 1963, it established a UN Mission to South Vietnam to investigate allegations that the South Vietnamese Government was persecuting Buddhists and depriving them of their religious rights.[164] The UNGA also established – concurrently with the Working Group deployed by the CHR – a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.[165] Furthermore, in relation to alleged massacres committed by the Portuguese army in Wiriamu and other areas of Mozambique, it dispatched a commission of inquiry investigating into such abuses within the broader context of Portugal's colonial and assimilation policies.[166]

As already mentioned, the UN Security Council (UNSC) represents the only body that was entrusted by the UN Charter with explicit powers in terms of fact-finding. Article 34 of the Charter specifically authorises the Council to investigate disputes whose continuation may endanger international peace and security. According to commentators, this power can be exercised directly or through the establishment of a subsidiary body.[167] However, as it has been noted by certain experts, the Council generally referred to its implied powers in setting up international inquiries and has made specific reference to Article 34 only on two occasions.[168] As consequence, Article 34 has now been considered as fallen in disuse.[169]

Generally, UNSC's inquiries have tackled mainly situations affecting international peace and security, thus encompassing armed conflicts, acts of aggression and violations of international humanitarian law and human rights. Among the most remarkable examples, it should be noted the three-member commission established to investigate the impact of Israeli settlements construction in the Occupied Palestinian Territory, which can be considered a sort of 'predecessor' for the 2012 Human Rights Council fact-finding mission on Israeli settlements.[170] In relation to acts of aggression, the Council set up in 1981 a commission of inquiry to investigate the origin, background and financing of the mercenary aggression of 25 November 1981 against the Repub-

164 UN Mission to South-Vietnam, Statement by the President of the General Assembly, 1239th meeting (1963). According to Miller, the Mission undertook its work upon 'the invitation of the President of South Vietnam, Ngo Dinh Diem, but without the express authority of the General Assembly. During the mission's visit, the Diem regime was overthrown and this, in part, led to the failure of any United Nations body, including the General Assembly, to take any action on the report of the mission'. Miller (n 153) 42.

165 UNGA Res. 2243(XXIII) (1968).

166 UNGA Res. 3114(XXVIII) (1973); Report of the Commission of Inquiry on the Reported Massacres in Mozambique, UNGA (XXIX) Supplement No. 21 (A/9621).

167 For a more extensive analysis of the power of the UNSC to set up inquiries pursuant to Article 34 see, Conforti (n 156) 161-166.

168 UN Commission of Investigation concerning Greek Frontier Incidents, UNSC Res. 15 (1946); UN Commission for India and Pakistan, UNSC Res. 39 (1948).

169 Van den Herik (n 14) 524.

170 UNSC Res. 446 (1979).

lic of Seychelles.[171] With specific regard to the protection of human rights from colonial practices, in 1985 the UNSC appointed an ad hoc inquiry to shed light over South Africa colonial and aggressive practices in Angola and Botswana.[172]

As it will be analysed more in depth below, in modern times the UNSC has progressively delegated the power to set up fact-finding missions to the UN Secretary General. As consequence, the UNSG has acquired a more active role in appointing inquiries only starting from the 1990s. This was also due to the explicit recognition made by the 1991 UNGA Declaration on Fact-Finding of the role of the UNSG in using fact-finding 'to contribute to the prevention of disputes and situations'.[173] Before the 1990s, examples of inquiries set up by the UNSG directly have been rare, including an inquiry in the situation in Hungary following the Soviet invasion of 1956 and a mission to investigate alleged use of chemical weapons in the Iraqi-Iranian conflict in 1986.[174]

In conclusion, the period between 1945 and 1990 has been characterised by the gradual involvement of a variety of UN actors in the establishment of international inquiries. However, such a process has mainly developed in the absence of a clear institutional framework by resorting to the use of implied powers. Therefore, the UN fact-finding machinery has not followed a clear division of labour nor has led to the definition of guidelines to identify and specify competences in the establishment of fact-finding mechanisms. This has indeed negatively impacted the records of these investigations, whose follow-up has been weakened also by the scarce enforcement and accountability remedies available at the time.

1.2.4 International commissions of inquiry established in the period 1990-2016

1.2.4.1 Introduction

The 1990s have represented an important break-through in re-shifting the parameters of the international world order. The collapse of the Soviet Union and the consequent termination of the policy of the 'two blocks' have inevitably affected the United Nations' approach in tackling crises situations.

171 UNSC Res. 496 (1981).
172 UNSC Res. 571 (1985).
173 UNGA Declaration on Fact-finding (n 5) para. 12.
174 Inquiry of the Secretary-General on the Situation in Hungary (established at the request of the General Assembly) UNGA Resolution 1004 (ES-II) (1956) (replaced by UN Special Committee on the Question of Hungary) UNGA Res. 1132 (XI) (1957); Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq, established in March 1984 following the request from Iran, UN Doc. S/17911 (1986).

Concurrently, the latest decade of the 20th Century has marked important achievements in the process of recognition of human rights violations as a matter of international concern, threating international peace and stability.[175]

This has inevitably influenced the practice of appointing international commissions of inquiry. In particular, the latest twenty-five years have witnessed an exponential proliferation of international inquiries in the field of human rights.[176] As many of these investigations were referring to situations where widespread human rights violations were perpetrated in the context of armed conflicts, their mandates have often combined the use of IHRL with that of IHL. Also, a renewed attention towards accountability and international crimes can be noticed, revitalising the legacy of the 1919 Commission and the 1943 UNWCC after almost a fifty-year gap.

In this regard, the 1992 Commission of Experts to investigate IHL breaches during the conflict in former Yugoslavia can be considered a first important breakthrough.[177] Its decisive role in the UN Security Council's subsequent decision to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) and its contribution in terms of gathering prosecution oriented criminal evidence were revealing of the potential of commissions of inquiry as a tool capable of inspiring and concretely supporting the international community's response to atrocities.

Inspired by such precedent, many other international fact-finding missions have been established by different bodies at the international and regional level with mixed success. While it is undisputed that international inquires have rapidly proliferated in a context where the United Nations were much more involved than before in addressing human rights violations as an issue of international concern, a number of trends can be highlighted.

First, there has not been a serious attempt at the institutional level to provide comprehensive guidelines and codification of the practice of fact-finding.[178] This has negatively impacted on the possibility of better harmonizing their practices and consolidating a coherent lesson-learnt approach. Secondly, it should be noted a shift in the *modus operandi* of international inquiries from a pure fact-finding model into a paradigm that increasingly matches the combination of factual and legal analysis with the identification of responsibilities and possible responses.[179] Finally, a more systematic reference to international criminal law (ICL) language has emerged in mandates and findings of commissions of inquiry, a trend supported by the revival of

175 See, as an example, Conforti (n 156) 148, 149.

176 Hun J Kim, 'The Role of UN Commissions of Inquiry in Developing Global Human Rights: Prospects and Challenges' (2016) 14 *The Korean Journal of International Studies* 244.

177 Commission of Experts established pursuant to Security Council Resolution 780, UNSC Res. 780 (1992).

178 Micaela Frulli, 'Fact-Finding or Paving the Road to Criminal Justice?' (2012) 10 *JICJ* 1326, 1332, 1337.

179 Van den Herik (n 14) 507-537.

international criminal justice mechanisms within the UN framework and by the creation of the International Criminal Court.[180] This latest element can be interpreted as an attempt by human rights inquiries to flag the issue of accountability for the international community's response, particularly in those contexts where international criminal justice mechanisms have not (yet) been empowered with jurisdiction.

1.2.4.2 International bodies involved in the establishment of commissions of inquiry

The UNSC, as the primary body mandated to maintain international peace and security, has continued to exercise its power to set up inquiries also in recent times. However, the number of inquiries established by the Council in the fields of human rights and IHL in the last twenty-five years has been limited. This can be linked with the choice of the Council to delegate such prerogative to the UNSG based on the powers conferred by article 98 of the UN Charter and with the activism demonstrated in this specific field by the Human Rights Council. In particular, in the last twenty-five years the UNSC has set up inquiries to investigate human rights violations in contexts such as Somalia and Abkhazia.[181] It also prompted landmark investigations such as the Commission of Experts on Former Yugoslavia, the Commission of Experts on Rwanda, the Commission of Inquiry on Burundi and the Commission of Inquiry on Darfur.[182] More recently the UNSC has also dispatched a commission of inquiry on events in the Central African Republic.[183] The Secretary General has also acted *proprio motu* or in conjunction with the OHCHR and has set up special inquiries, mapping exercises and investigative teams in different contexts marked by serious human rights violations including Liberia, the DRC, Togo, East Timor, Cote d'Ivoire, Palestine, Guinea and Sri Lanka.

Looking at the General Assembly, its recourse to the power of appointing fact-finding missions has decreased compared to the past. This may be explained by the more proactive role assumed by the Human Rights Council and the OHCHR. In fact, the establishment and consolidation of new UN institutional frameworks where human rights issues are debated may have led the UNGA to take a few steps backward in the field of human rights investigations. However, a number of initiatives can be flagged including the Group of Experts on Cambodia appointed in 1998 and the mandate provided to OHCHR

180 On the issue see Jens Meierhenrich (ed), *International Commissions: The Role of Commissions of Inquiry in the investigation of International Crimes* (2013); Philip G Alston, *The Criminalisation of International Human Rights Fact-Finding', Conference on Fact- finding on Gross Violations of Human Rights During and After Conflicts* (Norwegian Centre for Human Rights 2011).

181 UNSC Res. 876 (1993); UNSC Res. 885 (1993).

182 UNSC Res. 780 (1992); UNSC Res. 935 (1994); UNSC Res. 1012 (1995); UNSC Res. 1564 (2004).

183 UNSC Res. 2127 (2013).

to set up an investigative team to shed light on human rights violations in Afghanistan in 1999.[184]

While the OHCHR has been also extremely proactive in setting up investigations *proprio motu*,[185] the real game changer in the panorama of actors involved in appointing human rights inquiries has been the establishment of the UN Human Rights Council. Set up in 2006 to replace the Commission on Human Rights, the Council has rapidly taken the lead in dispatching investigations over human rights abuses, by resorting mainly to two different channels.[186] The first is the establishment of ad-hoc independent international commissions of inquiry or fact-finding missions. The second method consists in mandating the OHCHR to conduct an investigation over a specific country or situation. In particular, the HRC has decided to establish ad hoc independent international commissions of inquiry to cover different situations involving widespread human rights violations and/or violations of IHL in armed conflicts, which include:

- High Level Mission to Beit Hanoun (2006)
- Commission of Inquiry on Lebanon (2006)
- Fact-Finding Mission on the Gaza conflict (2009)
- Fact-Finding Mission on the attacks on the Gaza flotilla (2010)
- Commission of Inquiry on Cote D'Ivoire (2011)
- Commission of Inquiry on Libya (2011)
- Commission of Inquiry on Syria (2011)
- Fact-Finding Mission on Israeli settlements (2012)
- Commission of Inquiry on North Korea (2013)
- Commission of Inquiry on Eritrea (2014)
- Commission of Inquiry on the Gaza conflict (2014)

184 Group of experts for Cambodia to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability, A/RES/52/135 (1998); OHCHR Investigative team for Afghanistan to investigate fully the reports of massacres of innocent civilians and of mass executions of prisoners of war as well as on reports of killings in Mazar-e Sharif and Bamian; and reports of mass killings of prisoners of war and civilians, rape and cruel treatment in Afghanistan, A/RES/54/185 (1999).

185 See, for example, the investigations mandated prior to the establishment of the Human Rights Council in Colombia (2002), Cote d'Ivoire (2002), Darfur (2004), Togo (2005), Uzbekistan and Kyrgyzstan (2005), Afghanistan (1999, 2006). See also, the OHCHR Mission to Western Sahara and refugee camps in Tindouf (2006), the OHCHR Fact-finding mission to Kenya to look into the violence and allegations of grave human rights violations following the presidential elections in December 2007 (2008), the Nepal conflict mapping (2009), the OHCHR Assessment Mission to Tunisia (2011) and the OHCHR Mission to Egypt (2011). For a comprehensive list of OHCHR mandated missions and investigative teams see, UNOG Library & Archives, 'International Commissions of Inquiry and Fact-Finding Missions' (Geneva, United Nations Library).

186 According to van den Herik and Harwood, '[t]he HRC has firmly taken the lead in establishing commissions, being the mandating body for over 60 per cent of all UN commissions established since 2006'. van den Herik and Harwood (n 154) 7.

The HRC has also mandated the OHCHR to dispatch independent investigations in situations involving serious human rights violations. More specifically, this practice has developed and consolidated in most recent years and examples include:

- OHCHR Mission on Honduras (2009)
- OHCHR Mission in Syria (2011)
- OHCHR Mission in Mali (2013)
- OHCHR Mission in the Central African Republic (2013)
- OHCHR Investigation on Sri Lanka (2014)
- OHCHR Investigation to Iraq (2014)
- OHCHR Investigation to Libya (2015)
- OHCHR Investigation on atrocities committed by Boko Haram (2015)
- OHCHR Investigation to South Sudan (2015)
- United Nations Independent Investigation on Burundi (2015)

1.2.4.3 The role of the Human Rights Council

While there seems to be no controversies around the competence of the HRC in establishing inquiries due to the powers derived from the General Assembly,[187] it has been questioned whether the Council represents the most appropriate organ to undertake such a task. This is due to a number of reasons.

1.2.4.3.1 Criticism over the lack of powers of the Human Rights Council in imposing inquiries on States and ensuring adequate follow-up

The first reason is related to the alleged lack of powers of the HRC in imposing international investigations on the affected countries.

Looking from this perspective, one of the advantages of resorting to the authority of the UNSC is that a Security Council resolution adopted under Chapter VII of the UN Charter is binding upon all UN member states. The UNSC, as primary body for the maintenance of international peace and security, would appear as the only actor empowered to 'impose' international investigations to concerned states and in so better facilitating the work of commissions of inquiry and ensuring an adequate follow-up. On this point, it has been argued how the practice reveals a poor record of states' compliance with inquiries mandated by the HRC. On the contrary, UNSC mandated commissions such as those established in relation to former Yugoslavia and Darfur are often referred as best practices and experiences that have actually led to a concrete response by the international community.

187 Christine Chinkin, 'U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza', in M Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 481. See also, van den Herik and Harwood (n 154) 7.

However – while the examples of Darfur and the former Yugoslavia should be commended as positive models for future investigations – one should not overestimate the power of the Security Council in such a domain.

Firstly, certain authors have disputed whether the competence granted under Article 34 of the UN Charter to the UNSC to set up inquiries can be 'imposed' on states. Conforti, for example, argues that the Security Council cannot exercise coercive powers in order to force states to cooperate with and accept international inquiries into their territories.[188] This applies to inquiries set up according to a Chapter VI resolution, but what about a fact-finding mission dispatched under Chapter VII? In this regard, the Council may use its implied powers to establish a commission of inquiry to investigate over a situation that already represents a threat to or breach of the peace, in this way imposing it as a mandatory measure for states. Although the Council has done this in the past (as in the referred examples of former Yugoslavia and Darfur), the process aimed at placing a context marked by human rights violations under the radar of the Council within its Chapter VII powers may face significant obstacles. These challenges are related to the veto power exercised by the UNSC permanent members and the modality through which the UNSC operates when confronted with a situation of threat to the peace, breach of the peace or aggression. In this regard, it seems unlikely that the UNSC could have reached the necessary consensus to establish commissions of inquiry with a similar mandate to those set up by the HRC in relation to the OPT, North Korea or Syria.

Secondly, a Security Council mandate does not represent an absolute guarantee for State cooperation. In this regard, a telling example is represented by the UN Fact-Finding Team on the events in Jenin mandated by the UNSC and subsequently dismantled by the Secretary General in light of Israel's denial of access and cooperation.

However, one should acknowledge how the practice of commissions of inquiry set up by the UNSC registers a more decent record of compliance and follow-up particularly if compared with that of the HRC. A telling example is represented by the situation in Syria. In this context, the UN Commission of Inquiry, established by the HRC in 2011, has been repeatedly denied any access to the territory and contact by the relevant parties concerned. Such challenges have inevitably frustrated the follow-up process to its findings and recommendations. At the same time, an ad hoc Joint Investigative Mechanism of the United Nations and the Organisation for the Prohibition of Chemical Weapons (OPCW) has been set up by the Security Council acting through resolution 2235 (2015).[189] The Mechanism, which has been given a much narrower focus than the HRC Commission of Inquiry, was mandated to identify to the greatest extent feasible individuals, entities, groups or governments who

188 Conforti (n 156) 165.
189 UNSC Res. 2235 (2015) para. 15.

were perpetrators, organizers, sponsors or otherwise involved in the use of chemicals weapons in the Syrian Arab Republic. The Mechanism was granted access to the territory of Syria and maintained constant interaction with the Syrian regime based on an agreement signed between the UN and the Government of Syria concerning the status of the Mechanism in order to ensure the timely, safe and secure conduct of the mandate of the Mechanism in the country.[190] Since the beginning of its activities the Joint Mechanism submitted four reports. In particular, with regard to a number of incidents it has identified specific actors responsible for the use of chemical weapons (including the Syrian Government and the so-called 'ISIS' group) while in other instances has acknowledged the lack of sufficient evidence for reaching similar conclusions.[191] Its mandate was renewed for another year by the Council acting through resolution 2319 (2016).[192] It is important to emphasized how in the debate preceding the adoption of resolution 2319, certain permanent members stressed the wish that the Mechanism's findings could help reaching the necessary consensus in the Council for the adoption of a resolution targeting all actors responsible for chemical attacks with specific sanctions.[193]

To conclude, while the practice suggests that the UN Security Council may have played a more authoritative role than the Human Rights Council in imposing inquiries on states and ensuring a more concrete follow up, the Security Council should not be viewed as an absolute guarantee for international inquiries' success. In this regard, the political deadlock that has for long time paralysed the Security Council over a number of issues – particularly in relation to the protection granted to some of the permanent members' closest allies when it comes to shield them from accusations of gross human rights violations – has certainly affected its efficiency in promptly responding to human rights emergencies. In this regard, as the example of North Korea may suggest,[194] an active role by the Human Rights Council in appointing human rights inquiries may even be seen as instrumental in exercising the necessary pressure for placing a particular situation under the radar of the Security Council.

190 Third Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/738 (24 August 2016) para. 11.

191 Ibid; First Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/142 (12 February 2016); Second Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/530 (10 June 2016); Fourth Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/888 (21 October 2016).

192 UNSC Res. 2319 (2016) para. 1.

193 'UN Security Council Extends Inquiry Into Chemical Weapons Attack in Syria' (2016) *The Wire* http://thewire.in/81108/un-security-council-extends-inquiry-into-chemical-weapons-attack-in-syria/ accessed on 8 December 2016.

194 As it will be analysed in Chapter 3.1, the work and findings of the HRC Commission of Inquiry on North Korea have played an important role in stimulating, for the first time in history, a UN Security Council debate on the situation of human rights in North Korea.

1.2.4.3.2 Criticism over the competence of the Human Rights Council in applying IHL

Another criticism of the HRC's involvement in fact-finding concerns its mixed applicability of IHL and IHRL standards when it comes to define the mandate of inquiry bodies.[195] Critics have highlighted how such an approach, in allowing investigations into situations of armed conflicts and breaches of the peace, is exceeding the limits of the HRC's mandate, which deals uniquely with the promotion and protection of human rights. Secondly, the need for a specific expertise to cover investigations entrusted with the analysis and application of IHL norms has been pointed out, a task which is necessarily different from that required in case IHRL is at stake.

While the lack of competence of the Human Rights Council in dealing with IHL may represent a formal obstacle, one should also consider the negative implications deriving from a strict and clear-cut separation between the two bodies of law. Even those authors that have raised concerns over such a practice have underlined the growing interaction between IHL and IHRL in addressing modern situations of armed conflicts. In many contexts around the world, widespread and systematic human rights abuses go hand-in-hand with situations of armed conflicts where IHL norms apply. If we take many of the situations investigated by HRC appointed inquiries, they involve the applicability of both IHRL and IHL paradigms. Requiring the HRC not to be actively involved in comprehensively investigating contexts such as Libya, Syria or the Palestinian Territory just because IHL norms apply along side with IHRL would probably render it tooth less. In this regard, a curtailed or partial investigation would in fact run contrary to the very same purpose behind the establishment of independent international inquiries, which is to provide an impartial and comprehensive account of the facts and trends of violations in order to direct relevant stakeholders within the international community to take appropriate response.

Hence, although the Council's involvement in the field of IHL has attracted several criticisms, its competence can be grounded on the complementary applicability of IHL and IHRL in situations of modern armed conflicts as recognised by authoritative international bodies.[196] This conclusion has been shared by Marauhn who, in ruling out any accusation against the Council acting *ultra vires*, has also noted that

195 Boutruche (n 4); Frulli (n 178) 1332. See also the criticism raised by NATO representatives on the broadening of the scope of the HRC Commission of Inquiry on Libya to encompass alleged violations of IHL committed during the NATO-led coalition airstrikes. On this issue, see Robert Grace, 'The Design and Planning of Monitoring, Reporting and Fact-Finding Missions' (2013) Program on Humanitarian Policy and Conflict Research Harvard University 15.

196 See, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Rep 2004 para. 106.

> '[commissions] can draw legitimacy for addressing international humanitarian law from the interface between the two bodies of law, in particular in situations of non-international armed conflict'.[197]

A number of relevant examples support this view. The first one is represented by the International Commission of Inquiry on Syria. The commission was established by the HRC on 18 August 2011.[198] It was initially mandated 'to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic' and applied exclusively IHRL paradigms in its first report.[199] However, the deterioration of the situation led the Commission to amend its mandate. In its third report covering the period between February and August 2012, the Commission

> 'determined that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict. The commission therefore applied both international humanitarian law and international human rights law in its assessment of the actions of the parties to the hostilities'.[200]

This decision found adequate support in the opinion of certain scholars. Marauhn, for example, noted that

> 'it would have been difficult to [justify in front of] the international community had the HRC stopped its fact-finding activities upon the uprising being qualified as a non-international armed conflict. […] [Furthermore] the law of war does not have a supervisory body at hand with the exception of the International (Humanitarian) Fact-Finding Commission'.[201]

A similar pattern can be noticed in relation to the Commission of Inquiry into events in Libya. The Commission was set up by HRC resolution S-15/1 of 25 February 2011 in order to investigate 'all alleged violations of international human rights law in the Libyan Arab Jamahiriya'.[202] The Commission investigated primarily the context of human rights violations committed before,

197 Thilo Marauhn, 'Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – The Case of Syria' (2012) 43 *California Western International Law Journal* 439.

198 Human Rights Council, A/HRC/18/53 (2011).

199 Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add. 1 (23 November 2011) para 4.

200 3rd Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/21/50 (16 August 2012) *Summary*.

201 Marauhn (n 197) 454.

202 Human Rights Council, A/HRC/S-15/1 (2011); Report of the International Commission of Inquiry to investigate alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44 (1 June 2011) *Summary*.

during and after the anti-government demonstrations spreading in a number of different Libyan cities in February 2011. However, in light of the armed conflict that developed in late February 2011 and continued during the Commission's operations, it looked into both violations of international human rights law and relevant provisions of international humanitarian law.[203]

These two examples reflect how in modern times it has become extremely challenging to separate the operative sides of those bodies mandated to address IHRL violations (such as the HRC) from those instructed to look at the applicability of IHL in the context of armed conflicts (such as the ICRC and the International Humanitarian Fact Finding Commission). While, it is beyond question that the primary focus of their mandates should not be altered, operative implications such as investigations and inquiries should necessarily take into account the possibility of interaction between the two legal frameworks.

As already emphasized, the activism of the HRC in mandating investigations in contexts where both IHRL and IHL apply has been put into question also in terms of the specific expertise required for the interpretation and application of IHL norms.[204] It has been argued that

> 'the focus on human rights violations and the involvement of human rights law experts in fact-finding missions investigating violations committed in the context of an armed conflict may lead to distortion with respect to the evaluation of the lawfulness of the conduct of military operations'.[205]

The issue concerning the implications of the applicability of IHL norms from a 'human rights perspective' should not be underestimated. However, while certain experiences such as the 2011 Libya Commission have not tackled the issue accordingly,[206] many other HRC mandated commissions have more adequately reflected an expertise in military operations and criminal investigations both in terms of their composition and methodology used. For example, the 2009 UN Fact-Finding Mission on the Gaza Conflict had one former military official and one former ICTY Prosecutor among its members. Furthermore, UN inquiries in the OPT have frequently resorted to the expertise of (former) military officials, military analysts and ballistic and forensic investigations. Also, the composition of the commission of inquiry on Syria was amended in order to include the former ICTY Prosecutor Carla Del Ponte. These examples reflect the intention to empower these investigations with an expertise that

203 Report of the International Commission of Inquiry into Libya (n 202) *Summary*.
204 Frulli (n 178) 1332; Boutruche (n 4).
205 Frulli (n 178) 1332.
206 On the absence of military experts among the commissioners in the Libya Commission see Kevin J Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis' in Jens Meierhenrich (ed), *International Commissions: the Role of Commissions of Inquiry in the Investigation of International Crimes* (Oxford University Press) 7.

go far beyond human rights law, in line with the mandates and operational challenges faced.

1.2.4.3.3 Criticism over the 'politicization' of inquires mandated by the Human Rights Council

Some critics have pointed out that the 'politicization' within the HRC as an interstate body has negatively affected its impartiality in establishing inquiries, resulting in commissions provided with unilateral mandates that have undermined their legitimacy and negatively affected their findings. Indeed, it is difficult to deny the fact that the Human Rights Council is influenced by political considerations of some of its members in defining its agenda and interventions. As an example, the 2015 Dutch proposal for initiating an international inquiry over events in Yemen was withdrew due to the opposition of Saudi Arabia and its Arab allies, which mounted a lobbying campaign in the HRC by tabling an alternative resolution encompassing a national (rather than international) inquiry.[207] Indeed, the Human Rights Council's selectivity in focusing on specific contexts and the unilateral language used in certain resolutions (such as those concerning the 2011 Libya uprising or condemning Israeli practices in the OPT) are real risks that need to be urgently tackled given the far-reaching implications on the work and legitimacy of commissions of inquiry themselves. At the same time, it is difficult to argue that other bodies (such as the UNSC) would be more immune from political considerations. Although with different mandates, both the UNSC and the HRC are political organs composed by states.

Hence, the attempt to contaminate the applicability of human rights and international humanitarian law with political considerations, through selective and 'ad-hoc' interventions based on double standards is indeed alarming and needs to be tackled.[208] However, selectivity in the application of human rights/IHL standards is a real threat that both the UNSC and the HRC are facing. Both of them may misuse international law to serve their different political goals.

1.2.4.4 A renewed interest in criminal accountability

The period between 1990 and today has witnessed – more than ever in the past – commissions of inquiry request to provide a response to the quest for accountability.

The accountability function entails for inquiry commissions a further effort in paving the way for stakeholders' responses. Accountability may refer to both states and individuals and implies not only the characterization of certain conducts as violations of the law but also the identification of the actors

207 Kim (n 176) 242.
208 Franck and Fairley (n 152) 311-312.

responsible. Thus, by being empowered with 'accountability' tasks in their mandates, fact-finding missions started pointing the attention of key actors involved in situations of armed conflict and human rights crisis that their actions may be subjected to judicial (or, more broadly, law enforcement) sanction due to their law infringements.

Notwithstanding certain examples dating back to the first half of the 20th Century,[209] commissions charged with a specific accountability mandate represent a relatively recent trend. In this regard, the 1990s have witnessed a renewed interest by the international community in the area of individual criminal responsibility. This has helped the creation of a number of ad hoc mechanisms entrusted with the repression of international crimes. The establishment, in the period 1992-2005, of ad hoc tribunals, mixed courts, special tribunals and, finally, the creation of a permanent international criminal court in 1998 are vivid examples of a growing attention for this particular area of international law. This context has indeed affected the mandate and work of international inquiries.

It can be argued that the relationship between commissions of inquiry and international criminal accountability mechanisms has been one of mutual inspiration. It is undeniable that the findings of commissions of inquiry have often paved the way for international criminal investigations. For example, the work and recommendations of the Commission of Experts on former Yugoslavia played a decisive influence in the UNSC's decision to establish an ad hoc international criminal tribunal. As we will see in the course of this study, the Commission of Experts' findings also facilitated and supported the investigations and prosecutions conducted in the framework of the ICTY from a number of different angles. Similarly, the report of the International Commission of Inquiry on Darfur played a pivotal role in inspiring the UNSC's referral of the situation to the ICC.

At the same time, the recent proliferation of international criminal tribunals has undoubtedly influenced the framing of mandates of international inquiries, which started more consistently to refer to individual criminal responsibility as one of their key elements. Again, the HRC has played a pivotal role in this process. According to certain scholars,

> 'of twelve HRC commissions, the mandates of six expressly instruct commissions to investigate violations *in order to* ensure that those responsible are held accountable'.[210]

209 See, in particular, the 1919 Commission of Responsibilities and the 1943 United Nations War Crimes Commission.

210 Van den Herik and Harwood (n 154) 10.

1.2.4.5 Towards a new role for commissions of inquiry

In conclusion, although only few developments have been registered at the institutional level to clarify and provide guidelines on their work, the practice of the last twenty-five years indicates a significant evolution in the role and function of commissions of inquiry as instruments under international law. It is now clear that the mandates of commissions of inquiry established in the last twenty-five years provide a broader interpretation of their role than it was indicated in their original codifications and shed light on the wide spectrum of their functions.

In particular, modern commissions of inquiry progressively established under UN auspices to investigate conflicts in countries such as former Yugoslavia, Sudan, Guinea, Palestine, Libya and Syria have, in accordance with the mandates received, gone far beyond the task of merely ascertaining facts and uncovering the truth for dispute settlement purposes. Their findings have included legal qualifications, identification of perpetrators of violations of international law, determination of both States and individual's responsibility under international law, and recommendations and follow-up measures for key actors and stakeholders involved in a certain situation, including measures to ensure accountability.[211] As we will see in the course of this dissertation, these developments may help cementing a new role for commissions as a warning and denouncing tool integrally part of the broader response by the international community to situations of armed conflict and grave human rights emergencies.

1.3 Commissions of Inquiry: Institutional Instruments and Codifications

1.3.1 Introduction

The second perspective from which to assess the evolution in the role of international inquiries is to look at how they have been codified in international conventions, resolutions and soft-law instruments.

As it has been described above, commissions of inquiry and fact-finding missions, as instruments under international law, have mainly evolved through

211 See, inter alia, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General Pursuant to Security Council Resolution 1564 (2004) (25 January 2005); Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (25 September 2009); Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of?28 September 2009 in Guinea, S/2009/693 (18 December 2009); Report of the independent international commission of inquiry on Syria (n 199).

practice. Commissions have in fact been perceived more as ad hoc tools to react to specific emergency situations rather than permanent and inherent parts of a standardised response to be activated in case of necessity. This may well explain why attempts to regulate these tools at institutional level have been rare. Furthermore, although few references to such mechanisms can be found in international treaties, the vast majority of regulatory frameworks have been created through instruments of soft law, which do not purport to commit any relevant international law actor to their respect.

1.3.2 The Hague Conventions and the traditional fact-finding model

Indeed, the traditional idea of fact-finding as tool of preventive diplomacy in the hands of states to help them solving their international disputes is inherent to its inclusion in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. The Conventions provided for the establishment of a specific inquiry mechanism with the consent of all the parties affected. Article 9 of the 1907 Convention clearly determined that

> 'in disputes of an international nature […] the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation'.[212]

The Conventions also included a specific discipline on how these commissions shall be established and function. One necessary requirement for their creation was the consent of both parties to the dispute.[213]

The so-called Hague Conventions represent an important precedent for those calling for a more comprehensive institutionalisation of the instrument of commissions of inquiry. At the same time, given the period and the scope of the Conventions, it is difficult to argue that such model was created having the idea of current human rights fact-finding in mind.

1.3.3 Codification of fact-finding in the UN Charter

A slightly different value should be attached to the inclusion of fact-finding in Articles 33 and 34 of the UN Charter. Although the UN Security Council has

212 The Hague Convention for the Pacific Settlements of International Disputes (1907), UKTS 6 (1971) Cmnd 4575, Article 9.

213 Ibid Article 10.

expressively referred to Article 34 only on two occasions, the previous subparagraphs have widely described how UN bodies have extensively been involved in appointing fact-finding mechanisms.

Although it is difficult to appreciate a qualitative shift in the inclusion of fact-finding in the UN Charter if compared with the previous discipline in the Hague Conventions, an important development should be registered. Placed at disposal of an organ mandated to maintain international peace and security, inquiries are no longer tools in the hands of states. They do no longer serve uniquely states' interests and are appointed by organs whose aims may transcend states' national agendas. While the purpose behind the inquiries' appointment remains the same (clarification of facts for the maintenance of peace and security through restoring friendly relationship among states), the perspective from which they originate shift significantly. This shift brings important consequences in terms of how fact-finding missions are designed, the way they collect information and formulate findings and the recommendations and policy actions they require relevant actors to take.

As we will se in the following sub-paragraphs, after its inclusion in the UN Charter, some attempts were made to regulate and standardise the practice of fact-finding bodies. In 1967 the UN General Assembly adopted a resolution upholding the practice of independent international fact-finding.[214] Although certain instructions were given to the Secretary General to set up a roster of experts, this did not lead to the creation of a permanent and predisposed inquiry mechanism.[215]

1.3.4 The 1991 UN General Assembly Declaration on Fact-Finding

A more substantial improvement was represented by the adoption by the General Assembly of the 1991 Declaration on Fact-finding in the Field of the Maintenance of International Peace and Security. The Declaration recognizes the need for all competent organs of the United Nations involved in the maintenance of peace and security to have full knowledge of all relevant facts and to undertake fact-finding activities to this end.[216] The Declaration contains an important definition of 'fact-finding' considered as

214 UNGA Res. 2329 (XXII) (1967).

215 In particular, Antonio Cassese specifically refers to the Dutch proposal presented in 1967 to the UNGA to establish a permanent commission of inquiry, which was rejected and led to the adoption of Resolution 2329. Antonio Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 295, 297.

216 UNGA Declaration on Fact-finding (n 5) para. 1.

> 'any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security'.[217]

It then sets a number of guiding principles, as proper fact-finding should be 'comprehensive, objective, impartial and timely'.[218]

Looking at the wording of the Declaration, the General Assembly decided to take into account states' concerns in relation to some of the potential side effects in establishing international fact-finding missions. These concerns seem linked to a traditional approach to fact-finding, which considers inquiry commissions uniquely as a tool to solve matters arising between states. Accordingly, fact-finding missions shall refrain from prejudicing states' interests and destabilising states' position in the international arena. In this regard, the text of the Declaration underlines how

> 'the competent United Nations organs should bear in mind that the sending of a fact-finding mission can signal the concern of the Organization and should contribute to building confidence and defusing the dispute or situation *while avoiding any aggravation of it*' (emphasis added).[219]

Also, states' consent is perceived as *conditio sine qua non* for allowing fact-finding missions to actually operate in the field. According to the declaration,

> 'the sending of a United Nations fact-finding mission to the territory of any State requires the prior consent of that State, subject to the relevant provisions of the Charter of the United Nations'.[220]

At the same time the Declaration urges states 'to endeavour to follow a policy of admitting United Nations fact-finding missions to their territory'.[221] In this light it should be interpreted its request to states that deny access to fact-finding missions to explain the reasons behind such decision.[222]

In terms of mandating organs, the Declaration refers particularly to the powers of the UN Security Council, the UN General Assembly and the UN Secretary General. In particular the UNSG is given precedence in selecting the most appropriate body to undertake fact-finding tasks and mandated to

217 Ibid para. 2.
218 Ibid para. 3.
219 Ibid para. 5.
220 Ibid para. 6.
221 Ibid para. 21.
222 Ibid para. 20.

'prepare and update lists of experts in various fields who would be available for fact-finding missions'.[223]

1.3.5 Fact-finding in the R2P framework

Perhaps, the most significant breakthrough in the evolution of the role of international inquiries is linked to their inclusion within the 'Responsibility to Protect' framework. The 2009 UNSG report implementing the responsibility to protect in fact expressively referred to fact-finding investigations as mechanisms at disposal of the international community to react to situations of human rights concern. The document – while referring to Article 34 of the UN Charter and to the competence of the UNSC, the UNGA and the HRC to establish human rights inquiries – designs a new framework around the use of fact-finding missions and commissions of inquiry. The reference to fact-finding is in fact included under Pillar III of the R2P framework, which relates to the timely and effective response that the international community should put in place in cases where states have failed in their responsibility to protect their own people.[224] In this regard, the report argues how, as a first step to react to a human rights emergency, 'intergovernmental bodies can play pivotal roles in conducting on-site investigations and fact-finding missions'.[225] Drawing inspiration from the Darfur experience, it also determines that '[the General] Assembly or the [Security] Council […] may appoint a fact-finding mission to investigate and report on alleged violations of international law'.[226]

More important is the emphasis on the role entrusted to fact-finding missions within the international community's response. According to the report:

> 'investigation, of course, is not a substitute for "timely and decisive" protective action […] but rather should be seen as an initial step towards it. If undertaken early in a crisis, at the first sign that a State is failing to meet its obligations relating to the responsibility to protect, such on-site missions can also provide opportunities for delivering messages directly to key decision makers on behalf of the larger international community, for example, by trying to dissuade them from destructive courses of action that could make them subject to prosecution by the International Criminal Court or ad hoc tribunals'.[227]

223 Ibid paras. 14, 15.
224 Implementing the Responsibility to Protect (n 12) paras. 49, 52.
225 Ibid para. 52.
226 Ibid.
227 Ibid para. 53.

This passage is of crucial importance in order to appreciate the evolution of human rights inquiries as instrument under international law. This is mainly for two reasons.

The first stands behind the idea that fact-finding missions are no longer tools that are uniquely in the hands of states. In this regard, the report implementing the R2P framework certified what had already become a common practice. It goes without saying that states' consent and cooperation with these investigations are no longer a *conditio sine qua non* for their existence. Thus, fact-finding becomes part of an international community's response that goes far beyond single states' agendas. This response directly tackles a new and emerging interest in the modern international arena: the need for individuals to have their basic human rights recognized and respected regardless of their nationality, as a matter of concern of the international community as a whole. In this regard, the transformation of the role of commissions of inquiry should be conceived as inherent part of a wider renovation of the basic foundations of the international world order. As the UNSG report acknowledges,

> 'it is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect'.[228]

The second reason relates to the role that fact-finding missions are requested to exercise. According to the R2P framework, human rights investigations should act as initial step in the international community's response aimed at preventing gross human rights violations to happen or rapidly responding to such abuses. In this context, human rights investigations act as early warning mechanisms,[229] not only by reporting emerging trends of human rights violations through their fact-finding and legal analysis but also through deterring further violations to happen by suggesting the international community further courses of action.

In this field, we can see once again how theory and practice have mutually inspired each other. It is undisputed that the R2P framework, as further developed in the UNSG's report, has echoed certain important developments from the practice related to the establishment of human rights investigations and their impact on specific responses undertaken by the international community. The precedents set by fact-finding experiences such as those in former Yugoslavia and Darfur were surely in the minds of the drafters of the 2009 R2P implementing report. At the same time, one can also argue that the enshrinement of the fact-finding tool in the R2P framework has definitely acted as engine for the consolidation of such a new model of commissions of inquiry,

228 Ibid para. 54.
229 Van den Herik and Harwood (n 154) 8, 9.

in particular if one looks at the activism demonstrated in the field by the UN HRC in more recent years.

1.3.6 Guidelines on human rights fact-finding and the 2015 OHCHR codification

Another aspect of the so-called 'institutionalisation' of human rights fact-finding relates to the adoption and publication of guidelines and manuals by UN bodies. These instruments represent important attempts to shed more clarity and develop a more coherent methodology in relation to different aspects of a practice that has been too often left to non-harmonized interventions.

A first important example is represented by the UN Secretary General 'Model rules of procedure for United Nations bodies dealing with violations of human rights'. This instrument was adopted in 1970 and displays 25 rules divided into eleven sections according to the life cycle of human rights fact-finding investigations. It represents a first attempt to codify standard rules for a more coherent exercise of fact-finding powers. In this regard, it is specified that the 'ad hoc organ' deputed to undertake fact-finding should be intended as subsidiary organ of the UN body responsible for its establishment and for the drafting of its terms of reference.[230] Those individuals appointed as commissioners should act according to principles of impartiality and integrity while decisions are taken by majority.[231] In relation to states' consent and cooperation, the language of the rules appears ambiguous. In particular, it is determined that the mandating organ may request the affected state(s) to cooperate with the ad hoc body in different areas (including information request and access to territory).[232] However, there is no specific reference to the binding nature of such request or to whether state(s)' consent should be considered a necessary requirement to activate the ad hoc body. In this regard, certain authors have emphasized that,

> 'while the model rules are […] a modest start toward establishing normative procedures, they are not an answer to the problem of ensuring manifest fairness and diligence in investigations'.[233]

A more substantive development is represented by the 'Training Manual for Human Rights Monitoring' adopted in 2001 by the Office of the High Commissioner for Human Rights. It should be noted how the manual is not directed specifically to commissions of inquiry/fact-finding missions but it targets more

230 Model Rules (n 10) Rule 3.
231 Ibid Rules 6, 15.
232 Ibid Rule 17.
233 Franck and Fairley (n 152) 321.

generally any UN body mandated to monitor and report over human rights violations.

The Manual defines its primary objective as 'to improve the efficiency, professionalism and impact of human rights field operations in implementing their monitoring mandates'.[234] This can be accomplished by providing comprehensive information on human rights standards that are relevant to the UN field operations. It also needs the development of specific skills and techniques for human rights monitoring by UN human rights staff.

The Manual clarifies the distinction between 'monitoring' and 'fact-finding'. 'Monitoring' is defined as a broad term describing 'the active collection, verification and immediate use of information to address human rights problems'.[235] On the contrary 'fact-finding' is described as 'a process of drawing conclusions of fact from monitoring activities'.[236] According to the Manual, 'fact-finding entails a great deal of information gathering in order to establish and verify the facts surrounding an alleged human rights violation. Moreover, fact-finding means pursuing reliability through the use of generally accepted procedures and by establishing a reputation for fairness and impartiality'.[237] On these grounds, 'fact-finding' is considered necessarily a narrower term than 'monitoring'.

Finally, to respond to the recent proliferation of commissions of inquiry and fact-finding missions appointed under the UN human rights umbrella, the OHCHR published in 2015 a document entitled 'Guidance and Practice of commissions of inquiry and fact-finding missions on international human rights and humanitarian law' ('the Guidance'). Unlike previous instruments, this document specifically focuses on international commissions of inquiry/fact-finding missions appointed to investigate international human rights and humanitarian law violations. It means that it does not deal with parallel mechanisms of investigations, including OHCHR/UN field missions and special rapporteurs' reports.

The publication, which provides policy, methodological, legal and operational guidance, can be seen as the result of 'two decades of experience by OHCHR in advising, supporting, deploying and reviewing international commissions of inquiry and fact-finding missions'.[238]
According to the OHCHR, the Guidance serves the purpose of supporting

234 OHCHR, 'Training Manual on Human Rights Monitoring' (New York & Geneva, United Nations 2001) para. 19.
235 Ibid para. 28.
236 Ibid para. 29.
237 Ibid.
238 OHCHR, Guidance and Practice (n 3) 3. In particular, the OHCHR has recorded that it has provided assistance to 50 commissions of inquiry so far.

> 'the work of such international investigative bodies, and those establishing and mandating them, in applying a consistent methodology based on best practice and maximizing their potential to successfully fulfil their mandates'.[239]

Although the document seems to respond to an increasing demand for harmonization and standardisation of these instruments, the OHCHR appears mindful of the fact that

> 'while existing standards and best practices provide a solid framework to guide the work of commissions and missions, flexibility, good judgement and adaptability will be required, as every commission/mission will in some way be unique and require specific responses and support'.[240]

The Guidance contains an important definition of commissions of inquiry and fact-finding missions in the sphere of international human rights and humanitarian law. These are defined as

> 'temporary bodies of a non-judicial nature, established either by an intergovernmental body or by the Secretary-General or the High Commissioner for Human Rights, and tasked with investigating allegations of violations of international human rights, international humanitarian law or international criminal law and making recommendations for corrective action based on their factual and legal findings'.[241]

The Guidance further incorporates some of the most salient developments related to that evolution in the role of commissions of inquiry that has been emphasized above. In particular, it expresses how

> 'international commissions of inquiry and fact-finding missions are now a key tool in the United Nations response to situations of violations of international human rights law and international humanitarian law, including international crimes'.[242]

It acknowledges their increasing importance 'in countering impunity by promoting accountability for such violations', while also emphasizing how the commissions' work combines the collection of information and storage of historical records with the identification of preliminary findings towards further investigations.[243] The Guidance further underlines their contribution in recommending measures to redress violations, providing justice and reparation to victims, and holding perpetrators to account.

239 Ibid 3.
240 Ibid 4.
241 Ibid 7.
242 Ibid V.
243 Ibid.

Particularly striking is the reference to the role played by commissions of inquiry in promoting accountability and inspiring political action by the international community. In particular, the Guidance notes an increasing reference in the mandates of commissions of inquiry to language such as 'accountability' and 'perpetrators to hold accountable'. According to the OHCHR,

> 'international human rights investigations have furnished crucial elements to judicial procedures. They have done so in the inquiries of ad hoc international tribunals and of the international Criminal Court'.[244]

The Guidance contains specific sections related to each substantive aspect of the commissions' life-cycle, including their mandate, composition, methodology, use of sources and evidence, cooperation by the parties, reporting and follow-up measures. This is why many of its substance will be analysed more in detail in the course of the following Chapter dealing with a thematic and comparative study between different experiences of commissions of inquiry.

For the moment it should be highlighted how the Guidance refers to the fact that

> 'the United Nations has […] created a body of principles and standards for fact-finding and inquiries under its authority and, over the years, established practice and doctrine. United Nations-mandated commissions/missions should ensure that they adhere to these principles and standards, reflect them in their terms of reference, methods of work and rules of procedure, and describe them in the final report'.[245]

In particular, it reaffirms the need for commissions to respect, in the performance of their functions, principles such as do no harm, independence, impartiality, transparency, objectivity, confidentiality, credibility, visibility, integrity, professionalism and consistency.[246] To this purpose, the Guidance includes in the annexes two specific instruments such as the 'International legal and methodological standards and instruments' and the

> 'Model standard rules of procedure for commissions of inquiry/fact-finding missions on violations of international human rights law and international humanitarian law'.

These documents are expected to contribute to the creation of a more harmonized and coherent framework in order to allow future experiences of human rights inquiries to operate under common denominators.

244 Ibid 7.
245 Ibid 33.
246 Ibid 33-35.

1.3.7 The International Humanitarian Fact-Finding Commission

In this overview of institutional instruments regulating the use of international inquiries, the International Humanitarian Fact-Finding Commission deserves a separate analysis.[247] Established by Article 90 of Additional Protocol I to the Geneva Conventions, the IHFFC represents a rather unique example of permanent international commission of inquiry. However, its permanent character is not the only sign of such uniqueness. The Commission possesses distinctive features also in a number of other relevant areas including its triggering mechanism, competence and procedure.

One can argue that the IHFFC combines characteristics of the most traditional models of inquiries with those of more recent investigations. On the one hand, in fact the Commission is expected to restore an attitude of respect for the Conventions and formulate recommendations that can help states in peacefully settling their disputes, in this way absolving a preventive diplomacy function. On the other hand, the Commission is also mandated to investigate into alleged serious breaches of the laws of war, particularly those that may trigger individual responsibility, thus arguably fulfilling an accountability role that renders it similar to modern human rights inquiries.

According to the ICRC, the Commission, in helping to clarify the facts and settle disputes involving violations of the laws of war, may represent one of the most powerful tools placed at disposal of the that High Contracting Parties in order to comply with their commitment 'to respect' and 'ensure respect' for the provisions of the Geneva Conventions.[248] In particular,

247 It is important to clarify that the following analysis will only address to a small extent the role and function of the IHFFC, in light of its contribution to the thematic areas that will be covered in the comparative study in Chapter 2. This instrument has been in fact the object of extensive and advanced academic debate. For a more comprehensive overview of the IHFFC and its potential ramifications, this author suggests to refer to the significant body of literature already existing. In particular, see Luigi Condorelli, '*La Commission international humanitaire d'établissement des faits: un outil obsolète ou un moyen utile de mise en oeuvre du droit international humanitaire?*' (2001) 824 *IRRC* 393; Frank Hampson, 'Fact-finding and the International Fact-Finding Commission' in Fox Hazel and Meter Michael (eds), *Armed Conflict and the New Law, Vol. II, Effecting Compliance* (London, the British Institute of International and Comparative Law 1993) 53; Silvain Vité, *Les procédures internationales d'établissement des faits dans la mise en ouvre du droit international humanitaire* (Brussels, Bruylant 1999); Fritz Kalshoven, 'The International Humanitarian Fact-finding Commission: its Birth and Early Years' in Erik Denters and Nico Schrijvers (eds), *Reflections on International Law from the Low Countries* (The Hague, Kluwer Law International 1998) 201.

248 ICRC, 'The International Humanitarian Fact-Finding Commission' (Geneva, Advisory Service on International Humanitarian Law 2001).

> '[b]y recognizing the Commission's competence […] a State contributes significantly to the implementation of international humanitarian law and to ensuring compliance with it during armed conflict'.[249]

Although envisaged in 1977, the Commission was officially constituted only in 1991 after twenty declarations by states accepting its jurisdiction were deposited.

The Commission is composed by fifteen individuals elected by those states that have recognized its competence.[250] The members act in their personal capacity and do not represent the interests of the State of which they are nationals.

In relation to the triggering mechanism, the IHFFC cannot act *proprio motu* in order to investigate a specific claim. It needs a request filed by a State that has specifically recognised its competence. Only States have the authority to activate the Commission, while no such competence is attributed to individuals, non-state armed groups or international and non-governmental organisations. Another important element concerns the fact that the Commission can investigate a claim only with the consent of all the parties involved. In this regard the functioning of the IHFFC is anchored to the traditional idea that considers fact-finding as dependent from states' consent.

With regard to the acceptance of the IHFFC's competence, the mechanism appears similar to the one designed to trigger the jurisdiction of the International Court of Justice (ICJ). In particular, a State does not automatically become bound to accept the Commission's competence by the mere ratification of Additional Protocol I. It needs to submit either a comprehensive declaration (thereby permanently recognising the competence of the Commission) or an ad hoc declaration, by which it consents to the IHFFC's investigation only with regard to a particular dispute.

There is a clear difference between an organ such as the IHFFC and an adjudicative mechanism such a court or a tribunal. In this regard, the ICRC has underlined how the Commission was neither set up with the intent of handing over judgments nor its proceeding contain the fundamental guarantees ensured by a judicial trial.[251]

While the distinction between the IHFFC and international courts or tribunals appear clear in principle, a certain degree of contamination between the two models emerges in relation to procedures employed.

In particular, the IHFFC discipline provides that investigations will not be conducted by the Commission as a whole but by a seven-member Chamber

249 Ibid.

250 For a comprehensive and updated list of the countries that have recognized the Commission's competence visit the IHFFC website at http://www.ihffc.org/index.asp?Language=EN&page=statesparties_list accessed on 8 December 2016.

251 Ibid.

consisting of five members of the Commission in addition to two ad-hoc appointees nominated by the parties involved in the dispute.[252] This element seems clearly to draw inspiration from the consolidated practice of the ICJ to grant the parties of a contentious case the possibility to appoint ad hoc judges.

Furthermore, in the course of the investigations the parties concerned will be invited to assist the Chamber's own investigations by providing information and presenting and challenging evidence. All evidence is disclosed to the parties involved and each of them will have the possibility to file observations. This adversarial model appears as rather unique in the ambit of international inquiries and places the IHFFC in a blurred zone between fact-finding and judicial proceedings.

With regard to its mandate, the IHFFC was established to investigate alleged grave breaches or other serious violations of the Geneva Conventions and Additional Protocol I; and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol'.[253] This wording from one side limits the IHFFC investigations only to those most serious violations of IHL.[254] From the other, it allows the Commission to go beyond the mere fact-finding in order to engage in a dialogue with the concerned parties and formulate recommendations that would support states in peacefully settling their disputes and in restoring the respect for basic IHL rules.

The specific reference to the Geneva Conventions and Additional Protocol I in its mandate seemed immediately to pose significant limitations to the work of the Commission in particular with regard to modern asymmetric armed conflicts, given its inability to investigate violations occurring in non-international armed conflicts or to refer to IHL instruments other than Geneva Conventions and Additional Protocol I. For this reason, since its official constitution in 1991 the IHFFC has declared its availability to investigate claims arising also from non-international armed conflicts and to take into account the whole framework of IHL norms.[255]

Looking at the practice, to date the Commission is still awaiting its first case. After more than two decades from its formal constitution, around seventy states have recognized its competence. Unfortunately, such numbers had little impact on the reality on the ground, namely that as for today the Commission

252 Ibid.
253 Protocol Additional to the Geneva Conventions of 12 August 1949 (n 9) Article 90(2)(c)(ii).
254 ICRC, The International Humanitarian Fact-Finding Commission (n 248).
255 Frits Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?' (2002) *Humanitäres Völkerrecht* 214.

has 'failed to attract actual work'.[256] This has led certain authors to label it as a 'sleeping beauty'.[257]

There are many reasons behind the inactivity of the IHFFC. Two appear to be particularly striking. The first one is related to its independence. The fact that the Commission was established as a treaty body meant that it could enjoy full autonomy from other relevant frameworks such as the ICRC or the United Nations.[258] Such autonomy, while it may strengthen the Commission's impartiality and independence, can also explain why the international community has not enthusiastically supported its activation in the last decades. A clear example is represented by the conflict in the former Yugoslavia. Despite the ICRC time and time again had called on the parties to refer their claims to the IHFFC, the UNSC decided to set up a brand-new commission of experts rather than pressuring warring states to refer to the existing Fact-Finding Commission's services.[259]

Conversely, the second reason for the Commission's inactivation is related to its dependence from states' consent. The fact that Article 90 did not empower the Commission with a right of *proprio motu* initiative or with compulsory and automatic competence severely impacted its ability to function. It is in fact well known the reluctance of parties to an armed conflict to allow their conduct to be scrutinised by international bodies.

One can criticise the recent shift in human rights/IHL mandated commissions of inquiry practice to operate regardless of the consent of the parties affected. While there is no doubt that states' cooperation will significantly increase the chances of success of fact-finding experiences, state practice has also demonstrated that human rights and IHL investigations are still perceived as a threat rather than a tool to advance the cause of peace and stability. In this regard, the experience of the IHFFC may stand as the most vivid example of the limited space international fact-finding mechanisms are accorded when left entirely in the hands of states.

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256 Ibid.

257 See, Elzbieta Mikos-Skuza,'The International Humanitarian Fact-Finding Commission: An Awakening Beauty' in Andreas Fischer-Lescano, Hans-Peter Gasser, Thilo Marauhn, and Natalino Ronzitti (eds), *Frieden in Freheit: Festschrift fur Michael Bothe zum 70 Geburstag* (Nomos 2008) 481. However, as Professor Kalshoven clearly explains, it was doubtful that even at its origin the Commission could be defined as a 'beauty'. In this regard, Professor Kalshoven points out how, during the debates for the formulation of Article 90, opposing views were expressed between proponents of a strong commission with automatic and compulsory jurisdiction and opponents of the very idea of an independent fact-finding body. The compromise achieved through the adoption of Article 90 gives raise to a mechanism that is far away from the perfect archetype of an effective fact-finding and dispute settlement mechanism. Kalshoven (n 255) 213-214.

258 Kalshoven (n 255) 215.

259 On this issue, August Reinisch, 'The International Fact-Finding Commission to Article 90 Additional Protocol I to the Geneva Conventions and its Potential Enquiry Competence in the Yugoslav Conflict' (1996) 65 *Nordic Journal of International Law* 241.

Despite no cases have been filed to its office so far, the IHFFC has been engaged in a number of promotional and confidence-building activities. Through its members, the Commission visited capitals and met with political and military representatives of states. It also interacted with relevant organs such as the ICRC and the UN Security Council. With regard to the latter, the possibility of utilising the services of the Commission for specific enquiries into alleged serious violations of IHL has been discussed.[260]

Furthermore, Professor Kalshoven has duly noted how the Commission has been repeatedly involved in situations that might have led to real work. For example, The 'Tamil Tigers' group manifested their interest in submitting to the Commission claims in relation to alleged violations of IHL perpetrated during the Sri-Lanka civil war. Similarly, the Chechnya authorities invited the Commission to investigate violations allegedly committed by Russian forces. This submission was based on the assumption, considered inadmissible by the Commission, that Chechnya was actually an independent State emerged from the succession from the Soviet Union. In relation to the 2001 war in Afghanistan, Amnesty International unsuccessfully urged the countries members of the Northern Alliance Coalition (the United States and the United Kingdom) to request the Commission to investigate over the high tool of casualties recorded in the prisons of Maza-I-Sharif.[261] However, the context where the Commission went closest to an actual referral was Colombia, due to an agreement – later vanished by a change in the Government's policy – reached between the Colombian Government and the rebel armed group of the ELN.[262]

Finally, in the aftermath of the horrific attack to a *Médicins Sans Frontières* (MSF) hospital in Kunduz (Afghanistan) on 3rd October 2015 allegedly resulting from a NATO airstrike, MSF publicly urged

> 'signatory States to activate the [International Humanitarian Fact-Finding] Commission to establish the truth and to reassert the protected status of hospitals in conflict'.[263]

While such request has revitalised public interest in the Commission, certain scholars have duly emphasized how an IHFFC's involvement in the dispute

260 Kalshoven (n 255) 214.

261 Ibid 215.

262 In particular, according to Kalshoven, 'the case of Colombia is illuminating in that it brings to light the importance of trust gradually growing between parties, to the point where they can seriously consider entering into an agreement involving the submission of their mutual accusations of wrongful conduct of hostilities to an independent, neutral body of outsiders'. Kalshoven (n 255) 215.

263 MSF, 'Afghanistan: Enough. Even war has rules – MSF calls for State activation of the International Humanitarian Fact-Finding Commission to investigate Afghanistan bombing' (7 October 2015).

will be highly unlikely.[264] Interestingly enough, also in this case the main obstacle for the Commission's involvement is represented by its dependency on affected states' consent.

1.4 Defining 'Commissions of Inquiry/Fact-finding Missions' for the Scope of the Comparative Thematic Analysis

After having provided a historical overview of the role of commissions of inquiry as evolved in practice and as codified in international instruments, this dissertation will engage in a comparative thematic analysis (that will be conducted in the following Chapter) of a number of relevant experiences of commissions of inquiry.

To this purpose, it is necessary to identify which particular inquiries will form the subject matter of this study. Indeed, given the accounts provided above, the potential scope of investigation would be enormous. It is thus important to restrict and limit the scope of this study by applying a number of criteria that will help in properly identifying and framing the object of the comparative thematic analysis.

The first criterion concerns the subject matter of international investigations. As it has been highlighted in the historical overview, international commissions of inquiry and fact-finding missions have been established with a wide variety of different mandates, ranging from settling maritime disputes or incidents to investigating the causes of an armed conflict. The comparative thematic analysis will restrict its scope to those missions established to investigate so-called 'atrocities', namely allegations of widespread international human rights and humanitarian law violations and possible implications related to the commission of international crimes.

The second criterion regards their national/international character and their mandating institution(s). Inquiries can be set up at national and international level. Those created at international level can be established in many different manners. They can be activated by means of bilateral conventions based on agreements between states; they can be included in multilateral treaties (such as the International Humanitarian Fact-Finding Commission); or they can be set up by UN organs or by bodies active in the context of regional organizations. Also non-governmental organizations (NGOs) can set

264 Catherine Harwood, 'Will the 'Sleeping Beauty' Awaken? The Kunduz Hospital Attack and the International Humanitarian Fact-Finding Commission', *EJIL Talk!* (15 October 2015); Ove Bring, 'The Kunduz Hospital Attack: The Existence of a Fact-Finding Commission', *EJIL Talk!* (15 October 2015).

up their own investigations on specific incidents or patterns involving violations of human rights.[265]

The comparative thematic analysis will concentrate only on international inquiries and mainly on those commissions established within the United Nations framework. There are a number of reasons why it should be the case. Firstly, looking at the current institutional frameworks, the UN should still be considered as the most authoritative representation of the international community of states in the fields of the maintenance of peace and security and the protection of human rights. Consequently, any mechanism established with its framework as the potential to address and affect the response of any State of the international community, regardless of its regional affiliation. Furthermore, the UN has developed a sophisticated and rather unique system for the promotion and protection of human rights, which now includes increasing monitoring and reporting also of those situations of armed conflicts where the applicability of human rights law intersects with IHL. This has led the UN to take the lead in establishing the large majority of international commissions of inquiry/fact-finding missions investigating human rights and IHL violations. In this regard, it can be argued that states and regional organisations still perceive the UN as the primary actor capable to entrust a human rights investigation with the necessary legitimacy, as expression of the will of the whole international community of states. As a consequence, UN sponsored commissions of inquiry still receive the highest level of attention not only in terms of technical follow-up mechanisms (through the UN human rights machinery and the UN Security Council) but also in relation to public opinion and media coverage. These are factors that may affect discussions within diplomatic circles and thus shape states' policies. Such a focus on the UN may also be linked to the need of assessing potential trends in terms of harmonisation and standardisation of the practice. In this regard, the 2015 OHCHR 'Guidance and Practice' can represent the perfect example of how preserving the competence under one framework may help developing useful lessons learnt and common guidelines.

However, certain examples of human rights inquiries established by regional organizations or upon collaboration between states and regional/international mechanisms will also be taken into account, particularly in cases where their mandates and findings may allow a comparison with UN own inquiries. Pertinent examples are the 2008 EU Independent International Fact-Finding Mission on the Conflict in Georgia and the 2009 Arab League Fact-

265 See, as an example, the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990, which was established jointly by FIDH, Africa Watch, ICHRDD and UIDH in 1993. The Commission was one of the first expert bodies to raise attention and warning against the threat of an imminent genocide in Rwanda. Final Report of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990 (March 1993).

Finding Committee on the Gaza Conflict as well as those inquiries established within the framework of the European Commission and Court of Human Rights.[266]

The third criterion relates to the nature of the body mandated to conduct the investigation. Inquiries can in fact be conducted in many different ways. Human rights violations can be investigated directly by a UN or regional organization organ;[267] through the work of Special Rapporteurs;[268] through field reports by UN missions in loco;[269] through the establishment of ad hoc commissions of inquiry and fact-finding missions; or through OHCHR led investigations.[270]

The comparative thematic analysis will mainly focus on those inquiries – namely, commissions of inquiry, fact-finding missions, OHCHR investigations, panels of Inquiry, high-level missions, commissions of experts, mapping exercises – which are established on an ad hoc basis through the appointment of external experts acting independently and the setting up of a temporary secretariat acting as technical and administrative support. In particular, it is the ad hoc nature – including the appointment of external independent commissioners, their particular expertise and type of coordination with the secretariat put at disposal – that differentiates these bodies from the other types of investigations mentioned above.

The fourth criterion relates to the historic period. The comparative analysis will mainly deal with those commissions established in recent times, with an emphasis on the period ranging between 1990 and the present. As already explained in the previous sub-chapters, this period represents an important watershed in understanding the evolution of the role of commissions of inquiry, particularly in dealing with human rights and international human-

266 Council of the European Union, Decision 2008/901/CFSP (2008); Report of the Independent Fact-Finding Committee on Gaza Presented to the League of Arab States (30 April 2009). For an assessment of the practice of fact-finding missions created in the framework of the European Court and Commission of Human Rights see, Philip Leach – Costas Paraskeva – Gordana Uzelac, 'International Human Rights and Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights' (London Metropolitan University 2009).

267 See, as an example, UNSG, 'Report of the Secretary General on the situation in Mali', S/2014/943 (23 December 2014); UNSG, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem and the occupied Syrian Golan', A/HRC/25/38 (12 February 2014).

268 See, as an example, the UN special rapporteurs and independent experts set up on the situation of human rights in the Occupied Palestinian Territory, Belarus, Central African Republic, Democratic People's Republic of Korea, Eritrea, Mali, Myanmar, Somalia, Sudan, Syria and Islamic Republic of Iran.

269 See, as an example, the Human Rights Monitoring Mission deployed by OHCHR to Ukraine on March 2014 to evaluate and report on the human rights situation and to provide support to the Government of Ukraine in the promotion and protection of human rights.

270 See, as an example, the OHCHR investigations mandated by the Human Rights Council in Mali, Iraq, Sri Lanka, Libya and Burundi.

itarian law violations. The aim of this study is in fact not only to assess the commissions' role in ascertaining facts for dispute settlements' purposes but also and foremost to measure their ability to resort to the application of IHRL and IHL in order to highlight patterns of human rights abuses, determine responsibilities and in so inspire possible actions by the international community, including avenues to ensure accountability.

In this regard, the end of the Cold War and the passage from the 20th to the 21st Century has been characterized by a number of events that suggest using it as starting point for the purpose of this study. These events are related firstly to the creation of a new world order emerging from the termination of the policy of the 'two blocs'. This has indeed affected the international community's involvement in situations of armed conflicts and internal human rights violations. In particular, an increasing level of interventionism by international organs was progressively developed in matters before considered as falling within the exclusive domain of states (which were often shielded by the imposition of the veto power exercised within the policy of 'two blocks'). Secondly, the establishment of international criminal tribunals and the renewed importance of international criminal law also stood as a new paradigm and game-changer in the debate concerning human rights violations. In addition, the definition and progressive development of the R2P concept and the establishment of the UN Human Rights Council are also elements whose importance for human rights inquiries (especially in terms of their scope) should not be underestimated. These elements, combined together, clearly explain why the latest twenty-five years marked an extremely interesting period to appreciate the evolution undertaken by international commissions of inquiry.

2 Commissions of Inquiry into Practice
A Comparative Thematic Analysis of the Most Relevant Experiences of Commissions of Inquiry

2.1 Introduction

As mentioned above, this Chapter will be devoted to a more in-depth analysis of the practice of international commissions of inquiry and fact-finding missions. The analysis will pursue a comparative and a thematic approach. In lieu of providing an account of each commission separately, this work will identify a number of relevant themes (or thematic areas) and for each of them analyse and compare the contribution provided by different commissions. The author believes that through such an approach this study will serve the purpose of evaluating the role of these bodies and their impact much more than just limiting itself to summarize the main findings of each commission.

To this purpose, two categories need to be identified. These are the type of fact-finding experiences that will serve as examples (the subject matter) and the relevant themes (or thematic areas) that will form the basis of the comparative analysis.

2.2 The Subject Matter: Commissions of Inquiry, Fact-Finding Missions and Other Human Rights Investigations

The selection of commissions of inquiry that will be compared in the thematic analysis has been made on the basis of five different criteria that have been outlined and motivated in detail in Chapter 1.4. To recap, these criteria are:

- The subject matter of the investigation;
- The international character and the mandating institution;
- The type of body mandated to carry out the investigation;
- The historical period.

Based on the argumentation provided in Chapter 1.4, the examples that will be compared mainly respond to the following characteristics:

- The commissions are mandated mainly to investigate serious IHL and/or IHRL violations, with an emphasis on the perpetration of international crimes;
- They have been established by international organizations, mainly by bodies operating within the UN framework;

- They are bodies composed by external experts that exercise their functions independently from the mandating organs and are assigned an ad hoc task;
- They have been established in the period ranging from 1990 and 2016;

Accordingly, the thematic comparative analysis will mainly be based on the experience of international commissions of inquiry, fact-finding missions, panels of inquiry, OHCHR investigations, investigative teams and mapping and conflicts exercises that have been established between 1990 and 2016, that have been composed of external and independent experts and mandated by an international or regional organizations to investigate serious IHL and/or IHRL violations in a specific context performing their tasks with an accountability focus.

2.3 Thematic Areas Selected

Based on the most-debate aspects of the work undertaken by commissions of inquiry, the thematic areas selected for the comparative analysis are the following:

- Specific mandate received;
- Standard of proof implemented;
- Impact of cooperation/non cooperation by the parties;
- Selection, collection and use of sources and evidence;
- Legal analysis and contribution to the development of international law;
- Contribution in the areas of international criminal law and accountability.

2.4 Thematic Comparative Analysis of the Practice of Commissions of Inquiry

2.4.1 Mandate

2.4.1.1 Introduction

The term mandate indicates the type of instructions received by a commission of inquiry in its founding resolution. The instructions refer to the tasks provided to the commission and the boundaries set in terms of time frame (*ratione temporis*), subject matter (*ratione materiae*), legal framework applicable, territorial range (*ratione loci*) and actors whose conduct should be investigated (*ratione personae*).[271]

271 OHCHR, Guidance and Practice (n 3) 67.

The mandate represents an extremely important factor in shaping the commissions of inquiry's work and in directing their findings towards specific conclusions. At a first sight, it is also an element that escapes the commissions' control as their mandates are normally framed by political organs such as the UN Security Council and the Human Rights Council.

In principle there is nothing wrong with political organs such as the Security Council or the Human Rights Council setting up commissions of inquiry and laying down their mandates. In effect, appointing fact-finding bodies falls within their powers and competences. Problems may arise when political organs decide to resort to human rights inquiries in order to serve their political agenda. This appears in contrast with the very nature of commissions of inquiry as independent technical bodies entrusted to impartially establish facts. It can also negatively affect their work and prejudice the credibility of their findings. This is even more the case in conflicts where the polarized rhetoric of the different actors involved can seriously jeopardize the process of impartially stating the facts and correctly applying the law.

2.4.1.2 Different types of mandates

If we take a close look at the history of commissions of inquiry in the fields of human rights and IHL, their experiences reflect a variety of different mandates. Indeed, such diversification is linked with the manifold (and often unique) character of the situations under investigation. It also appears in line with the idea that commissions of inquiry represent an ad hoc response to ad hoc, specific crises situation.

Therefore, certain commissions have been requested to investigate isolated incidents such as targeted assassinations, coup d'état or violations perpetrated in relation to specific and circumscribed events. This is the case, for example, of the Commission of Inquiry on Burundi, the Commission of Inquiry on the events connected with the march planned for 25 March 2005 in Abidjan (Cote d'Ivoire), the Commission of Inquiry on Guinea and the HRC Fact-Finding Mission on the Israeli attacks on the Gaza Flotilla.[272] Indeed, this entails that

272 For example, the 1995 Commission of Inquiry on Burundi was given the mandate to '(a) establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed'. The 2004 investigation in Cote D'Ivoire .was requested to investigate alleged human rights violations committed in connection with the march planned for Abidjan on 25 March 2004. The Commission of Inquiry on Guinea was mandated to 'establish the facts and circumstances of the events of 28 September 2009 in Guinea and the related events in their immediate aftermath'. Finally, the 2010 Commission of Inquiry on the Gaza Flotilla events was set up to investigate violations of international law resulting from the Israeli attacks on the Flotilla. See UNSC Res. 1012 (1995) para. 1; Report of the Commission of Inquiry on the events connected with the march planned for 25 March 2005 in Abdijan, S/2004/384 (13 May 2004); Report of the International Commission of Inquiry on Guinea (n 211) para. 1; Report of the international fact-finding mission to investigate violations of international

their temporal scopes have been circumscribed to a limited number of days, if not hours. It also bears important consequences in terms of their findings, as their accounts are often more detailed than those of commissions charged with much broader temporal mandates.

Other examples of commissions of inquiry have been mandated to more generally investigate violations of IHL and IHRL committed during broader contexts such as armed conflicts. This is the case of the Commission of Experts on the Former Yugoslavia, the Commission of Experts on Rwanda, the 2009 UN Fact Finding Mission and the 2014 Commission of Inquiry on the Gaza conflicts and those commissions of inquiry recently established in relation to Libya, Central African Republic (CAR) and Syria.

Furthermore, certain international inquiries have also been requested to analyse and investigate long time trends marked by institutionalised and systematic patterns of human rights violations. In these cases, the fact-finding component necessarily becomes less detailed in relation to specific events and the selection of incidents is based upon criteria that reflect the need to highlight the existence of identified patterns and institutionalised policies. For example, the UN Fact-Finding Mission on settlements was mandated by the HRC to investigate the impact of the Israeli settlement enterprise, a policy which originated in 1967 and still remains in force today, on the human rights of the Palestinian people living in the OPT.[273] The commissions of inquiry on North Korea and Eritrea were based on similar grounds, namely to investigate the state-sponsored and institutionalised patterns of systematic and widespread violations of human rights associated with regimes that have remained in power for decades.

Finally, some commissions have been requested, within their broader mandate, to make findings in relation to a specific question or allegation. For example, the Commission of Experts on Rwanda was requested to provide conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide. Indeed, the perpetration or not of the crime of genocide in the context of Rwanda seemed not only a further specification within the broader mandate, but directed also the Commission's investigation towards reaching specific findings. Similarly, the 2004 Commission of Inquiry on Darfur was mandated to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties and also to determine whether or not acts of genocide have occurred. Mandates referring to specific

law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance', A/HRC/15/21 (27 September 2010).

273 Human Rights Council, A/HRC/RES/19/17 (2012) para. 9; Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, A/HRC/25/63 (7 February 2014) para. 1; Report of the commission of inquiry on human rights in Eritrea, A/HRC/29/42 (4 June 2015) para. 4.

questions or allegations have also instructed the 2006 Independent Special Commission of Inquiry for Timor-Leste, the 2006 Commission of Inquiry on Lebanon and the 2012 Commission of Inquiry on North Korea.[274]

With regard to the geographical and temporal scope and the time available to accomplish the mandate, each experience of commissions of inquiry differs. As it was emphasized by the 2015 OHCHR Guidance, 'the terms of the mandate necessarily have an impact on the time frame and resources required to fulfil it', which means that technical resources (including intellectual, material and logistic support) and budget provided should be commensurate to the mandate received.[275]

2.4.1.3 The influence of mandating organs: unilateral and pre-determined mandates

Coming back to the initial question concerning the capability of political organs to frame the commissions' mandate and, in this way, indirectly affecting their work and findings, two important trends should be highlighted.

The first one concerns the establishment of commissions provided with a one-sided mandate, namely a mandate that requires commissions to investigate only the alleged violations perpetrated by one side of the conflict. The issue has emerged particularly in relation to the approach undertaken by the UN Human Rights Council (and previously by the Commission on Human Rights) towards events in Israel and the OPT.

In particular, the commission of inquiry charged to investigate events immediately following the outbreak of the so-called 'Second Intifada' in 2000 was mandated by the Commission on Human Rights

> 'to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law *by the Israeli occupying Power in the occupied Palestinian territories*' (emphasis added)

274 In particular, the Special Commission of Inquiry for Timor-Leste was requested to 'establish the facts and circumstances relevant to incidents that took place on 28 and 29 April and 23, 24 and 25 May and related events or issues that contributed to the crisis, clarify responsibility for those events and recommend measures of accountability for crimes and serious violations of human rights allegedly committed during the mandated period'; see, Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006) para. 1. In relation to the Commission of Inquiry on the situation of human rights on North Korea, the inquiry was mandate to pursue three interlinked objectives (namely (a) further investigating and documenting human rights violations; (b) collecting and documenting victim and perpetrator accounts; (c) ensuring accountability) and pointed towards nine non-exhaustive substantive areas of investigations including violations of the right to food, violations associated with prison camps, torture, arbitrary arrest and detention, discrimination, violations of the freedom of expression, violations of the right to life, violations of the freedom of movement and enforced disappearances; see, Report of the Commission of Inquiry on the situation of human rights in North Korea (n 273) para. 3.

275 OHCHR, Guidance and Practice (n 3) 10.

without referring to any alleged violations committed by the Palestinian side.[276]

The UN Human Rights Council, which replaced the Commission on Human Rights in 2006, immediately set up two commissions of inquiry into events related to the 2006 'Lebanon War' and the shelling of the Gaza Strip's town of Beit Hanoun following Israeli military operations. The two resolutions dispatching the investigations both enshrined one-sided mandates. In particular, the international Commission of Inquiry into Lebanon was mandated to

> '(a) to investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) to examine the types of weapons used by Israel and their conformity with international law; and (c) to assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment'.[277]

Similarly, the High-Level Mission to Beit Hanoun was required to

> 'assess the situation of victims; address the needs of survivors; and make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults'.[278]

The establishment by the HRC of the UN Fact-Finding Mission on the Gaza Conflict in 2009 followed the same line. The Fact-Finding Mission's founding resolution in fact requested it to

> 'investigate all violations of international human rights law and international humanitarian law *by the occupying Power, Israel, against the Palestinian people* throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression', (emphasis added)

without any reference to the conduct of Palestinian armed groups.[279]

It should be noted how commissions reacted in different ways to such instructions. In the case of the Beit Hanoun and Lebanon missions, the commissioners acted in accordance with the tasks received and refrained to investigate the conducts of other actors involved. However, the Commission of Inquiry on Lebanon duly noted the limitations inherent to such a mandate. In particular, it made clear how the mandate received had

276 CHR, Report of the Fifth Special Session 'Grave and massive violations of the human rights of the Palestinian people by Israel', E/CN.4/S-5/5 E/2000/112 (19 October 2000).
277 Human Rights Council, S-2/1 (2006) para. 7.
278 Human Rights Council, Special session resolution S-3/1 (2006), para. 7.
279 Human Rights Council, A/HRC/RES/S-9/1 (2009) para. 14.

> 'limits *ratione personae* (actions by the Israeli military) and *ratione loci* (on Lebanese territory) and [did] not allow for a full examination of all of the aspects of the conflict, nor does it permit consideration of the conduct of all parties'.[280]

In relation to the need to investigate conducts by Hezbollah, the Commission argued how

> 'any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved.'[281]

That said, the Commission noted how

> 'it was not entitled […] to construe [its mandate] as equally authorizing the investigation of the actions by Hezbollah in Israel. To do so would exceed the Commission's interpretative functions and would be to usurp the Council's powers'.[282]

A different approach was taken by other commissions. For example, the 2000 Inquiry Commission referred to its mandate as being 'to investigate violations of human rights and humanitarian law in the occupied Palestinian territories after 28 September 2000' without paying attention to the one-sided character of its founding resolution.[283] Although the report does not contain any remark with regard to the unilateral mandate received, the investigative team led by Professor Dugard decided that its investigation should look into violations committed by both sides of the conflict. In particular, it concluded that

> 'human rights violations [had] been committed by Palestinians, either under the authority of the PA or by individual Palestinians acting seemingly without authority'.[284]

With regard to the 2009 UN Fact-Finding Mission on the Gaza Conflict, its initial terms of reference were informally revised and agreed upon with the President of the HRC following Chair Commissioner Richard Goldstone's objections concerning the one-sided character of the mandate. Hence, the new mandate, as referred in the Mission's final report, referred more neutrally to

> 'investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of

280 Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2 (23 November 2006) para. 5.
281 Ibid para. 6.
282 Ibid para. 7.
283 Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000, E/CN.4/2001/121 (16 March 2001) para. 4.
284 Ibid para. 12.

> the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after'.[285]

In general it can be noted that, while the inclusion of one-sided language in commissions of inquiry mandates has been a distinctive feature of the HRC's involvement particularly in relation to certain contexts such as Israel and the OPT, commissions themselves have in certain cases minimized the harmful implications of such trend. Thus, the negative impact of the HRC pursuing a political agenda while making use of its power to set up international investigations should not be overestimated. What may remain problematic is the shadow casted by such 'original sin' in terms of 'perception of credibility' of the commissions in the eye of the international community, something that may negatively affect their whole follow-up process. This aspect should indeed stimulate further reflection.

At the same time, despite the remarks made by the Lebanon Commission on the matter, one should not attach too much value to the asserted usurpation of the Council's powers inherent to the commissions' decisions to unilaterally amend their mandates. In a number of cases, commissioners have in fact themselves amended the mandates received or they have interpreted their terms of reference in a way that did not harm the independence and credibility of their investigations. This approach has been silently acknowledged by the HRC, which has filed no opposition to this practice. Such behaviour can be interpreted as a sign of the discretion that is generally granted to commissions of inquiry in discharging their mandates.

The second contentious trend related to the capability of political organs to influence the course of independent international investigations is the inclusion in their mandates of formulas directing the commissioners towards specific findings.[286] Such a practice has been noted with concern by the UN Fact-Finding Mission on the Flotilla events which emphasized how 'by referring to terms such as 'Israeli attacks on the flotilla' or 'violations of international law' [in its mandate], its founding resolution seemed to determine that such conducts had in fact occurred prior to any investigation'.[287]

Indeed many international investigations are created within a background of pre-existing violations. The vast majority of resolutions establishing international inquiries already contain language referring to violations of international law. This practice might not be the ideal in light of the fairness and impartiality of the fact-finding process but it is difficult to imagine how it can be avoided. In this regard, one author has noted how

285 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 131.
286 On this issue see Franck and Fairley (n 152) 312, 316.
287 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 272) para. 5.

> 'the UN has no reason to create an ad hoc international commission of inquiry unless it believes that the commission will, in fact, discover that the investigated state is responsible for human rights abuses'.[288]

However, in such context one should distinguish between those requests to investigate alleged violations or even specific allegations (as for example the question of genocide or the use of certain weapons)[289] from those formulas containing pre-assessed conclusions and directing the commissioners towards reaching 'pre-packed' findings. While in the first case commissioners are simply called to examine a particular allegation, in the second case the facts and the law are somehow already 'suggested' to the commissioners. Indeed, only the second case appears problematic for the commissions' independent assessment of the facts.

For example, the amended mandate of the international Commission of Inquiry on Syria is to

> 'investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, *including those that may constitute crimes against humanity*, are held accountable' (emphasis added).[290]

It is not clear why among the crimes perpetrated, the HRC has expressively mentioned crimes against humanity, particularly given that in the context of Syria war crimes and, possibly, the crime of genocide may also have been committed.

Equally, the mandates of commissions of inquiry established in relation to the situation of human rights in North Korea and Eritrea have also made specific reference to crimes against humanity, although in these cases the reference appears more justified given the non applicability of international humanitarian law (and of the war-crimes regime) to the situations at hand. Probably, the most open example of a mandate predetermining specific allegations has been the one contained in the HRC resolution establishing the 2009 Fact-Finding Mission on the Gaza Conflict. The Mission was in fact mandated to investigate

> 'all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the

288 Heller (n 206) 10.

289 See for example, Report of the Commission of Inquiry on Darfur (n 211); Report of the Commission of Inquiry on Lebanon (n 280).

290 Human Rights Council, A/HRC/28/20 (2015).

Occupied Palestinian Territory, particularly in the occupied Gaza Strip, *due to the current aggression*' (emphasis added),

in this way predetermining that the Israeli military campaign could qualify as an act of aggression.[291]

Would these 'specific-findings-oriented' mandates have an impact on the actual findings of the Commission? The practice shows in general how commissioners tend not to be too much constrained by such formulas. While it has been mentioned above that the 2009 Gaza Mission have agreed upon an amendment of its mandate, with regard to the Commission of Inquiry on Syria its findings on criminal accountability have not been limited only to crimes against humanity but have extended also to war crimes and the crime of genocide. Again, what may be problematic is the shadow casted by a 'specific-findings-oriented' mandate in terms of 'perception of credibility' of these inquiries in the eye of the international community.

2.4.1.4 Towards a harmonization of the practice

While commissions of inquiry (and their mandates) have necessarily to adapt to the manifold (and often unique) character of the situations under investigation, in most recent years a trend has emerged that moves towards harmonizing and standardizing different inquiries' experiences. This can be linked to the significant increase in the number of commissions established but also to the growing importance of ensuring accountability for human rights and international humanitarian law violations. This trend has impacted on their mandates in terms of an increasing reference to accountability in their wordings. Furthermore, the fact that the UN Human Rights Council and, in general, the UN human rights machinery have been considerably involved in the commissions of inquiry's sphere has represented a second important factor in such harmonization process.

As a result, mandates of commissions of inquiry have increasingly resorted to well-established formulas in relation to at least four fields of operations, such as:

1 The establishment of the facts in relation to IHL and/or IHRL alleged violations;
2 The emphasis on those violations that could amount to international crimes and the qualification of such crimes;
3 The identification of responsibilities;
4 The need to formulate recommendations at domestic, regional and international level on how to advance responses, including by ensuring accountability at domestic and international level, fostering reconciliation,

291 Human Rights Council, A/HRC/RES/S-9/1 (2009) para. 14.

> fighting impunity and deterring further violations to happen and re-establishing the respect for the rule of law.

Such trend has also been noted by the OHCHR, which in its 2015 study has emphasized how

> '[d]espite the variations in the formulation of mandates, commissions/missions have approached the task consistently as involving: the establishment of facts in relation to incidents and allegations of violations of international human rights and humanitarian law; the assessment of such facts in the light of the applicable body(-ies) of law; the reaching of conclusions with regard to the existence of violations and […] alleged perpetrators; and the issuing of recommendations to different entities'.[292]

The OHCHR study also noted how, along with the applicability of IHL and IHRL, there has been an increasing tendency for mandates of commissions of inquiry to focus on international criminal law and accountability.[293]

2.4.2 Standard of proof

2.4.2.1 Introduction

In the First Chapter a number of definitions of what commissions of inquiry/fact-finding missions are under international law have been given. It is now time to start clarifying also what these bodies are not. Certainly, commissions of inquiry cannot be equated to judicial or adjudication mechanisms. In other words, they cannot be charged with the power of making binding judicial determinations. In particular, as we will see in the course of the dissertation, such non-judicial character is inherent to their nature, their procedures and methodology. It also derives from the standard of proof they rely upon in order to justify the credibility of their findings.

Commissions of inquiry and fact-finding missions have themselves repeated countless number of times their inability to make definitive findings.[294] In

292 OHCHR, Guidance and Practice (n 3) 11.

293 Ibid 12.

294 For example, the 2009 UN Fact-Finding Mission on the Gaza Conflict expressively underlined how its findings 'do not attempt to identify the individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials'. Similarly the Commission of Inquiry on CAR emphasized how the standard applied 'does not rise to the level of proof beyond reasonable doubt that would be required to establish individual criminal responsibility in a court of law. This is because the Commission is neither a prosecutor nor a court'. Report of the UN Fact-Finding Mission on Gaza (n 211) para. 172; The International Commission of Inquiry on the Central African Republic –Final Report, Annex –S/2014/928 (22 December 2014) para. 16.

this regard, judicial bodies in criminal trials rule upon the responsibility of an individual based on the standard of proof of 'responsibility beyond reasonable doubt'. This standard is grounded on the need to respect a number of fundamental guarantees, which are embedded in the adversarial nature of the proceedings and the right of the defendant to a fair trial. It is precisely the existence of these guarantees that makes the reliance on 'open source' material and 'unchallenged evidence' (which are inherent to the work conducted by commissions of inquiry) more difficult.[295] On the contrary, if one looks at international inquiries and the nature of their procedures, it finds out that they have necessarily relied upon a lower standard of proof.

At the same time, experts and practitioners have warned against an excessively low standard of proof in the practice of commissions of inquiry. In particular, it has been argued that

> 'a commission cannot act with the same kind of ease that advocacy groups and international human rights organisations act. A mission has to be accountable in terms of having sound evidence on which the analysis is based'.[296]

2.4.2.2 Standard of proof in the practice of commissions of inquiry

In the application of standards of proof, the practice of commissions of inquiry have for long time been marked by a certain lack of transparency. Only recently commissions have more consistently started spelling out in clear terms the standard of proof they were implementing. Also, recent examples display a trend towards standardisation, with commissions increasingly resorting to similar formulas to indicate the standard of proof applicable.

If we look at commissions of inquiry established in the past, there is little reference in their reports on the methodology used in order to ensure the reliability of their findings. As an example, the 1973 UNGA mandated Commission of Inquiry on the reported massacres in Mozambique, although devoting much attention to the way sources and information had been collected, did not clearly spell out the standard of proof it had implemented.[297]

In the same vein, the first attempts to codify standard rules for a more coherent exercise of fact-finding powers did not directly tackle the issue of standard of proof. For example, the UN Secretary General 1970 'Model rules

295 On the issue concerning the applicability of certain due process guarantees to human rights fact-finding exercises see Franck and Fairley (n 152).

296 Steven Wilkinson, 'Finding the facts: standards of proof and information handling in monitoring, reporting and fact-finding missions' (2014) Program on Humanitarian Policy and Conflict Research Harvard University, 14, Interview with Yakin Ertuk, Commissioner, Kyrgyzstan Inquiry Commission; Commissioner, Commission of Inquiry on Syria (7 August 2013).

297 Report of the Commission of Inquiry on the reported massacres in Mozambique, A/9621/n. 21 (1974).

of procedure for United Nations bodies dealing with violations of human rights' do not contain any specific guidelines in relation to standard of proof.

A progressive shift has occurred due to the proliferation of human rights fact-finding bodies during the years 1990s and 2000s. During this period, commissions of inquiry and fact-finding missions have increasingly clarified the rules of procedure and standards of proof under which they have been operating. Looking at the practice, commissions have mainly resorted to three different standards, namely: 'reasonable suspicion', 'balance of probabilities' and 'reasonable grounds to believe' standards.[298] Despite the qualitative difference among them, these standards have in common the fact that they all require a significantly lower burden of proof than the 'beyond reasonable doubt' formula used in judicial proceedings.[299]

For example, the OHCHR Mapping Exercise on the DRC applied the 'reasonable suspicion' standard by noting how

> '[t]he question [for it] was therefore not one if being satisfied beyond reasonable doubt that a violation was committed, but rather of reasonably suspecting that the incident did occur. Reasonable suspicion is defined as 'necessitating a reliable body of material consistent with other verified circumstances tending to show that an incident or event did happen'.[300]

The same standard has been applied by the 2006 Commission of Inquiry on Timor-Leste.[301] Other fact-finding experiences, such as those in relation to the Flotilla incident (2010) and in Libya (2011), have resorted to the 'balance of probability' formula. In particular, according to the report of the HRC Fact-Finding Mission on the Flotilla incident,

> '[m]atters were decided on the basis of the preponderance and quality of the evidence so as to satisfy all the members of the Mission in order that they felt sure of their conclusions'.[302]

A rather cumbersome formula was employed by the 2009 UN Fact-Finding Mission on the Gaza Conflict, where it highlighted the importance to dispose of 'sufficient information of a credible and reliable nature for the Mission to

298 OHCHR, Guidance and Practice (n 3) 62.

299 For a detailed overview of the different standards engaged in fact finding see Wilkinson, Standards of Proof in International Humanitarian and Human Rights Fact-Finding (n 149).

300 OHCHR, 'Democratic of the Congo 1993-2003: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010) para. 7.

301 Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (n 274) para. 12.

302 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 272) para. 24.

make a finding in fact' in order to draw its conclusions on the events occurred.[303]

2.4.2.3 Towards a harmonised practice: the 'reasonable grounds to believe' standard

More recently, commissions have more consistently referred to the formula of 'reasonable grounds to believe that a certain event took place'. According to the 2015 OHCHR Mission in Libya this standard is satisfied in case it has obtained

> 'a reliable body of information, consistent with other material, based upon which a reasonable and ordinarily prudent person would have reason to believe that such an incident or pattern of conduct has occurred'.[304]

This standard of proof has been consistently employed by the vast majority of recently established inquiries including the commissions of inquiry on Syria (2011-2016), North Korea (2012), Central African Republic (2013), Gaza (2014), Eritrea (2014), as well as the OHCHR investigations into Sri Lanka (2014) and Libya (2015). Such coherency is revealing of an increasing tendency towards the harmonization and standardisation of the practices of commissions of inquiry. In particular, the Commission of Inquiry on Syria in its eleventh report highlighted how 'the methodology employed […] was based on standard practices of commissions of inquiry and human rights investigations' including in relation to the standard of proof implemented.[305]

At the same time, the 2015 OHCHR 'Guidance and Practice' contains a specific paragraph dedicated to standard of proof. More importantly, the Guidance includes a recommendation for commissions/missions to clearly indicate in their methods of works and ToRs the standard of proof they adopted and to insert an explicit reference and explanation in their reports.[306] In this regard, experts and practitioners have also emphasized how transparency regarding standards of proof may play a critical role in contributing to an inquiry's credibility.[307]

The need for more clarity in relation to the methodology and standard of proof has been emphasized also by legal scholars.[308] According to Boutruche,

303 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 171.
304 Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings, A/HRC/31/CRP.3 (15 February 2016) para. 11.
305 11th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/31/68 (11 February 2016) para. 3.
306 OHCHR, Guidance and Practice (n 3) 62.
307 Wilkinson, Finding the facts (n 296) 13.
308 Wilkinson, Standards of Proof in International Humanitarian and Human Rights Fact-Finding (n 149) 14.

> 'the underlying question paramount to the issue of concluding "undisputedly" that certain facts and alleged violations are correct is the standard of proof required. However, this standard of proof greatly varies according to the mandate and procedure in which the fact-finding process takes place'.[309]

Boutruche also noted how many fact-finding bodies 'do not elaborate on the criteria of proof used to ascertain facts when applying the most common standard "balance of probabilities"'.[310] Similarly, Bertrand Ramcharam has expressed the view that

> 'as a general rule the standard of proof applied by fact-finding bodies should be a balance of probabilities. Probability in this sense may be defined as an evaluation of the likelihood of a past event having happened, given the facts and assumptions, expected or adopted for the purposes of the evaluation'.[311]

Therefore, the practice of commissions of inquiry as well as the opinions of experts and practitioners concur in identifying the correct standard of proof for fact-finding exercises in the 'reasonable grounds'/ 'balance of probabilities' models. However, it is difficult to draw clear-cut conclusions on the choice of a standard of proof rather than another. On the contrary, given in particular the variety of tasks assigned to commissions of inquiry, certain experts have highlighted the need to 'discuss the utility of employing multiple standards of proof within the same mission'.[312] In particular, the standard can vary and the threshold may increase particularly in cases where an investigation into alleged violations of IHL and military attacks is required or if the mandate prescribes the identification of individuals that are responsible for the perpetration of international crimes.

In conclusion, there seems to be enough consensus that the standard of proof that commissions of inquiry/fact-finding missions employ (whether through the formula of 'reasonable grounds to believe' or 'balance of probabilities') should be higher than a mere suspicion. In other terms there should be more evidence supporting the findings that contradicting it. At the same time the standard employed should be lower than the one applicable in judicial proceedings. This goes back to the initial characterization of fact-finding bodies as clearly distinguished in their nature and procedure from law-adjudicating mechanisms such as courts and tribunals. As it has been emphasized by an OHCHR human rights officer 'the final outcome [of commissions of inquiry] is not to convict people in front of a court of law. The purpose is to raise a

309 Boutruche (n 4) 113.
310 Ibid 114.
311 Bertrand Ramcharan, 'Evidence' in: Bertrand Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff: The Hague 1982) 78.
312 Wilkinson, Finding the facts (n 296) 12.

red flag'.[313] While it is important to stress the clear differences existing between the two, it is equally relevant to stress how the work of commissions of inquiry may have an impact on subsequent criminal investigations.

2.4.2.4 The implications for international criminal proceedings

Although it represents a lower standard than the one used in criminal trials, 'reasonable grounds to believe' is not an unknown formula to international criminal proceedings. For example, the ICC Statute determines that different standards of proof apply to the different stages of the proceeding, ranging from the 'reasonable basis to proceed with an investigation' to 'the responsibility beyond any reasonable doubt' of an individual in trial. Within this spectrum, the Statute disposes at Article 58 that, for the Pre-Trial Chamber to issue a warrant of arrest, the Prosecutor should demonstrate that there are 'reasonable grounds to believe' that an individual has perpetrated the crimes in question.[314] This, in a way, renders the work of international commissions of inquiry not completely avulsed from the context of international criminal investigations. Such similarity between the standard of proof used by commissions and the one employed by the ICC at the 'arrest warrant' stage has been duly noted by the Commission of Inquiry on Eritrea in its second report.[315] It may suggest that the commissions' findings may play a relevant role particularly in the preliminary phases of the proceedings within the ICC framework.[316] However, the role of commissions of inquiry in the application of international criminal law and in criminal proceedings deserves further examination and analysis. More attention to this topic will be devoted in the section dedicated to international criminal law and accountability.

313 Ibid 5, Interview with Martin Seutcheu, Human Rights Officer with OHCHR.

314 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998) (Rome Statute) Article 58(1)(a).

315 Detailed findings of the commission of inquiry on human rights in Eritrea, A/HRC/32/CRP.1 (8 June 2016) para. 32.

316 In particular, as it will be explained more in depth in the section dedicated to international criminal law, the findings commissions of inquiry can play a relevant role in the pre-investigative and investigative phases of international criminal proceedings. On this issue, Carsten Stahn and Dov Jacobs, 'Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction' (2014) Grotius Centre Working Paper 2014/017- ICL, 13.

2.4.3 Impact of cooperation/non-cooperation by the parties

2.4.3.1 Introduction: the critical role of parties' cooperation for the work of commissions of inquiry

An issue that should be dealt preliminary concerns whether states are under a duty to cooperate with international inquiries. It should be underlined that there is no general obligation under international law for parties involved into a situation to cooperate with an international commission of inquiry. The only organ that has the power to impose an inquiry on states would be the UNSC acting under Article 34 of the UN Charter. Despite the contrary opinion of certain scholars,[317] '[t]he mainstream view is that investigations pursuant to article 34 are mandatory and create obligations for States to co-operate under article 25 of the UN Charter'.[318] However, it has been noted how Article 34 has fallen in disuse and the Security Council has normally appointed inquiries based on its implied powers. Hence, unless an inquiry is set up according to a UNSC resolution containing a specific reference in this direction, states cannot be forced to cooperate.[319]

That being said, cooperation by the parties involved in a conflict or a dispute is extremely important for the work of commissions of inquiry. This is mainly for two reasons.

The first relates to the need to grant to the commissioners access to the territory and facilitate their movement in situations that are often extremely volatile from the point of view of security. Past experiences indicate that where commissions of inquiry have been given access to the territory, the accuracy of their findings may increase both in terms of methods used and quality of information collected. In particular, commissions of inquiry that were provided access to the territory such as those in Darfur and the 2009 Gaza conflict have shown a level of accuracy in assessing specific incidents that is higher than other commissions, such as in the case of Syria, that were not allowed in. In this regard, site-visits to locations where incidents or attacks have taken place and direct contact with affected communities often play a critical role in advancing the process of collecting evidence, especially in case where commissions are tasked with investigating violations of IHL and IHRL or allegations of international crimes.

The second reason concerns the parties' support in providing the commissions with evidence and information. Information in possess of those parties involved in situations of armed conflict are often decisive in assessing whether violations of IHL or IHRL have taken place or in determining responsibilities. A clear example is represented by the assessment of whether an attack has

317 Conforti (n 156) 165.
318 Van den Herik (n 14) 523.
319 Ibid 525.

breached the obligation to respect distinction and proportionality under IHL. Such an evaluation cannot be properly conducted without knowing all the information available at the time to the party of the conflict responsible for launching the attack.

2.4.3.2 State's consent: a necessary requirement in traditional fact-finding

The above discussion may help understanding why cooperation of the parties involved may represent a critical factor for a successful accomplishment of the international fact-finding exercise. However, it was not only for this reason that international inquiries and fact-finding missions – as traditionally conceived – were allowed to carry out their tasks only in case the parties involved could agree on their establishment. In this regard, fact-finding – in its traditional sense – was conceived as a tool entirely falling under states' control in order to help them solving their own disputes. It goes without saying that in the absence of state consent the whole fact-finding exercise was viewed as meaningless. This idea – firstly enshrined in the 1899 Hague Convention – was, to a certain extent, echoed in the 1991 UN General Assembly Declaration on Fact-finding. According to paragraph six of the Declaration, 'the sending of a United Nations fact-finding mission to the territory of any State requires the prior consent of that State'.[320]

If we look at the history of commissions of inquiry, international investigations have initially paid due respect to the principle of state consent as necessary requirement for their activation.

An interesting example is represented by the already mentioned 2002 Investigative Team set up by the UN Secretary General to investigate the effects of the Israeli assault on Jenin Camp within the framework of 'Operation Defensive Shield' during the Second Intifada.[321] After allegations circulated among Israeli governmental officials that due to its composition the Mission would extend its mandate covering the whole Israeli campaign in the West Bank and accuse Israel of war crimes, the Israeli cabinet decided not to allow the Team into the country.[322] While the Security Council convened to discuss Israel's stance, UN Secretary General Kofi Annan decided to disband the Team.[323]

320 UNGA Declaration on Fact-finding (n 5) para 6.

321 The decision to establish the investigative team was later endorsed by the UN Security Council through resolution 1405 of 19 April 2002. UNSC Res. 1405 (2002) para. 2.

322 'Israel defies UN over Jenin mission' *The Telegraph* (25 April 2002) http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1392196/Israel-defies-UN-over-Jenin-mission.html accessed on 8 December 2016; 'Israel ban on UN probe may backfire' *The Age* (2 May 2002) http://www.theage.com.au/articles/2002/05/01/1019441391191.html accessed on 8 December 2016.

323 In particular, the UNSG regretted of 'being unable to provide the information requested by the Council in resolution 1405 (2002), and especially that the long shadow cast by recent events in the Jenin refugee camp will remain in the absence of such a fact-finding exercise'. UNSG, 'Report of the Secretary General prepared pursuant to General Assembly resolution

The same approach was later adopted by former UN Special Rapporteur on the situation of human rights in the OPT John Dugard in 2006, when Israel provided no response to his request for cooperation in the fact-finding activity he was entrusted to by the Human Rights Council in relation to events connected to 'Operation Summer Rains' in Gaza.[324] In this regard, the former Special Rapporteur, who made immediately clear that the consent of the Israeli Government would have been a necessary prerequisite for the Mission to be deployed, clearly expressed the view that

> 'it is pointless to persist with the fact-finding mission requested […] as the Government of Israel has, by its failure to respond to [the] request, indicated very clearly that it will not grant permission to the visit of such a fact-finding mission'.[325]

2.4.3.3 Commissions of inquiry as independent from state consent: the most recent developments

Things have changed since then. In particular, in 2006 the UN Commission on Human Rights has been replaced by the Human Rights Council. As already mentioned, since its establishment the Council has been extremely active in setting up human rights investigations. These inquiries have often been denied access and cooperation by concerned states. However, such obstacles have not prevented those commissions to carry out their inquiries. In particular, the following chart describes a list of the most relevant international human rights inquiries established since 1990.

Commission	*Establishing organ*	*Year*	*Cooperation by the parties*
Commission of Experts on the former Yugoslavia	UNSC (via UNSG)	1992	Not granted access and cooperation by Serbian forces; granted access and cooperation by other countries
Commission of Inquiry on Burundi	UNSC (via UNSG)	1995	GRANTED

ES-10/10', A/ES-10/186 (30 July 2002) para. 4. On the issue see, also, Michael Kearney, 'Empowering the General Assembly to Advance International Criminal Investigations' (2014) 4.

324 Human Rights Council, A/HRC/S-1/3 (2006) para. 6.

325 Report of the Special Rapporteur on the human rights situation in the Palestinian territories occupied since 1967 pursuant to resolution S-1/1 of the Human Rights Council, A/HRC/4/116 (20 December 2006) para. 8.

Commission	*Establishing organ*	*Year*	*Cooperation by the parties*
Commission of Inquiry on East Timor	Commission on Human Rights/ UNSG	1999	Granted access to the territory and exchange of views but not cooperation for fact-finding purposes
Human rights inquiry commission (OPT)	Commission on Human Rights	2000	Granted access to the territory but not cooperation by Israel
Commission of Inquiry on Darfur	UNSC (via UNSG)	2004	GRANTED
Commission of Inquiry on Lebanon	HRC	2006	Granted access and cooperation by Lebanon, not by Israel
High Level Mission to Beit Hanoun	HRC	2006	Granted access and partial cooperation by Palestinian authorities, not by Israel
Commission of Inquiry on Guinea	UNSG	2009	GRANTED
Fact-Finding Mission on the Gaza Conflict	HRC	2009	Granted access and partial cooperation by Palestinian authorities, not by Israel
Panel of Experts on Sri Lanka	UNSG	2010	NOT GRANTED
Fact-finding Mission on the Flotilla incident	HRC	2010	Granted cooperation by Turkey, not by Israel
Commission of Inquiry on Cote d'Ivoire	HRC	2011	GRANTED

Commission	*Establishing organ*	*Year*	*Cooperation by the parties*
Commission of Inquiry on Libya	HRC	2011	Granted, but limited and fragmented by on-going armed conflict
Fact-Finding Mission on Israeli settlements	HRC	2012	Granted cooperation by Palestinian authorities, not by Israel
Commission of Inquiry on Syria	HRC	2012	NOT GRANTED
Commission of Inquiry on North Korea	HRC	2013	NOT GRANTED
Commission of Inquiry on CAR	UNSC (via UNSG)	2013	GRANTED
OHCHR investigation on Sri Lanka	HRC	2014	NOT GRANTED
Commission of Inquiry on Eritrea	HRC	2014	NOT GRANTED
Commission of Inquiry on the Gaza Conflict	HRC	2014	Granted partial cooperation by Palestinian authorities, not by Israel
OHCHR investigation on Libya	HRC	2015	Granted access and cooperation by Libyan authorities, but only formally

Out of a sample of 21 commissions of inquiry, 12 commissions were denied both access and cooperation by at least one concerned state. In one case, the 2000 human rights inquiry commission in the OPT, the investigative team was granted access to the territory by the Government of Israel, which however denied any sort of cooperation. In a number of other instances – including the 1992 Commission of Experts and those missions mandated to investigate events in the OPT– commissions were granted access and cooperation by one side of the conflict but denied contacts by the other.

2.4.3.4 Different nuances of parties' consent and cooperation

When discussing parties' cooperation and access, it is often difficult to reach definitive findings. In other terms, to distinguish between 'cooperation' and 'lack of cooperation' without appreciating the different nuances emerging from such a broad spectrum of experiences may lead to fallacious conclusions. As it was clearly expressed by the OHCHR,

> '[l]ack of cooperation may vary from refusing to speak with and provide information and relevant documents to these bodies, to barring them from entering the country or the area where the incidents under investigation took place, and intimidating victims, possible witnesses and sources of information to prevent them from cooperating with the investigator'.[326]

It is extremely rare to document cases of absolute lack of cooperation and access from the concerned parties. This may happen with those investigations dealing with internationally isolated regimes such as North Korea.

Certain commissions have been formally denied any sort of cooperation and access by a State, while at the same time informal contacts, interactions and exchange of information may be set up. Although it is particularly challenging to collect information on this particular issue, this may have been the case for the 2014 Commission of Inquiry on the Gaza conflict, the 2010 UNSG Panel and the 2014 OHCHR investigation on Sri Lanka.[327] On the contrary, certain commissions that were officially welcomed by affected states received in practice only little assistance. A recent example is represented by the 2015 OHCHR investigation on Libya, which, although it was formally granted cooperation and access by the Libyan authorities, was able to undertake only a one-day visit to Tripoli and was not provided with any response in relation to a detailed list of questions it dispatched to the Government of Libya.[328]

In other cases, commissions have been allowed into the territory but have received little or no cooperation by the affected authorities. For example, the 2000 Human rights inquiry commission on the OPT was granted access to the whole area but denied official cooperation by the Government of Israel.[329] Another example concerns the 1999 UN Commission of Inquiry on East Timor,

326 OHCHR, Guidance and Practice (n 3) 64.

327 See, for example, Report of the OHCHR Investigation on Sri Lanka (OISL), A/HRC/30/CRP.2 (16 September 2015) para. 9. In particular, according to the OHCHR Mission, 'the Government which took office after Presidential elections in January 2015 did not change its stance on cooperation with the investigation, nor admit the investigation team to the country, but it engaged more constructively with the High Commissioner and OHCHR'. See also, Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (31 March 2011) paras. 20-22.

328 OHCHR Investigation on Libya (n 304) para. 7.

329 Report of the human rights inquiry commission (n 283) para. 7.

which was granted only partial access to the affected areas as it was allowed into Jakarta and East Timor but not to West Timor where many of the displaced persons had taken shelter. With regard to the interaction with the Indonesian authorities, Indonesia allowed the Commission to visit Jakarta only in order to exchange views with the national commission of inquiry and not to conduct any investigation or fact-finding activity.[330]

As mentioned above, certain commissions have then received cooperation and access only by one of the parties to the conflict. A good example is the 2006 Commission of Inquiry on Lebanon, which was granted cooperation and access by the Government of Lebanon but not by the Israeli Government.[331] This is also generally the case for those commissions of inquiry and fact-finding missions mandated to investigate events in Israel and the OPT.[332]

The situation may be further complicated in those cases of inquires mandated to investigate non-international armed conflicts, where the process of requiring cooperation from the non-state armed groups involved poses significant institutional and operational challenges. Although certain commissions – such as in the cases of Gaza and in the CAR – have been able to interact with non-state actors,[333] the pivotal importance of ensuring more consolidated network of cooperation with armed groups has so far been largely under-

330 Report of the international Commission of Inquiry on East Timor, A/54/726 – S/2000/59 (31 January 2000) para. 108.

331 Report of the Commission of Inquiry on Lebanon (n 280) paras. 19, 21.

332 While receiving partial where not full cooperation by the Palestinian authorities, these investigations have been refused any contact with the Israeli authorities. Obviously, this has impacted the ability to travel to the affected areas, particularly in relation to the occupied West Bank, whose borders are fully controlled by the State of Israel. It followed that all commissions and missions entrusted to investigate events related to the West Bank – such as the 2009 UN Fact-Finding Mission on the Gaza Conflict, the 2012 UN Fact-Finding Mission on Settlements and the 2014 UN Commission of Inquiry on the Gaza Conflict – were denied access to the territory and held meetings with Palestinian officials and interlocutors in Jordan. Different is the situation concerning the Gaza Strip, where one of the border access areas (the so-called Rafah crossing) has been under Egypt's control since Israel's disengagement in 2005. In this regard, despite Israel's ban the Egyptian authorities authorized the 2006 High-Level Mission to Beit Hanoun and the 2009 UN Fact-Finding Mission on Gaza the access into Gaza through Rafah border crossing. For alleged security concerns, they did not allow the most recent 2014 Commission of Inquiry, which held separate meetings in Geneva and Amman. Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, A/HRC/9/26 (1 September 2008) paras. 3-4; Report of the UN Fact-Finding Mission on Gaza (n 211) para 8.

333 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 145; International Commission of Inquiry to investigate events in Central African Republic (n 294) para. 11. In particular, the Gaza Mission emphasized how it 'held meetings with senior members of the Gaza authorities and they extended their full cooperation and support'. However, in relation to certain incidents and patterns, the Mission noted how the cooperation by the Gaza authorities has been lacking while instances of Gaza witnesses' refusal to testify due to possible retaliations have also been recorded.

estimated and overridden by security and institutional concerns in volatile and swiftly changing contexts.

Finally, even in those cases where commissions have been genuinely granted access to the territory and cooperation by the concerned authorities, this has not automatically translated in practical access to affected areas and primary sources of evidence.[334] The fact that these inquiries often operate in situations of armed conflict or in their immediate aftermath means conducting investigations in extremely challenging environments from the point of view of the security of staff and the operations. It also often implicates the impossibility to reach specific areas within the affected territory due to security or logistical reasons. Furthermore, such instable and volatile contexts in many cases affect the ability and willingness of witnesses and victims to freely interact with the investigators for fear of reprisals, in spite of any formal cooperation granted to the commissions by the concerned authorities.

On this point, the Commission of Inquiry on Darfur has outlined a list of criteria in order to assess the degree of cooperation by concerned stakeholders. These criteria include:

> '(i) freedom of movement throughout the territory of the Sudan; (ii) unhindered access to all places and establishments, and freedom to meet and interview representatives of governmental and local authorities, military authorities, community leaders, non-governmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate; (iii) free access to all sources of information, including documentary material and physical evidence; (iv) appropriate security arrangements for the personnel and documents of the Commission; (v) protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry and, in particular, guarantee that no such person would, as a result of such appearance, suffer harassment, threats, acts of intimidation, ill-treatment and reprisals; and (vi) privileges, immunities and facilities necessary for the independent conduct of the inquiry'.[335]

Based on these criteria, the Commission, despite acknowledging that 'the attitude of the Government authorities towards the Commission has been cooperative', noted a number of instances where requests to review specific records were not adequately followed up and pressures by local authorities on prospective witnesses was made.[336] Similarly, the 2013 Commission of Inquiry on CAR faced significant challenges in carrying out its mandate due to the volatile security situation that did not allow it to visit certain areas of the country and in relation to the harassment and threats suffered by members

334 For example Wilkinson has emphasized how the Commission of Inquiry on Darfur, despite being accorded cooperation by the Government of Sudan, faced a number of restrictions and resistance by regional and local authorities. Wilkinson, Finding the facts (n 296) 18.
335 Report of the Commission of Inquiry on Darfur (n 211) para. 28.
336 Ibid paras. 30-36.

of its investigative team.[337] Similar obstacles have been faced by many other commissions and missions demonstrating how state's consent and official cooperation do not always automatically translate into concrete access to sources and evidence.

2.4.3.5 Preliminary findings

The nuances that emerge from the practice thus suggest high caution in drawing definitive conclusions concerning the impact of cooperation/lack of cooperation by the parties on the records of commissions of inquiry, given the type and number of variables to take into account. However, with these caveats in mind, a number of tentative remarks can still be made.

Firstly, it emerges that in recent times commissions that have been denied cooperation and access to the territory by concerned parties have decided to carry out their tasks anyway. This represents a significant shift from the original conception of inquiries as tools that should be activated only on the basis of state consent. It thus seems that – particularly in light of their conceptualization in frameworks such as R2P or as mechanisms at disposal of UN human rights institutions – human rights inquiries should be now viewed as instruments that are imposed on (rather than agreed upon with) states.

In terms of cooperation, the chart displays an important distinction between those inquiries set up by the UN Security Council and those established by the Human Rights Council.

All four commissions established by the UNSC (former Yugoslavia, Burundi, Darfur and CAR) have received formal cooperation and access by concerned states. On the contrary, of 13 commissions set up by the HRC since 2006, five were not provided with cooperation and access (Eritrea, North Korea, Syria, OHCHR investigation on Sri Lanka, and Fact-Finding Mission on Israeli settlements). Six were provided with partial cooperation and access (Beit Hanoun, Lebanon, Gaza 2009, Gaza/Flotilla, Gaza 2014, Libya 2015). Only in two cases, the 2011 Commission of Inquiry on Libya and the 2011 Commission of Inquiry on Cote d'Ivoire, the HRC mandated commissions received formal cooperation and access to the territory by concerned governments.

At a first glance, these findings may support those views already debated in Chapter 1 that qualify the UN Security Council as the most authoritative organ for the establishment of inquiries in the context of armed conflicts and widespread human rights violations.[338]

Three objections may be raised in this regard. First, the HRC has been recently much more active than the UNSC in establishing these kind of investi-

337 International Commission of Inquiry to investigate events in Central African Republic (n 294) paras. 20-21.

338 See, for example, Frulli (n 178) 1332.

gations. Indeed, the more commissions are set up, the higher is the likelihood to face a situation where the concerned governments are not willing to cooperate. Second, as already emphasized in Chapter 1, it is difficult to imagine the UNSC finding the necessary political consensus and leverage to impose human rights investigations in particularly sensitive contexts such as Israel and the OPT, Syria and North Korea. Third, the practice may reveal that a UNSC-mandated investigation is not an absolute guarantee for state's consent. The example of the UNSC-mandated investigation on the events in Jenin stands as vivid reminder in this sense.

2.4.3.6 Denial of cooperation as tool for delegitimizing commissions

It is now time to go back to the initial issue concerning the impact of parties' lack of cooperation on the work of commissions of inquiry. Looking at the practice, it has not been unusual for certain countries to use the limitations posed to the commissioners' activities as a mean to delegitimize the work of international inquiries.

For example, Israel has denied cooperation to the vast majority of international commissions of inquiry established in relation to events in the OPT, except for those panels of inquiry set up by the UN Secretary General to investigate into causes of the flotilla incidents and into attacks and strikes to UN facilities in the 2009 and 2014 Gaza conflicts.[339] Israel has justified its behaviour by referring to the political biases and the predisposed approach of the Human Rights Council, while ignoring the fact that the mandates of the 2009 and 2014 inquiries on the Gaza conflict enabled these missions to investigate the conduct of all parties. As consequence, the lack of intelligence information from the Israeli side has often been used as an argument to undermine the quality and reliability of the inquiries' final findings. A typical example is the follow up to the report of the 2009 UN Fact-Finding Mission on the Gaza conflict. Israel's refused any sort of cooperation with the Mission, which was denied access to the territory of Israel and the West Bank and entered the Gaza Strip via Egypt. The Mission's findings contained numerous assessments on the compliance by Israel and Palestinian armed groups with IHL norms. Based on the evidence that, for obvious reasons, did not contemplate intelligence information coming from the Israeli side, the Mission concluded that the 'disproportionate destruction and violence against civilians [in Gaza] were part of a deliberate policy'.[340] It also expressed the view that

339 Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council, UN Doc. A/63/855 (15 May 2009); Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011); Letter dated 27 April 2015 from the Secretary-General addressed to the President of the Security Council, S/2015/286 (27 April 2015).

340 Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 1211, 1690.

> 'what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability'.[341]

As it will be explained more in details in Chapter 3, some of the findings were unilaterally retracted by Justice Goldstone in an editorial of 2011 on the basis of alleged information subsequently disclosed to him by the Israeli authorities. In fact, Goldstone's retraction has been used by many Israeli political figures and international actors to undermine the legal validity of the whole report.

Indeed, one cannot deny the importance, in contexts of urban warfare and armed conflict such as the Gaza Strip, of the information that Israel military intelligence possessed at the time of launching attacks in order to provide a comprehensive evaluation on the respect of basic IHL rules during Israeli military campaigns. It is also a fact that Israel's lack of cooperation has rendered the work of the commissions more arduous and, in relation to specific incidents, may have diminished the accuracy of their findings, which, particularly in certain sections, have been based mainly on testimonies of victims and witnesses from the Palestinian side.[342] Commissions themselves have acknowledged such limitations countless number of times.

However, two considerations should be made. Firstly – irrespective of whether certain far-reaching conclusions contained in the report of the 2009 UN Fact-Finding Mission on the Gaza Conflict could have been avoided given the kind of evidence available – this does not necessarily mean that the whole fact-finding exercise has been vitiated. Secondly, deliberate obstructions posed by states to the work of commissions of inquiry should not be used as an argument to delegitimize the work of these investigations as 'unbalanced', particularly looking at those mandates allowing for a comprehensive investigation of the conducts of all sides. Quite to the contrary, as it has been emphasized by the UN High-Level Mission to Beit Hanoun,

> 'the effective ban on its visiting Israel and meeting with Israeli actors (including victims of Kassam rocket attacks in southern Israel) has itself been an obstacle to the balance that Israel seeks'.[343]

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341 Ibid para. 1690.

342 See in particular those sections of the UN Fact-Finding Mission on the Gaza Conflict related to attacks against hospitals in Gaza and deliberate attacks against civilians. Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 620, 707. Another example concerns the account of the events immediately following the seizure of the Mavi Marmara vessel by the Israeli soldiers and the exchange of fire on board. See, Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 272) para. 115.

343 Report of the high-level fact-finding mission to Beit Hanoun (n 332) para. 73.

Thus, the decision not to cooperate with the commissions and to negatively affect their findings should fall under states' responsibility rather than solely translate into criticism on the commissions' findings. This message finds, to a certain extent, echo in the findings of the 2014 Commission of Inquiry on the Gaza conflict. In its report the Commission recognized

> 'the dilemma that Israel faces in releasing information that would disclose in detail the targets of military strikes, given that such information may be classified and jeopardize intelligence sources. Be that as it may, security considerations do not relieve the authorities of their obligations under international law. The onus remains on Israel to provide sufficient details on its targeting decisions to allow an independent assessment of the legality of the attacks conducted by the Israel Defense Forces and to assist victims in their quest for the truth'.[344]

2.4.3.7 Is state consent a necessary requirement for undertaking international inquiries?

This leads us directly to the core question in this debate: is it wise for international inquiries to operate without states' consent and cooperation?

From a substantive point of view, it can be argued that, even in cases where a State denies any sort of cooperation and access to the territory, commissions of inquiry can still collect information from an array of relevant and impartial sources such UN agencies, other international organisations and international and local NGOs. Furthermore, as the cases of Gaza, Syria, North Korea and Eritrea have clearly demonstrated, commissioners can gather first-hand information from primary sources by conducting interviews with victims and witnesses abroad or via phone/Skype. Obtaining information from former officials of the regimes investigated or military analysts familiar with such contexts can also critically contribute to fill the gap left by states' non-cooperation. In this regard, the ability of the 2009 and 2014 Gaza missions of including views from former Israeli military officials and experts as well as using the interviews with Israeli soldiers conducted by the NGO *Breaking the Silence* stands as important reminder of how commissions can undertake a thorough and comprehensive investigation of the facts and circumstances related to specific incidents even in the absence of cooperation from the states involved.[345]

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344 Report of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/CRP.4 (22 June 2015) para. 75; Report of the detailed findings of independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/CRP.4 (22 June 2015).

345 In this regard the Report of the UN Fact-Finding Mission on the Gaza Conflict contains, for each specific section, a sub-paragraph exposing the Israeli view over a particular incident or attack. See Report of the UN Fact-Finding Mission on Gaza, (n 211) paras. 372, 464, 498, 570. The same approach had been previously undertaken by the UN High Level Mission to Beit Hanoun. See, Report of the high-level fact-finding mission to Beit Hanoun, (n 332) paras. 36-40. With regard to the use by commissions of inquiry of certain sources, particular-

Indeed, some problems remain. Site visits constitute an important component in the fact-finding process. They enable direct inspections of locations and allow commissioners and investigators to adequately match information coming from witnesses' testimonies and secondary sources with the reality on the ground. Furthermore, intelligence information and medical reports – which cannot be obtained unless through institutional channels of cooperation with the relevant authorities – can also prove extremely valuable in clarifying whether certain incidents have entailed violations of IHL principles and the use of certain weapons or the excessive use of lethal force in law enforcement operations. For example, the UN Fact-Finding Mission on the Flotilla incidents could provide accounts of a number of killings that took place during the seizure of the ship thanks to the information coming from Turkish medical reports.[346]

However, while these sources have proven to be extremely important in corroborating and consolidating the reliability of investigations, they cannot be considered a *conditio sine qua non* for inquiries to reach specific findings over certain incidents. Such conclusion is corroborated by the fact that commissions of inquiry by nature are not bodies mandated to reach definitive findings. As specified above, commissions of inquiry operate under a standard of proof ('reasonable grounds to believe' or 'balance of probabilities') that is not extraordinary high. This means that their findings can (and should) be subsequently corroborated or overturned by further investigations.

In conclusion, while recognizing the critical importance of states' cooperation in ensuring increased accuracy of the findings, the practice has shown that in general international commissions of inquiry have been able to discharge their mandates and provide a fair and reliable account of the events in line with the mandate and standard of proof implemented also in those situations where parties' cooperation was missing. Hence, from an operational and substantial point of view, states' consent and cooperation should not be considered as a *conditio sine qua non* for commissions of inquiry to carry out their mandates.

This of course does not mean that the specificity of each particular case should not be taken into consideration. There are specific contexts, incidents or findings for which the information coming from the parties directly involved may prove vital in order to provide a fair account of the events. In particular, looking at the practice, commissions of inquiry have often decided not to take a final stance on the use of certain means or tactics of warfare in the absence

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ly in relation to interviews conducted with Israeli soldiers by the NGO *Breaking the Silence*, see Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 339-344, 459, 522, 727, 802, 1183, 1192-1199; Report of the independent commission of inquiry on Gaza (n 344) paras. 284, 292, 391, 400, 401.

346 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 272) para. 19.

of a comprehensive set of information, including those provided by the actors directly involved in those incidents. For example, the 2009 UN Fact-Finding Mission on the Gaza Conflict, despite acknowledging the breach of the obligation to take feasible precautions, could not prove the intent by Palestinian armed groups to use civilians in Gaza as human shields given the insufficient cooperation from the Palestinian side on this matter.[347] Equally, the Commission of Inquiry on Lebanon could not make a final determination on the use by the Israeli armed forces of depleted uranium, incendiary weapons, dense inert metal explosive (DIME) and fuel air explosive.[348] Along the same line, the 2011 Commission of Inquiry on Libya, given the insufficient information coming from the NATO headquarters, determined in its interim report that it was not in a position to assess the veracity of the information received in relation to allegations concerning NATO airstrikes intentionally and indiscriminately targeting civilians.[349] Finally, in relation to the use of chemical weapons in the Syrian conflict, the Syria Commission of Inquiry initially determined that although

> 'chemical weapons, specifically sarin, were found to have been used in multiple incidents during the conflict, in no incident was the commission's evidentiary threshold met with respect to the perpetrator'.[350]

However, the impossibility of reaching certain findings in relation to specific incidents does not mean that the overall result should not be given enough credibility or that commissions of inquiry should desist from undertaking their investigative tasks at all. As an example, while one can criticise the 2009 UN Fact-Finding Mission on the Gaza Conflict for reaching certain conclusions on the overall scopes and objectives of the Israeli military campaign in Gaza in the absence of certain information coming from the Israeli side, this does not mean that the whole report should necessarily be considered as flawed

347 Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 491-496.

348 Report of the Commission of Inquiry on Lebanon (n 280) paras. 257, 262, 263, 264.

349 Report of the International Commission of Inquiry into Libya (n 202) para. 235. However, such issue was partially reassessed in the Commission's final report in which the inquiry noted that although NATO forces conducted 'a highly precise campaign with a demonstrable determination to avoid civilian casualties,' certain targeted sites 'showed no evidence of military utility' and resulted in 'confirmed civilian casualties'. Full Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Law in Libya, A/HRC/19/68 (8 March 2012) para. 812. See also Heller (n 206) 4.

350 6th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/25/65 (12 February 2014) *Summary*. However, such initial approach was overturned by subsequent investigations, which allowed the Commission to determine that 'reasonable grounds exist to believe that chemical agents, likely chlorine, were used on Kafr Zeita, Al-Tamana'a and Tal Minnis in eight incidents within a 10-day period in April. There are also reasonable grounds to believe that those agents were dropped in barrel bombs from government helicopters flying overhead'. 7th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/27/60 (13 August 2014) para. 118.

or that, in the absence of Israel's cooperation, the Mission should not have carried on its mandate.

Moving on to analyse whether there are any institutional obstacle that may prevent commissions of inquiry to carry out their mandates in the absence of states' consent, it should be noted how many of these inquiries – including those in Gaza, Syria, North Korea, and Eritrea – had their reports welcomed and endorsed by their mandating organs. This may be read as an implicit sign of acquiescence in the commissions' practice to operate without states' approval. The OHCHR has also acknowledged such trend by noting how

> '[l]ack of cooperation from the authorities has not prevented investigations and fact-finding from taking place nor commissions / missions from reaching conclusions'.[351]

Moreover, the inclusion of international fact-finding in the R2P framework among the primary steps that the international community should adopt to react to situations where states are failing to protect their people's basic rights seems to go into the same direction.

This analysis leads to the conclusion that, both from an operational/substantial and institutional point of view, there should be no impediment for commissions of inquiry to operate in situations where parties' consent is missing, although states' cooperation should be sought and strongly encouraged as critical factor in increasing the accuracy of the findings and contributing to the improvement of commissions' records.

2.4.4 Selection, collection and use of sources and evidence

2.4.4.1 Introduction

In the work of commissions of inquiry the selection of sources and evidence and the process of combining them together are of pivotal importance to ensure the credibility of their findings. Hence, it is relevant to assess not only the choice of sources but also the manner in which different sources have been combined by inquiries.

As a general remark, commissions of inquiry have, as common practice, resorted to a combination of primary and secondary sources. Looking at different fact-finding experiences, it emerges a manifold picture in which commissions have referred on occasion to testimonies and interviews conducted with witnesses and victims sometimes even in the form of public

351 OHCHR, Guidance and Practice (n 3) 65.

hearings,[352] states official records and information, reports produced by international and local NGOs, reports by UN agencies and other international organizations such as the ICRC, site visits, video tapes, satellite images, assessments of forensic experts, medical reports, ballistic examinations, experts testimonies and written submissions by several stakeholders.

2.4.4.2 Criteria used for combining sources

Indeed, the most salient aspect to be analysed does not much pertain to the type of source used but to the way different sources have been combined in order to support the credibility of the findings. The methodology implemented in order to ascertain and corroborate facts is in fact a crucial component in assessing the credibility of the whole fact-finding exercise. In this regard, the practice of commissions of inquiry shows a consolidated tendency towards a combination of primary and secondary sources, with a clear inclination towards the former.

For example, the UNSG Panel of Experts on Accountability in Sri Lanka made clear that the weight and reliability of each of the sources had been carefully evaluated. In this regard, its final report stated how

> 'allegations [were] only included as credible when based on primary sources that the Panel deemed relevant and trustworthy. These primary sources were corroborated by other kinds of information, both direct and indirect'.[353]

Similarly, the UN Fact-Finding Mission on the Gaza Conflict determined that

> 'in establishing its findings [it] sought to rely primarily and whenever possible on information it gathered first-hand. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration'.[354]

This approach finds adequate echo in scholars' reviews. Wilkinson has emphasized how 'direct observations and direct interactions with victims and witnesses […] appears to be a mainstay of [fact-finding] missions' and 'the importance of direct observations of facts, while not always attainable, sets

352 Particularly striking are the examples of the 2009 UN Fact-Finding Mission on the Gaza Conflict and the 2012 Commission of Inquiry on North Korea, which resorted to the formula of public hearings in order to gather information and testimonies from eye-witnesses and victims.

353 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) para. 52.

354 Report of the UN Fact-Finding Mission on the Gaza Conflict (n 211) para. 23.

itself at the heart of the work of [fact-finding] missions'.[355] Furthermore, according to Boutruche,

> 'information gathered by others must be carefully assessed in terms of credibility and objectivity. Such information should not be given the same weight among the sources used to ascertain facts'.[356]

At the same time, Grace emphasizes how practitioners involved in fact-finding exercises 'in general tend to place great importance on eyewitness accounts'.[357]

2.4.4.3 Criteria used to verify credibility of sources and veracity of information

Thus, it seems that the crosschecking between primary and secondary sources appears as the most common basis used for ensuring credible fact-finding. In terms of criteria employed to verify the veracity of the information, it is worth noting that the Guidelines for Field Staff, NGOs and UN Agencies involved in the monitoring and reporting mechanism on children in armed conflicts established by UNSC Resolution 1612 have determined the minimum standard of proof necessary to prove a fact or allegation, namely when information provided by a primary source are corroborated by at least two other supporting sources of information.[358] In this regard, Boutruche has noted that

> 'to ensure credible fact-finding and an accurate "balance of probabilities", the sources used to gather information must be as diverse and reliable as possible, including information which comes directly from victims and witnesses, international organizations, non-governmental organizations and government sources'.[359]

Consistently, the Commission of Inquiry on Guinea decided that

> 'the information received must be checked against independent sources, preferably eyewitness accounts, and independently verified evidence […]. This is the approach commonly used by international commissions of inquiry, which endeavour to put together reliable evidence corroborated by verified testimony. Thus, the report does

355 Wilkinson, Finding the facts (n 296) 30-31. See also Diane F Orentlicher, 'Bearing Witness: The Art and Science of Human Rights Fact-Finding' (1990) 3 *Harv. Hum. Rts. J.* 83.
356 Boutruche (n 4) 14.
357 Grace (195) 31.
358 'Guidelines for Field Staff, NGOs and UN Agencies, Children and Armed Conflict – Monitoring and Reporting of Grave Violations of Child Rights in Israel and oPt' (May 2009) 8; Boutruche (n 4) 10.
359 Boutruche (n 4) 13.

> not include any testimony that has not been corroborated by at least one other source'.[360]

Similarly, the Commission of Inquiry on the 2014 Gaza Conflict has explained the choice of the 'reasonable grounds to believe' standard of proof in the following terms:

> '[t]he assessment in each case considered two elements: 1) the reliability and credibility of the source, taking into account its nature and objectivity, the quality of previously submitted information and the methodology utilized by the source, and 2) the validity and veracity of the information itself on the basis of cross-checking witness testimony against photographic evidence and other materials relating to the same incidents provided by other sources'.[361]

In terms of how to assess the credibility of sources, the DRC Mapping Exercise report has also offered some relevant guidance in emphasizing how

> '[a]ssessing the reliability of the information obtained was a two-stage process involving evaluation of the reliability and credibility of the source, and then the pertinence and truth of the information itself. This method is known as the admiralty scale. Reliability of the source is determined using several factors, including the nature, objectivity and professionalism of the organisation providing the information, the methodology used and the quality of prior information obtained from the same source. The validity and authenticity of the information is assessed by comparing it to other available data relating to the same incidents to ensure that it tallies with already verified elements and circumstances'.[362]

2.4.4.4 Impact of the accountability focus

Certain scholars have duly highlighted the similarity in the approach between commissions of inquiry and tribunals in relation to their preference for first-hand information and reluctance to reach findings on the basis of hearsay evidence.[363]

In particular, despite the fact that commissions of inquiry operate with a methodology and standard of proof typical of a fact-finding rather than judicial body, it is undeniable their increasing focus on issues related to the ascertainment of individual criminal responsibility. This has inevitably affected

360 Report of the International Commission of Inquiry on Guinea (n 211) para. 22.
361 Report of the independent commission of inquiry on Gaza, (n 344) para. 19.
362 Report of the Mapping Exercise on the DRC (n 300) para. 102.
363 Dov Jacobs and Catherine Harwood, 'International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013) 11.

their methodology in assessing sources and evidence. In this regard, the Commission of Inquiry on Burundi noted how it

> 'decided to conform its fact-finding activities, insofar as possible, to judicial standards, not only to give its eventual conclusions a solid base but also in order to amass evidence that could be of use for any later judicial action'.[364]

More recently, the Special inquiry into Al-Houla, undertaken by the HRC Commission of Inquiry on Syria instructed it to 'preserve the evidence of crimes for possible future criminal prosecutions or a future justice process'.[365] Other commissions have been requested to collect facts in order to identify alleged perpetrators and store evidence that could serve the purpose of future criminal investigations.[366] This has inevitably affected the process of collecting evidence and reaching certain findings. In the context of Darfur,

> 'in classifying the facts according to international criminal law, [the Commission] adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis'.[367]

2.4.4.5 The need to overcome lack of cooperation by the parties

Now it is time to assess a number of trends developed by commissions of inquiry and fact-finding missions in relation to the choice and the use of sources and evidence.

In the previous section it has been emphasized how the lack of cooperation from the parties involved into a particular situation may seriously hinder the collection of first-hand information by independent fact-finding bodies. However, the practice of commissions of inquiry has shown how such obstacle can be overcome.

Firstly, inquiries mandated to investigate countries that have dismissed their mandates such as in the case of Israel, Syria, North Korea and Eritrea have been able to obtain first-hand information and testimonies from victims and witnesses via Skype or by meeting them in third countries, including through the possibility of arranging public hearings.[368] Secondly, although

364 Report of the international Commission of Inquiry concerning the assassination of the President of Burundi on 21 October 1993 and the massacres that followed, S/1996/682 (22 August 1996) para. 6.

365 A/HRC 22/13 (2013) para. 5. See also Jacobs and Harwood (n 363) 8.

366 This has been the case for commissions established to investigate the contexts of former Yugoslavia, Rwanda, Darfur, Syria and North Korea.

367 Report of the International Commission of Inquiry on Darfur (n 211) para. 14; Jacobs and Harwood (n 363) 9.

368 Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 137-145; Report of the Commission of Inquiry on the situation of human rights in North Korea (n 273) para. 12; Report of the commission of inquiry on human rights in Eritrea (n 273) para. 12.

states official records have been difficult to obtain in cases of denial of cooperation, certain commissions have been able to indirectly obtain testimonies from witnesses familiar with States' policies. In particular, the UN Fact-Finding Mission on the Gaza Conflict, while it was not allowed to engage in any official dialogue with Israeli authorities, nevertheless collected a wide variety of information coming from the Israeli side. In particular, the team led by Justice Goldstone was able to review a number of documents, including official statements of Israeli authorities. It also benefited from the expertise of military experts familiar with Israel planning military operations as well as from the testimonies provided by Israeli soldiers to the organisation *Breaking the Silence*.[369] A similar approach was undertaken by the 2014 Commission of Inquiry on the Gaza Conflict and by the UN Fact-Finding Mission on the Flotilla incident particularly in relation to testimonies provided by Israeli Defence Force (IDF) personnel to the Israeli internal Commission (so-called 'Turkel Commission').[370]

With particular regard to the 2009 UN Fact-Finding Mission on the Gaza Conflict, one of the distinctive features of the report is the extensive use by the Mission of 'indirect' Israeli sources – such as public statements or interviews of political and military figures – in order to prove the 'deliberate' character of certain military attacks. In particular, the Mission determined that it did not have to consider whether Israeli military officials involved in the military operations were directly influenced by public statements from high-level political and military echelons. It was enough for it 'to conclude from a review of the facts on the ground […] that what [was] prescribed as the best strategy [appeared] to have been precisely what was put into practice'.[371] This approach has raised some criticism and certainly cannot be used in the context of criminal proceedings to support findings concerning individual criminal intent beyond reasonable doubt. However, it may help providing important indications in unveiling the link existing between violations of IHL perpetrated on the ground and the policies and strategies designed by high-level military and political elites. In this regard, one should remind that the UN Mission on Gaza was not mandated to secure individuals to justice but rather to ascertain facts over alleged violations of IHL. For this reason, such extensive reliance on 'indirect' Israeli sources may still be justified given the average standard of proof implemented and the objectives behind the fact-finding exercise. In this regard, as certain scholars have emphasized,

> 'the efforts made by the Mission(s) to find the truth and engage the parties, provide strong evidence for the overall credibility and validity of the exercise. As a result,

369 Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 1176, 1180, 1183.

370 Report of the independent commission of inquiry on Gaza (n 344) paras 284, 292, 391, 400, 401.

371 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 1195.

> the Mission and its report have particular implications for IHL and UN fact-finding'.[372]

2.4.4.6 The role of NGOs reports

The practice of international fact-finding bodies has also witnessed a prominent role played by non-governmental organizations acting on the ground and their reporting, particularly in situations where commissions of inquiry had no direct access to the territory or contact with relevant authorities. As an example, the 2000 Human rights inquiry commission in the OPT emphasized the importance of NGOs reporting in the determination of its findings. Its final report underlined how

> 'the impressions and interpolations of the Commission and the testimony received by the Commission [confirmed] the views expressed by the most respected and reliable NGOs in the region. The Commission [had], therefore, relied to varying degrees on the findings of respected NGOs where they were supported by reliable eyewitness accounts and where they coincided with other evidence received by the Commission'.[373]

It should be noted how such an attitude of resorting to the findings and conclusions provided by local NGOs has a double-side effect. From one hand, local NGOs possess relevant experience of the specific context, particularly when it comes to collecting information on the ground, selecting relevant testimonies and matching facts with existing policies. This may prove extremely helpful for a body composed of external experts that may not always possess an extensive experience of the dynamics characterizing a specific region. On the other hand, the high degree of familiarity of those NGOs with the context may sometimes affect the level of objectivity in assessing certain trends. In these situations, the ideal solution would be for international commissions to combine information provided by NGOs with the use of first-hand sources.[374] Indeed, this has not always been possible particularly in contexts where commissions have not received cooperation by the parties and full access to the territory. When this has been the case, the information provided by NGOs active on the ground has assumed a paramount importance and has often inspired large sections of the commissions' reports. This, of course, may raise doubts on the independent contribution provided by international commissions in ascertaining facts, as the line between fact-finding exercises and NGOs reporting becomes more blurred.

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372 Zoran Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' (2012) 13 *Melbourne Journal of International Law* 48.

373 Report of the human rights inquiry commission (n 283) para. 10.

374 Wilkinson, Finding the facts (n 296) 37-38.

On this point, two different examples should be highlighted. On one hand, the Commission of Experts on Rwanda extensively resorted to NGOs reporting to corroborate its findings. Its final report stated how 'the material contained in most of these reports seems to be precise, detailed and corroborated by the information gathered in particular by the Special Rapporteur'.[375] This prompted the Commission to resort extensively to NGOs contributions in sensitive areas such as for the determination of the number of casualties in specific incidents and by geographic areas.[376]

On the other hand, the UNSG Panel of Experts on Accountability in Sri Lanka was very critical in assessing the contribution of secondary sources. For example, with regard to the value of written submissions it determined that

> '[s]ubmissions could not be individually verified by the Panel and, therefore, were not used as a direct source to meet the Panel's threshold of credibility for the allegations […]. In some cases, however, submissions helped to corroborate other sources of information'.[377]

More specifically, in relation to the role of NGOs reports the Panel argued that

> 'a number of NGO reports exist on events in the Vanni. While the Panel reviewed some of these reports, it did not rely on them to compile these allegations, but rather carried out its own assessment of the nature and scope of allegations.'[378]

2.4.4.7 Different standards for different findings?

Indeed, while commissions and fact-finding missions have attempted to resort to uniform standards in the selection and evaluation of their sources and evidence, this has not always been possible due to the different nature of their tasks.

For example, different standards may be needed in order to investigate a single incident or the existence of a pattern or a policy. While the great majority of commissions have been identifying patterns and policies of violations in their reports, only few of them have expressly detailed the methodology used to reach such findings, particularly in relation to the choice of incidents indicative of a specific pattern. In particular, the OHCHR Mapping Exercise on the violations perpetrated in the territory of the DRC during the period 1993-2003 determined that:

375 Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405 (9 December 1994) para. 50.
376 Ibid paras. 73-74.
377 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) para. 19.
378 Ibid, para. 50.

> '[a] gravity threshold with a set of criteria enabling the Team to identify incidents of sufficient severity to be included in the final report was used for incident selection. These criteria fell into four categories: 1) nature of the crimes and violations linked to a given incident, 2) scale (number) of crimes and violations linked to an incident, and number of victims, 3) how the crimes and violations were committed and 4) impact of crimes and violations on communities, regions or the course of events'.[379]

Concurrently, the Commission of Inquiry on Darfur decided to select

> 'incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding. In making this selection, access to the sites of incidents, protection of witnesses and the potential for gathering the necessary evidence were, amongst others, of major consideration'.[380]

Furthermore, many experts have supported the argument that a different approach is needed when fact-finding relates to IHL or IHRL investigations. For example, Marauhn, by noting that the Commission of Inquiry on Syria has applied a similar methodology for assessing both IHL and IHRL violations, has warned against such uniformity insofar as it may raise serious concerns vis-à-vis the reliability of certain findings.[381] Similarly, Boutruche has emphasized that, while

> 'fact-finding may at times comprise elements common in both IHL and human rights law fields, differences exist, particularly with regard to the techniques that vary depending on the nature of the violations'.[382]

In this regard, the practice of commissions of inquiry has confirmed how armed conflicts further complicate fact-finding tasks. For example, looking at the reports of the Commission of Inquiry and OHCHR investigation on Libya, it emerges that the types of sources used to substantiate findings on incidents involving arbitrary arrests, torture and enforced disappearance (which mainly attract findings related to IHRL) have been different from those required to investigate situations of conduct of hostilities, which call into question the applicability of IHL norms. While for the former these missions had access to detention facilities and received direct testimonies from victims and witnesses of the events, for the latter little or no cooperation from the parties involved

379 Report of the Mapping Exercise on the DRC (n 300) para. 6. See also Grace (n 195) 18-19.
380 Report of the International Commission of Inquiry on Darfur (n 211) para. 223.
381 Marauhn (n 197) 444-447.
382 Boutruche (n 4) 3.

in the hostilities (particularly non-state armed groups) was granted.[383] This meant neither access to intelligence information about military targets nor access to affected locations. In particular, the OHCHR investigation drew the attention on the fact that without the 'ability to conduct site visits and undertake detailed investigations, [it] has not been able to determine which parties were responsible for many specific attacks'.[384] In sum, the impossibility to resort to primary and direct sources and the need to rely necessarily upon written reports and hearsay evidence clearly reflects a different level of accuracy in the findings, particularly if compared to those based on direct contacts with victims and eyewitnesses of the events.[385]

The challenges related to fact-finding in determining compliance with IHL in areas were active hostilities are still on going have been already highlighted in the section devoted to the impact of parties' (non) cooperation. Here it is important to stress how physical evidence may play a critical role in corroborating the findings based on primary sources (including witnesses' testimonies).[386] Indeed, the opportunity to conduct site visits and the possibility of receiving from concerned parties satellite images, medical and forensic reports and the intelligence information available at the time of attacks are of paramount importance, particularly when it comes to assessing respect for the principles of distinction, proportionality, precautions or to ascertain whether certain weapons have been employed and who is responsible for their use. Examples highlighted above from the investigations in Gaza, Lebanon, Libya and Syria show how often commissions have abstained from making definitive findings in the absence of concrete evidence.[387] In other occasions, where commissions have actually reached certain conclusions, their findings have been harshly criticised for the lack of solid evidence.[388]

Such challenges have been duly noted by certain authors. Boutruche, for example, has argued that fact-finding applicable to situations of conduct of hostilities

383 Report of the International Commission of Inquiry into Libya (n 202) paras. 82-129, 155-180; Report of the Investigation by the OHCHR on Libya (detailed findings) (n 304) paras. 101-107, 125-171.

384 Report of the Investigation by the OHCHR on Libya (detailed findings) (n 304) paras. 101, 107.

385 In particular, the 2011 Commission of Inquiry on Libya was criticized for its analysis of certain attacks vis-à-vis the principle of proportionality. See Heller (n 206) 39.

386 Heller (n 206) 16.

387 (n 347-350).

388 See in particular, the section of the report of the 2009 UN Fact-Finding Mission on Gaza concerning 'deliberate attacks against civilians'. Report of the UN Fact-Finding Mission on Gaza (n 211) para. 706.

> 'not only requires legal expertise in order to properly cover all aspects of the related IHL norms but broad multi-disciplinary expertise ranging in focus from forensics to the military'.[389]

Furthermore, certain authors maintain that commissions need to increase their proof standards when it comes to findings related to individual criminal responsibility. According to Grace,

> 'a general consensus exists among […] practitioners that missions should exercise extreme caution when deciding to identify individuals suspected of criminal responsibility'.[390]

Similarly, Marauhn noted how the Commission of Inquiry on Syria was tasked with the investigation of alleged human rights violations, including those that could amount to crime against humanity. According to his opinion,

> 'the Commission, in interpreting its mandate, distinguished between establishing the facts of human rights violations, only requiring "reasonable suspicion". In contrast, the second component of its mandate needs a higher burden of proof by requiring the identification of "those responsible"'.[391]

2.4.4.8 Conclusions

In conclusion, commissions of inquiry generally tend to confer a prominent role to primary and first-hand sources as well as privilege the combination of different sources in order to corroborate the reliability of their findings. At the same time specific factors such as lack of parties' cooperation and denial of access to the territory may hinder the process of source gathering. Similarly, certain issues require an additional level of scrutiny. In particular, compliance with international humanitarian law principles in situations of armed conflict and the identification of individuals criminally responsible may prove particularly challenging. In this regard, the practice of commissions of inquiry/fact-finding missions shows either some hesitancy in reaching definitive findings or harsh criticism in cases certain conclusions are drawn without solid evidence at disposal.

In order not to be too much exposed to attacks and entrench greater transparency one possible way would be for commissions to clearly and

389 Boutruche also emphasized the need to match the evaluation *ex post* made by the investigation with the one *ex ante* made by the attacker and points out how in order to reach findings on solid basis 'information must be gathered from various sources, including interviewing eye witnesses and gathering material evidence to assess the nature of the injury or the features of the damage' while also underlining the importance to resort to the opinion of military experts and to conduct site visits. Boutruche (n 4) 20, 22, 33, 34.

390 Grace (n 195) 33.

391 Marauhn (n 197) 426.

thoroughly spell out the methodology used to collect and test evidence and the obstacles encountered in the collection of information. There is a growing consensus that the more such a process is subjected to public scrutiny, the more difficult it becomes to undermine the work of commissions of inquiry at a later stage.

Unfortunately, looking at most recent examples, a reversed trend in the space devoted to explain the methodology employed to gather sources and evidence can be noted. While in fact certain past experiences have largely displayed the methodology used to identify, select and corroborate sources, such a matter has been given less attention in more recent inquiries.

The 1999 CHR-mandated Commission of Inquiry on East Timor, for example, shaped its whole report on the basis of the sources collected and testimonies available in relation to specific incidents. A similar approach had been previously undertaken by the 1994 Commission of Inquiry on Burundi, whose mandate included the investigation of the assassination of the former President Ndadaye and the massacres that followed immediately after. With regard to the second part, the Commission's final report contains a detailed section on the methodology used to collect and test the evidence available. Furthermore, the report contains an analysis of the main challenges and factors hindering both the accessibility and reliability of such evidence.[392] With regard to the first part of the report, the criteria developed to assess and test the reliability of evidence permitted the commission to challenge the genuineness of a number of testimonies, particularly those coming from within official military ranks.[393]

Such rigorous approach has not always been followed by more recent fact-finding missions. With certain notable exceptions such as the 2011 Commission on Libya, commissions have generally been more reluctant to develop and display methodologies to assess the credibility of evidence.[394] As an example, the 2009 UN Fact-Finding Mission on the Gaza Conflict relied extensively and almost uniquely on the testimonies of victims or people directly present at the scene in relation to the vast majority of incidents examined. In almost all cases, the Mission found these testimonies to be reliable and credible. Such complete trust has been criticised by certain scholars and may indeed cast substantiated doubts on the procedures implemented by the Mission to test the reliability of witnesses,[395] particularly given the fact that the Mission,

392 Report of the international Commission of Inquiry on Burundi (n 364) paras 223-244.
393 Ibid para. 205.
394 Heller (n 206) 14.
395 Abraham Bell, 'A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law' (2010) ASIL Annual Meeting 8.

as general policy, omitted to explain the methodology developed to such a scope.[396]

Future commissions should thus view the experiences of Burundi and East Timor as models for the high level of attention devoted to the assessment of sources and evidence. The methodology chosen for corroborating findings is a crucial element in ensuring the credibility and fairness of the whole fact-finding exercise. For this reason it is important not only that commissions develop a sound methodology but also that such methodology is publicly displayed. This would allow commissions of inquiry to shield themselves from attacks and criticisms, particularly in cases where their findings are touching upon sensitive matters or they have been reached without having all possible evidence at disposal.

In relation to the challenges posed by particular investigations (such those concerning armed conflicts), it is crucial for commissions of inquiry to be entrusted with adequate resources. This pertains to both financial and logistic support and the possibility to resort to technical expertise. It is instructive to recall the precedent of the UN Fact-Finding Team in Jenin, which was denied cooperation by Israel precisely on the ground that military expertise was not adequately represented in its composition.[397] In this regard, disposing of a multidisciplinary team comprising different kinds of expertise (including those in the legal, medical, military, ballistic and forensic fields coupled with the knowledge of the context under investigation) not only appears paramount in order to collect and properly assess information coming from multiple sources but will also entrench the credibility of the investigation in the eyes of the multiplicity of actors involved.[398] In this regard, Boutruche has noted how

> 'A diversity of sources ensures that allegations are reviewed from different angles and provide the opportunity for the fact-finder to confront alternate accounts of events'.[399]

396 In this regard a notable exception is represented by the section dealing with attacks by the Israeli forces to the Al-Quds hospital, in which it was highlighted how 'the Mission met staff from the hospital on six separate occasions, three of them on site visits. […] Three long interviews were carried out with one doctor individually, another was carried out with two doctors together and there were two group meetings with four and five doctors, respectively'. Report of the United Nations Fact-Finding Mission on the Gaza Conflict (n 211) para. 595.

397 (n 322).

398 On this particular aspect see Grace (n 195) 43.

399 Boutruche (n 4) 13.

2.4.5 Legal analysis and contribution to the development of international law

2.4.5.1 Introduction

The contribution to the development of international law may, at a first glance, be perceived as not being among the primary functions of international fact-finding missions and commissions of inquiry. In fact, if one looks at their traditional conceptualization, the idea behind the setting up of international inquiries is inherently linked with the need of stating the facts. However, one cannot ignore the role assumed by these instruments in the practice. Commissions of inquiry nowadays increasingly resort to the application of international law and their findings contain not only an overview of the facts investigated but also their analysis according to the relevant international legal frameworks.

In this regard, the work and practice of commissions of inquiry naturally prompt the dilemma in determining whether they can be considered as mere fact-finding tools or rather should be viewed as law-applying authorities. According to Boutruche such dilemma appears intrinsic to the idea of commissions of inquiry/fact-finding missions as an instrument.

> 'The question about the separation of fact-finding and the legal evaluation may be as difficult to grasp as it is intrinsic to fact-finding. In this respect it constitutes a diffused challenge throughout the fact-finding process: How can fact-finding be completely separate from the legal assessment of the ascertained facts?'.[400]

In this regard, Van den Herik has argued how the law-applying function may have always been among the intrinsic features of fact-finding bodies:

> 'the main difference between traditional and contemporary commissions of inquiry does […] not correspond to the fact/law distinction in the sense that traditional commissions were pure fact-finders and contemporary commissions are law-appliers. The fact/law distinction is simply not that easy to make'.[401]

Indeed, international law may be well regarded as a necessary feature in the commissions' work as 'selection criterion' in order to identify which facts are relevant and properly qualify them.[402] Still, according to van den Herik, a

400 Boutruche (n 4) 6.

401 Van den Herik (n 14) 536.

402 In this regard, Boutruche refers to the opinions of Salmon and Vité by underlying how 'the expression 'ascertaining' facts is misleading as it suggests that the operation is about ascertaining an objective phenomenon that would then be 'confronted' to the legal norm. On the contrary, [Salmon] stresses the influence of law on facts in several respects; for example, he suggests that the relevance of a fact is linked to the choice of the applicable law. Ultimately, the facts covered through the inquiry are framed by the elements of the very rule allegedly violated. Otherwise, a legal conclusion cannot be reached'. Boutruche

> 'question arises whether the invocation of international law also serves ulterior purposes and whether contemporary commissions of inquiry should in fact be regarded as de facto law-applying authorities rather than fact-finding exercise'.[403]

What can be stated unambiguously is that fact-finding and law-application cannot be seen as isolated or compartmentalised features in the work of commissions of inquiry but rather should be viewed as co-constitutive elements. Law often defines the parameters through which a fact-finding body operates and the discernment between relevant and non-relevant facts is made precisely on the basis of the relevant legal frameworks. From this standpoint, it becomes extremely difficult to argue that commissions of inquiry cannot be considered as law-applying bodies.

While it should be noted how commissions and fact-finding missions have always showed an inclination towards engaging in legal analysis,[404] in modern times international law has become a prominent feature in both their mandates and reporting. Not only commissions have been requested to collect information with the aim to find out whether violations of IHL and IHRL were committed, but '[i]n more recent years, the mandates of human rights commissions include more pronounced instructions to make legal characterizations'.[405] Hence, considerable progresses have been made since the Commission of Experts on the former Yugoslavia's stance according to which, 'the Commission's mandate is to provide the Secretary-General with its conclusions on the evidence of such violations and not to provide an analysis of the legal issues'.[406]

With commissions of inquiry undisputedly entrusted to make legal determinations including through highlighting responsibilities, a number of relevant questions automatically arise. How have commissions interpreted and applied international law in their practice particularly compared to the use made by judicial bodies? Which kind of contribution commissions have provided to the development and consolidation of international law? And, finally, which kind of value do these legal findings possess?

The following sub-paragraphs will attempt to shed light on some of these questions.

(n 4) 7; Jean Salmon, '*Le fait dans l'application du droit international*' (1982) 175 *The Collected Courses of the Hague Academy of International Law* 261; Sylvain Vite ì, '*L'expertise au service du droit: comment la norme façonne le processus d'enquête dans la mise en œuvre des droits de l'homme et du droit des conflits armés*' in Debons and others (eds), *Katyn et la Suisse* (Georg Geneva 2009) 251.

403 Van den Herik (n 14) 529.

404 Ibid 519.

405 Ibid 531.

406 Report of the Commission of Experts on Former Yugoslavia (n 177) para. 41.

2.4.5.2 Use and interpretation of international law in the practice of commissions of inquiry

The practice shows how commissions have been generally fairly flexible and progressive in their understanding and interpretation of the law. According to certain authors, commissions have in fact been profiting from the caveat that they could not be equated to a court of law entrusted with making definitive findings.[407]

As mentioned, the main bodies of law that have been used by those commissions of inquiry that form the subject matter of this dissertation are international humanitarian law, international human rights law and international criminal law.

Leaving aside for the moment the application of ICL, the main contributions provided by commissions of inquiry/fact-finding missions have dwelled on the applicability of international legal frameworks and the interaction between IHRL and IHL, the applicability of IHRL to non-state actors and issues related to IHL compliance in situation of modern and asymmetric armed conflicts.

2.4.5.2.1 The interaction between international humanitarian law and human rights law

With regard to the interaction between IHL and IHRL, the practice of commissions of inquiry offers significant developments, although they have mainly echoed the general idea of complementarity that has been enshrined in the International Court of Justice's jurisprudence and supported by scholars.[408]

In particular, the HRC Commission of Inquiry on Syria was confronted with the issue concerning to what extent IHRL continues to apply in situations of armed conflict. It argued how

> '[t]he onset of IHL applicability does not replace existing obligations under IHRL; both regimes remain in force and are generally considered as complementary and mutually reinforcing'.[409]

In other terms, the Commission claimed how the applicability of one framework does not exclude the other, on the contrary they should be 'applied consistently' whenever possible. If not, 'the principle of *lex specialis* applies'.[410]

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407 In particular, in the opinion of Van den Herik, commissions of inquiry 'occasionally [display] a rather flexible and progressive attitude in their selection and understanding of the law, which is informed by their function and purposes'. van den Herik (n 14) 535.

408 ICJ, Legal Consequences of the Construction of a Wall (n 196) para. 106; Marco Sassoli, '*Le droit international humanitaire : Une lex specialis par rapport aux droits humains*?' in Andreas Auer, Alexandre Flückiger, Michel Hottelier (eds), *Les droits de l'homme et la constitution: Etudes en l'honneur du Professeur Giorgio Malinverni* (Schulthess Geneva 2007) 375.

409 3rd Report of the independent commission of inquiry on Syria (n 200) para. 5.

410 Ibid. For a critique, see Marauhn (n 197) 440.

The manner in which the Commission has combined the application of IHL and IHRL has raised the concern of certain authors. Marauhn for example argued how the Commission's interplay of IHL and IHRL in order to describe incidents of unlawful killings has been 'to say the least, imprecise'.[411] He also stressed how certain violations, as in the case of arbitrary arrests and detentions, have not been examined from the point of view of IHL. Such a selective approach, apparently undertaken without specific grounds, has exposed the Commission to the accusation of 'blurring the lines' between the two bodies of law with negative implications in terms of their compliance.[412]

Similarly, the Commission of Inquiry on Darfur determined, with regard to the applicability of both IHL and IHRL to the situation in Darfur, how

> '[t]he two are complementary. […] The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict'.[413]

The Commission went on by underlining how international human rights law and humanitarian law are 'mutually reinforcing and overlapping in situations of armed conflict'.[414] The Darfur Commission's report then analysed the main violations perpetrated both from the point of view of IHL and IHRL. Unfortunately, less space was devoted to an understanding of how to combine the applicability of the two bodies of law particularly in those cases in which the two appear conflicting. In this regard, a more in-depth contribution has been provided by the 2011 Commission of Inquiry on Libya particularly in relation to the limitations imposed by IHRL on the use of lethal force in certain situations of armed conflict.[415] However, such findings have been strongly criticised by scholars given their lacking solid basis under positive law.[416]

In general, the practice of commissions of inquiry has represented a first opportunity to test the interplay of IHL and IHRL in modern armed conflicts. Indeed, commissions have acknowledged the concurrent applicability of the two legal frameworks as well as emphasized how specific violations can be characterized through different legal lens. At the same time – given the uncertainty existing on how concretely the two bodies of law interact – commissions have, with some notable exceptions, not gone beyond the borders set by authoritative bodies such as the International Court of Justice and the Human Rights Committee, namely that IHL and IHRL both concurrently apply in situations of armed conflicts, IHL being *lex specialis*. No further clarity has been provided in relation to possible concrete ways through which the two

411 Marauhn (n 197) 441.
412 Ibid 442-444.
413 Report of the International Commission of Inquiry on Darfur (n 211) para. 143.
414 Ibid para. 144.
415 Full Report of the International Commission of Inquiry on Libya (n 349) para. 131.
416 Heller (n 206) 27-28.

systems interplay or on how a certain rule can affect the applicability of the other in case of a specific conflict. In this regard, one can argue that the approach by commissions of inquiry has been more explanatory than progressive.

2.4.5.2.2 Obligations of non-state armed groups

The discourse is different when it comes to assess commissions of inquiry's contribution in addressing the obligations of non-state armed groups, particularly in relation to human rights law. In this field a consolidated position had yet to be developed in terms of both *opinion juris* and state practice, given the impossibility for non-state actors of ratifying human rights treaties and all the consequences stemming in terms of enforcement.

In this context, it is important to highlight how the recent practice of commissions of inquiry has registered significant developments. In 2011, the UNSG Panel of Experts on Accountability in Sri Lanka somehow implied the existence of IHRL obligations for non-state actors exercising control over a territory despite refusing to apply the human rights paradigm to the conduct of non-state groups outside their areas of control. In particular, the Sri Lanka investigation argued how

> 'regarding the human rights obligations of non- state actors [it had] not addressed human rights violations beyond those that it has characterized as violations of international humanitarian law. The Panel has not considered LTTE abuses outside the conflict zone under international human rights law because of the uncertainty surrounding whether non-state actors have human rights obligations beyond the territories they control'.[417]

This position has been revisited by subsequent investigations. In its second report, the Commission of Inquiry on Syria noted in fact how

> 'at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind states, individuals and non-State collective entities, including armed groups'.[418]

On this basis, the report noted how Freedom Syrian Army (FSA) affiliated groups had perpetrated a number of human rights abuses.[419] This passage is interesting in the sense that it determines that non-state actors are bound to respect these obligations without specifying whether such responsibility should be linked to the exercise of governmental-like function or control over

417 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) para. 243.

418 2nd Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/19/69 (22 February 2012) para 106.

419 Ibid paras. 113-120.

a territory, in this way contradicting the position expressed by the Sri Lanka Panel.

Such approach has not been immune from criticism. Certain authors have emphasized how

> '[t]his is a somewhat contentious legal finding since human rights obligations are traditionally only thought to apply to States or non-State entities that carry out the functions of states or have effective control over some territory. […] the point remains that it is doubtful whether the Commission of Inquiry is the best placed body to legally determine whether any breaches of ius cogens had occurred, whether such action was attributable to the group and what consequences would result in terms of responsibility'.[420]

In this regard, the Commission has been perceived to engage in the 'progressive development' of the existing law. At the same time, it has also been accused to enforce the law on entities it was not intended to and 'to be doing so in a way that lacks rigor and legal justification'.[421]

However, such reasoning appears as an isolated case particularly looking at the extensive contribution subsequently provided by the Syria Commission on issues related to the responsibility of non-state actors. In fact, the Commission's work has been predominantly focused at clarifying the extent and scope of the obligations of certain non-state groups – such as the so-called Islamic State (IS or ISIS) and Al-Nusra Front – that were capable to acquire a certain degree of control over portions of the Syrian territory and had developed a refined and organizational structure pretty similar to state-like entities.

For example, in its seventh report, the Commission argued how

> 'the rise in torture and the inhumane treatment of the civilian population in areas controlled by ISIS and affiliated groups provide reasonable grounds to believe that such groups promote the widespread and systematic attack on the civilian population.'[422]

These findings are relevant not in so much as highlighting how non-state armed groups may be involved in the commission of crimes against humanity but in emphasizing how, for those non-state actors that exercise governmental-like function over a territory, there are legal consequences in the case human rights are violated. This concept was further developed in the Commission's

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420 James Devaney, 'Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?' (2013) Sant'Anna Legal Studies STALS Research Paper n. 2/2013, 13.

421 Ibid. See also Tilman Rodenhauser, 'Progressive Development of International Human Rights Law: The Reports of the Independent Commission of Inquiry on the Syrian Arab Republic', *EJIL Talk!* (13 April 2013).

422 6th Report of the independent commission of inquiry on the Syrian Arab Republic (n 350) paras. 60-61.

'Rule of Terror' report dedicated to ISIS administration of the Syrian territory. In particular, it was noted that

> '[i]n areas where ISIS has established effective control, ISIS has systematically denied basic human rights and freedoms and in the context of its attack against the civilian population, has perpetrated crimes against humanity'.[423]

Other commissions have consistently endorsed the approach undertaken by the Syria investigation in relation to the obligation of non-state armed groups. For example, the 2013 UNSC-mandated Commission of Inquiry on CAR underlined how it decided to adopt 'the widely accepted understanding that non-state groups that exercise de facto control over territory must respect human rights in their activities'.[424] The Commission further corroborated its approach by pointing out how

> '[d]ebates that took place in the late part of the twentieth century as to whether such non-state actors are nevertheless bound by the standards of international human rights law, have today been replaced by a general understanding that non-state groups that exercise de facto control over territory must respect human rights in their activities'.[425]

Similarly, the 2014 UN Commission of Inquiry on the Gaza Conflict, with regard to the executions of 21 alleged 'collaborators' for which the Al-Qassam Brigades in Gaza had claimed responsibility, found that such actions

> 'appear[ed] to have been carried out with the knowledge of the local authorities in Gaza, in violation of their human rights obligation to protect the right to life and security of those in their custody'.[426]

The 2015 OHCHR investigation on Libya followed a similar pattern in adopting 'the approach that non-State actors who exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control'.[427]

In conclusion, the approach by commissions of inquiry on the human rights obligations of non-state armed groups has been rather progressive. Although certain findings have raised criticism for their lacking solid basis in positive law, in general their contribution in this direction can be viewed as a gradual

423 Report of the independent commission of inquiry on the Syrian Arab Republic – Rule of Terror: Living under ISIS in Syria (14 November 2014) para. 74.
424 Report of the International Commission of Inquiry on the Central African Republic (n 294) para. 41.
425 Ibid para. 107.
426 Report of the independent commission of inquiry on Gaza (n 344) para. 68.
427 Report of the Investigation by the OHCHR on Libya (detailed findings) (n 304) para. 29.

and substantive step in the process of progressive crystallization of customary international law norms, particularly in light of the increasing interconnection between IHL and IHRL in situations of modern and asymmetric armed conflicts.

2.4.5.2.3 Use and interpretation of jus ad bellum and jus in bello

The great majority of commissions of inquiry that forms the basis of this comparative thematic study have been mandated to investigate situations of armed conflicts. When dealing with the application of international law to regulate these contexts, a first important distinction should be made between *jus ad bellum* (or 'the law regulating the use of force') and *jus in bello* (the law regulating armed conflicts or international humanitarian law).

Jus ad bellum

While the discussion around IHL and IHRL paradigms has been predominant in the analysis of commissions of inquiry, it is important also to pay some attention to their involvement in *jus ad bellum*-related issues. In this field, one of the most remarkable contributions has been the analysis contained in the report of the International Fact-Finding Mission on the Conflict in Georgia (so-called 'Tagliavini Report'). The Mission was established by the Council of the European Union on 2 December 2008 to

> '[i]nvestigate the origins and the course of the conflict in Georgia, including with regard to international law […] humanitarian law and human rights, and the accusations made in that context'.[428]

In its report – published in September 2009 and divided in three volumes – the Mission determined how the Georgian offensive in Tskhinvali following tensions in South-Ossetia and Abkhazia did not satisfy the requirements of necessity and proportionality to defend Georgian villages. Also, the use of force directed by the Georgian army against Russian peacekeepers was not justified under international law. On another hand, the Russian response, although initially justified by the need to protect its peacekeepers, was deemed to exceed the limit of self-defense and resulted in a number of IHL and IHRL violations.

Quite surprisingly, the Tagliavini Mission found that the intensity of the Georgian offensive in Tskhinvali could qualify as a breach of the prohibition on the use of force enshrined in Article(2)4 of the UN Charter. In responding to the objection that Article 2(4) traditionally refers to inter-states violence, the report noted how South Ossetia could be subjected to Article 2(4) as it acquired the status of *de facto* state. The report thus made a distinction between the territories under jurisdiction of South Ossetia and those under Georgia, without at the same time questioning Georgia's territorial integrity, an apparent

428 Council of the European Union (n 266) Article 1(2).

contradiction that has been duly noted by certain authors.[429] The Mission then scrutinized Georgia's arguments on self-defence. In this regard, it emphasized how the restrictive interpretation that the armed attack triggering the right to self-defence could be generated only by a State or by militia through the substantial involvement of a State has been challenged by more recent developments. The report thus took a progressive approach in the debate concerning whether non-state armed groups could perpetrate armed attacks prompting the exercise by states of their right to self-defence. On this point, the Tagliavini Mission relied extensively on the de-facto jurisdiction of South Ossetia but also on the UN Security Council practice particular in relation to the 9/11 attacks.

Scholars have criticized such progressive interpretation of the law on the use of force. Lott for example notes how state practice and the opinion of many commentators still require a certain link between the armed activities and a state in order for the armed attack to trigger the right to self-defence.[430] In particular, for the author, although Georgia had to face what can be described as 'unlawful use of force', there are no legal requirements to classify that as 'armed attack' justifying self-defence under article 51 of the UN Charter. Such more cautious interpretation seems also in line with the position expressed by the ICJ.[431]

The Tagliavini Mission also addressed Georgia's claim that its offensive was conducted in pre-emptive self-defence. Its report, besides reaching the conclusion that there was no valuable evidence to suggest that Russia was on the verge of attack at the time of the offensive in Tskhinvali, noted how the notion of 'pre-emptive self-defence' bore uncertain status under international law, in this way implicitly questioning its applicability. Thus, the contribution by the Tagliavini report to the debate concerning *jus ad bellum*, although it may have been subjected to criticism, appears at least mindful of the need to balance and check more recent developments with the existing state practice and *opinion juris* acquired on these matters. In this light, while the Mission has been open to take into consideration certain progress associated with modern warfare (such as the applicability of the notion of armed attack to non-state actors), it has treated other theories (such as pre-emptive self-defence) with great caution particularly in light of the political sensitiveness of the issues involved.

Extremely interesting appears also the report's reasoning on the legality of the Russian response. While dismissing the other three motives adduced

429 Alexander Lott, 'The Tagliavini Report Revisited: Jus ad Bellum and the Legality of the Russian Intervention in Georgia' (2012) 28(74) *Utrecht Journal of International and European Law* 4.

430 Ibid 9.

431 ICJ, Legal Consequences of the Construction of a Wall (n 196) para. 139; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) ICJ Rep 2005, paras. 106-147.

by the Russian Federation to justify its reaction, the report focused in particular on the need to respond to an attack directed against Russian peacekeepers.[432] In this regard, the Tagliavini Mission determined that an attack on Russian peacekeepers amounted to an armed attack against Russia triggering the right to self-defence unless it was proven that such corps were firing against Georgian troops during the offence in Tskhinvali.[433] Hence, the report – while noting how the Russian response was disproportionate to the threat suffered and amounted to serious violations of both IHL and IHRL – actually justified the legality of the Russian Federation's reaction *per se* based on the right to self-defence.[434] Such conclusion appears surprising given the lack of substantial *opinio juris* and state practice on the matter. In particular, Lott suggested to apply the command and control test to determine whether Russian peacekeepers were to consider states' instrumentalities and found out how they were falling under the control of an international force rather than that of the Russian Federation.[435]

Also the legality of the 2006 Israel offensive into Lebanon was scrutinized by the HRC mandated Commission of Inquiry based on *jus ad bellum* parameters. The Commission noted the illegality of Hezbollah action under international law resulting in the killing of eight Israeli soldiers on 12 July 2006. At the same time, the report determined how Israel's reaction, although initially justified under the right to self-defence, 'very quickly escalated from a riposte to a border incident into a general attack against the entire Lebanese territory'.[436] According to the Commission, these actions had 'the characteristics of an armed aggression, as defined by General Assembly resolution 3314 (XXIX)'.[437] Regardless of whether such a finding has been based or not on solid factual grounds, it is important insofar as it seems to imply that the use of force, even when initially justified under self-defence, can nonetheless result in an act of aggression if by its character, gravity and scale manifestly flagrantly violates the relevant prohibition enshrined in the UN Charter.

Jus in Bello

Turning to the application of *jus in bello* or IHL, the main contributions of commissions of inquiry have revolved around the determination about the existence of an armed conflict and the challenges posed by modern warfare

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432 The other motives adduced by the Russian Federation to justify its armed intervention in Georgia were the invitation provided by South Ossethia, the urgency to engage in a humanitarian intervention to prevent the commission of mass atrocities and the need to protect its own citizens abroad.

433 Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009) paras. 21, 268.

434 Ibid paras. 265-269.

435 Lott (n 429) 17-18.

436 Report of the Commission of Inquiry on Lebanon (n 280) para 61.

437 Ibid.

particularly in relation to asymmetric conflicts in urban and densely populated settings.

In terms of the conditions triggering the applicability of the law of armed conflict, commissions have often taken a cautious approach – especially where situations on the ground appeared particularly blurred and volatile – while leaving any final determination to the authority of judicial bodies.

In terms of distinction between international armed conflicts and conflicts of internal nature, the Commission of Experts on the Former Yugoslavia admitted how

> '[d]etermining when these conflicts are internal and when they are international is a difficult task because the legally relevant facts are not yet generally agreed upon. This task is one which must be performed by the International Tribunal'.[438]

However, for the sake of simplification, the Commission put forward the opinion

> 'that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia'.[439]

Similarly, the OHCHR Mapping Exercise on the DRC held that it was 'difficult to classify all of the various armed conflicts that affected the DRC all over its territory between 1993 and 2003'.[440]

A challenging exercise has also been the characterization of the hostilities between Israel and Hezbollah in 2006. In this regard, the Commission of Inquiry on Lebanon determined that

> '[t]he fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it'.[441]

438 Report of the Commission of Experts on Former Yugoslavia (n 177) para. 43.

439 Ibid para. 44.

440 Report of the Mapping Exercise on DRC (n 300) para. 474.

441 In particular, the Commission substantiated this approach on three different grounds. First, the participation of the Hezbollah group in Lebanese institutions and public life as well as its capability of exercising de facto state authority and control over southern Lebanon. Second, the links existing between Hezbollah and the Government of Lebanon, especially in relation to the concept of 'resistance' to the Israeli occupation that has been part of the Lebanese Government's longstanding aspirations and narrative. Third, the fact that the whole territory of Lebanon was subject to the hostilities. On this basis, the Commission determined that both Lebanon and Israel were parties to the conflict and bound by the

Another complex assessment has been represented by those situations that escalated from mere disturbances and tensions into armed conflicts and vice versa. In this regard, commissions of inquiry have indeed felt the necessity of operating such distinction given the different legal frameworks available (IHRL in situation of peacetime while a combination of IHL and IHRL in situations of armed conflict). However their practice also shows certain hesitancy in making conclusive findings on such matters, leaving again the issue to the final determination of authoritative judicial bodies.

For example, with regard to the situation in Libya in 2011, the HRC mandated Commission of Inquiry claimed how

> 'the precise date for determining when change from peace to non-international armed conflict occurred is somewhat difficult in the current circumstances. The Commission notes that other organisations that have been examining this question such as the Prosecutor of the ICC and the […] ICRC have not put forward a particular date'.[442]

However, the Commission engaged in its own assessment based on a number of criteria mainly echoing the jurisprudence developed by the ICTY on the matter.[443] In particular, according to its report:

> 'in determining whether a non-international armed conflict exists, the Commission has thus had to consider the intensity of the conflict, the extent of relevant control of territory and the nature of the armed group in opposition to the Government. Examining the nature of the armed group involves considering such factors as whether there is a hierarchical command structure, the extent to which it is able to carry out organized operations (e.g. organises into zones of responsibility, means of communication); discipline systems, the nature of logistical arrangements and how the group presents itself (e.g. whether it is capable of involvement in negotiations)'.[444]

Hence, based on a variety of information concerning structural developments among opposition forces as well as their territorial gains, the Commission reached the view that

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Geneva Conventions of 1949, and customary international humanitarian law. Report of the Commission of Inquiry on Lebanon (n 280) para. 55.

442 Report of the International Commission of Inquiry into Libya (n 202) para. 62.

443 See ICTY, *Prosecutor v. Tadiæ*, Decision on the Defence Motion for Interlocutory Appeal, Case No. IT-94-1 (2 October 1995) para. 70; ICTY, *Prosecutor v. Limaj,* Case No. IT-03-66-T (Judgment, 30 November 2005) paras. 94-129, 135–67; ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T (Judgment, 3 April 2008) paras. 40–49.

444 Report of the International Commission of Inquiry into Libya (n 202) para. 64.

> 'by or around 24 February, a non-international armed conflict had developed sufficient to trigger the application of AP II and Common Article 3 of the Geneva Conventions'.[445]

More recently, a much more comprehensive analysis has been developed by the UNSC Commission of Inquiry on CAR. The CAR Commission distinguished between three different phases characterizing the situation in CAR between January 2013 and December 2014. According to the Commission, 'these three phases […] do not necessarily reflect the nature or intensity of the conflict that took place in the country during the relevant periods of time', a determination that is necessary in order to reach a conclusion as to whether a non-international armed conflict existed in CAR triggering the applicability of IHL.[446]

While in its preliminary report, the Commission expressed the view that a non-international armed conflict existed in CAR since the beginning of its mandate (1 January 2013), given the complexities of the situation it found more grounds in its final report to revisit such an assessment, and to suggest a more nuanced and less definitive approach in line with the determinations made by the ICRC and the ICC Prosecutor.[447] More in particular, after an extremely detailed analysis of the criteria to assess the existence of an armed conflict as applied to the volatile situation on the ground, the Commission's report concluded that 'the level of hostilities during the period from 24 March 2013 until early December [2013] did not reach the level required to conclude that an armed conflict existed'.[448]

While leaving final determinations to future analysis based on more detailed accounts, the Commission thus considered that

> 'it is a more accurate reflection of the facts on the ground and of the careful and nuanced application of the relevant law to conclude that there was a non-international armed conflict taking place on the territory of the CAR up until March 2013, and again from 4 December 2013 until the present time. For the remaining periods covered by this report the Commission therefore analyses the various alleged abuses only in terms of violations of international human rights law and crimes against humanity under the Rome Statute'.[449]

445 Ibid para. 65.

446 Report of the International Commission of Inquiry on the Central African Republic (n 294) para. 83.

447 Ibid paras. 88, 89-93.

448 Ibid paras. 86-95, 96.

449 Ibid paras. 97, 99-101. It should be noted in particular how two competing interests have been balanced by the Commission in its conclusions on the qualification of the conflict; the first calls for caution in suggesting too many changes in the qualification of the conflict while the second urges precision in the determination of the conflict in order to avoid the risk that further war crimes accusations could be ruled out by an inaccurate qualification of the contextual elements. According to the Commission, when balancing the two considerations 'it is best to err on the side of caution and to avoid blunt classifications that may provide a greater degree of legal certainty and facilitate the continuing and uninter-

With regard to the challenges facing the applicability of IHL in modern asymmetrical armed conflicts, the first key area relates to the applicability of the principle of distinction and its ramification in terms of direct participation in the hostilities and definition of military objectives. This has represented a particularly compelling issue especially for those inquiries mandated to investigate armed conflicts in Lebanon, Gaza and Sri Lanka.

In this regard, a first important challenge has been posed by those tactics aimed at targeting the enemy's so-called 'supporting infrastructure', a definition that may blur, alter and significantly broaden the notion of military objective. This may bear significant implications for non-state armed groups such as Hezbollah and Hamas that, although labelled as 'terrorist' by Israel and most western countries, have developed a structure that comprises political, law enforcement and military wings as well as a network of indirect affiliates.

In this debate, a first important contribution comes from the Commission of Inquiry on Lebanon. The Commission has in fact stressed how

> '[t]he idea of treating Lebanese citizens as members, friends, family or sympathizers of Hezbollah, and therefore as potential enemies and/or combatants susceptible to lawful attack, goes well beyond any legal interpretation of the principle of "civilians having lost their protected status" and of their "direct participation in the hostilities"'.[450]

The Commission went even further by determining that '[t]reating as 'terrorists' all members or affiliates of an official political party leads to an unacceptable interpretation of the law' and that 'the presence of Hezbollah offices, political headquarters and supporters would not justify the targeting of civilians and civilian property as military objectives'.[451]

A similar approach has been adopted by the 2009 UN Fact-Finding Mission on the Gaza Conflict. The Mission scrutinised Israel's policy of attacking 'everything related to Hamas terrorist group's supporting infrastructure', noting how it led to the systematic targeting of governmental and police facilities. On this basis, it determined how Hamas should be considered an organisation with its civil and military branches, a differentiation that is relevant for the application of the principle of distinction under IHL. In this regard, the Mission expressed the view that the Israeli policy failed to explain

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rupted application of international humanitarian law but that do not accurately reflect the nature of the events on the ground'.

450 Report of the Commission of Inquiry on Lebanon (n 280) para. 81. For an appraisal on the interpretation and application by the Commission of relevant norms of international humanitarian law see, James G Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal' (2007) 5 *Journal of International Criminal Justice* 1039.

451 Report of the Commission of Inquiry on Lebanon (n 280) paras. 117, 318.

how the buildings targeted effectively contributed to military action.[452] This led it conclude that the test proposed by Israeli military officers to target all Hamas' infrastructure 'is not the test applied by international humanitarian law and accepted State practice to distinguish between civilian and military objects'.[453] While refusing the categorisation of such objects as of 'dual-use' nature, it thus determined that 'the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law', amounting also to the grave breach of extensive destruction of property under the Fourth Geneva Convention.[454] The Mission went even further by expressing the view that Israel's justifications for the strikes were dangerous arguments that should be vigorously rejected as incompatible with the cardinal principle of distinction.

On this point, a different approach was later undertaken by the 2011 Commission of Inquiry on Libya. In particular, the Libya Commission's analysis significantly diverged from its Lebanon and Gaza predecessors in so far as it qualified the *thuwars* in their entirety as members of an organised armed group, thus making them targetable any time (regardless of the type of conduct undertaken) by applying the 'continuous combat function' criterion.[455]

However, more recently, the Commission of Inquiry mandated to investigate the 2014 Gaza Conflict endorsed the approach adopted by the previous Lebanon and Gaza experiences in underlying how

> 'the mere fact of being a member of the political wing of Hamas or any other organization in Gaza, or working for the authorities […] is not sufficient in and of itself to render a person a legitimate military target'.[456]

Such remarks has called directly into question the interpretation of what constitute a lawful military target under IHL. In this regard, the Commission expressed the view that

452 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 383.

453 Ibid para. 384.

454 Ibid para. 387. This reasoning partly differs from the approach undertaken by the Commission of Inquiry on Lebanon in relation to the targeting of 'dual-use' objects. The latter in fact appreciated that 'some infrastructure may have had 'dual use' but this argument cannot be put forward for each individual object directly hit during this conflict. Even if some claims were true, the collateral harm to the Lebanese population caused by these attacks would have to be weighed against their military advantage, to make sure that the rule on proportionality was being observed'. Report of the Commission of Inquiry on Lebanon (n 280) para. 147.

455 On this point see Heller (n 206) 24.

456 Report of the detailed findings of the independent commission of inquiry (n 344) para. 220.

> 'massive scale of destruction and the number of homes and civilian buildings attacked raise concerns that Israel's interpretation of what constitutes a "military objective" is broader than the definition provided by international humanitarian law'.[457]

It is thus undeniable the contribution provided by commissions of inquiry, through their different positions, to a pivotal debate within the dynamics of modern warfare, which concerns the application of the 'group membership doctrine' to assessments related to the direct participation in the hostilities.[458]

An articulated interpretation of the principle of distinction as applied in densely populated contexts can also be found in the report of the UNSG Panel on Accountability in Sri Lanka. The report noted how the Sri Lanka Government had

> 'provided vastly low estimates of civilians trapped in the conflict zone. Together these indicate that it associated many or most people inside the conflict zone with the LTTE and thereby failed to take account of this bedrock principle'.[459]

In this regard, the Panel determined how

> '[i]n regard to the presence of the LTTE in the proximity of civilians in the [No Fire Zones], international tribunals, including the ICTY, have clarified that the ban on attacks against civilians protects a population that is '*predominantly* civilian'

457 Ibid para. 223.

458 In this regard the findings of the Mission seem to contradict the notion of 'direct participation' as envisaged in a Guidance published by the ICRC in 2009. In particular, the Guidance has widened the definition of direct participation as traditionally envisaged by the Geneva Conventions, by determining that the status of civilian should be preserved only for those people who engage in hostile acts, which are spontaneous, sporadic and unorganized. When the participation of an individual goes beyond that level of engagement, that individual cannot be considered a civilian anymore but becomes automatically a member of an organized armed group. In this case the protection accorded by IHL is waived for as long as the individual remains part of the group, as the rest period between acts is considered nothing other than preparation for the next hostile act. In this context, the so-called 'revolving door' of protection thus operates no longer based on the notion of active participation but on mere membership. Whether such development has consolidated in the creation of a customary law norm is a matter of debate among scholars. Nils Melzer, *Interpretative Guidance on the Notion of 'Direct Participation in Hostilities' under International Humanitarian Law* (ICRC Geneva 2006) 72.

459 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) para. 195.

and

> 'the presence within the civilian population of individuals who do not come within the definition of civilians [i.e. combatants] does not deprive the population of its civilian character'.[460]

This has led the Panel to argue that the same act of indiscriminately shelling that results in civilian casualties may configure the criminal offence of 'murder'.[461]

This reasoning should be linked with the outstanding contribution provided OPT inquiries in relation to the use of precautions in urban warfare. For example, the 2009 Gaza Mission, following the example of the 2006 HRC Commission of Inquiry in Lebanon,[462] was keen in underlying how the system of warning implemented by Israel during the campaign (including the sending of 'leaflets' and the 'roof-knocking' practice) did not meet the 'effective warning' standard as enshrined in Article 57 of Additional Protocol I.[463] The Mission paid particular attention to the specific context existing in Gaza, including the unavailability of humanitarian corridors and the assumption that 'no safe place' could be identified for civilians to move to.[464] Furthermore, in assessing the policy implemented by the IDF, according to which those who did not act according to warnings were automatically to lose their protection, it also determined that

> 'the fact that a warning was issued does not, however, relieve a commander or his subordinates from taking all other feasible measures to distinguish between civilians and combatants'.[465]

This analysis has been further developed by the UN Commission of Inquiry on the 2014 Gaza Conflict in relation to specific policies implemented by the IDF during its ground invasion. In particular, the 2014 Gaza Commission focused on the IDF policy of declaring entire neighbourhoods or villages as

460 Ibid para. 196.

461 Ibid paras. 193, 197. In this regard, the report noted how 'international jurisprudence accepts that 'where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterized as murder, when the perpetrators had knowledge of the probability that the attack would cause death'. It also drew attention on the fact that the war crime of making civilians the object of an attack does not only apply to deliberate attacks against civilians but also to attacks undertaken 'wilfully', which – based on international jurisprudence – may encompass attacks that are reckless regarding the impact on civilians, namely indiscriminate shelling.

462 Report of the Commission of Inquiry on Lebanon (n 280) paras. 149-161.

463 Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 537-40.

464 Ibid para. 473.

465 Ibid para. 520.

'sterile combat zones'.[466] The Commission's report noted in fact that while the IDF had delivered initial warnings directing civilians to abandon those areas, parts of the civilian population could not move for a variety of reasons. In this regard, declaring specific areas 'sterile combat zones' entailed that when the Israeli forces subsequently commenced military operations, their manner of deployment suggested a presumption that civilians were no longer present in these areas.[467]

The Commission argued that Israeli forces may have treated entire densely populated areas as one single military object instead of distinguishing between civilians and combatants in each of the incidents occurring in affected areas.[468] In this regard, the Commission highlighted how

> 'the issuing of warnings does not signify that the subsequent attack will be lawful. The stated effort to create a "sterile combat zone" and to consider everyone in an area that has been the object of a warning as engaging in "terrorist activity", could be construed as an attempt to use warnings to justify attacks against individual civilians'.[469]

In this regard the reasoning of the Commission follows the line traced by previous investigations in Lebanon and Darfur.[470] Therefore, the Commission

466 For an in depth analysis of the Report of the Commission of Inquiry on the 2014 Gaza Conflict see Diakonia IHLRC, 'From Fact-Finding to Ending Impunity' (2015).

467 Report of the detailed findings of the independent commission of inquiry (n 344) paras. 400-401. See also Breaking the Silence, 'This is how we fought in Gaza' (2014) 18 http://www.breakingthesilence.org.il/testimonies/database/?tzuk=1 accessed on 8 December 2016.

468 Report of the detailed findings of the independent commission of inquiry (n 344) para. 337.

469 Ibid para. 404.

470 In assessing whether the IDF had taken feasible precautions to spare Lebanese civilians from attacks the Commission of Inquiry on Lebanon stated that '[a] warning to evacuate does not relieve the military of their ongoing obligation to 'take all feasible precautions' to protect civilians who remain behind, and this includes their property. By remaining in place, the people and their property do not suddenly become military objectives which can be attacked. The law requires the cancelling of an attack when it becomes apparent that the target is civilian or that the civilian loss would be disproportionate to the expected military gain'. Report of the Commission of Inquiry on Lebanon (n 280) para. 158. In relation to attacks conducted by the Sudanese Government in Darfur villages, the Commission of Inquiry on Darfur underlined that '[e]ven assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels […] the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels'. Report of the International Commission of Inquiry on Darfur (n 211) para. 267.

suggested that these operations could qualify as direct attacks against civilians or civilian objects and thereby amount to war crimes.[471]

These tactics have led international inquiries on the OPT to engage in broader reflections on the overall objectives of certain methods of warfare. In this regard, the findings of the 2014 Gaza Commission echoed the assessments of previous investigations on the employment by Israel of military tactics that disproportionately affected large segments of the civilian population with the alleged punitive intents. For example, the 2009 UN Fact-Finding Mission on the Gaza Conflict dedicated, in one of the most controversial sections of its report, an analysis to the attacks on foundations of civil life in Gaza and the application of the so-called 'Dahiya Doctrine'.[472] The team led by Justice Goldstone endorsed the view previously expressed by the Commission of Inquiry on Lebanon that this military doctrine, firstly applied in certain areas of Beirut and Southern Lebanon, violated basic tenets of IHL and IHRL.[473] In particular, the Mission argued how such policy could amount to the grave breach of extensive destruction of property and to the violation of the prohibition of using the starvation of civilians as a mean of warfare enshrined in Article 54 of Additional Protocol I.[474] It further noted how

> 'the cumulative effect of the blockade policies […] and of the military operations […] strongly suggest that there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas'.[475]

471 Report of the detailed findings of the independent commission of inquiry (n 344) para. 340.

472 The so called 'Dahiya Doctrine' is a military strategy designed by the IDF general Gadi Eizenkot that foresees, through the employment of disproportionate force, the destruction of the civilian infrastructure of so called 'hostile regimes', in order to punish such regimes, impose long reconstruction processes and deter future reactions. The doctrine was named after a densely populated southern suburb in Beirut was heavily shelled by the Israeli Defense Forces during the 2006 Lebanon War. 'Israel finally realises that Arabs should be accountable for their leaders' acts –Interview with IDF Northern Command Chief Gadi Eizenkot' *Yedioth Ahronoth* (10 June 2008); Richard Falk, *Humanitarian Interventions and Legitimacy Wars: Seeking Peace and Justice in the 21st Century* (Routledge 2014) 38.

473 Report of the UN Fact-Finding Mission on Gaza (n 211) paras. 1200-1211; Report of the Commission of Inquiry on Lebanon (n 280) paras. 110, 331. In particular, the Lebanon Commission stated how it 'formed a clear view that, cumulatively, the deliberate and lethal attacks on civilians and civilian objects, including protected religious property, protected cultural and historical property, and items essential to the survival of the civilian population; the collateral damage caused to protected cultural and historical properties; the attacks against protected personnel […] the indiscriminate and disproportionate nature of these attacks; the wilful targeting of fleeing civilians; and the gratuitous and wanton destruction of civilian property and civilian infrastructure offering no clear and unambiguous military advantage, amount to collective punishment'.

474 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 928.

475 Ibid para. 1324.

In other words, according to the Goldstone-led team,

> 'Israel, rather than fighting the Palestinian armed groups operating in Gaza in a targeted way, has chosen to punish the whole Gaza Strip and the population in it with economic, political and military sanctions',

in this way breaching the prohibition of collective punishment enshrined in Article 33 of the Fourth Geneva Convention.[476]

Such reasoning has been subjected to strong criticism particularly in relation the overall conclusions reached. Indeed, engaging in a debate whether the overall Israeli military campaigns have aimed at strategic and political objectives may lie outside the scope of pure IHL fact-finding, which purportedly should limit its assessments on the compliance of military attacks with IHL principles such as distinction, proportionality and precautions. At the same time, one may also argue that commissions of inquiry felt the need to assess the effects of an emerging trend of military doctrines that apparently blurs the lines between the notion of 'concrete and direct military advantage' and broader political and strategic scopes. The fact that such analysis led to overall (and one may argue disputable) findings unveils the challenges that such an emerging trend poses to the traditional framework of the laws of war.

Similar challenges were faced by the 2014 Gaza Commission in relation to its assessment of the controversial 'Hannibal Doctrine', a military tactic allegedly applied by the IDF in Rafah on 1st August 2014, which involves the use of all necessary force in order to prevent or put an end to the capture by an armed group of an IDF soldier. The Commission expressed the view that

> '[p]reventing the capture or freeing a soldier from captivity may be conceived as a concrete and direct military advantage, albeit of a limited nature, since the loss of one soldier in a large army such as the IDF does not reduce its military capability. When doing so in a manner that is highly likely to result in the soldier's death, it further reduces the concrete and direct military advantage. On the other hand, some have argued that in such a case the proportionality test must take into account the strategic consideration of denying the armed groups the leverage they could obtain over Israel in negotiations for the release of the captured soldier'.[477]

The Commission considered this to be an 'erroneous interpretation of international humanitarian law'. In particular, it specified how

> 'the proposed interpretation of the anticipated military advantage, which would allow for abstract political and long-term strategic considerations in carrying out

476 Ibid para. 1325.

477 Report of the detailed findings of the independent commission of inquiry (n 344) para. 369.

> the proportionality analysis, would have the consequence of emptying the proportionality principle of any protective element'.[478]

Therefore, the report found that the Rafah attack could have been expected to cause incidental loss of civilian life and damage to civilian objects 'which would be grossly excessive in relation to the anticipated concrete and direct military advantage, and may therefore amount to a war crime'.[479] Such reasoning provides an important contribution in reaffirming the fundamental objectives and spirit behind the formulation of certain principles as proportionality, particularly in spite of modern challenges coming from urban warfare and asymmetric conflicts. In this regard, the Commission stressed how the 'military culture resulting from such policy priorities may have been a contributing factor for the unleashing of massive firepower on Rafah, in total disregard for its impact on the civilian population', in this way expressing its concerns for those emerging doctrines based on a misinterpretation and frustration of the rationale behind IHL rules.[480]

Other hotly debated issues have been the tactics employed by non-state armed groups of placing military objectives into civilians areas and the alleged use of human shields. On this point, the assessments by international investigations have varied depending on each specific context. For example, the analysis of the Panel on Accountability in Sri Lanka focused on the IHL related prohibition of placing military objectives near densely populated civilian areas where feasible. The Panel determined how

> '[c]redible allegations point to a violation of this provision insofar as they indicate patterns of conduct whereby that the LTTE deliberately located or used mortar pieces, other light artillery, military vehicles, mortar pits, bunkers, and trenches in proximity to civilian areas. These locations included hospitals and concentrations of IDPs, including in each of the NFZs'.[481]

More nuanced has been the assessment by the inquiries on Lebanon and Gaza on the alleged use of human shields by Hezbollah and Palestinian armed groups. In particular, according to the Lebanon Commission,

> '[t]here is some evidence that Hezbollah used towns and villages as "shields" for their firings. At the same time, evidence points to such use when most of the civilian population had departed the area. The Commission found no evidence regarding the use of "human shields" by Hezbollah. However, there was evidence

478 Ibid para. 370.
479 Ibid.
480 Ibid para. 371.
481 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) para. 239.

> of Hezbollah using UNIFIL and Observer Group Lebanon posts as deliberate shields for the firing of their rockets'.[482]

Even more conservative appears the approach taken by the 2009 Fact-Finding Mission on Gaza. While not disputing the fact that both Palestinian armed groups and Israeli forces were fighting within an area populated by civilians and acknowledging that such method of warfare constituted a failure to take all feasible precautions to spare civilians,[483] the Mission determined how such elements were not alone sufficient for a finding that a party was using the civilian population as a human shield. For the Mission in fact,

> 'as the words of article 57 (1) [of Additional Protocol I] show […] an intention to use the civilian population in order to shield an area from military attack is required'

and from the facts available such a specific intent could not be detected.[484]

Finally, it is important to assess the review made by commissions of inquiry of the Palestinian armed groups' policy of launching rockets from Gaza into Southern Israel. In particular, the 2009 Gaza Mission took a firm stance by unequivocally labelling the indiscriminate launching of rockets and mortars as indiscriminate and intentional attacks against the civilian population, entailing individual criminal responsibility as war crimes.[485] In this regard, the Mission carefully assessed Hamas' arguments that these actions were to be considered as a form of resistance against the Israeli occupation and denial of Palestinian people's self-determination. While noting that the right to (armed) resistance against colonial regimes violating self-determination has been affirmed by the UN General Assembly,[486] the Mission nonetheless argued that the exercise of such right cannot result itself in a violation of the laws of war. In particular, according to the report,

> 'the peremptory norms of customary international law, both of human rights law and humanitarian law, apply to all actions that may be undertaken in response to, or to oppose, human rights violations'.[487]

Looking at these examples, it can be argued that commissions of inquiry have approached the challenges posed by urban and asymmetric armed conflicts

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482 Report of the Commission of Inquiry on Lebanon (n 280) para. 330.
483 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 494.
484 Ibid para. 492.
485 Ibid paras. 1717-1724.
486 'Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence from colonial countries and peoples for the effective guarantee and observance of human rights', A/RES/3246/XXIX (29 November 1974) para. 3.
487 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 1369.

by reaffirming the need to firmly comply with IHL basic tenets and pillars as enshrined in existing treaties and conventions and further developed by authoritative jurisprudence. While specific findings have from time to time sparked controversy, this may be linked with the increasing demand to amend the traditional legal framework in order to adequately regulate those trends emerging from modern warfare. Indeed, this is not a task for commissions of inquiry, whose reflections however could act as engine for advancing the debate at decision-makers level. For now, it is worth mentioning this passage from the 2010 Sri Lanka Panel's report in relation to the tactics employed in the conflict between the Sri Lanka Government and the LTTE:

> '[n]either the publicly expressed aims of each side of this armed conflict […] nor the asymmetrical nature of the tactics employed by the two sides affects the applicability of international humanitarian law to the parties. The State has a right under international law to ensure its national security and to defend itself against armed attacks, including those of insurgents who may engage in acts of terrorism. Those ends do not, however, justify all means to achieve them; all action for those legitimate purposes must comply with the requirements of international law. As the International Court of Justice has found, the rules of Common Article 3 "constitute a minimum yardstick [and] reflect […] 'elementary considerations of humanity'"'.[488]

2.4.5.3 Legal creativity in the practice of commissions of inquiry

Beside from the contributions in the above discussions, the practice of commissions of inquiry has also offered remarkable examples of development of brand-new international law concepts and paradigms. In particular, two examples of creativity by international inquiries in framing new paradigms of international law are presented below. They pertain to the work and findings of the Commission of Experts on former Yugoslavia and the Commission of Inquiry on Syria.

2.4.5.3.1 Ethnic cleansing and rape: the contribution of the Commission of Experts on former Yugoslavia

One cannot deny the outstanding contribution given by the Commission of Experts on the former Yugoslavia in framing and developing new concepts of international law.

Primarily, the Yugoslavia Commission of Experts should be paid tribute for the first conceptualization of the offence of 'ethnic cleansing' under international law, defined as

488 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) para. 198.

> 'a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas'.[489]

The Commission referred to a number of measures carried out in strategic areas linking Serbia proper with Serb-inhabited areas in Bosnia and Croatia. According to the Commission, 'this strategic factor is significantly relevant to understanding why the policy has been carried out in certain areas and not in others'.[490] The report further argued how

> '[t]hose practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention'.[491]

The definition and conceptualization of ethnic cleansing by the Commission served the basis for important judgments delivered on the matter by the ICTY as well as inspired the analysis of other international investigations such as the one investigating events in CAR.[492]

In relation to the role of rape and other forms of sexual violence as methods of warfare, the Yugoslavia Commission was again pioneer in noting how rape should not only be considered in violation of the law of armed conflict but also as 'a crime of violence of sexual nature against the person'.[493] In this regard, it highlighted how rape could be considered as a grave breach of the Geneva Convention (under the label of 'inhumane treatment and willfully causing suffering') and also as fulfilling the material element for genocide and crimes against humanity.[494]

The Commission further undertook an unprecedented analysis of the use of rape as a tool in armed conflict through a series of studies which unveiled the existence of several patterns, especially linked to the practice of ethnic cleansing and abuses in detention camps.[495] It also developed a database of reports concerning rape and sexual assaults, which was heavily relied upon by the ICTY investigative organs.[496] In particular, the Commission noted how there had been a decrease of the trend when the issue was raised in the media. In its view, this entailed that the practice had been governed by commanders and high-level officials and 'that there was an overriding policy advocating

489 Report of the Commission of Experts on Former Yugoslavia (n 177) para. 130.
490 Ibid para. 133.
491 Ibid para. 130.
492 Report of the International Commission of Inquiry on the Central African Republic (n 294) para. 451.
493 Report of the Commission of Experts on Former Yugoslavia (n 177) para. 102.
494 Ibid paras. 104-106.
495 Ibid para. 252-253.
496 Ibid para. 243.

the use of rape as a method of 'ethnic cleansing', rather than a policy of omission, tolerating the widespread commission of rape'.[497]

2.4.5.3.2 Legal definition of 'massacres' and the debate around 'terrorism': the contribution of the Commission of Inquiry on Syria

Another significant brand-new concept developed by the practice of inquiry commissions pertains to the legal definition of 'massacres' as framed by the Commission of Inquiry on Syria. In particular, one year after its establishment, the Human Rights Council decided to amend the inquiry's mandate – originally focused on violations of IHRL and crimes against humanity – to include the investigation of all 'massacres'.[498] The first task for the Commission was thus to define what actually the term 'massacres' could mean. In this regard, 'massacre' was interpreted as encompassing

> 'an intentional mass killing of civilians not directly participating in hostilities, or hors de combat fighters, by organized armed forces or groups in a single incident, in violation of international human rights or humanitarian law'.[499]

This definition was viewed by certain doctrine as a further step in the process of blurring the lines between IHL and IHRL. According to Marauhn,

> 'the Commission no longer seems to carefully distinguish between human rights law and the law of armed conflict. Rather, it seems to apply these bodies of law alongside each other'.[500]

The Commission highlighted how specific investigative resources were devoted to perform such a task. On the basis of the evidence collected, it determined how a number of massacres were committed by both Government forces and affiliated militia and by anti-government armed groups.[501]

The Commission linked the perpetration of massacres with both war crimes and crime against humanity.[502] On this point, the Commission's seventh report highlighted how the term 'massacres' may encompass

497 Ibid para. 237.
498 Human Rights Council, A/HRC/21/L.32 (2012) para. 19.
499 4th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/22/59 (5 February 2013), para. 42.
500 Marauhn n (197) 443.
501 4th Report of the independent commission of inquiry on the Syrian Arab Republic (n 499) paras. 44-57.
502 Ibid paras. 48, 52, 57. For example, with regard to the massacre taking place in Harak in August 2012, where houses were burned and bodies were found with injuries caused by shrapnel, close-range gunfire and severe knife wounds, the Commission argued how there were 'reasonable grounds to believe that Government forces and Government-affiliated militia committed the war crime of murder'.

> 'multiple instances of the war crime of murder, the war crime of sentencing or execution without due process and the war crime of attacking civilians […] When murder is committed as part of a widespread or systematic attack directed against a civilian population […] the commission of massacres may amount to the crime against humanity of murder'.[503]

This reasoning seems to support the idea that massacres, although independently qualified, may assume relevance in terms of criminal accountability only if they can be linked with the commission of existing war crimes and crimes against humanity. In other terms, the conceptualization of massacres does not automatically imply the creation of a new type of criminal offence.[504]

It is beyond question that massacres, by their same definition, are linked with violations of both IHL and IHRL. This means that massacres may occur both in armed conflict and peacetime situations.[505] It is thus important to analyse how the new notion interacts with both legal frameworks.

For example, the Commission has clarified the meaning of 'attacks against civilians' under IHL as offences linked to the perpetration of massacres.

> 'While the majority of civilian casualties resulted from indiscriminate or disproportionate attacks, primarily aerial bombardments, these killings do not fall within the definition of a massacre. Where there are reasonable grounds to believe that the shelling, bombardments or bombings intentionally targeted civilians, such attacks fall within the definition and are detailed below'.[506]

Such stance is confirmed in the Commission's eight report, where it stated that

> '[w]here there are reasonable grounds to believe that the shelling, bombardments or bombings intentionally targeted civilians, such attacks fall within the definition of a massacre'.[507]

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503 7th Report of the independent commission of inquiry on the Syrian Arab Republic (n 350) Annex IV para. 2.

504 This does not mean that the perpetration of massacres cannot represent strong evidence for the commission of international crimes. Perhaps, precisely for this reason the Commission duly ensured that '[in] the [massacres] described, the intentional mass killing and identity of the perpetrator were confirmed to the commission's evidentiary standards'. 5th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/24/46 (16 August 2013) Annex II para, 1.

505 Ibid para. 11. In particular, in defining 'massacre' a Government-forces' raid against a small activists' cell in the village of Al-Bayda, the Commission stated that 'that the type of military operation and the alleged massacre that ensued were not in the context of an armed confrontation'.

506 7th Report of the independent commission of inquiry on the Syrian Arab Republic (n 351) para. 3.

507 8th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/28/69 (5 February 2015) para. 4.

This clarification is extremely important insofar as it underlines how only deliberate attacks, and not attacks that are just 'indiscriminate', can fall among the offences triggering the commission of a massacre.

Furthermore, in many of its reports the Commission has distinguished between massacres and 'other unlawful killings'. There seems to be no explicit explanation on the rationale behind such distinction. Some clarity can be made by looking at the conceptualization of massacres defined as 'intentional mass killings of civilians'. It implicitly follows that any other form of arbitrary deprivation of life under IHRL or murder under IHL that it is either not massive or not intentional cannot fall within the definition of a massacre.

A final important remark concerns the orchestrated (or policy-related) character of massacres. As it has been emphasized by the Syria Commission, massacres can amount to both war crimes and crimes against humanity and have in turn been allegedly committed by both government forces and anti-government groups in the Syrian conflict. For example, in its eight report the Commission acknowledged how, in relation to the conduct of pro-government forces,

> 'the massacres and unlawful killings formed part of those attacks and constitute crimes against humanity. Government forces also committed the war crime of murder and has arbitrarily deprived people of life'.[508]

Thus, there seems to be no direct and automatic link between massacres and crimes against humanity requiring a widespread and systematic pattern or state-like organizational policy. While often being associated with orchestrated policies, massacres can also be perpetrated in the form of isolated acts if the massive number of civilian casualties and intentional character of the attack are proven. At the same time, offences that form part of a widespread and systematic attack (and thus be qualified as crimes against humanity) may not be labelled as 'massacres' if they do not fulfil these two requirements. This may mark an important difference with the legal paradigm of ethnic cleansing, which requires by its nature the existence of an organized policy and can be intrinsically linked with the commission of crimes against humanity.

Looking at the same context but from the perspective of a different area of law, the conflict in Syria and the atrocities perpetrated by certain armed groups have unfortunately provided fertile grounds for developing further the notion of terrorism under international law. In this regard, the Syria Commission of Inquiry has refrained from taking any progressive approach. While it has often labelled certain groups as 'terrorists', the Commission has done so without referring to any specific legal framework, except for UN

508 Ibid para. 58.

Security Council's resolutions.[509] In relation to the employment of certain conducts, their label as 'terrorist acts' has been made exclusively in relation to the prohibition against attacks spreading terror among the civilian population under IHL. In particular, the Commission's fifth report highlighted how

> '[t]he commission investigated a number of incidents that may be labelled as "terrorist attacks" or "terrorism". Once the threshold of non-international armed conflict has been met, and the suspected perpetrators are parties to the conflict, the commission renders its assessment of an attack's legality under the rubric of international humanitarian law and international human rights law. Any attack the sole purpose of which is to spread terror among the civilian population is prohibited'.[510]

Such passage leaves some doubts insofar as – despite quoting both IHL and human rights law – it limits its analysis to a vague reference to the prohibition of attacks spreading terror among civilians as set forth in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. While the vague and cautious approach undertaken by the Commission may be well justified by the longstanding controversies around a universally agreed definition of terrorism, still certain improvements from the current stalemate could be expected particularly in light of the recent contribution provided by the Special Tribunal for Lebanon on the matter. Indeed, one may argue that specific recommendations for relevant actors within the international community to enforce more resolute actions fighting terrorist groups (as contained in some of the Commission's reports) and the subsequent follow-up measures adopted (such as those envisaged in UNSC Resolution 2178) needed a specific background capable of qualifying those groups as 'terrorists' based on more solid and impartial parameters in terms of actual conducts and violations perpetrated.[511] This would have firstly helped identifying and isolating those anti-government groups engaged in terrorist acts and spreading intimidation among civilians from those who limited themselves to military challenging pro-government forces. Secondly, it would have contributed to properly tackle the issue concerning the spurge in foreign-fighters.

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509 In particular, the Commission noted how the self-proclaimed 'Islamic State' and Jabhat Al-Nusra were designated as 'terrorist groups' by UN Security Council Resolution 2170 (2014). It also acknowledged in its eight report that 'in 2014, terrorist groups used suicide and car bombs in Homs and Hama governorates'. 8th Report of the independent commission of inquiry on the Syrian Arab Republic (n 507) para. 126; Report of the independent commission of inquiry on the Syrian Arab Republic – Rule of Terror (n 423) para. 1.

510 5th Report of the independent commission of inquiry on the Syrian Arab Republic (n 504) para. 11.

511 7th Report of the independent commission of inquiry on the Syrian Arab Republic (n 351) para. 131.

2.4.5.4 *Contribution to the development of international law in the practice: concluding remarks*

In conclusion, the use of international law by commissions of inquiry analysed previously suggests an ambivalent approach. On the one hand, certain commissions have been at the forefront in the progressive development and even in the creation of new paradigms of international law. The relevant contributions in the areas of 'ethnic cleansing', rape and sexual violence as methods of warfare, 'massacres' and the human rights obligations of non-state actors go into this direction. In this regard, it can be argued that inquiries have in certain occasions even inspired and paved the way for the work of legal and judicial bodies in refining new legal concepts.

Conversely, in other significant fields of international law the approach of commissions of inquiry has been more restrained and anchored to the traditional legal framework and existing jurisprudence. This is particularly the case for those determinations made in the area of conduct of hostilities and generally the laws of war, where commissions' analysis have mainly echoed positive law in spite of the challenges posed by modern warfare to the overall architecture of IHL norms.

In general, as Darcy notes, the influence of commissions of inquiry on the development of international law has declined compared to landmark experiences of the past such as the 1919 and 1943 world wars commissions.[512] This is mainly due to the fact that the law itself is now better established than it was at the beginning of the 20th Century. However, some of the abovementioned examples clearly show that there is still space for commissions to act as catalyst factor in the international law-making process. At the same time, the practice of modern inquiry commissions

> 'do[es] reflect an appreciation that, in particular in the most politically sensitive dossiers, there is a set need to interpret and apply the law quite meticulously and to develop legal reasoning at some length'.[513]

In fact, as it has been duly pointed out 'rigorous legal reasoning may help to forestall, or at least de-legitimize, unilateral dismissal on legal grounds'.[514]

2.4.5.5 *The value of legal findings of commissions of inquiry*

With regard to the value of the legal findings made by commissions of inquiry, any assessment inevitably becomes more questionable and possibly subjected to review. In general what can be unambiguously stated is that commissions

512 Darcy (n 44) 19.
513 Van den Herik (n 14) 535.
514 Ibid.

of inquiry cannot act as binding sources of international law as the law-making power remains primarily a prerogative of states in the international legal system.

Furthermore, as it has been duly pointed out by van den Herik,

> 'even though [commissions] extensively use the law and apply it to established facts, the commissions do not act as de facto law applying authorities in the sense of creating binding legal obligations. […] International law is rather used as the predominant language of communication and construction of facts in a quest to make the facts more objective and to create political effects'.[515]

At the same time, other authors have emphasized how commissions of inquiry might be considered as a sort of an hybrid being their approach quasi-judicial, 'in that they comprise a detached assessment of facts through the lens of applicable international legal standards' and their reports 'may 'inadvertently wind up serving jurisprudential purposes' if they have addressed disputed or uncertain international law questions'.[516]

Based on these premises, it has been noted how

> 'the development of international law is not solely the domain of States in practice, and commissions of inquiry can be counted amongst the various other entities, such as international courts, which have contributed to this multi-faceted process'.[517]

But how authoritative commissions' findings can be? At the current stage, it is probably premature to provide a definitive response to this question, and the answer may vary depending on each particular situation. However – looking in particular at the way the findings of these international investigations have been quoted and referred to in the work of international tribunals, bodies, academics and practitioners – an argument can be advanced that at least some of these international inquiries can be included in the range of authoritative international bodies whose determinations should be taken into account in the progressive interpretation and consolidation of international law, particularly when it comes to assess the customary nature of certain provisions. In this regard, Darcy argues how 'the reports of commissions of inquiry can be compared to the recognised subsidiary sources of international law [such as] judicial decisions and scholarly writings' as set out in Article 38(1)(d) of the Statute of the International Court of Justice 'and as such, can

515 Van den Herik (n 14) 536.

516 Darcy (n 44) 3; Teo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting and Fact-Finding Missions' (2013) HPCR Working Paper, 21.

517 Darcy (n 44) 20.

carry significant persuasive value and prove influential in the development of international law'.[518]

2.4.6 Contribution in the areas of international criminal law and accountability

2.4.6.1 Introduction

As already mentioned in Chapter 1, the use of international criminal law and the emphasis on individual criminal accountability represent recent and hotly debated trends in the evolution of international commissions of inquiry.[519]

It should be noted preliminary that the issue of accountability is by far broader than individual criminal responsibility *stricto sensu*.[520] This has been duly reflected in the practice of commissions of inquiry.[521] In particular, accountability has been defined as encompassing, inter alia, domestic institutions reforms, redress and reparations for victims, disciplinary and administrative measures and the creation of national human rights authorities.[522] Beside accountability, many of these investigations have also attempted to inspire and support the international community's efforts to provide peaceful and long-term solutions to conflict situations.[523]

As an example, according to the Panel of Experts on accountability in Sri Lanka

> 'accountability goes beyond the investigation and prosecution of serious crimes that have been committed; rather it is a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity. Consistent with the international standards mentioned

518 Darcy (n 44) 3, 21.

519 In terms of academic contributions see Jens Meierhenrich, *International Commissions: the Role of Commissions of Inquiry in the Investigation of International Crimes* (Oxford: Oxford University Press) (Forthcoming); Richard J Goldstone, 'Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl Academic EPublisher 2013); Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability', in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl Academic EPublisher 2013); van den Herik and Harwood (n 154); Jacobs and Harwood (n 363); Stahn and Jacobs (n 316); Dapo Akande and Hannah Tomkin, 'International Commissions of Inquiry: A New Form of Adjudication?' *EJIL:Talk!* (6 April 2012).

520 OHCHR, Guidance and Practice (n 3) 12.

521 Ibid 12.

522 Ibid 12, 13.

523 Ibid 7.

> above, accountability necessarily includes the achievement of truth, justice and reparations for victims'.[524]

At the same time, the Commission of Inquiry on Libya emphasized how

> 'the concept of accountability incorporates various methods including criminal prosecutions, disciplinary measures, administrative procedures and victim compensation measures. Accountability should therefore not be interpreted in a narrow, restrictive way to refer only to criminal prosecution'.[525]

In this context a number of inquiries, although tasked with identifying individuals criminally responsible, have duly noted the institutional fragility behind certain eruptions of violence that led to the perpetration of grave human rights violations. As an example, the 2006 Commission of Inquiry on Timor-Leste has devoted significant attention to its findings on institutional responsibility. According to the Commission the eruption of violence in April and May 2006, rather than a series of isolated acts, was considered as a reflection of the 'deep-rooted problems inherent in fragile state institutions and a weak rule of law'.[526] This led the Commission to recommend a series of comprehensive institutional and judicial reforms, something that can explain how the idea of accountability – as a tool to reinstall a culture of respect for the rule of law – has gone far beyond prosecuting individuals for criminal offences.[527]

However, bearing in mind these important caveats, this section will mainly focus on the contribution given by commissions of inquiry in the field of international criminal law and individual criminal accountability.[528]

As already emphasized in previous sections, a commission of inquiry is not an international criminal tribunal; it does not have an adjudicative role and cannot produce legally binding decisions. However, the fact that inquiries are not entrusted with powers of adjudication does not mean that they are not authorised to use international criminal law or that they cannot play any role whatsoever in the process of ensuring accountability for international crimes. What has been the use of international criminal law by these commissions and which role if any can be envisaged for them in ensuring criminal

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524 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) *Executive summary*.

525 Report of the International Commission of Inquiry on Libya (n 202) para. 763.

526 Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (n 274) para. 74. See also Kim (n 176) 246.

527 Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (n 274) paras. 228-245.

528 This dissertation will not deal with the role of fact-finding bodies in the work and practice of international judicial mechanisms other than criminal, such as the proceedings in front of the International Court of Justice. On this issue see Devaney (n 420).

accountability are among the main issues that will be analysed and debated in this section.

2.4.6.2 *The recent proliferation of international-criminal-law-based commissions of inquiry: contributing factors and causes*

As mentioned – with the notable exceptions of the 1919 Commission of Responsibilities and the 1943 UNWCC – the inclusion of international criminal law in the work of commissions of inquiry is a relatively recent trend. In particular, it can be associated with the beginning of the 1990s and the experiences of the international investigations in Former Yugoslavia and Rwanda. As it has been acknowledged by certain scholars,

> 'the relevance of these two commissions of inquiry should be […] emphasized – they represent a turning point as they paved the way for prosecution oriented investigations led by UN fact-finding missions'.[529]

Starting from these leading experiences, experts have noted how not only accountability-based commissions have proliferated but their number has also constantly increased over the years representing the great majority of the commissions established nowadays.[530]

International criminal law and accountability have been mainstreamed at different levels in the work of commissions of inquiry, through inclusion in the their mandates, thanks to their growing relevance in the legal analysis and findings and by reference to the activation of accountability mechanisms in the recommendations.[531]

However, one of the main justifications for the proliferation of international criminal law in the work of international investigations has been its interconnection with the main bodies of IHL and IHRL, particularly in relation to their enforcement. This has been duly pointed out by inquiries themselves. The Commission of Inquiry on Darfur, for example, noted how

529 Frulli (n 178) 1328.

530 In particular van den Herik and Harwood have developed a graph that 'depicts the number of UN commissions established each year since 1990, as compared with the number of mandates that refer to the goal of ensuring accountability. The graph shows that there is a trend towards establishing commissions with an accountability function'. van den Herik and Harwood (n 154) 11.

531 In particular, Harwood has argued how international criminal law has proliferated in modern commissions of inquiry through its inclusion in their mandates, its interlinks with IHL and IHRL as standard legal frameworks and by means of teleological grounds as many investigations have been conducted 'with a view to ensuring accountability for violations'. Catherine Harwood, 'The Competence of UN Human Rights Council Commission of Inquiry to Make Findings of International Crimes' (2013) Grotius Centre Working Paper, 12.

> '[t]he importance of determining individual criminal responsibility for international crimes […] is a critical aspect of the enforceability of rights and of protection against their violation. International human rights law and humanitarian law provide the necessary linkages for this process of determination'.[532]

Similarly, the 2009 Gaza Mission determined how

> '[i]nternational criminal law has become a necessary instrument for the enforcement of IHL and IHRL. […] The Mission regards the rules and definitions of international criminal law as crucial to the fulfilment of its mandate to look at all violations of IHL and IHRL by all parties to the conflict'.[533]

In this way – whether by reason of such interrelation or based on teleological grounds and on the need to promote accountability – commissions of inquiry have started referring more consistently to ICL paradigms even in cases where they did not receive an explicit mandate to do so.

While the increased use of international criminal law by commissions of inquiry has become a well-consolidated trend, one should speculate on the origins of such phenomenon. Indeed, one reason may well be the revival of international criminal law linked to the proliferation of international criminal tribunals during the 1990s. It should be noted how this represents a phenomenon to which international inquiries themselves may have significantly contributed given the role played by the Commissions of Experts on the Former Yugoslavia and Rwanda for the establishment of the ICTY and the ICTR, the firsts of an important series of international criminal justice mechanisms culminated with the entry into force of the International Criminal Court in 2002.

A second – more recent –explanation may be of an opposite nature to the first one. Commissions have in fact been increasingly entrusted with an ICL focus in order to fill the vacuum left by accountability mechanisms. It is in fact undisputed that, despite the rise in numbers of international criminal courts and tribunals, there are still many contexts marked by gross IHL and IHRL violations that do not fall under the radar of criminal justice. This is for different reasons ranging from the absence of political will to lack of jurisdiction. This vacuum has created situations of protracted impunity that have rapidly become matters of concern (and even outrage) among public opinion, which has often urged international bodies to entrust ad hoc investigations in the absence of the necessary political consensus to adopt more robust measures of accountability.

In other terms, while initially one of the primary reasons for accountability-focused commissions of inquiry has been the renewed interest for international

532 Report of the International Commission of Inquiry on Darfur (n 211) para. 407.
533 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 286.

criminal justice mechanisms, more recently commissions have been entrusted with ICL mandates precisely with the aim to fill the gaps left by the accountability and law-enforcement system. However, this ultimate reason may lead to more unexplored terrains insofar as it may entail that international criminal law can live and develop outside the courtroom. In this regard, Akande and Tomkin have argued how in

> 'the absence of any court that has compulsory and universal jurisdiction with respect to the determination of violations of human rights, IHL and other rules of international law, international commissions of inquiry may be one of the best ways of obtaining authoritative pronouncements on these legal issues'.[534]

But can commissions of inquiry's pronouncements represent an end in themselves? What will be the added value of such an exercise if not followed up by more robust actions of criminal accountability or law enforcement? It is precisely on this basis that Frulli has warned against 'the risk of getting tangled up in fact-finding activities, becoming an end in themselves and not a means to achieve accountability'.[535]

A third reason why international criminal law has been recently mainstreamed in the work and practice of international inquiries is probably due to the value that ICL findings may play in rising alert over the deterioration of certain crises and provoking responses by the international community. The 'politicized' use of ICL will be analysed more in depth below. For now, it is sufficient to highlight how an 'alerting' use of ICL may lay on a distortion of the legal value to be attached to ICL findings compared to IHL and IHRL violations. While in fact ICL possesses a specific function that distinguishes it from frameworks such as IHL or IHRL, this does not mean that the latter should be considered less significant or that their violations should attire less concern than those offences labelled as international crimes. In this regard, one can argue that the proliferation of ICL-based commissions may rely upon a misconception of ICL, as paradigm capable of attracting the attention of media and public opinion and in this way influencing international stakeholders' responses much more than 'less evocative' frameworks such as IHL or IHRL. This is only partially true. Looking also from a strictly legal perspective, international crimes may play an added value in soliciting the obligation for the international community to respond. Frameworks such as the R2P or the Peace and Security Council within the African Union have in fact included international crimes as the main trigger factors for the activation of

534 Akande and Tomkin (n 519); Stahn and Jacobs (n 316) 3.
535 Frulli (n 178) 1336.

institutionalised responses.[536] This may thus explain why commissions of inquiry have been increasingly entrusted with making ICL findings, particularly if one looks at the modern function of inquiries as tools empowering international stakeholders with the appropriate facts and analysis to develop adequate responses to crisis situations.

2.4.6.3 Competence in applying international criminal law

It is now time to go back to the initial idea of commissions of inquiry applying international criminal law to assess whether these bodies have indeed the competence and legitimacy to perform such a task. This is not a secondary issue given that – as has been pointed out by certain scholars –

> 'perceptions of legitimacy can strongly influence the extent to which concerned states, affected individuals and other actors are willing to engage with commissions, and thus such perceptions can play a decisive role in the effectiveness of an investigation'.[537]

As highlighted above, commissions of inquiry have started to increasingly refer to ICL paradigms due to instructions contained in their mandates, by reason of interrelation with the main bodies of IHL and IHRL and as tool in their pursue of accountability.

Particularly in relation to the inclusion of ICL in commissions' mandates, the question arises whether the mandating bodies possess such a competence. Indeed, with regard to those commissions established by the UNSC, there is little doubt that the UNSC may entrust inquiries with ICL mandates given that its authority to set up international criminal tribunals (and thus dealing with criminal justice more in general) has been well established. More controversial appears the case of the HRC, which has been responsible for the establishment of the great majority of accountability-based commissions. The question concerning the HRC going beyond the IHRL reign has been the focus of intense academic debate.[538] The issue has been examined previously in relation to its capability in applying IHL paradigms and the conclusion reached, looking also at the competence bestowed upon it expressly or implicitly by the UN General Assembly, appears to be that the Council, considered within the broader UN picture, does not act *ultra vires* in resorting to legal paradigms, such as IHL or ICL, that go beyond its strict IHRL mandate. This conclusion is

536 In particular, under Article 4 (h) of the Constitutive Act of the Africa Union (AU), the AU is empowered to intervene in the territory of one of its member states in case grave situations -namely genocide, crimes against humanity and war crimes – arise. See, Constitutive Act of the African Union (Lome, Togo, 11 July, 2000).

537 Van den Herik and Harwood (n 154) 12.

538 On this point see M. Frulli (n 178); van den Herik and Harwood (154); Harwood (n 531).

reinforced in the case of ICL, particularly given its intrinsic linkage with IHL and IHRL as potential enforcement paradigm.

This however does not answer all the questions as Harwood notes how

> 'IHL and ICL may be dealt with by the UN generally, so its external jurisdiction is intact […]. However, internal irregularities should be avoided, as the perception that the HRC has exceeded its mandate may damage its credibility and legitimacy, which could impair relationships with states and in turn reduce compliance with HRC resolutions and commissions' recommendations'.[539]

In this regard, it should be noted some isolated instances of states' objections over the exercise of such a power by the HRC.[540] However, given the broad mandate of the UN to rule upon issues related to criminal justice and accountability, the HRC cannot be considered acting *ultra vires* in entrusting ICL-based commissions of inquiry. In particular, the strong interrelation existing between ICL and the main frameworks of IHL and IHRL coupled with the development of an increasing practice with only isolated state objections may represent two significant factors in justifying what has now become a well-established trend. In this regard, it should be reminded how the HRC and other UN organs have, as a general practice, endorsed the conclusions of inquiries that have reached ICL findings, in some cases even explicitly referring themselves to the need to hold accountable those individually responsible.[541]

2.4.6.4 Resorting to international criminal law: a productive or counterproductive step?

Once determined the *prima facie* competence of commissions of inquiry to use ICL, it is time to assess the utility for them to do so. In fact, such a trend may entail both opportunities and challenges that it is important to carefully analyse before reaching conclusive findings.

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539 Harwood (n 531) 8.

540 In this regard Harwood noted how India and Pakistan had abstained from voting on a resolution on the human rights situation in Syria on grounds that text was 'unduly focused on accountability' and that the HRC 'should not?confuse its mandate with the humanitarian one'. Also, in relation to the endorsement of the report of the 2009 UN Fact-Finding Mission on the Gaza Conflict, Russia while voting in favour of the resolution highlighted how 'a number of provisions in the document went beyond the scope of the Mission, in particular recommendations to the [ICC] and the Security Council, as well as calls on States to prosecute war crimes on the basis of universal jurisdiction'. However, Harwood seems arguing how these views seem to represent a distinct minority. See, Human Rights Council, Draft Resolution, A/HRC/23/L.29 (2013); Human Rights Council, A/HRC/RES/23/26 (2013); OHCHR, 'Press Release: Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission led by Justice Goldstone and Calls for their Implementation' (16 October 2009); Harwood (n 531) 8.

541 Harwood (n 531) 16, 17, 18.

The possibility for commissions of inquiry to resort to ICL may generate a number of positive implications. Firstly, as pointed out by certain experts, managing ICL paradigms can help commissions of inquiry increasing the quality of their fact-finding by basing it on more rigorous standards.[542] It may affect for example the methodology used for assessing evidence and the standard of proof employed, which require solid basis and specific guarantees when it comes to assess individual criminal responsibility.

In addition, reference to ICL can help commissions in shedding light on the existence of specific patterns and policies behind certain violations. International crimes are different from ordinary crimes on the grounds that they require the fulfilment of contextual elements, such as the existence of a widespread and systematic attack against the civilian population for the perpetration of crimes against humanity. Qualifying 'ordinary' violations in a specific context may thus help commissions of inquiry in 'contextualising' certain offences and thus providing a more comprehensive portrait of the situation under investigation. Such an exercise can entrust inquiries to interpret events into a different light, particularly when it comes to assess institutional and individual responsibilities for specific conducts. It will also strengthen the findings of these commissions looking in two directions: reaching the truth about certain events and stimulating specific reactions by the international community, including the trigger of accountability mechanisms.

However, the increasing resort to ICL by commissions of inquiry also raises a number of concerns. Some fear that the migration of ICL outside the courtroom may undermine its legitimacy, particularly where findings are subjected to less rigorous standards in terms of procedures and evidence.[543] A number of academics have warned against the politicization of ICL in relation to the 'alarming' and 'provoking' functions of modern commissions of inquiry.[544] Put in other terms, ICL findings used as vehicle to trigger political action by the international community may delegitimise this body of law, which has been always intrinsically anchored to independent and impartial criminal proceedings respectful of high quality standards and guarantees both in terms of rules of procedure and evidence and due process. Thus, its use outside the courtroom risks turning ICL into a new hybrid category. This may lead not only to undermine the findings of commissions of inquiry but can also weaken states' support to international criminal justice mechanisms if there is indeed a perception that ICL is used for other purposes than impartially enforcing the law in court.

Although such concerns should not be underestimated, the idea of ICL surviving outside the courtroom should not be *a priori* rejected. ICL pronouncements made by different bodies can bear different values. This variety should

542 Jacobs and Harwood (n 363) 3.
543 Jacobs and Harwood (n 363).
544 Harwood (n 531) 19-25; van den Herik and Harwood (n 154) 16-18.

not be seen as necessary endangering the legitimacy of ICL. To remain in the realm of courtrooms, it is interesting to recall the reasoning contained in the Separate Opinion of Judge Gaia in the ICJ *Genocide Case* II. In particular, Gaia raised some doubts on the Court's approach to equate the legal framework when considering issues related to the responsibility of States for acts of genocide and individual criminal responsibility, particularly in relation to issues concerning standard of proof and *dolus specialis*.[545] According to Gaia, 'establishing that an individual or organ committed certain acts with genocidal intent is not a precondition for finding that a State committed genocide'.[546]

On this point, it should be noted how the UN Commission of Inquiry on Darfur excluded that the Government of Sudan had pursued a genocidal policy in Darfur, this without ruling out the possibility that single individuals within its political and military ranks acted with such an intent. On the contrary, it may happen that a determination by commissions of inquiry that international crimes may have been perpetrated in a specific context does not result in the conviction of an individual in court, in case the requirements for individual criminal culpability are not fulfilled.[547] In these examples it may be explained the subtle but significant difference between commissions of inquiry and international tribunals when it comes to assess their role in ICL. In this regard, according to the Commission on Darfur, a commission of inquiry

> 'does not [...] make final judgement as to criminal guilt; rather, it makes an assessment of possible suspects that will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law'.[548]

Hence, determining that a situation has been characterized by violations that may amount to international crimes (with the purpose to call for further investigations) or even ruling that certain crimes have been committed for the purpose of state's responsibility is by far a different task from investigating and prosecuting an individual for a specific offence in the context of criminal proceedings. This, however, does not mean that the first action entails an undue use of the legal framework or that it cannot be instrumental to criminally investigating and prosecuting an individual.

In addition, even within international criminal justice mechanisms the procedure that leads to individual criminal convictions undertakes different

545 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia II) ICJ Rep. 2015, Judge Gaia Separate Opinion.

546 Ibid 2.

547 In this regard it should be noted that, although it is not a commission of inquiry, the ICTY Appeal Chamber in *Krstic* determined that '[t]he fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff […] does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims'. ICTY, *Prosecutor v. Krstic*, Case No. IT-98-33-A (Appeal, 19 April 2004) para. 35.

548 Report of the International Commission of Inquiry on Darfur (n 211) para. 15.

stages. If one thinks at the ICC framework, a Prosecutor's request to open an investigation based on reasonable allegations that international crimes have been committed has by far a different meaning than a trial chamber ruling that a specific individual has perpetrated international crimes beyond reasonable doubt. Can we really speak about an undue use of ICL in the first case? The answer would reasonably be no. While indeed one can argue that a determination made by a criminal prosecutor differs from that of a commission of inquiry, at least in the preliminary stages it does not vary significantly in terms of standard of proof employed and sources of evidence used. As it will be assessed more in depth below, the fact that in more than one occasion the ICC machinery has significantly relied upon commissions of inquiry's findings during the preliminary examination phase is indicative of how an ICL that is managed outside the courtroom can be seen more as an opportunity than as a risk. This if course bearing firmly in mind the need to recognize different values to ICL findings if emanated from different authorities.

However, the fact that ICL findings by commissions of inquiry may potentially benefit international criminal investigations should actually prompt commissions to manage ICL in a proper manner by employing adequate standards to corroborate such findings. While in fact experts have somehow accepted a more flexible use of ICL if applied in the context of the so called 'preventive' sphere (such as in the framework of the work of international inquiries and R2P mechanisms),[549] an excessive laxity not only risks to undermine ICL as body of law but also would deter accountability mechanisms from resorting more consistently to the findings of international inquiries in their own investigations.

2.4.6.5 The use of international criminal law in the practice of commissions of inquiry

With these caveats in mind, it is now important to turn to the use that commissions have made of ICL in their practice. As it has been emphasized by Van den Herik and Harwood, '[t]he turn to international criminal law by commissions of inquiry has been selective'.[550] While in fact abundant reference can be found in relation to the contextual elements and legal definitions of the crimes, far less analysis has been devoted to issues related to criminal procedure and modes of liability.

Indeed, a selective approach to ICL should not be necessarily viewed with negative connotations. Given the role of commissions in paving the way for

549 Van den Herik and Harwood (n 154) 18-19; See also Gareth Evans, 'Crimes Against Humanity and the Responsibility to Protect' in Leila N Sadat (ed), *Forging a Convention for Crimes Against Humanity* (2011) 1; Larissa J van den Herik, 'The Schism between the Legal and Social Concept of Genocide in Light of the Responsibility to Protect' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide; International, Comparative and Contextual Aspects* (2007) 75.

550 Van den Herik and Harwood (n 154) 16.

future accountability mechanisms, an emphasis on the legal definition of the crimes and their contextual elements may appear in line with the preliminary nature of the findings of these inquiries on the commission of international crimes. Issues related to modes of liability may acquire more relevance when commissions are requested to narrow their scope of investigation and identify those allegedly responsible. On this point, it is necessary to look at those cases in order to examine how commissions have reacted to such instructions.

2.4.6.5.1 Contribution in the identification of different elements of international crimes
There are three main elements that should be assessed in order to enforce international criminal law, namely the contextual element; the material element or legal definition of the crime; and individual criminal responsibility. The practice of commissions of inquiry shows an important focus on the first two elements while only few and selective reference to the third one.[551]

In this context, one can argue that the most relevant contribution by commissions of inquiry in this field has been so far the identification of the linkage existing between specific incidents and underlying patterns and policies of IHRL and IHL violations. This can help framing the contextual elements of crimes where needed. For example, it has been underlined how

> 'a commission's investigation into a conflict situation may assist criminal investigators to identify the different parties involved and the various stages of conflict, such as when internal disturbances escalate into a non-international armed conflict, or when a conflict is internationalised'.[552]

This has been the case with the findings of the commissions of inquiry on Côte D'Ivoire (2011), Libya (2011) and Central African Republic (2013).

In addition, the commissions' analysis can also point towards the existence of a widespread and systematic attack directed against the civilian population as requirement for crimes against humanity. This has been the case for many human rights inquiries including the most recent experiences in Guinea, North Korea and Eritrea.

The findings of commissions of inquiry can even start directing criminal investigators towards specific levels of responsibility, particularly in those cases where violations perpetrated on the ground seem the result of policies designed, organized and orchestrated at highest military and political level. A relevant example in this sense is the analysis of the Commission of Experts on former Yugoslavia on the siege of Sarajevo through the use of snipers and rape as a method of warfare. The Commission highlighted how such practices could not have been implemented on the ground without being envisaged

551 Harwood (n 531) 19-24.
552 Ibid 22.

or at least condoned and accepted at high-ranking military level.[553] Similarly, the 2014 Commission of Inquiry on Gaza emphasized, in relation to a number of Israeli military attacks, how they 'may have constituted military tactics reflective of a broader policy, approved at least tacitly by decision-makers at the highest levels of the Government of Israel'.[554]

This, according to the Commission's report, raised questions

> 'regarding the role of senior officials who set military policy in several areas examined by the commission […] In many cases, individual soldiers may have been following agreed military policy, but it may be that the policy itself violates the laws of war'.[555]

With regard to highlighting modes of individual criminal liability, the contribution of international inquiries has been more selective and less consistent.

In particular, certain commissions, such as in the case of Syria and Libya, did not articulate on modes of liability even though they were tasked with identifying those responsible.[556] On the contrary, inquiries such as those established in relation to Guinea, Darfur and East Timor engaged in depth on different forms of responsibility of alleged perpetrators. In particular, the Commission of Inquiry on Guinea represents one of the rare examples of investigations that publicly revealed the names of alleged suspects. It acknowledged how '[t]he final determination of individual criminal responsibility lies exclusively with a court of law'.[557] However, it noted how it was 'obliged by its mandate to establish responsibility and to identify, where it can, the perpetrators of the crimes committed'.[558] Thus, the Commission dedicated an entire section of its report to assess the different forms of individual criminal responsibility of the listed individuals with the aim that such information 'could guide any possible future criminal investigation of the presumed perpetrators'.[559]

While not publicly revealing the names of alleged responsible, the Commission of Inquiry on Darfur adopted a similar approach. It determined how it had *prima facie* identified

> '10 high-ranking central Government officials, 17 Government officials operating at the local level in Darfur, 14 members of the Janjaweed, as well as 7 members of the different rebel groups and 3 officers of a foreign army (who participated

553 Report of the Commission of Experts on Former Yugoslavia (n 177) paras. 183-209.
554 Report of the independent commission of inquiry (n 344) para. 44.
555 Ibid para. 77.
556 In particular, see the criticism raised by Heller on the failure by the 2011 Libya Commission of defining command responsibility and articulating its main features. Heller (n 206) 36.
557 Report of the International Commission of Inquiry on Guinea (n 211) para. 212.
558 Ibid.
559 Ibid paras. 212, 216-253.

> in their individual capacity in the conflict), who may be suspected of bearing individual criminal responsibility for the crimes committed in Darfur'.[560]

It scrutinized these cases according to different forms of criminal liability including perpetration/co-perpetration, joint criminal enterprise, aiding and abetting, planning, command responsibility and failing to prevent or repress the commission of a crime. The Commission in fact believed that

> '[t]o render any discussion on perpetrators intelligible, two legal tools are necessary: the categories of crimes for which they may be suspected to be responsible, and the enumeration of the various modes of participation in international crimes under which the various persons may be suspected of bearing responsibility'.[561]

In conclusion, although the approach of commissions of inquiry to ICL has been selective and certain elements (contextual and material) have been privileged over others (modes of individual criminal responsibility) in their analysis, this should not be necessarily seen as undermining the application of international criminal law. In this regard, notwithstanding the fact that certain authors have raised concerns for the process of severing ICL from the individual perpetrator,[562] a more diluted reference to individual criminal liability might be tolerated given the preliminary nature of the commissions' findings.[563]

That being said, the risks behind watering down the standards of ICL and 'merging' it with IHRL and IHL frameworks remain serious and should not be underestimated.[564] Indeed, one should not forget that the purpose of ICL remains to investigate and prosecute individuals for international crimes while granting them all the guarantees that a criminal process entails. Thus, inquiries' findings should always take such objectives into account when resorting to ICL paradigms. That said, one advice to commissions of inquiry would be to include some level of analysis on individual criminal responsibility every time findings related to the commission of international crimes are made. Alternatively, inquiries could present the reliability of their criminal law findings as conditioned to the need of fulfilling specific requirements or to further investigations by competent judicial bodies.[565] In this regard, it is interesting to

560 Report of the International Commission of Inquiry on Darfur (n 211) para. 531.
561 Ibid para. 530.
562 Harwood (n 531) 21.
563 This perception may be reinforced looking at the type of assessment that international criminal prosecutors undertake in the preliminary examination phases, where the analysis is focused on whether there are reasonable basis that international crimes have been committed rather than on building individual cases.
564 Harwood (n 531) 21-22.
565 Ibid.

note the formula chosen by the Commission of Inquiry on Guinea which specified how

> '[a]lthough the question as to whether or not crimes were committed can be finally and conclusively resolved only by a court with the requisite jurisdictional competence, […] there is a set of characteristics which demonstrate that the acts perpetrated on 28 September 2009 were sufficiently serious to justify their qualification as crimes against humanity'.[566]

2.4.6.5.2 Use and interpretation of international criminal law in practice

Moving to assess how international criminal law has been applied and interpreted by commissions of inquiry, these investigations have generally relied upon existing legal standards and jurisprudence. In particular, according to certain authors

> 'it can be observed that in their general legal qualifications, commissions refer to prevailing legal standards and interpretations. They cite international case law quite abundantly, even if in doing so they generally display a preference for the more flexible case law of the ICTY. The more demanding standards of the Rome Statute have sometimes been neglected'.[567]

However, few examples of progressive development of ICL and creative analysis should be highlighted.

Contextual elements in crimes against humanity

Experts have underlined a certain relaxation in the approach traditionally adopted by commissions of inquiry in determining the policy requirement as contextual element for crimes against humanity.[568] They pointed out the difference, in the level of reasoning, between the ICC Pre-Trial Chamber in the Kenya case and the analysis developed by commissions, particularly in the Zimbabwe, Sri Lanka, Libya and DRC contexts.[569] Central to the debate

566 Report of the International Commission of Inquiry on Guinea (n 211) para. 180.

567 Van den Herik and Harwood (n 154) 18.

568 Ibid 17.

569 In this regard, the ICC Pre-Trial Chamber in the *Kenya* case has engaged in an extensive and elaborated reasoning on the matter that led it, albeit with the dissenting opinion of Judge Kaul, to endorse an extremely inclusive approach, in so far as it has not required a precise level of organization or control over the territory. ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II) Case No. ICC-01/01-19 (31 March 2010). This approach has raised certain criticism by legal scholars. See, Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *LJIL* 855. On the contrary, Van den Herik and Harwood have noted how the Fact-Finding Mission on Zimbabwe and the Mapping Exercise on the DRC omitted the reference to the policy requirement in their analysis on crimes against humanity, while

is the notion of 'organizational policy' and, in particular, the issue of structure and control over the territory that an organization should possess in order to be capable of committing crimes against humanity.

In this debate, commissions of inquiry more recently established have provided more significant contributions.

For example the Commission of Inquiry on Eritrea referred to the ICC and ICTY jurisprudence to assess the 'attack against a civilian population' and 'organisational policy' requirements. In particular, in considering the 'organisational policy' always an implicit element in the codification of crimes against humanity, the Commission implicitly affirmed its customary character.[570]

The Commission of Inquiry on Syria has also significantly engaged in such an analysis, particularly with regard to the role played by certain non-state groups such as ISIS. The Commission has been clear in distinguish between the violations committed by Government forces, which were perpetrated in accordance with a State policy and may therefore result in the commission of crimes against humanity and those abuses perpetrated by anti-government groups that, in the absence of such a policy requirement, could amount 'only' to war crimes.[571]

However, the Commission acknowledged the particular position of those groups, such as ISIS and *Al-Nusra*, that have acquired a certain degree of control and developed administration-related functions over vast portions of the Syrian territory. In this regard, the Commission outlined the two different kinds of violations perpetrated by a group such as ISIS. Firstly,

> '[a]s an armed group bound by Common Article 3 of the Geneva Conventions and customary international law, ISIS has violated its obligations toward civilians and persons hors de combat, amounting to war crimes'.[572]

Secondly, the Commission noted, '[i]n areas where ISIS has established effective control, ISIS has systematically denied basic human rights and freedoms and

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the Panel of Experts on Sri Lanka discussed its fulfillment only in a footnote. The same criticism has been highlighted by Heller with regard to the 2011 Commission of Inquiry on Libya. Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina (18 July 2005) paras. 64-66; Report of the Mapping Exercise on the DRC (n 300) para. 488-491; Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (n 327) fn 127. See also van den Herik and Harwood (n 154) 17; Heller (n 206) 34.

570 2nd Report of the detailed findings of the commission of inquiry on Eritrea (n 315) paras. 181-182.

571 9th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/30/48 (13 August 2015) paras. 168-170.

572 Report of the independent commission of inquiry on the Syrian Arab Republic – Rule of Terror (n 423) para. 74.

in the context of its attack against the civilian population, has perpetrated crimes against humanity'.[573] In particular, the Commission argued how:

> 'ISIS functions under responsible command and has a hierarchical structure including a policy level. The group has demonstrated its capacity to impose a policy on its members and ensure the coordinated implementation of decisions made by its leadership. With the capacity and means to attack the civilian population on a large scale, ISIS has carried out mass victimization against civilians, including segments of the population on the basis of gender, religion and ethnicity. According to the evidence collected, there are reasonable grounds to believe that ISIS has carried out attacks in accordance with an organisational policy'.[574]

In the view of the Commission, this has permitted the group to carry out widespread and systematic attacks as part of a coordinated campaign of instilling terror among the civilian population under its control.

This reasoning has been reaffirmed in subsequent investigations, where the Commission determined how

> 'ISIS has directed acts of violence and terror against the civilian population under its control in Raqqah, Dayr Az-Zawr, Hasakah, Aleppo, Hama and Homs governorates. ISIS, a structured group, directs and organizes these acts of violence against civilians, evincing an organizational policy. ISIS has committed murder, torture, rape, sexual slavery, sexual violence, forcible displacement and other inhumane acts as part of a widespread attack on the civilian population, amounting to crimes against humanity'.[575]

With such an analysis the Syria Commission has, on the one hand, demonstrated the possibility for fact-finding bodies to go far deeper in their reasoning on the organizational policy than the experiences of Zimbabwe, the DRC, Sri Lanka and Libya have shown. On the other hand, the inquiry's assessment has resulted in a relevant contribution to the debate concerning the interpretation of the organizational policy requirement for crimes against humanity. Contrary to the inclusive approach put forward by the ICC Pre-Trial Chamber, it has in fact anchored the fulfilment of such a requirement on a number of indicators including, 'effective control over a territory', 'responsible command and a hierarchical structure', and 'capacity to impose a policy on its members and ensure the coordinated implementation of decisions made by its leadership'. This contribution may thus have the potential to influence future determinations on the matter, particularly if the ICC Trial and Appeal Chambers

573 Ibid.

574 Ibid paras. 76-77.

575 9th Report of the independent commission of inquiry on the Syrian Arab Republic (n 571) para. 172.

will not feel totally persuaded by the approach adopted by the Pre-Trial Chamber.

Genocide

Another area where commissions of inquiry have enriched the existing legal debate is related to the determination of the crime of genocide. In this regard, international inquiries have often been mandated to investigate situations that were considered by the international community to be on the verge of genocide. Commissions have reacted to this challenge in different ways depending on the specific context.

A first analysis can be found in the experiences of the commissions of experts on former Yugoslavia and Rwanda that led to the establishment of the *ad hoc* tribunals. In particular, in relation to the identification of the protected group, while the 'negative approach' put forward by the Yugoslavia Commission was not endorsed by the ICTY Appeal Chamber,[576] the Commission of Experts on Rwanda developed an important precedent in discussing the issue of political motives, given the exclusion of political groups from the list of protected groups under the Genocide Convention. In this regard the Rwanda Commission argued how,

> 'the presence of political motive does not negate the intent to commit genocide if such intent is established in the first instance. In connection the Commission argued that, to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact'.[577]

In a certain way such preliminary analysis paved the way for the more robust contribution given on the matter by the *ad hoc* tribunals, which in turn influenced the work of subsequent commissions of inquiry.

In particular, the Commission of Inquiry on Darfur was expressly mandated to determine whether the crime of genocide had been committed.

In its findings, the Darfur inquiry recognized that a number of conducts incarnating the material element of the crime had been perpetrated in the context of the Sudanese Government counterinsurgency campaign in Darfur. The Commission further noted the subjective approach developed by the ICTR in relation to the identification of the protected groups as well as the 'permanent and stable' requirements. In particular, the report highlighted that

> 'what matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group)

576 ICTY, *Prosecutor v. Stakic*, Case No. IT-97-24-A (Appeal, 22 March 2006) para. 27. See also Darcy (n 44) 19.

577 Report of the Commission of Experts on Rwanda (n 375) para. 159.

> by the two International Criminal Tribunals is in line with the object and scope of the rules on genocide'

noting also how such interpretation does not depart from the legal text of the Genocide Convention and it has been implicitly accepted by States.[578] However, with regard to the 'permanent and stable' requirements, the view endorsed by the Commission was only put forward by the ICTR Pre-Trial Chamber in *Akayesu* without being upheld in appeal.[579] This renders even more controversial the Commission's claim that such 'interpretation and expansion has become part and parcel of international customary law'.[580]

In any case, by applying this analysis to the context of Darfur, the report noted how

> 'in recent years the perception of differences has heightened and has extended to distinctions that were earlier not the predominant basis for identity. The rift between tribes, and the political polarization around the rebel opposition to the central authorities, has extended itself to issues of identity. Those tribes in Darfur who support rebels have increasingly come to be identified as "African" and those supporting the government as the "Arabs"'.[581]

For the Commission the argument regarding the self-perception of being different was demonstrated in both attackers and victims by the derogatory language used by the attackers in the attacks and by victims referring to 'Janjaweed'. On this basis, the Commission argued how 'it may be considered that the tribes who were victims of attacks and killings subjectively make up a protected group' within the definition of the crime of genocide.[582]

However, it determined how such actions could not be considered as committed pursuant to a genocidal policy. The Commission argued in fact that, despite the seriousness of the offences documented, the extremely high threshold set up in order to determine the mental element pervading the crime of genocide – namely, the intention to physically destroy in whole or in part a specific protected group – was not met.[583] In particular, in the words of the Commission:

> 'Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued

578 Report of the International Commission of Inquiry on Darfur (n 211) para. 501.
579 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Judgment, 2 September 1998); ICTR, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-A (Appeal, 1 June 2001).
580 Report of the International Commission of Inquiry on Darfur (n 211) para. 501.
581 Ibid para. 510.
582 Ibid para. 512.
583 Ibid paras. 507-522.

the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare'.[584]

Thus, the Commission dismissed the claim according to which the Government of Sudan had pursued a policy of genocide in Darfur. This, however, did not automatically rule out from its point of view the possibility 'that in some instances individuals, including Government officials, may commit acts with genocidal intent'.[585] Whether this was the case in Darfur, the report added, is a determination that only a competent court can make on a case-by-case basis.

Indeed, one of the merits of the Commission led by Professor Cassese has been to highlight, from a legal point of view, the difference between the existence of a State-led genocidal policy and the commission of genocide as a crime perpetrated by an individual, regardless of his or her links with the State apparatus. The inquiry seems to propend for the existence of the latter rather than the former in relation to the situation in Sudan, a view that has not been shared by the ICC Prosecutor at the time, Luis Moreno Ocampo.[586] By requesting an arrest warrant for Sudanese President Omar Al Bashir charging him with three counts of genocide, the Prosecutor seemed in fact implicitly to believe in the existence of a genocidal policy implemented at a State level, as it would be difficult to consider the conduct of the President of Sudan as separate from that of its Government.[587]

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584 The same reasoning has been applied with regard to the effect of the policies of displacement in dire and desert areas and to the conditions of life experimented in IDP camps. In this regard, the Commission found that the treatment and conditions of IDP camps, while envisaging a conduct that may be in breach of the Sudanese Government's obligations under international human rights law, could not be indicative of any intent to annihilate a group and thus amount to the crime of genocide. As the Commission stated, 'this is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong. Suffice it is to note that the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance'. Report of the International Commission of Inquiry on Darfur (n 211) paras. 507-522, 515.

585 Ibid paras. 518-20.

586 On this issue see Andrew T Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 834.

587 The Prosecutor's decision to charge Al Bashir with genocide was initially dismissed by the ICC Pre-Trial Chamber, before its ruling was reversed on appeal. As a result, the ICC Pre-Trial Chamber finally ordered the arrest warrant for offences including three counts of genocide, and determined that 'the conditions of life inflicted on the Fur, Masalit and Zaghawa groups [in Darfur] were calculated to bring about the physical destruction of a part of those ethnic groups' and that 'forcible transfer by resettlement by member of other tribes, [was] committed in furtherance of the genocidal policy'. ICC, *Prosecutor v Bashir*, (Judgment in the Sentencing Appeals) Case No. ICC-02/05-01/09-OA (3 February 2010) para. 30.

The question around the existence of a genocidal policy was also central to the analysis of the UNSC-mandated Commission of Inquiry on CAR. The situation in CAR in 2013 had been already labelled by different UN sources as being 'on the verge of genocide'.[588] The Commission analysed the policy of ethnic cleansing pursued by the anti-balaka forces against Muslim population in Bangui and other areas of the country. Referring to the jurisprudence of the *ad hoc* tribunals, it noted how ethnic cleansing had been acknowledged as a crime. However, although it could be associated with a genocidal policy, the CAR inquiry underlined how ethnic cleansing should not be viewed necessarily as synonymous with genocide.[589] In particular, it referred to case law of the ICJ and ICTY to demonstrate how there have been instances where ethnic cleansing had not been conducted with genocidal intent. On the contrary, based on the absence of the necessary *dolus specialis* required by the crime of genocide, the Commission argued for a stronger link existing between the ethnic cleansing perpetrated in the context of CAR and crimes against humanity, particularly in the form of persecution and forcible transfer.[590]

Finally, it is important to emphasize the contribution provided by the Syria Commission of Inquiry on the genocidal policy enforced by ISIS against the Yazidi minority. According to the Commission such policy has been implemented through three different stages: the separation of women and children from men and the mass killing of young and adult Yazidi men; the infliction on Yazidi women of conditions amounting to slavery and sexual slavery; and the separation of children from women and their related indoctrination through a policy of obliteration of Yazidi values.[591] The Syria investigation highlighted how all five material conducts enshrined in the Genocide Convention have been carried out by ISIS militants and elite against Yazidis.[592] With regard to the mental element, the Commission relied upon the numerous statements, magazines and leaflets published in which the terrorist group outlined the policy to be enforced against the targeted minority.[593]

Persecution and other findings

Looking more in general at the practice of commissions of inquiry, there have been many instances where their analysis has not been confined to restating existing jurisprudence but has provided innovative inputs to the process of interpreting and applying concepts of international criminal law. While there have been occasions where their reasoning may have gone beyond the existing and consolidated standards of interpretation, this may also explain an implicit

588 Report of the International Commission of Inquiry on the Central African Republic (n 294) para. 443.
589 Ibid para. 452.
590 Ibid para. 453.
591 ISIS Crimes Against the Yazidis (n 57) para. 31.
592 Ibid paras. 106-149.
593 Ibid paras. 150-165.

desire to creatively interpret the law when facing concrete and practical challenges coming from the investigated realities on the ground. From this perceptive one should look at the contribution provided by the inquiries on Darfur and North Korea on so called 'famine crimes' and grave violations of the right to food.[594] Even the debate on slavery (including instances of sexual slavery) as an international crime has enormously benefited from the contributions of the investigations in Eritrea and Syria.[595] It should also be recalled the significant role by investigations such as those in the former Yugoslavia, Rwanda and Guinea for the development of the concept of rape as both a war crime and a crime against humanity.[596] Finally, with regard to the commission of war crimes in modern and asymmetric warfare, the impact of the analysis developed by commissions such as those established in the former Yugoslavia, Lebanon, Sri Lanka and OPT should be carefully assessed, particularly in relation to the notion of deliberate and indiscriminate attacks against civilians and the responsibility through the chain of command in case of violations reflective of high-level policies.

In such a context, it is also relevant to highlight the contribution of international inquiries in the conceptualization and application of the crime against humanity of persecution. Commissions have referred to it in many situations where discriminatory policies marked by grave human rights violations could not be labelled as genocide given the absence of the necessary mental element. Examples encompass the analysis by inquiries in the context of former Yugoslavia, Darfur and CAR.

The Commission of Experts on the former Yugoslavia, for example, has referred to persecution not only as one of the constitutive acts of crimes against humanity but also as an intrinsic feature of the widespread and systematic attack that is necessary for the contextualization of the offence. In the words of the Commission,

> '[i]solated acts constituting offences, such as extra-judicial executions or other common crimes punishable under municipal law, do not qualify as crimes against humanity by themselves. The acts must be part of a policy of persecution or discrimination […] It is the systematic process of victimization against the protected group which is essential'.[597]

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594 On this issue see, Alessandro Tonutti, 'Famine Crises and International Crimes', (2014) International Law and Disasters Working Paper 02 http://disasterlaw.sssup.it/wp-content/uploads/2014/01/IDL-Working-Paper-22014.pdf accessed on 8 December 2016.

595 ISIS Crimes Against the Yazidis (n 57) paras. 113-128; 2nd Report of the detailed findings of the commission of inquiry on Eritrea (n 315) paras. 191-234.

596 Report of the Commission of Experts on Former Yugoslavia (n 177) paras. 232-253; Report of the Commission of Experts on Rwanda (n 375) paras. 126-146; Report of the International Commission of Inquiry on Guinea (n 211) para. 96.

597 Report of the Commission of Experts on Former Yugoslavia (n 177) para. 84.

Subsequent categorizations of crimes against humanity, included the one enshrined in the ICC Statute, have however ruled out such articulated interpretation. While in fact requiring that crimes against humanity should be perpetrated in the context of a widespread or systematic attack, they have not referred to the discriminatory character and the persecutorial intent of such attack as a necessary requirement.

More recently, the Commission of Inquiry on Darfur referred in many instances to the paradigm of persecution in order to qualify, through the lens of ICL, a number of offences perpetrated on discriminatory grounds.[598] The Commission, while finding how there was insufficient evidence to sustain that the Sudanese Government had pursued a genocidal policy, underlined nonetheless how such conclusion could not be interpreted as underestimating the gravity of the offences perpetrated during the counterinsurgency campaign in Darfur. In particular, through a reasoning that have subsequently inspired the inquiry on CAR, the Darfur Commission pointed out how 'some reports conclude that elements of persecution and "ethnic cleansing" are present in the pattern of destruction and displacement'.[599] On this basis, it deduced how a pattern of systematic and widespread attacks and violations committed by the Government on persecutory grounds (by targeting certain specific groups) could be inferred. 'In this respect', the report noted 'in addition to murder as a crime against humanity, the Government may be held responsible for persecution'.[600]

More open to debate appear the analysis developed by international investigations on the OPT in their assessment of Israeli policies of collective punishment. For example, the 2009 UN Fact-Finding Mission on the Gaza Conflict, while analysing the effects of the Israeli blockade in Gaza, emphasized the combined effect of a series of acts that had deprived the population of the Gaza Strip of their means of subsistence, employment, housing and water, while also denying their freedom of movement and right to leave and enter their own country.[601] By recalling the ICTY case law, it further noted that

> 'the [crime against humanity] of persecution encompasses a variety of acts, including, inter alia, those of physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights'.[602]

598 Report of the International Commission of Inquiry on Darfur (n 211) paras. 295, 320-321, 360, 379, 393.

599 Ibid para. 194. See also Report of the International Commission of Inquiry on the Central African Republic (n 294) paras. 451-453.

600 Ibid para. 519.

601 Report of the United Nations Fact-Finding Mission on the Gaza Conflict (n 211) para. 1328.

602 Ibid para. 1329.

On this basis, it concluded that

> 'from the facts available […] some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed'.[603]

Such stance was reiterated in the section dedicated to Israeli systematic violations against the Palestinian population in the West Bank, in particular in relation to those measures resulting in the application of a discriminatory legal framework and in widespread arrests and detentions.[604]

A different approach was adopted by the Commission of Inquiry on Eritrea in assessing a number of collective punishment policies during peacetime, particularly the practice of punishing relatives of people considered as 'criminals'. The Commission defined these acts as crimes against humanity under the label of 'other inhuman acts' rather than 'persecution', by emphasizing how

> 'with respect to forms of reprisal resulting in detention, enforced disappearance, physical injury or death, […] they are of a character similar to other crimes set out in the Rome Statute, but that those crimes do not adequately capture the nature of the acts of reprisal described'.[605]

2.4.6.5.3 Identification of responsibilities

Turning to the issue concerning the identification of those responsible for the crimes, only a limited number of commissions have been openly instructed to carry out such a task. A look to the practice reveals how commissions have interpreted such a mandate in different ways.

In general, these inquiries have exercised a high level of caution in identifying and displaying information about those responsible for grave violations. This can be linked to the absence of due process and adversarial procedure guarantees that is inherent to the work and procedure of fact-finding bodies. For example, the Commission of Inquiry on Darfur justified its decision not to publicly reveal the names of alleged perpetrators on three main grounds. First, the need to safeguard elementary principles of due process; second, the fact that the Commission was not vested with any prosecutorial or investigative power; third, the need to protect witnesses.[606] In sum, the Commission was of the opinion that

603 Ibid.
604 Ibid para. 1534.
605 2nd Report of the detailed findings of the commission of inquiry on Eritrea (n 315) paras. 273-280.
606 Report of the International Commission of Inquiry on Darfur (n 211) paras. 526-529.

> 'the information it has gathered would be misused if names were to be published, as this could lead to premature judgements about criminal guilt that would not only be unfair to the suspect, but would also jeopardize the entire process undertaken to fight impunity'.[607]

So far, thirteen commissions have been expressly mandated to name individuals responsible. These include commissions established in the context of Libya, Darfur, Timor-Leste, DRC, Guinea, Kyrgyzstan, Gaza, Bahrain, Cote d'Ivoire, Syria, North Korea, CAR, and Burundi.

Commissions have reacted to these instructions in different ways. In certain occasions, such as in the case of the inquiries in Libya and in the 2014 Gaza Conflict, they have declined to name individuals. While in the Libya case the Commission cited time constraints and the difficult conditions under which it operated as justification, no reason has been provided by the Commission of Inquiry on Gaza.[608]

Other investigations – such as for example in the cases of Darfur, North Korea, Syria and Cote d'Ivoire – have identified individuals but refused to publish their names. They have preferred to transmit sealed lists of perpetrators to their mandating organs within the United Nations.

Only two commissions – the Commission of Inquiry on Guinea and the 2006 Commission of Inquiry on Timor-Leste – decided to publicly reveal the names of alleged perpetrators in their reports, which in the case of Guinea included the Head of State and high-level governmental officials. It should be noted how in the context of the Timor-Leste investigation, the Timor-Leste Government had specifically requested the Commission to reach such findings.[609]

While inquiries have rarely named individuals, their findings have more often pointed towards the responsibility of specific actors, groups or organs. Commissions have in this way refrained from reaching findings on specific persons in the absence of adequate due process guarantees but, at the same time, have grouped together useful information on the responsibility of specific groups and institutional actors that may help in narrowing down the scope of investigation and consequently facilitate future criminal prosecutions.

For example, in contexts such as Kyrgyzstan, Cote d'Ivoire, Guinea, Darfur, Timor-Leste, North Korea and Eritrea, international investigations have identified and expressly named paramilitary groups or state organs as allegedly responsible for the violations perpetrated. While in the case of Guinea and Darfur the inquiries have combined findings on individual responsibility with those on groups, the Commission of Inquiry on Kyrgyzstan did not identify any individual but expressly referred to the responsibility of members of the

607 Ibid para. 528.
608 Report of the International Commission of Inquiry into Libya (n 202) para. 236.
609 Grace (n 195) 34.

army, police and non-state groups for the commission of criminal acts, while also analysing the institutional and political responsibility of certain governmental actors.[610] Similarly, the 2006 Commission of Inquiry on Timor-Leste interpreted its mandate 'to clarify responsibility' in a way that encompassed both criminal and political/institutional responsibility at organs level.[611]

On the same line, the Commission of Inquiry on North Korea noted, with regard to a number of policies, how these had been decided at Supreme Leader level and could not be implemented without the Supreme Leader's approval.[612] Furthermore, the report determined that among the main perpetrators were officials of the State Security Department, the Ministry of People's Security, the Korean People's Army, the Office of the Public Prosecutor, the judiciary and the Workers' Party of Korea, who are acting under the effective control of the central organs of the Workers' Party of Korea, the National Defence Commission and the Supreme Leader of the Democratic People's Republic of Korea.[613] Particularly telling are also the findings included in the reports of the Commission of Inquiry on Eritrea. Its first report expressly listed among perpetrators the Eritrean Defence Forces (in particular the Eritrean Army); the National Security Office; the Eritrean Police Forces; the Ministry of Information; the Ministry of Justice; the Ministry of Defence; the People's Front for Democracy and Justice; the Office of the President; and the President.[614] The second report contained an entire section on institutional responsibility, highlighting in particular the role played by the informal inner circle around the Eritrean Presidency, including the specific position of the army and the blurred relationship between the Government and the People's Front for Democracy and Justice.[615]

Hence, the possibility for commissions of inquiry to focus on groups/organs and on the responsibility at political/institutional (rather than individual) level may add new value to the work of these bodies, particularly given that an actor can still be held accountable for its political and institutional failures even in those situations where proving criminal liability becomes arduous. Such assessment may bear significant implications, particularly taking into account that the objectives of modern fact-finding exercises encompass not only holding individuals accountable but also stimulating international tailored responses in spite of political and institutional failures at domestic level. In

610 Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010 (January 2011) paras. 367-400. See also Grace (n 195) 37.

611 Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (n 274) paras. 4, 11.

612 Report of the Commission of Inquiry on the situation of human rights in North Korea (n 273) para. 67.

613 Ibid para. 24.

614 Report of the commission of inquiry on Eritrea (n 273) para. 23.

615 2nd Report of the detailed findings of the commission of inquiry on Eritrea (n 315) paras. 326-330.

this regard, it is unfortunate that so far the analysis on institutional and political responsibilities has received only marginal attention in the practice of international inquiries and has been significantly underestimated in the work of experts and practitioners.[616]

2.4.6.6 Use of international criminal law by commissions of inquiry: main objectives

2.4.6.6.1 Objective One: provoking action

In conclusion, it is possible to identify two main purposes behind the use of international criminal law by inquiry mechanisms. The first one relates to the activation of the international response through the exercise of denouncing, condemning and provoking functions.[617] As it has been described above, this use of ICL is indeed more 'political' as it refers to the commissions' ability, through their findings and recommendations, to solicit stakeholders' responses and direct them to tackle impunity for international crimes. In particular, according to van den Herik:

> 'the use of international criminal law serves accountability purposes, but perhaps even more importantly, it evidences the quest to evoke external action. The doctrine of R2P has articulated a moral and political responsibility for the international community and more specifically the Security Council to act when international crimes are being committed and characterizing acts as international crimes also assists in bringing a situation within the attention of the International Criminal Court'.[618]

This 'provoking' function has thus been highlighted as a distinctive feature of the latest generation of commissions of inquiry, particularly those created within the UN Human Rights Council's framework. To say it again with the words of van den Herik, 'human rights inquiries are used as advocacy tools with the main agenda being to induce compliance or alternatively to provoke external action that will halt on-going human rights violation'.[619] Indeed, such evolution from their original and purely fact-finding role may trigger the question of whether it is still possible to label them as 'commissions of inquiry'. This issue merits further reflection and will be dealt more in depth in the final Chapter.

2.4.6.6.2 Objective Two: contributing to the work of international justice mechanisms

The second purpose behind the use of international criminal law by international inquiries is more technical and relates to the value ascribed to their findings. On this point, a number of questions should be posed. In particular,

616 Grace (n 195) 37.
617 Van den Herik (n 14) 536-537.
618 Ibid 533.
619 Ibid 527.

what is the role to be attributed to commissions of inquiry's findings in the course of criminal proceedings? Can such findings be used for the purpose of criminal investigations and how? Is there room for a better coordination between commissions of inquiry and international tribunals?

In this regard, the practice of commissions of inquiry has provided mixed responses. It is undeniable that commissions of inquiry have on many occasions facilitated the work of international criminal tribunals. Looking at their practice, commissions have created databases to store evidence and incidents that have been (like in the case of former Yugoslavia) – or may be like in the case of North Korea – significantly relied upon by criminal prosecutors. As the landmark case of Darfur has shown, commissions have also been able to set up lists of prima facie perpetrators that can help criminal prosecutors narrowing the focus in the selection of specific criminal cases where the evidence available appear more robust.

Furthermore, inquiries' assessments may be extremely valuable in identifying contextual elements of the crimes. In this regard, the analysis developed by the Yugoslavia Commission of Experts on the existence of an international or non international armed conflict or the reasoning of the inquiries in Guinea and Syria on the fulfilment of the so called 'state policy requirement' for crimes against humanity in relation to a circumscribed incident or the conduct of non-state actors stand as remarkable examples.

Finally, commissions can support the work of judicial bodies by providing preliminary assessments of whether certain crimes have been committed (like in relation to the issue of whether the crime of genocide had been committed in the contexts of Darfur or Central African Republic) or by offering their interpretation on questions of law. They may also help the progressive development of international criminal law, in particular by linking certain patterns, as it has been the case for the studies of the Yugoslavia Commission on ethnic cleansing and rape, with the commission of international crimes.

The contribution of commission of inquiry to the work of international criminal tribunals is thus beyond question. However, how far this contribution can be stepped up? This issue has not yet been addressed at institutional level and the practice of recent international investigations seems to go in different directions.

In particular, certain commissions have adopted a more conservative approach. For example, the Commission of Inquiry on Libya in its interim report underlined how it opted 'for a cautious approach by consistently referring to the information obtained as being distinguishable from evidence capable of being used in criminal proceedings', in this way suggesting the impracticability to resort to its findings in the course of criminal trials.[620]

Such approach appears diametrically opposed to the role as envisaged by previous commissions such as those established in relation to the conflicts in

620 Report of the International Commission of Inquiry into Libya (n 202) *Executive summary.*

former Yugoslavia and Rwanda. For example, the Commission of Experts on Rwanda noted how

> 'in accordance with the Security Council mandate, [it] plans to gather evidence and report to the Secretary-General. The primary objective of this plan of action is to produce specific evidence likely to be used for prosecution and to identify individuals responsible for having perpetrated grave violations of international humanitarian law as well as possible acts of genocide'.[621]

Other human rights inquiries have tried to go beyond the specific question of evidence and more generally conceptualise their role in relation to the whole criminal accountability process. In particular, the Commission of Inquiry on CAR viewed its work 'as a vital step towards encouraging and facilitating criminal investigations and prosecutions to be undertaken', explaining how its tasks

> 'is to marshal a reliable body of information, that is consistent with and supported by as many sources as possible, in order to provide the foundations for a full-fledged criminal investigation to be undertaken in the future by the appropriate national and/or international authorities'.[622]

Furthermore, the Commission of Inquiry on Darfur stated how it 'would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor'.[623] More comprehensively, the Commission of Inquiry on North Korea, while restating its difference from a court of law and the impossibility to make final determinations on criminal responsibility, advocated for its competence to

> 'determine whether its findings constitute reasonable grounds establishing that crimes against humanity have been committed so as to merit a criminal investigation by a competent national or international organ of justice'.[624]

This may lead to the assertion that commissions of inquiry, although non adjudicatory in their nature, may act as quasi-judicial filters or pre-judicial bodies.[625] However, such labels can be misleading in adding unnecessary confusion to a debate that mainly relays on the developing practice in the absence of a solid institutional background. There is no reference to categories such as 'pre-judicial body' in the law and practice of international organisa-

621 Report of the Commission of Experts on Rwanda (n 375) Appendix V, para. 1.
622 Report of the International Commission of Inquiry on the Central African Republic (n 294) paras. 16, 24.
623 Report of the International Commission of Inquiry on Darfur (n 211) para. 15.
624 Report of the Commission of Inquiry on the situation of human rights in North Korea (n 273) para. 74.
625 Frulli (n 178) 1330.

tions. While it is fair (and even necessary) to assess whether modern inquiry commissions have gone beyond their fact-finding role, this should not necessarily be done through the creation of brand-new categories in the absence of a consolidated institutional regime.

On the contrary, an approach that, by looking at the practice, simply assesses the contribution and role possibly played by commissions of inquiry in advancing criminal accountability should be preferred, at least for the time being. Hence, once accepted the contribution of commissions of inquiry to the work of criminal justice mechanisms, it remains to analyse more specifically which value and weight their findings may bear in the course of criminal proceedings.

2.4.6.7 Contribution of commissions of inquiry to the work of international tribunals: an assessment of the practice

As already explained in the section dedicated to the standard of proof, international criminal proceedings are composed by a variety of different stages, from preliminary examination to the trial and appeal procedures. In this regard Stahn and Jacobs have analysed the different value and contribution that inquiries' findings can play in the various phases of such process.[626] It emerges, as a general trend, that fact-finding bodies can exercise a more influential role in the preliminary examination and investigation stages (which are the preliminary phases of involvement of international criminal justice mechanisms) than during pre-trial and trial proceedings. This indeed should be considered as a general remark that does not capture always the full picture. Moreover, it has been highlighted how their findings mostly benefit the Prosecutor, while their incidence on the work of judges and especially of the defence appears more marginal.[627]

2.4.6.7.1 Preliminary examination phase

In the phase of preliminary examinations, where the standard of proof required is lower and the reliance on third party information bears considerable weight, the contribution of international commissions can prove extremely useful, especially in providing fresh evidence and direct testimonies in contexts where

626 Stahn and Jacobs (n 316).

627 Ibid 12-13. In particular, the possibility for the findings of international inquiries to contribute to the work of defense teams in criminal trials has been so far largely underestimated, including by commissioners themselves. In this regard, with regard to the experience of the 2011 Commission of Inquiry on Libya, Heller pointed out the Commission's lack of compliance with a request from the ICC's Office of Public Counsel for the Defense in the *Saif Qadhafi* case to provide exculpatory evidence in its possession. According to the author such failure appears 'inconsistent with the Commission's claim to have functioned independently of the [Office of the Prosecutor]'. Heller (n 206) 8.

international prosecutors are not immediately granted access to the affected territory.

Furthermore, the investigation of the Prosecutor at preliminary examination stage does not focus on the identification of a specific individual case, something that reduces the concerns for the defensive rights of the individual(s) involved.[628] In fact, the Prosecutor is expected to acquire information that can help it assessing whether there are reasonable basis for finding that international crimes have been committed. As it has been emphasized, 'the idea is to evaluate more generally if a situation deserves closer attention. Human rights fact finding reports are useful in this context'.[629]

Unsurprisingly, if one takes a close look at the practice of the ICTY and the ICC, human rights documentation and, in particular, fact-finding missions' reports have played a significant contribution in this phase. With particular reference to the ICC, a first remarkable example relates to the role played by the findings of the Commission of Inquiry on Darfur on the preliminary examination subsequently conducted by the Office of the Prosecutor, which, unlike the Cassese-led team, was not granted access to the territory of Sudan.

Following the same line, the investigations conducted by the HRC-mandated Fact-Finding Mission and the UNSG Panel of Inquiry on the Gaza Flotilla incident have been highly influential for the work subsequently conducted by the ICC Prosecutor on the issue. The incident was submitted to the attention of the Prosecutor on 14 May 2013 by a referral from the Union of the Comoros, State Party to the Rome Statute and registered State of the Mavi Marmara vessel involved in the incident.[630]

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628 Stahn and Jacobs (n 316) 14.

629 Ibid.

630 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation' (14 May 2013), http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf accessed on 8 December 2016. Based on the Comoros Referral the ICC Prosecutor issued, on 6 November 2014, a statement on the conclusion of its preliminary examination, in which it determined that the legal requirements under the Rome Statute to open an investigation had not been met. In particular, Prosecutor Bensouda, although concluding how there was a reasonable basis to believe that war crimes within the jurisdiction of the ICC had been committed on board of the Mavi Marmara, noted that 'the potential case(s) likely arising from an investigation into this incident would not be of sufficient gravity to justify further action by the ICC', given that gravity is an explicit criteria set by the Rome Statute for the opening of an investigation. After an Application for Review of the Prosecutor's decision was filed on behalf of the Republic of Comoros on 29 January 2015, on 16 July 2015 the ICC Pre-Trial Chamber requested the Prosecutor to reconsider its decision due to a number of material errors in her determination of the gravity requirement. See 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: 'Rome Statute legal requirements have not been met'' (6 November 2014), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-06-11-2014.aspx accessed on 8 December 2016; ICC, 'Situation on registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report' (6 November 2014); 'Application for Review

In this regard, it is extremely relevant to note how both the Comoros referral and the Prosecutor's subsequent decision relied significantly upon the findings of the UNSG Panel of Inquiry and of the HRC Fact-Finding Mission.[631] With specific regard to the work of the HRC fact-Finding Mission, its findings were used extensively in the Comoros referral as the principal source in order to provide an account of the events prior, during and after the seizure of the Mavi Maramara by the IDF.[632] In relation to those findings concerning individual criminal responsibility, the HRC Mission's determinations on the characterization of certain acts as war crimes were also duly taken into consideration, although the referral included a broader list of criminal offences including both war crimes and crimes against humanity.[633]

Also in relation to the 'Article 53(1) Report' submitted by the ICC Prosecutor in response to the referral, the Mission's report provided a precious contribution to those sections dedicated to the factual determinations and legal analysis. In particular, such findings have been used by the Prosecutor in its assessment concerning the legality of the Gaza blockade, although it did not reach a preliminary conclusion on the matter.[634] More importantly, the Fact-finding Mission's analysis played a prominent role in the Prosecutor's assessment on whether specific war crimes had been perpetrated during and after the seizure of the flotilla by the Israeli forces.[635] In this regard, it should be noted that, notwithstanding its final decision not to proceed with an investigation given the absence of the gravity requirement, the Prosecutor did partially endorse the position expressed by the Fact-Finding Mission on the fact that certain war crimes had probably been committed.[636]

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pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation on Registered Vessels of the Union of the Comoros, the Ellenic Republic of Greece and the Kingdom of Cambodia', Case No. ICC 01/13 (29 January 2015); Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (Pre-Trial Chamber I) Case No. ICC 01/13 (16 July 2015).

631 Referral on Gaza Freedom Flotilla situation (n 630) paras. 5, 25, 29, 30; ICC Prosecutor, 'Situation of Comoros – Article 53(1) Report' (n 630) paras. 7, 31, 38, 39-42, 44, 67, 75, 108, 123.

632 In particular, the Referral upheld the Mission's findings on the use of live ammunition and lethal force by Israeli soldiers. It also endorsed the Mission's view that the treatment of those passengers detained after the seizure amounted to torture and inhuman treatment according to international human rights standards. Furthermore, the Mission's findings were used to support the argument that the actions carried out by the IDF were undertaken as part of a deliberate plan and policy to resort to violence in order to dissuade the flotilla to reach Gaza, in this way justifying the 'gravity' requirement. Referral on Gaza Freedom Flotilla situation (n 630) paras. 25, 38-40, 42-45, 48.

633 Ibid paras. 58-59, 60-65.

634 ICC Prosecutor, 'Situation of Comoros – Article 53(1) Report' (n 630) paras. 30, 31.

635 Ibid paras. 42, 66, 75, 108, 121.

636 Ibid paras. 61, 72.

Another important example of the influence played by fact-finding bodies on the ICC preliminary examinations relates to Georgia. The situation, with regard to alleged crimes committed during the conflict with the Russian Federation over South Ossetia between 1 July and 10 October 2008, has been under the radar of the ICC since 14 August 2008 when a preliminary examination was opened. On 16 October 2015 the Prosecutor requested Pre-Trial Chamber I to open a full investigation. The request was granted on 27 January 2016.

The Prosecutor's request under Article 15 of the Statute has heavily relied upon the findings produced by the EU-mandated International Fact-Finding Mission (IIFFMCG or 'Tagliavini Mission').

In particular, the analysis conducted by the Tagliavini Mission has played an important role in supporting the Prosecutor's assertion that the Russian Federation was exercising overall effecting control over South Ossetia's military and civil authorities at the time of the conflict. In this regard, the Prosecutor noted how 'the IIFFMCG concluded that Russia supported South Ossetian forces in numerous ways, including by training, arming and equipping them' and, on such basis, determined that

> 'the information available provides a reasonable basis to believe that at all times and locations relevant to this Application the Russian armed forces exercised overall control over South Ossetian forces'.[637]

The evidence collected by the Tagliavini Mission has also significantly influenced the Prosecutor's analysis on the alleged responsibility of Russian peacekeepers for the crimes committed by South Ossetia forces. In particular, the request makes reference to the fact that:

> 'the IIFFMCG conducted interviews that also provided different accounts "ranging from active intervention to stop violations, to passive observation, and even involvement". The IIFFMCG stated that while it appeared difficult to conclude that Russian forces systematically participated in or tolerated the conduct of South Ossetian forces, there seemed to be "credible and converging reports" indicating that in a number of instances Russian forces did not act to prevent or stop South Ossetian forces from committing crimes'.[638]

It is also important to highlight the IIFFMCG's contribution to the Prosecutor's assessment on the use of certain weapons, such as Grad MLRS, resulting in indiscriminate attacks against civilians and on the fulfilment of contextual elements for the commission of crimes against humanity.[639] In particular,

637 ICC, 'Request for authorization of an investigation pursuant to article 15' Case No. ICC-01/15 (17 November 2015) paras. 99-100, 103.
638 Ibid para. 139.
639 Ibid paras. 196, 224-225, 254.

the Prosecutor's request heavily referred to the findings of the Tagliavini Mission in order to determine the multiple character of the commission of the crimes and the existence of a state-organised policy behind the perpetration of certain offences, such as forcible transfer and persecution, committed on ethnic grounds and labelled as crimes against humanity in the Prosecutor's application.[640]

Following the same line, in the case of Cote d'Ivoire, the analysis contained in the ICC Prosecutor's Article 15 request for an investigation and the Pre-Trial Chamber's subsequent authorisation have significantly driven inspiration from the findings of the HRC-mandated commission of inquiry.[641] In this regard, the fact that the Prosecutor's request and the report of the HRC-mandated inquiry have been published almost simultaneously may suggest that a certain degree of coordination between the two bodies might have been put in place, given the numerous references to the findings of the Commission in the Prosecutor's request.

Conversely, other inquiries' experiences had marginal impact on the preliminary work of the ICC Prosecutor. In this regard, the Libya situation is often evoked as an example of lack of coordination between the work of fact-finding bodies and international criminal justice mechanisms, in light of the fact that the ICC preliminary examination was concluded before the submission by the UN Commission of Inquiry of its interim report.[642] Similarly, the Report of the UN Commission of Inquiry on CAR was published two months after the opening of an investigation by the Office of the Prosecutor and could not significantly contribute to the Prosecutor's analysis. Quite the contrary, in many instances it has been the Prosecutor's assessment that has influenced the final findings of the UNSC-mandated inquiry, particularly in relation to the question around the existence of an armed conflict and the commission of genocide.[643]

2.4.6.7.2 Investigation phase

Moving to the investigation stage, certain authors have emphasized the need to distinguish between investigations over a situation and over a specific individual case.[644] In the first case, the role of fact-finding missions' reports remains extremely relevant and reference to their findings may abound, as this phase can be hardly distinguished from the preliminary examination. In

640 Ibid paras. 265-266.

641 ICC, 'Request for authorization of an investigation pursuant to article 15' Case No. ICC-02/11 (23 June 2011) paras. 28, 63, 70, 71, 82; ICC, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire' (Pre-Trial Chamber III) Case No. ICC-02/11 (2 Ocotber 2011) paras. 37, 92, 97, 123, 124, 142.

642 Frulli (n 178) 1333.

643 Report of the International Commission of Inquiry on the Central African Republic (n 294) paras. 89-93, 461.

644 Stahn and Jacobs (n 316) 14.

the second case, an indiscriminate reference to commissions of inquiry' findings may become more problematic given the increased role played by the defence in light of the narrowing of the investigation to a specific individual.

Referring again to the situation in Darfur, the report of the UN Commission of Inquiry played an important role as source of information also in the course of the ICC investigation following the closing of the preliminary examination. In particular, both the ICC Prosecutor and Pre-Trial Chamber extensively referred to the Commission's factual and legal analysis in their requests for and decisions issuing warrants of arrest, this despite reaching opposite findings on certain issues, particularly in relation to the question on whether genocide had been perpetrated.[645]

In this regard, it should be noted that, while investigations over specific cases may entail more restrain in referring to the evidence collected by fact-finding bodies, two elements should be taken into account. The first one is that commissions of inquiry have been increasingly empowered with the task of identifying individuals responsible for international crimes. It means that they are required to collect evidence that can serve such purpose, at least at a *prima facie* level. The second one is that the standard of proof that has been consistently applied by commissions (the 'reasonable grounds' formula) resembles the one required for the Prosecutor to request an arrest warrant to the ICC Pre-Trial Chamber. These two elements may suggest that findings from human rights inquiries might still play a substantive role also in the formal investigation stage. However, only future practice will help clearing the grounds, depending on the way inquiries will carry out such a task and bearing in mind that the Prosecutor and Pre-Trial Chamber maintain full discretion on the way commissions' findings on individual suspects may be used and interpreted.

2.4.6.7.3 Confirmation of charges and trial stages

Shifting to more advanced stages of the criminal procedure, the standard of proof as well as the adversarial nature of the procedure and the powers granted to the defence inevitably increase. These are factors that render the reliance on the work of commissions of inquiry necessarily more difficult. For example, looking at the confirmation of the charges phase, the Prosecutor case against Mbarushimana failed the Pre-Trial Chamber test precisely because of the abuse of UN and civil society reports in the evidence presented.[646] In this

645 ICC, *Prosecutor v Harun and Ali Khusayb*, 'Prosecutor Application under Article 58(7)' Case No. ICC-02/05 (27 February 2007); ICC, *Prosecutor v Bashir*, 'Prosecutor Application under Article 58(7)' Case No. ICC-02/05-157-AnxA (14 July 2008) paras. 52, 68, 79, 88; ICC, *Prosecutor v Bashir*, (Pre-Trial Chamber I) Case No. ICC-02/05-01/09 (4 March 2009) paras. 63, 64, 68, 76, 83, 85, 88, 97, 136, 215.

646 ICC, *Prosecutor v. Mbarushimana*, (Pre-Trial Chamber I, Decision on the Confirmation of Charges) Case No. ICC-01/04-01/10- 465-Red (16 December 2011) paras. 113–239; See also Stahn and Jacobs (n 316) 19.

regard, the Pre-Trial Chamber in the Gbagbo case made it clear how such reports cannot be the 'fruits of a full and proper investigation by the Prosecutor' according to Article 54 of the ICC Statute.[647]

Indeed, such principle applies even more to the trial stage, where the standard of proof required is the responsibility of the defendant beyond reasonable doubt. However, this does not mean that commissions of inquiry's findings cannot be referred at all during trial, particularly if they dwell on legal issues rather than on factual evidence. As an example, the ICTY Trial Chambers in the *Jelisic* and *Tolimir* decisions expressly endorsed the view adopted by the Commission of Experts about the fact that genocide could be perpetrated by the mere combination of measures of forcible transfer of a targeted group and elimination of its total leadership (including political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others) regardless of the actual numbers killed.[648]

2.4.6.7.4 Conclusions

In sum, while the influence played by commissions of inquiry on the work if international tribunals is undeniable, a question emerges concerning whether such forms of interaction should be further institutionalised or, at least, rationalised and conceptualised. While we will devote more attention to this issue in the final Chapter, it is now important to underline how, in the absence of a formal and institutionalised framework of coordination, the experience of interaction between fact-finding bodies and criminal justice mechanisms has so far provided mixed responses. While in contexts such as former Yugoslavia, Darfur, Georgia and Cote d'Ivoire the interaction has indeed been fruitful with the criminal justice machinery mostly benefiting from the work of fact-finding bodies, the case of Rwanda appears more contentious while the Libya process can even be considered as an example indicative of what are the risks behind the lack of coordination between the two spheres.[649]

This issue has also stimulated a fruitful debate among scholars. For example, Frulli has advanced the need to ensure a more clear-cut separation of tasks among criminal prosecutors and commissions of inquiry investigators through an organised system of cooperation among them.[650] Other authors have instead warned against an unrestrained enthusiasm on the impact of fact-finding bodies on the work of criminal tribunals. In particular they have emphasized how it would be

647 ICC, *Prosecutor v. Gbagbo,* (Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) Case No. ICC-02/11-01/11-432 (3 June 2013) para. 35. See also Stahn and Jacobs (n 316) 19.

648 ICTY, *Prosecutor v. Jelisic*, Case No. IT-95-10-T (Judgment, 14 December 1999) para. 82; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T (Judgment, 12 December 2012) paras. 777, 781.

649 Stahn and Jacobs (n 316) 9-10.

650 Frulli (n 178) 1333.

'misleading to frame the link between investigative fact-finding and international criminal justice in terms of a continuum, in which one element builds naturally on the other. There are differences and structural tensions that challenge the idea of a fluid 'division of labor'.[651]

651 Stahn and Jacobs (n 316) 8.

3 Commissions of Inquiry at the Current Stage
Impact and Way Ahead

3.1 Impact of Commissions of Inquiry on the Response by the International Community

3.1.1 Introduction

Since their first conceptualization in the Hague Conventions, one of the main purposes of international commissions of inquiry has been to provide states and competent bodies within the international community with the relevant facts and analysis in order to develop appropriate responses to certain situations.

Hence, the type of response provided by the international community may represent a useful indicator to evaluate the performances of international inquiries. At the same time, as we will see in the course of this paragraph, such indicator should not be overestimated.

If we look at the unfolding of the most recent human rights emergencies around the world (many of whom have been the object of ad hoc international investigations), the picture appears generally as extremely bleak. In many recent crises – such as Syria, Yemen, Iraq, Libya, South Sudan and the OPT – we have assisted not only to a constant deterioration of the situation on the ground but also the response offered by the international community has weakened and become more fragmented and selective, particularly in terms of enforcement and compliance with relevant international law norms. In this regard, a number of concerning trends should be highlighted. These include the selectivity of the UN Security Council and Human Rights Council when it comes to uphold international law standards, the political stalemate among High Contracting Parties around a possible revision of common article 1 to the Geneva Conventions that would enhance third states obligations vis-à-vis violations of the laws of war and the decision to pull out from the ICC expressed by an increasing number of African states.[652] Should these trends

652 On the double-standards applied by the Human Rights Council see, as an example, its inconsistent approach vis-à-vis the Yemen crises particularly in relation to a Dutch proposal of dispatching an international inquiry (n 207). On the selectivity of the UN Security Council in applying and enforcing international law see, as an example, its systematic recourse to the veto power to block any attempt to refer the situation in Syria to the ICC. UNSC, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security

be taken into account in the assessment on the impact of commissions of inquiry?

The answer to such question deserves further reflection. Firstly, it would be unfair to ascribe responsibility solely to international inquiries for the weaknesses of the international community's response to current atrocities. The lack of enforcement or selective enforcement of international law has much deeper roots than the positive or negative performance of a fact-finding body. In particular, as it will be analysed in the course of this Chapter, commissions of inquiry have succeeded the most in those cases where they have been granted adequate political and technical support from key decisions makers at regional and international level.

Secondly, similarly to the assessment undertaken in Chapter 2 with regard to parties' cooperation, it would be naïve to reach 'black and white' conclusions when it comes to measure the impact of commissions of inquiry on the response to human rights emergencies. In order to properly measure the role played by these commissions, it is thus paramount to assess the different nuances and variables emerging from the practice.

3.1.2 Perspectives from which to assess impact

However, before looking at the practice, it may be useful to identify two perspectives (or angles) from which to measure the impact of the work conducted by international inquiries.

The first perspective (perspective one) relates to their 'provoking' and 'alerting' role. From this angle, commissions of inquiry can be evaluated based on the way they have influenced the response of domestic institution and the international community by triggering and soliciting specific reactions. In this manner commissions of inquiry are assessed in their more 'political' and 'activist' dimension. As it has been emphasized in the course of this dissertation, this dimension has not always been inherent to the work of international inquiries and only recently it has represented a distinctive feature in their activities.

Council from Adopting Draft Resolution', SC/11407 (22 May 2014). See also the numerous failures by the Security Council to condemn illegal Israeli settlements. 'U.S. Veto Thwarts UN Resolution Condemning Settlements' *Haaretz* (18 February 2011) http://www.haaretz.com/israel-news/u-s-veto-thwarts-un-resolution-condemning-settlements-1.344333 accessed on 8 December 2016. On the decisions to pull out from the ICC by African states it is important to highlight the steps taken by Burundi, South Africa and Gambia. 'Burundi to leave the ICC six months after probe announced' *BBC News* (7 October 2016) http://www.bbc.com/news/world-africa-37585159 accessed on 8 December 2016; 'South Africa to Quit International Criminal Court' *Al Jazeera* (21 October 2016) http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html accessed on 8 December 2016; 'The Gambia joins African queue to leave ICC' *BBC News* (26 October 2016) http://www.bbc.com/news/world-africa-37771592 accessed on 8 December 2016.

The second perspective (perspective two) pertains to the inquiries' role as law-applying authorities. This angle enables us to assess how far their factual findings and legal analysis have been used and reproduced in subsequent determinations by legal bodies and judicial actors subsequently involved in the response by the international community.

Thus, with the important caveat that no strict scientific parameter can be deployed to describe a phenomenon such as the impact of inquiries in their practice, the following analysis will look comprehensively at both these perspectives in order to shed more clarity on the matter.

3.1.3 Impact of commissions of inquiry: an assessment of the practice

3.1.3.1 Two landmark experiences: the Commission of Experts on Former Yugoslavia and the Commission of Inquiry on Darfur

Looking at the most recent practice, two international commissions of inquiry stand out as milestones in the history of international human rights fact-finding. The first one is the Commission of Experts on the Former Yugoslavia, the second one the Commission of Inquiry on Darfur.

The Yugoslavia Commission can be considered a success story looking at both the perspectives outlined above. It has propelled a significant reaction by the international community through the establishment of the ICTY, it has actively supported future criminal prosecutions through the collection of evidence and the creation of a comprehensive database and it has even contributed to the progressive development of international law through its work and studies on a number of specific patterns. What appears more surprising is that all such positive outcomes emerged from an experience that can be considered as pioneering in inaugurating the era of modern human rights inquiries and, as such, was not directly benefiting from any previous lessons learnt.

It has been argued that the key for the success of the Yugoslavia Commission has been the support and cooperation that it has received from world powers. This is only partially true. Since its inception, the Commission suffered from a considerable lack of funding by the United Nations, which prompted the resignation of his Chair, Professor Kalshoven.[653] In order to overcome such deficit, a Trust Fund was set up in March 1993 in order to receive voluntary donations. Based on such mechanism, thirteen governments decided to contribute for a total of $1,320,631. Also, private donations significantly contributed to finance specific tools, such as the creation of a database at

653 Michael P. Scharf, 'Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability' (2006) Case School of Law – Occasional Paper, 8; Cherif Bassiouni, The United Nations Commission of Experts (n 84) 801.

DePaul's University International Human Rights Law Institute, whose total cost exceeded one million dollars.[654]

Hence, the lack of funding from the UN was compensated by the strong support provided by governments, in particular the United States. Such support was not only expressed in financial terms but also through political and technical means. In terms of political backing, the Commission benefited from the political climate existing in the aftermath of the Cold War, with a United States' led Security Council that entrusted it with a strong mandate.[655] With regard to technical support and cooperation, the governments of Austria, Sweden and Germany provided government lawyers and police investigators while a number of different countries prepared written submissions including interviews with victims and witnesses.[656] The Commission benefited also from the cooperation of a wide range of countries, including the newly born Croatia, Bosnia Herzegovina and Slovenia that were directly involved in the conflict.

When it comes to assessing the impact of the Yugoslavia Commission, a first indicator of its success has been the actions undertaken by the international community in response (perspective one). After the publication of the Commission's interim report that recommended the setting up of an ad hoc international tribunal to try the most serious offences, the UNSC, acting pursuant to Resolution 808 (1993), took a first significant step in establishing the ICTY. According to Scharf, the Commission preliminary findings played a crucial role in highlighting how the particular circumstances and gravity of the crimes committed in the former Yugoslavia required the formation of an ad hoc international criminal tribunal rather than a truth and reconciliation commission or the activation of domestic mechanisms.[657] In this regard, Prof. Bassiouni noted how the Council referred to the conclusions of the Commission's interim report that the establishment of an ad hoc tribunal would be 'consistent with the direction of its work'.[658] However, this author also acknowledged how it was not possible to assess whether the Commission's work and recommendations played a decisive role or whether the Council merely referred to it in order to support a decision that was already in the mind of some of its permanent members.[659] In any case, the ICTY was established and its Statute reflected the same legal frameworks that had been identified in the Commission's interim report, including the prohibition against

654 Bassiouni, The United Nations Commission of Experts (n 84) 796.
655 Ibid 790. In particular, Prof. Bassiouni noted how the Commission 'received its mandate from what appeared to be a unified Security Council. Thus, its legal and moral authority was unprecedented'.
656 Bassiouni, The United Nations Commission of Experts (n 84) 799.
657 Scharf (n 653) 12-13.
658 Bassiouni, The United Nations Commission of Experts (n 84) 791; UNSC Res. 808 (1993).
659 Ibid 790, 791.

the crime of genocide, crime against humanity and grave breaches of the Geneva Conventions and other war crimes.

In terms of further responses by the international community, certain scholars have highlighted how the creation of the Tribunal and the findings of the Commission on the links between Belgrade and the crimes perpetrated by the Srpska Republic in Bosnia Herzegovina

> 'led inextricably to the issuance of indictments, which in turn contributed to the downfall of Slobodan Milosevic, ultimately resulting in his arrest and transfer to The Hague for trial'.[660]

The role played by international criminal justice in the former Yugoslavia conflict and its contribution to the causes of peace and reconciliation in the Balkans is the object of a complex and on-going debate among scholars. Hence, it would be hasty to reach clear-cut conclusions in this sense. Indeed, it can be alleged that the work and findings of the Yugoslavia Commission have clearly paved the way for the adoption of more concrete steps by the international community that – through the establishment of the ICTY and all the consequences that this led to – have significantly affected the course of the conflict.

Looking from the second perspective, the Yugoslavia Commission has also heavily contributed through its investigations and findings to the work of the ICTY. While the Commission was not initially required to collect evidence that could serve the purpose of criminal proceedings, after the establishment of the ad hoc tribunal the Bassiouni-led team implied that this was the case. In particular, the UNSC required the Commission to continue its work 'on an urgent basis' pending the appointment of a Prosecutor.[661]

Thus, resolutions 808 and 827 established a certain form of connection between the two organs despite no institutional link was ever envisaged.[662] In addition, delays in the appointment of the Prosecutor resulted in the Commission terminating its work before the Prosecutor actually took office. However, after the completion of its work the Commission transmitted all its evidence and material, including the database, to the Office of the Prosecutor ensuring in this way a prompt and swift transition. In this regard, Bassiouni has emphasized how

> 'the fact that the Tribunal's Office of the Prosecutor was able to produce over two-dozen indictments within a few months of the submission of our report indicates how useful the material turned out to be'.[663]

660 Scharf (n 653) 13.
661 UNSC Res. 827 (1993).
662 Bassiouni, The United Nations Commission of Experts (n 84) 792.
663 Scharf (n 653) 10.

In particular, the database included 64,000 pages of documentation of all kind and, although many of the sources could not be used as evidence in criminal trials, it underwent a process of refinement that tremendously facilitated the ICTY Prosecutor in its screening process.[664] Moreover, the 35 field missions, on-site investigations and studies on specific focus areas undertaken by the team led by Prof. Bassiouni significantly affected the direction given to the ICTY investigations.

Certain authors have pointed out how the ICTY jurisprudence partly endorsed and partly departed from the legal findings reached by the Commission.[665] It has also been argued that the Commission proved sometimes to be more conservative than the ad hoc tribunal in analysing a number of specific trends.[666] However, it is undeniable that the experience of the Yugoslavia Commission resulted in a significant contribution to the development of international law, particularly in relation to policies associated with the commission of international crimes. The innovative work and analysis conducted by the Commission on practices such as 'ethnic cleansing' and 'rape' have already been assessed in the previous Chapter. At the present stage it is just important to stress how such findings have not only benefited the jurisprudence of the ICTY but have also influenced the course of other international justice mechanisms and subsequent human rights fact-finding experiences.

The final report of the Commission was welcomed by UNSG Boutros Ghali who emphasized how

> 'the material and information collected and recorded in the database, now transferred to the Tribunal, will not only assist in the prosecution of persons responsible for serious violations of international humanitarian law, but will constitute a permanent documentary record of the crimes committed in the former Yugoslavia, and thus remain the memorial for the hundreds of thousands of its innocent victims'.[667]

664 Bassiouni, The United Nations Commission of Experts (n 84) 796.

665 Darcy (n 44) 18.

666 Ibid 19-20. In particular, the author refers to the arguments – included in the Commission's report and subsequently refuted by the ICTY – on the necessary nexus between crimes against humanity and armed conflicts and on the applicability of the war crimes paradigm solely to international armed conflicts.

667 Cherif Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' (1996) Occasional Paper No. 2 – International Human Rights Law Institute, DePaul University College of Law, 60-61.

As it has been pointed out by Frulli,

> '[t]he Darfur Commission marks another watershed for prosecution oriented fact-finding and it could represent a model for drafting guidelines and regulations to be adopted for analogous cases in the future'.[668]

In particular, contrary to the Yugoslavia Commission, the team led by Prof. Cassese operated in a more settled environment in terms of the possibility to resort to lessons learnt from previous experiences of fact-finding and to activate pre-existing accountability mechanisms.

The Commission was established by the UNSG pursuant to UNSC Resolution 1564 (2004) with the mandate to

> 'investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable'.[669]

According to certain authors, the 'unique' character of the mandate played an important part in the Commission's success allowing it to tailor its analysis to reach specific conclusions and recommendations.[670] In addition, the mission led by Prof. Cassese received a satisfactory degree of cooperation from the Government of Sudan and was granted access to the whole Sudanese territory, including Darfur. It held consultations in Geneva and visited Sudan two times, meeting with governmental representatives, and a number of other local and international stakeholders. Hence, notwithstanding the time constraints imposed by its mandate, the Commission was able to present at the end of its three-month investigations a comprehensive and elaborated report to the Secretary General.

The UNSC-mandated inquiry represented the culmination of a scaling-up investigative and monitoring efforts by the international community in relation to the situation in Darfur. It was established way after the international community's preliminary involvement in the conflict, which erupted in 2003. In particular, the Security Council's decision to set up the Commission was based on the failure by the Sudanese Government to comply with its commitments to disarm the Janjaweed and to bring those leaders responsible for grave violations to justice. It is also important to highlight how just before the Security Council was to discuss the findings contained in the Commission's report, it passed Resolution 1591 setting up a committee mandated to list

668 Frulli (n 178) 1330.

669 UNSC Res. 1564 (2004) para. 12.

670 Philip Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations' (2005) 3 *Journal of International Criminal Justice* 602.

specific individuals responsible for human rights violations and threats to the peace to be subjected to travel bans and the freezing of assets.[671]

In addition, the creation of the team led by Professor Cassese was preceded by a number of previous fact-finding experiences. In particular, in the space of 2004 the Commission on Human Rights appointed an independent expert to Darfur in order to examine the situation and an investigative team was set up by the UN High Commissioner for Human Rights and concluded its work with a recommendation to establish an independent international commission of inquiry.[672]

Similarly to its predecessor in former Yugoslavia, there are many reasons why the Commission of Inquiry on Darfur can be considered a success story.

The first reason is indeed its impact on the response by the international community (perspective one). One of the most important follow-up measures to the recommendations of the Darfur Commission was the decision by the UNSC through resolution 1593(2005) to refer the situation in Sudan to the ICC, using for the first time the power granted by Article 13(b) of the ICC Statute. As it has been underlined by certain experts,

> '[i]n the Darfur case, the work of the Commission had a strong impact on the referral of the situation to the ICC. The UN Security Council was convinced by the evidence presented in the report that there was indeed room for the ICC prosecutor to commence its investigation in Darfur'.[673]

Whether or not this corresponds to the truth, the UN Security Council in passing resolution 1593 expressly took note of the Commission's report.[674] It also emphasized two important conclusions reached by the Commission, particularly in terms of advancing domestic accountability efforts and providing redress for victims through states' contributions to the ICC Trust Fund for Victims.[675]

While certain passages of Resolution 1593 have raised several criticisms in terms of compliance with international law standards,[676] the historic

671 UNSC Res. 1591 (2005).
672 Alston (n 670) 602.
673 Frulli (n 178) 1331.
674 UNSC Res. 1593 (2005).
675 Ibid.
676 For some commentaries to the resolution which highlight a number of its critical aspects see Annalisa Ciampi and Luigi Condorelli, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) *Journal of International Criminal Justice* 597; Robert Cryer, 'Sudan, Resolution 1593 and International Criminal Justice' (2006) *Leiden Journal of International Law* 195; Corrina Heyder, 'The UN Security Council Referral of the Crimes in Darfur to the International Criminal Court in Light to the US Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) *Berkeley Journal of International Law* 658; Florian Aumond, '*La situation au Darfur déférée à la CPI*' (2008) *Revue générale de droit international public* 111.

significance of the first UNSC referral to the ICC and the role played by the Commission of Inquiry in such a decision cannot be underestimated. In this regard, certain commentators have highlighted how:

> '[t]he UN Security Council is an inherently political body and reliance on the work of credible, competent and independent commissions of inquiry as a basis for its decisions regarding which situations are to be further investigated and even referred to the ICC prosecutor may help the Council to fulfil the role conferred to it by the ICC Statute. Reliance on impartial and professional reports may enhance the credibility of the Security Council as a guarantor in the struggle against impunity for the most serious international crimes'.[677]

Hence, the experience of the Darfur Commission may have represented the gateway for another important role to be assigned to modern fact-finding bodies in reconciling the inherent political nature of the Security Council with its responsibility in the activation of criminal justice mechanisms.

The findings of the Commission also proved an invaluable source of information for the preliminary phases of the ICC involvement in the situation (perspective two). The Commission identified 51 alleged individuals who could be suspected of bearing criminal responsibility for the crimes committed in Darfur.[678] It transmitted the sealed list of alleged perpetrators to the UNSG with the recommendation to hand it over to a competent prosecutor. It also provided a remarkable analysis of the potential modes of criminal responsibility on which to charge those allegedly involved in the violations.[679]

As a result, the evidence gathered in Darfur by the Cassese-led Mission proved extremely relevant for the ICC Prosecutor investigative team, particularly in light of the fact that, unlike the Commission, the latter was not allowed into the territory and received no cooperation from the Sudanese Government. As it has been stressed above, the factual and legal analysis undertaken by the Commission significantly inspired the work undertaken by the ICC Prosecutor during the preliminary investigation and investigation stages.[680] This notwithstanding the fact that the two bodies reached opposite findings with regard to certain particular issues, particularly on whether the crime of genocide had been perpetrated as a government-led policy in Darfur.

Finally, the Commission, through its legal analysis, has provided an important contribution to the development of international law in specific areas. In particular, its reasoning on the crime of genocide has drawn the attention

677 Frulli (n 178) 1331.
678 Report of the International Commission of Inquiry on Darfur (n 211) para. 532.
679 Ibid paras. 533-564.
680 ch 2.4.6.7.1.

of many reviewers.[681] While in relation to the notion of 'protected group' its endorsement of the so-called 'subjective approach' can be considered as merely reaffirming previous jurisprudence, its reasoning on the *dolus specialis* may have added fresh inputs to an on-going debate. Furthermore, its analysis on the link existing between the exploitation of natural conditions and the commission of international crimes, although partially overturned by the ICC Prosecutor, may have inspired future inquiries such as the one investigating human rights violations in North Korea.[682]

Along the same line one should assess the contribution of the Commission of Inquiry on East Timor on the decision by the United Nations Transitional Administration in East Timor (UNTAET) to set up the so called 'Special Panels for Serious Crimes' to investigate the most serious violations perpetrated after the 1999 referendum for independence. Unlike the experiences in former Yugoslavia and Darfur, the inquiry established by the UN Commission on Human Rights in September 1999 did not engage in a comprehensive legal analysis of the violations occurred on the ground. Moreover, the evidence collected could hardly be used in following criminal investigations. However, in its final remarks, the Commission recommended the establishment of an international prosecutor body and an international human rights tribunal consisting of judges appointed by the UN and possibly including Indonesian and East-Timorese nationals to sit in Indonesia with jurisdiction over serious violations of human rights and international humanitarian law.[683] In June 2000 UNTAET, by explicitly recalling such recommendation, officially established Panels with Jurisdiction over Serious Criminal Offences within the District Court in Dili. The Panels were entrusted with jurisdiction over genocide, crimes against humanity, war crimes, torture and sexual offences and were composed by two international and one East-Timorese judge.[684]

Although the experience of the Special Panels will not be remembered as a success,[685] this cannot overshadow the role played by the Commission of

681 See, as an example, William A Schabas, 'Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide' (2005) 18(4) *Leiden Journal of International Law* 871-885; Claus Kress, 'The Darfur Report and Genocidal Intent' (2005) 3 *Journal of International Criminal Justice* 562-578.

682 Tonutti (n 594).

683 Report of the international Commission of Inquiry on East Timor (n 330) paras. 152-153.

684 UNTAET, Regulation No. 2000/15, UNTAET/REG/2000/15 (6 June 2000) Sections 1, 22.

685 In particular, the Special Panels faced a number of significant obstacles, including inadequate financial and logistical support from international actors and lack of ownership from East Timor. Furthermore, the non-cooperation of Indonesia significantly hampered the possibility of trying high-ranking perpetrators with the consequence that only a handful of low-level officials faced justice. In addition, criticism was raised on the quality of the proceedings compared with international standards of due process. International Bar Association, 'Special Panels for Serious Crimes (East Timor)' http://www.ibanet.org/Committees/WCC_East Timor.aspx accessed on 8 December 2016. See also David Cohen, 'Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor' (2006) East West Centre Special Rep. 9.

Inquiry's report in the decision by the UN to set up such accountability mechanism.

3.1.3.2 The 'controversial' legacy of commissions of inquiry in the OPT

The experiences of former Yugoslavia and Darfur have somehow certified how consensus among key players within the international community and cooperation by affected states may significantly increase the chance of success of fact-finding exercises, particularly in terms of follow-up actions. On the contrary, inquiries that do not receive this level of support are exposed to accusations of 'politicization' with the concrete risk that their findings and recommendations may be undermined endangering the whole follow-up process. This is has been especially the case of those inquiries established in relation to contexts such as the OPT and Syria.

With specific regard to the OPT, probably the most interesting example is represented by the experience of the 2009 UN Fact-Finding Mission on the Gaza Conflict. The Mission was established by the Human Rights Council amid the opposition of the block of western countries.[686] The one-sided character of its original mandate and the choice of some of the commissioners attracted severe criticism and the Mission was denied any form of cooperation and access to the territory by Israel. Its final report contained a detailed set of conclusions and recommendations addressing different actors including Israel, the Palestinian authorities, the UN Human Rights Council, the UN Security Council, the UN General Assembly, the ICC Prosecutor and the international community as a whole.

In general, the Mission called for a more robust and effective intervention in the conflict by the international community through a number of different channels.

It referred to the 2005 World Summit Outcome document and the R2P framework to reiterate the obligation of the international community to intervene in case of perpetration of war crimes and crimes against humanity. In this regard, the report noted how

> 'after decades of sustained conflict, the level of threat to which both Palestinians and Israelis are subjected has […] increased. […] The State of Israel is […] failing to protect its own citizens by refusing to acknowledge the futility of resorting to violent means and military power'.[687]

686 The HRC resolution establishing the Mission was passed with the negative vote of Canada and the abstention of all EU member states. Human Rights Council, A/HRC/RES/S-9/1 (2009).

687 Report of the UN Fact-Finding Mission on Gaza (n 211) para. 1711.

In this context, according to the Mission:

> 'the international community has been largely silent and has to-date failed to act to ensure the protection of the civilian population in the Gaza Strip and generally the Occupied Palestinian Territory. Immediate action […] needs to be accompanied by a firmer and principled stance by the international community on violations of international humanitarian and human rights law and long delayed action to end them. […] When the international community does not live up to its own legal standards, the threat to the international rule of law is obvious and potentially far-reaching in its consequences'.[688]

With regard to specific recommendations, the team led by Justice Goldstone requested the Security Council to establish an independent committee of experts charged to monitor the investigative efforts undertaken. In the absence of progress at domestic level, the Mission, based on the precedent of Darfur, urged the Council to refer the situation in Gaza to the ICC.[689]

Aware of the deadlock within the Council on issues concerning Israel and the OPT, the report addressed also specific recommendations to the UN General Assembly. In particular, in case of inaction of the Council on the matter, the Assembly was invited to consider whether additional action within its powers could be required in the interests of peace and justice, including under the 'Uniting for Peace' resolution.[690] According to certain scholars, such a reference to the 'Uniting for Peace' resolution 'was one of the highest profile references to the resolution, and the problem which it had sought to address in many years'.[691]

Notwithstanding the fact that specific sections of the report immediately attracted a certain amount of criticism both from a factual and legal perspective,[692] the international community did react to the conclusions and recommendations included therein. In this regard, certain authors expressed the view that the report had 'significant impact' on the accountability efforts in the OPT, while fairly contributing to illuminating the facts of what happened in Gaza.[693] In addition, according to one opinion,

688 Ibid para. 1713.
689 Ibid para. 1766.
690 Ibid para. 1768.
691 Kearney (n 323) 5.
692 For a critical view of the Gaza Mission's report see Laurie R Blank, 'Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare' (2011) 43 *Cas. W. Res. J. Int'L. L.*; Bell (n 395).
693 Yihdego (n 372) 49; Wilkinson, Standards of Proof in International Humanitarian and Human Rights Fact-Finding (n 149) 33.

> 'despite the controversies over the fairness of some methods used and some of the impediments recorded, the Gaza Report was generally comprehensive and attempted to be inclusive of all parties to the conflict and others'.[694]

The report was, in fact, endorsed by both the Human Rights Council and the General Assembly, but not by the Security Council. In particular, the blessing of the General Assembly was considered by certain scholars a success.[695] While the track undertaken by the Palestinian National Authority (PNA) with the declaration ex article 12(3) of the Rome Statute accepting the jurisdiction of the ICC did not end successfully due to the controversial status of Palestine as a State,[696] a first important follow-up to the Mission's recommendations concerned the establishment by the UN Human Rights Council of a Committee of Independent Experts (chaired by Ms. Mary McGowan Davis) tasked with monitoring and assessing legal actions undertaken by Israeli and Palestinian authorities to investigate alleged violations. Such move triggered somehow a reaction by the affected parties. In particular, it was noted that Israel conducted 400 command investigations in relation to Operation Cast Lead, and 52 criminal investigations of which three have led to prosecutions, in this way 'suggesting that many of the concerns the Mission rose did indeed deserve judicial scrutiny'.[697] At the same time, the PNA established an ad hoc commission to investigate alleged violations of international law perpetrated during the conflict. The so-called 'Davis Committee' released two reports in which, although acknowledging Israel's significant efforts and allocation of resources for furthering the investigation process, it highlighted how there was no indication that Israel had opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead, while the Gaza

694 Yihdego (n 372) 19.

695 Yihdego (n 372) 53. In particular, according to the author, 'the empowerment (and readiness) of the UNGA to endorse or oversee a fact-finding mission with the purpose of probing serious breaches of civilian immunity during armed conflict, particularly when the hands of the UNSC are tied as a result of political division among its members, is of great importance'.

696 After the Palestinian Minister of Justice, on 22 January 2009, lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the ICC in Palestine starting from 2002, the ICC Prosecutor decided to open a preliminary examination into the situation. Such examination ended in April 2012 with the publication of an 'update' by the Office of the Prosecutor (OTP) in which it was argued that the OTP could not proceed to open an investigation due to controversies around the definition of Palestine as a 'State' under international law. According to the OTP, such controversies fell outside the competence of the ICC Prosecutor and should have been resolved by competent bodies within the United Nations. ICC, 'Situation in Palestine' (4 April 2012) http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf accessed on 8 December 2016.

697 Wilkinson, Standards of Proof in International Humanitarian and Human Rights Fact-Finding (n 149) 33.

de facto authorities had also not conducted relevant legal actions into the launching of rockets and mortar attacks against Israel.[698]

On a separate development, on 1 April 2011, in an editorial written for the Washington Post entitled 'Reconsidering the Goldstone Report on Israel and War Crimes', the Mission's Chair Richard Goldstone reconsidered the work and findings of the UN Fact-finding Mission in light of Israel's subsequent disclosure of certain evidence, concluding that 'If I had known then what I know now, the Goldstone Report would have been a different document'.[699] In particular, he adopted the following view:

> 'although the Israeli evidence that has emerged since publication of our report doesn't negate the tragic loss of civilian life, I regret that our fact-finding mission did not have such evidence explaining the circumstances in which we said civilians in Gaza were targeted, because it probably would have influenced our findings about intentionality and war crimes'.[700]

Such statement, despite being extrapolated from the context of an editorial that otherwise commended the efforts and the results achieved by the Fact-finding Mission, was used by certain actors to undermine the credibility and fairness of the whole inquiry.[701] This development induced the other members of the Mission to release a statement in which they made clear that:

> 'there is no justification for any demand or expectation for reconsideration of the report as nothing of substance has appeared that would in any way change the context, findings or conclusions of that report with respect to any of the parties to the Gaza conflict. […] The report of the fact-finding mission contains the conclusions made after diligent, independent and objective consideration of the in-

698 'Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9', A/HRC/16/24 (18 March 2011) para. 79.

699 Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes' *The Washington Post* (1 April 2011) http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html accessed on 8 December 2016.

700 Ibid.

701 In particular, according to Israeli Prime Minister Netanyahu it was time, after Goldstone retraction, 'to throw [the report] into the dustbin of history'. Consistently, the US Senate unanimously passed a resolution calling on the UN 'to reflect the author's repudiation of the Goldstone report's central findings, rescind the report and reconsider further Council actions with respect to its findings'. 'PM: Throw Goldstone Report into dustbin of history' *The Jerusalem Post* (2 April 2011) http://www.jpost.com/Diplomacy-and-Politics/PM-Throw-Goldstone-Report-into-dustbin-of-history accessed on 8 December 2016; 'US Senate Urges UN to Rescind Goldstone's Gaza Report' *Haaretz* (15 April 2011) http://www.haaretz.com/israel-news/u-s-senate-urges-un-to-rescind-goldstone-s-gaza-report-1.356124 accessed on 8 December 2016.

> formation related to the events within our mandate, and careful assessment of its reliability and credibility. We firmly stand by these conclusions'.[702]

In this regard, certain scholars have emphasized how

> 'such an unfortunate but intriguing "rift" among Mission members raises not only the issue of ensuring the impartiality and objectivity of a fact-finding mission before, during and after publishing their report, but also the need for a clear UN procedure by which subsequent concerns of members and those who are directly impacted by a fact-finding report can be accommodated'.[703]

Regardless of the whether the report of the UN Fact-Finding Mission contained substantial flaws, the whole experience has triggered an extremely polarized debate, in which political and strategic interests have often overlooked technical and legal assessments. This has indeed negatively affected the Fact-Finding Mission's legacy and follow-up process. However, despite the fact that neither the General Assembly nor the Security Council undertook significant actions in relation to the recommendations contained, the creation of the Davis Committee and the consequent reaction provoked at domestic level can be considered as important, albeit insufficient, steps. Thus, although no substantive progress was made in terms of political action and accountability, a number of meaningful albeit insufficient improvements can be highlighted, particularly in light of the creation of the Davis Committee and the steps undertaken at domestic level.

It can be argued that subsequent OPT investigations have drawn important lessons learnt from the 2009 Fact-Finding Mission experience. In particular, the HRC resolution establishing a commission of inquiry to investigate alleged violations committed during the 2014 round of hostilities in Gaza contained a much more even-handed and impartial language than its 2009 predecessor. The Commission was in fact mandated to

> 'investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014'

without referring solely to Israel.[704]

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702 Hina Jilani – Christine Chinkin – Desmond Travers, 'Goldstone Report: Statement issued by members of UN mission on Gaza war' *The Guardian* (11 April 2011) http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza accessed on 8 December 2016.

703 Yihdego (n 372) 48.

704 Human Rights Council, A/HRC/RES/S-21/1 (2014) para. 13.

Furthermore, unlike the 2009 Mission, the investigate team abstained from engaging in far reaching assessments and conclusions on the Israeli military campaign's overall scopes and objectives in the absence of information coming from the Israeli side. This however did not prevent the Commission to reach conclusions on the violations of IHL perpetrated by both sides of the conflict. In this regard, the Commission's report not only found that both sides had been responsible for indiscriminate and disproportionate attacks against civilians (some of them amounting to war crimes) but also it signalled how many of the violations were the consequences of policies designed and implemented at senior military and political level for which appropriate accountability should be sought.

While it is soon to assess the effects produced by the 2014 Commission of Inquiry particularly given the ICC's recent involvement in the situation, it is important to highlight how its final report has been endorsed by the HRC with a resolution adopted with 41 votes in favour, including those of all EU member states sitting on the Council.[705] The unanimous support of EU member states for the resolution represented an unprecedented move and can alone be considered as an important improvement from the 2009 experience. Such stance was accompanied by the inclusion, for the first time in the EU Council Conclusions on the Middle East Peace Process, of language referring to compliance with international law and accountability as cornerstones for peace and security in the region.[706]

While such steps may be considered as positive developments particularly if compared to the fragmented follow-up process to the 2009 Fact-Finding Mission's report, when it comes to assess the status of enforcement of international law in the OPT the picture remains bleak. Several international investigations have been established since 2000 and yet to date the parties to the conflict and international community have largely failed in their responsibility to uphold and comply with their international law obligations.[707] During this period, the human rights situation has significantly deteriorated and the humanitarian crises provoked by continuous rounds of conflicts and the prolonged military occupation has deepened. In addition, negative trends such as Israeli settlements expansion, displacement of civilians, de-facto annexation policies and political splits among the Palestinian side have further diminished meaningful prospects for peace.

Commissions of inquiry have not been immune from such a context and have underlined the crucial role of accountability and international law compli-

705 Human Rights Council, A/HRC/29/L.35 (2015).

706 The European Council, 'Council Conclusions on the Middle East Peace Process', Press Release 610/15 (20 July 2015) http://www.consilium.europa.eu/en/press/press-releases/2015/07/20-fac-mepp-conclusions/ accessed on 8 December 2016.

707 Alessandro Tonutti, 'International Commissions of Inquiry and Palestine: Overview and Impact – Study Analysis' (2016) Al-Haq Center for Applied International Law.

ance for addressing the root causes of the conflict and create a platform for sustainable peace negotiations. In this regard, the 2014 Gaza Commission has duly pointed out how the great majority of the recommendations formulated by previous investigations still remain on paper. It is from this perspective that one should consider its request to the Human Rights Council to conduct a comprehensive review of the status of the implementation of the numerous recommendations of past investigations and explore mechanisms to ensure their compliance.[708] The discussion around possible mechanisms to ensure implementation of international inquiries' reports is indeed as compelling as fascinating and should not only be limited to the context of Israel and the OPT. However, the question concerning which concrete avenues to explore in order to set up such mechanism remains unanswered. In this regard the 2016 OHCHR report on the status of implementation of recommendations contained in the 2009 and 2014 Gaza commissions' reports should be considered as a first step, which should form the basis for more concrete (and creative) actions at political level.[709]

3.1.3.3 Supporting domestic and international justice mechanisms: the work of the commissions of inquiry on Guinea, Georgia and Cote d'Ivoire

Other commissions have produced less impact than the Yugoslavia and Darfur experiences in terms of stimulating positive steps by relevant stakeholders within the international community. However, they have been able with their findings to influence further responses at domestic and international level, particularly in terms of criminal investigations. It has been already emphasized in Chapter 2 the significant contribution provided by investigations such as those concerning Georgia and Cote d'Ivoire on the subsequent ICC involvement in those matters.

With regard to the situation in Guinea, it should be noted how, in accordance with the recommendations of the UN Commission of Inquiry, on 8 February 2010 the Conakry Appeals Court General Prosecutor appointed three Guinean investigative judges (hereinafter 'panel of judges') to conduct a national investigation into the events of 28 September 2009. In this regard, the ICC Prosecutor has noted how

> 'over the reporting period, the panel of judges issued additional indictments against high-level political and military officials […] including former Ministers at the time of the events and the former Head of State, Moussa Dadis Camara, who was interviewed and indicted in Burkina Faso. The indictment and arrest of a former

708 Report of the detailed findings of the independent commission of inquiry on Gaza (n 344) para. 90.

709 Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, A/HRC/31/40/Add.1 (7 March 2016).

> member of the military for alleged acts of torture committed against demonstrators detained in the weeks following the 28 September 2009 events is another important step in the investigation of alleged crimes committed in military facilities'.[710]

In addition, the ICC opened a preliminary examination, which is still on going pending a final assessment on admissibility in relation to the efforts undertaken at domestic level. In particular, it should be noted how the ICC Prosecutor in its preliminary examination report has referred to the conclusions reached by the UNSG-mandated inquiry in relation to the events in the Conakry stadium and the allegations of crimes against humanity.[711]

3.1.3.4 Raising alert and directing attention: the experience of commissions of inquiry on North Korea and Eritrea

On a separate development, the commissions investigating violations in North Korea and Eritrea merit further reflection. Those inquiries have been mandated to look into long lasting regimes of systematic and institutionalised human rights denial. Interestingly enough, these contexts have also been for long time off the radar of the international community.

With regard to North Korea, the Commission of Inquiry created in March 2013 by the HRC handed in its final report on February 2014. It determined how the North Korea regime was involved in widespread and systematic violations including large scale enforced disappearances, arbitrary detentions, torture, summary executions and violations of freedom of expression, freedom of movement and the right to food. The report also found out how many of such violations were the result of a policy designed and implemented at the highest level of the State chain of command and could be qualified as crimes against humanity attracting individual accountability, including at Supreme Leader level. In its conclusions, the inquiry expressed outrage and strong condemnation for the perpetuation of a well-consolidated system of human rights denial of such a magnitude. In particular, the report highlighted how

> 'the gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world […] a State that does not content itself with ensuring the authoritarian rule of a small group of people, but seeks to dominate every aspect of its citizens' lives and terrorizes them from within'.[712]

710 ICC Prosecutor, 'Report on Preliminary Examination Activities' (13 December 2011) para. 114; ICC Prosecutor 'Report on Preliminary Examination Activities' (12 November 2015) paras. 176, 177.

711 ICC Prosecutor, '2011 Report on Preliminary Examination Activities' (n 710) paras. 107-113.

712 Report of the Commission of Inquiry on the situation of human rights in North Korea (n 273) para. 80.

In light of the grave and criminal nature of the violations, the report referred to the R2P framework and underlined how

> 'the international community must accept its responsibility to protect the people of the Democratic People's Republic of Korea from crimes against humanity, because the Government of the Democratic People's Republic of Korea has manifestly failed to do so'.[713]

The report thus called the UN and the international community to take firm action to ensure accountability given the unwillingness of the North Korean regime to react, in particular by either requesting the UN Security Council to impose targeted sanctions against those responsible for crimes against humanity or by referring the situation to the ICC.[714]

The North Korea's inquiry experience should mainly be assessed from the point of view of the type of response provoked (perspective one). In particular, the work and findings of the Commission of Inquiry had indeed the merit of placing the issue concerning the respect for human rights in North Korea at the centre of the attention. So far, the international debate around North Korea has been mainly focused on the threat for international peace and security derived from the development of its arsenal of nuclear weapons. Thus, for the first time international bodies were solicited to discuss the situation in North Korea from the point of view of 'internal' human rights concerns.

The Commission's report was endorsed by the Human Rights Council and submitted by the General Assembly to the attention of the Security Council. Furthermore, in March 2015 the Human Rights Council, acting through resolution A/HRC/28/L.18, formally requested the Security Council to refer the situation to the ICC and to consider

> 'the scope for effective targeted sanctions against those who appear to be most responsible for acts that, according to the commission, may constitute crimes against humanity'.[715]

It also noted

> 'the decision of the Security Council to add the situation in the Democratic People's Republic of Korea to the list of issues of which the Council is seized [and] the holding of an open Council meeting on 22 December 2014 during which the situation of human rights in the Democratic People's Republic of Korea was discussed'.[716]

713 Ibid para. 86.
714 Ibid para. 94.
715 Human Rights Council, A/HRC/28/L.18 (2015) para. 6.
716 Ibid para. 7.

Pending any decision of the Security Council on the matter, one year later, the Human Rights Council, through a resolution which was passed without a vote, decided to set up a group of experts tasked with finding practical ways to hold rights violators in North Korea to account. Such new mechanism was requested to

> '(a) explore appropriate approaches to seek accountability for human rights violations in the Democratic People's Republic of Korea, in particular where such violations amount to crimes against humanity, as found by the commission of inquiry; (b) to recommend practical mechanisms of accountability to secure truth and justice for the victims of possible crimes against humanity in North Korea, including the ICC'.[717]

It should also be highlighted that the OHCHR took steps, in line with the Commission's recommendation, towards establishing a field-based structure in the Republic of Korea with the aim of strengthening its monitoring and documentation efforts.[718]

While meaningful measures have yet to be taken by the international community to reverse the trend of impunity and lack of accountability in North Korea, the work of the Commission of Inquiry has had so far the merit to place the human rights aspect of the crisis among the key priorities in discussions held at international institutional level. In this light, it should highlighted the recent decision by the US Government to place North Korean Supreme Leader Kim Jong-un in a sanctions blacklist given his direct responsibility in a series of severe human rights violations.[719]

A similar pattern can be detected in relation to the situation in Eritrea. The Commission of Inquiry mandated in June 2014 by the HRC to assess the human rights situation in the country, submitted its final report on June 2015. Based on its findings that the Eritrean State was imposing a regime of severe human rights violations and limitations, the Human Rights Council decided to extend its mandate for a year and requested it to

> 'investigate systematic, widespread and gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity'.[720]

Hence, in June 2016, the Commission handed over its second report in which it determined how there were reasonable grounds to believe that crimes against

717 Human Rights Council, A/HRC/31/L.25 (2016) para. 11.
718 A/HRC/28/L.18 (n 715).
719 'Kim Jong-un placed on sanctions blacklist for the first time by the US' *The Guardian* (6 July 2016) https://www.theguardian.com/world/2016/jul/06/north-korea-kim-jong-sanctions-blacklist accessed on 8 December 2016.
720 Human Rights Council, A/HRC/29/L.23 (2015) para. 10.

humanity – including enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder – had been committed in Eritrea since 1991.[721]

The report also recommended that the Security Council refer the situation in Eritrea to the Prosecutor of the ICC for consideration, and that States Members of the United Nations exercise their obligation to prosecute or extradite any individual suspected of international crimes present on their territory.[722] While it is too soon to assess the impact of the work of the Eritrea inquiry in its broader sense, it should be underlined how the Human Rights Council endorsed the Commission's second report with resolution 32/24, reiterating a number of its key recommendations particularly in terms of accountability.[723]

3.1.3.5 When the impact has been more marginal: the case of the Commission of Inquiry on Libya

With regard to other commissions, the impact, looking at both perspectives, has been less significant. In this regard, an interesting example is represented by the 2011 Commission of Inquiry on Libya. The HRC resolution setting up the investigation was adopted just one day before the decision by the UN Security Council to refer the situation in Libya to the ICC.[724] While the UNSC expressly welcomed the decision by the HRC to dispatch the inquiry, it is difficult to imagine how the work of the Commission effectively contributed to subsequent actions undertaken by the international community, including the ICC investigation. In this regard, it should be noted how the first arrest warrants by the ICC Pre-Trial Chamber in the Libya case were issued in concomitance with the submission of the Commission's interim report. While the time and character of the response may differ in each particular case, it is important to emphasize how the R2P framework has generally placed commissions of inquiries and fact-finding missions as tools to be employed at the outset of the international community's involvement, capable through their findings and recommendations of inspiring further actions and progressive responses by relevant international stakeholders. In this regard, with regard to the Libya example certain authors have pointed out how

> '[i]t is […] questionable whether a concomitant commission of inquiry established by the Human Rights Council working simultaneously as ICC investigators, may

721 2nd Report of the detailed findings of the commission of inquiry on Eritrea (n 315) paras. 59-95.

722 Ibid paras. 107-111.

723 Human Rights Council, 'Commission of Inquiry on Human Rights in Eritrea welcomes strong resolution on human rights in Eritrea' (4 July 2016) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20228&LangID=E accessed on 8 December 2016.

724 Human Rights Council, A/HRC/S-15/2 (2011); UNSC Res. 1970 (2011).

be appropriate unless it is clearly established which body or organ undertakes which actions'.[725]

Thus, the fact that in the Libyan case the establishment of a commission of inquiry was concomitant with other more robust steps adopted by the international community may well explain its marginal incidence on the broader response.[726]

3.1.4 Conclusions and lessons learnt

In sum, when it comes to assess the impact of commissions of inquiry it is difficult to reach 'black and white' conclusions. Impact should in fact be measured from different perspectives, including capability of influencing reforms and political reconciliation at national level, incidence of the inquiries' recommendations on subsequent decisions adopted at international level and degree of endorsement of their findings in following decisions, resolutions and investigations. Indeed, the abovementioned examples reflect various degrees of impact according to these different angles. Thus, an important caveat is that when it comes to commissions of inquiry each case is often influenced by unique dynamics, something that makes it extremely difficult to engage in overall assessments and lessons learnt.

However, certain general trends can be highlighted. In particular, the practice has shown how a strong and coherent support by the international community during the entire commissions' 'life cycle' can play an invaluable role in positively affecting both their work and follow-up. This support should encompass from one side the need to protect the investigations' independence and impartiality, shield them from possible accusations and entrust them with adequate tools and resources. From the other it should ensure a smooth process of translating commissions' conclusions and recommendations into meaningful debates at institutional level, which can open the gate for the adoption of concrete responses. Equally, the development of an open and constructive relation between the commissions and those states involved into the concerned situations represents also a determinant factor in increasing the chances of the inquiries' success. Finally, appropriately placing commissions of inquiry

725 Frulli (n 178) 1333.

726 In this regard, it should be noted that the Libya case represents one of the rare examples where the R2P paradigm has been expressly recalled by the UN Security Council in the exercise of its functions to maintain and restore international peace and security. In particular, on 17 March 2011, the UNSC passed resolution 1973 in which it reiterated the responsibility of the Libyan authorities to protect the civilian population in order to justify the imposition of a no-fly-zone and the resort by Member States to 'all necessary measures' to protect civilians from the threat of attacks. See, UNSC Res. 1973 (2011).

at the right moment of the international community's response may be critical in increasing their incidence in shaping further actions.

From this perspective, the previous analysis has revealed how examples such the commissions appointed on former Yugoslavia and Darfur may be considered as important 'best practices' from which to draw inspiration for future experiences, both in terms of actions provoked (perspective one) and contribution of their factual and legal analysis to subsequent determinations (perspective two). Commissions such as those in Georgia and Cote d'Ivoire have seen their findings reflected in subsequent criminal investigations (perspective two), while the Commission of Inquiry on Guinea has stimulated specific actions at domestic level (perspective one). Other inquiries, although not leading to concrete responses, had the merit of placing long-lasting situations of human rights denial under the radar of international institutions (perspective one). Finally, there have been cases – such as in the OPT, Syria and Libya – where the work of international inquires has led to more divisions than consensus and resulted only in palliative measures by the international community. However, these examples had also the merit to trigger much-needed substantial and operational debates and should stand as vivid lessons learnt of the enormous challenges facing the international community's response to serious international law violations in the current set of circumstances.

3.2 The Modern Role of Commissions of Inquiry: An Appraisal

3.2.1 Introduction

After having undertaken a comparative thematic analysis and appraised the impact of a number of significant examples, it is now time to address the question of what modern commissions of inquiry have become as a tool.

A first important remark concerns the fact that, while the regime of international inquiries has undergone a significant evolution since its first conceptualization in the Hague Conventions, commissions have still preserved their original function related to ascertaining facts and unveiling the truth with regard to specific situations. Thus, the fact-finding component currently remains pivotal in their work as well as in the expectations of mandating bodies. In other words, what relevant actors of the international community primarily expect from commissions of inquiry now as in the past is firstly to clarify the facts and allegations in order to entrust them to make the most suitable decisions in relation to a specific matter.

However, inquiries have evolved in a way that has progressively entrusted them with a set of complex and multifaceted features that as no comparison with their role as traditionally conceived and envisaged in their first codifications. This has been probably the result of a process in which both the

directions coming from mandating organs and the commissions' own creativity played a relevant role.

3.2.2 Evolution in the role of commissions of inquiry: main features

The first aspect of such an evolution is their escaping from states' control. Under The Hague Conventions commissions of inquiry had been designed as a tool in the hands of states that could be activated in the preventive diplomacy sphere with the aim of decreasing animosities and reaching a peaceful settlement of their disputes. On the contrary, modern human rights inquiries have been increasingly established without the consent and cooperation of the affected countries. This has often implied that states have denounced their findings and allegations as baseless. Such an important change should be appreciated in the sense that the work of modern commissions of inquiry does not serve uniquely affected states' interests but calls into question the role of the whole international community.

This new function is directly related to the second aspect of the commissions' evolution. Nowadays, commissions of inquiry do not limit themselves to ascertain facts. They have become much more proactive in linking facts with legal analysis in order to highlight violations of the relevant legal frameworks. They have also started pointing out and identifying states' failures and responsibilities at political, institutional and individual level in relation to the events investigated. Finally, they have started addressing specific actors within the international community in order to suggest concrete courses of actions and follow-up measures to react to their findings. In other terms, international inquiries have not only evolved into a tool that the international community can rely upon for confronting certain situations where states have breached their international obligations, but they have themselves become active promoters in stimulating such a response by suggesting different directions.

In this regard, it can even be argued that modern commissions of inquiry 'function as correction mechanisms' to the inability of certain international organs to respond effectively.[727] As noted by van den Herik,

> 'they would represent public opinion and have the de facto aim to express condemnation, to present a compelling conflict narrative so as to counter the Security Council inaction or to elicit alternative involvement by the International Criminal Court'.[728]

Such analysis renders even more compelling those questions related to which legal value inquiries' findings may possess. This is especially the case in those

727 Van Den Herik (n 14) 528.
728 Ibid.

contexts where the enforcement of international law encounters serious challenges derived from the inaction of political bodies and/or the impossibility of entrusting judicial bodies with jurisdiction.

3.2.3 The role of commissions of inquiry in modern international law: an appraisal

It is thus possible to picture modern commissions of inquiry as a creature with two heads. From one side they have preserved their nature as an independent experts technical body not only in stating the facts but also in correctly interpreting and applying the law and contributing with their findings to the future activities of law-enforcement bodies. However, this technical function does no longer uniquely serve states' interests but has often been put at disposal of the international community to properly react to states' failures. More in particular, Frulli has emphasized how:

> 'Commissions of inquiry […] could have great potential and they may be rapidly deployed in situations where serious crimes are allegedly being committed and, if adequately equipped, be capable of gathering information or helping preserve evidence that could be valuable, at a later stage, to build a criminal case and that could otherwise get lost before a proper criminal investigation is put in place'.[729]

Hence, from this perspective, international inquiries can be seen as playing a significant role in the process aimed at consolidating the respect for international law and strengthening its compliance.

From the other side – and this is where modern commissions have significantly departed from their traditional conceptualisations – human rights inquiries play also a less technical and more 'activist' role in denouncing, condemning, rising attention and provoking further action by the international community vis-à-vis situations of concerns.[730] In this regard, their use of international law serves ulterior purposes than just technical assessments.

On this basis, it can be argued that

> '[modern] commissions of inquiry have [developed] an unmistakably public nature. Their prime task seems to be raising awareness and mobilizing public opinion […] and preparing a case for action'.

Therefore, they can be used 'as advocacy tools with the main agenda being to induce compliance or alternatively to provoke external action that will halt on-going human rights violation'.[731]

729 Frulli (n 178) 1330.
730 Van den Herik (n 14) 536.
731 Ibid 510, 527.

It is arguable whether this role may fit with the idea of commissions as early-warning tools as firstly envisaged in Article 34 of the UN Charter and further developed in the Agenda for Peace of former UN Secretary General Boutros-Ghali and in the R2P framework.[732] In reality, most of the modern commissions of inquiry function as more denouncing rather than just early-warning mechanisms given that the human rights emergencies that they investigate are often protracted in time and that the nature of the responses they inspire are reactive rather than pre-emptive. In this regard, van den Herik has noted how

> '[the] inquiry is to a certain extent predisposed. The mere fact that a commission is created by the Human Rights Council signals a perception that there are credible allegations that human rights have been violated'.[733]

In sum, by combining the first (more technical) and the second (more political) aspects together, it is possible to consider modern commissions of inquiry as absolving the function of preliminary step in the international community's response to situations marked by grave IHL and IHRL violations aimed at ensuring justice and accountability, restoring rule of law and, in so, achieving and promoting peace.

3.2.4 The modern role of commissions of inquiry: which legitimacy?

However, it should be noted that such an evolution has been the result of a process carried out in the absence of any regulation or conceptualisation endorsed at institutional level. In other words, no general treaty or resolution of the kind of The Hague Conventions or the 1991 UNGA Declaration on Fact-Finding have been adopted to discipline the role assumed by human rights inquiries in recent years.

Thus, the recent evolution should be connected primarily with the activity of mandating bodies and with the practice of commissions of inquiry themselves. This has by time generated a number of criticisms, firstly in relation to the lack of power in appointing these kind of inquiries and secondly with regard to the failure in ensuring consistency among different experiences.[734]

732 'An Agenda for Peace; Preventive diplomacy, peacemaking and peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992', UN Doc. A/47/277–S/24111 (17 June 1992).

733 Van den Herik (n 14) 536.

734 For example, in 2012 Frulli, while rewarding the experiences in former Yugoslavia and Darfur, has acknowledged how unfortunately those commissions had not triggered the compilation of guidelines to standardize commissions of inquiry as a tool. Frulli (n 178) 1332.

While the issue concerning the power of different international bodies in establishing commissions of inquiry has been deeply analysed in Chapter 1 and II, with regard to the lack of guidelines and standardisation, a number of important recent developments should be highlighted. In particular, the OHCHR has set up a 'Methodology Education and Training Unit' (MET) and a 'Rapid Response Unit' with the purpose of assessing lessons learnt, developing guidelines and setting up a framework capable of adequately and promptly assisting in future responses involving human rights inquires.[735] As it has been already underlined in Chapter 1, this process has led to the publication by the OHCHR of the 2015 'Guidance and Practice of commissions of inquiry and fact-finding missions on international human rights and humanitarian law', which provides policy, methodological, legal and operational guidance on the work of commissions of inquiry and fact-finding missions.[736]

Indeed, even such recent developments have not received any formal approval at State level nor does it appear probable that they will translate into a treaty or a declaration approved by political organs within the United Nations. Hence, the recent evolution undergone by commissions of inquiry has, for the time being, not been formally endorsed and acknowledgment at institutional level. However, it has led to a consolidated and well-settled practice that has so far encountered no formal opposition and the acquiescence of the great majority of states and international organisations. From this perspective, it should thus be accepted and assessed.

Looking again at the nature of the evolution undertaken by modern human rights inquiries, one may even wonder whether it is still possible to define them under the label of 'commissions of inquiry'. Regardless of what can be the possible answer, it is undeniable how commissions of inquiry have reached a new dimension. While this evolution still lacks solid basis in terms of institutional backing, such a new prototype appears more mindful of the modern setting in which commissions are operating, particularly looking at the primary importance of respecting human rights at international level (and at the array of mechanisms available to respond to human rights emergencies) and at the need to stimulate responses in a context marked by an increasing lack of accountability and disrespect for the rule of law.

735 Grace and Bruderlein (n 1). In relation to the work of the MET, certain concerns have been raised by practitioners with regard to the quality of the trainings delivered. Wilkinson, Finding the facts (n 296) 25.

736 OHCHR, Guidance and Practice (n 3).

3.2.5 Concluding remarks

In conclusion, modern commissions of inquiry can be considered both a fact-finding tool and a first step in the international community's response to ensure accountability for grave violations of international law.

Indeed, the fact that such evolution has so far lacked legal and institutionalised basis goes against a rigid and crystallised categorization of commissions of inquiry in one direction. At the same time, the practice has shown how their potential looking at the broader framework of the international community's response cannot and should not be underestimated.

On this basis, one additional question emerges: is it time to institutionalise such a role? The conservative reaction by a number of states to certain commissions of inquiry's experiences coupled with the intense debate generated among legal scholars on the risks and opportunities inherent to such an evolution are indicative of the fact that consensus has not yet been reached over a shared definition and conceptualisation of a new paradigm of commissions of inquiry. However, experiences on the ground have more consistently driven us towards the creation of such specific model. The practice developed so far with all its inconsistencies should thus be considered as the starting point for all future discussions.

Hence, rather than focusing on the absence of an institutionalised framework, the first step should be to address the inconsistencies of the current practice, including the lack of harmonization and coherency between different experiences. In other terms, the need to shed more clarity over a number of aspects and address inconsistencies resulting from the current practice should be seen as priorities in the process aimed at the legitimization and consolidation of the role of modern commissions of inquiry. This may help the framing of a coherent model of commissions that would be more consistently and increasingly referred in future responses. Therefore, the process of consolidation of inquiries in their modern conceptualisation necessarily requires a thorough assessment of the present gaps and inconsistencies. This is why the next sub-chapter will provide an analysis of some of the main challenges and gaps facing modern commissions of inquiry and suggest possible avenues to properly address them.

3.3 Modern Commissions of Inquiry: Between Challenges, Lessons Learnt and Way Forward

Through the analysis undertaken in the present study it is now possible to highlight a number of substantial challenges and lessons learnt from the experience of modern commissions of inquiry.

These challenges relate to the role of commissions both as technical bodies and as early warning triggers of further responses by the international com-

munity. The challenges identified in the present sub-chapter pertain to the following macro areas:

1 Lack of institutionalisation and controversies around the definition and boundaries of commissions of inquiry;
2 The cohabitation of political and technical interests that risk to produce short circuits within the commissions' own life cycle;
3 Challenges related to the current interaction of commissions of inquiry with the work of international tribunals.

3.3.1 Challenge 1: lack of institutionalisation, guidelines, harmonisation and controversies around commissions of inquiry's nature and discipline

Such issue has been extensively debated in the course of this dissertation. The model of modern commissions of inquiry, if any, has mainly been shaped through practice and in the absence of an institutionalised framework designed by relevant political decision-makers. Furthermore, until recently no meaningful steps have been taken to consistently draw lessons through the adoption of guidelines that can help standardising the work of commissions and, in so, enhancing their coherency.

It is important to emphasize as a preliminary remark that commissions of inquiry are mandated to investigate situations that are often unique in their character and difficult to group together under a common denominator. Such assumption is reflected in the idea that considers commissions as ad hoc tools to respond to ad hoc situations of crises. This however does not necessarily render the need of harmonization futile. Harmonization between different practices does not mean that commissions should work uniformly or under a one-model-fits-all framework. On the contrary, the fundamental rule under which each commission operates is its mandate, which should be framed according to the peculiarities of the situation under investigation. However, it is undeniable (and the practice analysed in this dissertation has provided numerous examples) that fact-finding bodies are often confronted with similar dilemmas, such as in the way to assess the credibility of evidence, the standard of proof to apply and the manner in which to proceed in case national authorities are not cooperative or access to affected location is not granted. In this regard, the fact that commissions have started increasingly to apply the model set by previous experiences in areas such as standard of proof or in relation to the findings concerning the perpetration of international crimes is indicative of the need for guidelines and lessons learnt. Developing lessons learnt with the aim of tending towards an harmonized practice in a number of key thematic areas does not necessarily mean that commissions should operate in a manner that detaches them from the unique dynamics of the situation under investigation. It does mean that when a particular issue arises, commissions may be put in the position to refer to previous experiences or to well-

established standards if they consider them as pertinently applicable to their case. On the contrary, the absence of guidelines and lessons learnt may risk in the long run to undermine the commissions' legitimacy and negatively impact the record of compliance with their findings.

In this regard more clarity is needed in defining roles and responsibilities throughout the whole 'life cycle' of commissions of inquiry.

Such life cycle can be dissected into three main phases, namely: a) the commission's establishment phase; b) the commission's work and reporting phase; and c) the commission's follow up phase.

With regard to the commissions' establishment phase, a first sign of fragmentation concerns their proper identification. Today in fact international investigations on human rights/IHL violations can take many forms. They can be performed through the establishment of a commission of inquiry, a fact-finding mission, a UN field mission's report or, as it has been more increasingly the case in recent times, through an OHCHR investigation. Although there have been some attempts to assess and clarify the meaning of such different labels, there seems to be a lack of transparency over the meaning and purposes of each of these forms of international inquiries.[737]

Furthermore, several bodies have been involved in the setting up of fact-finding mechanisms in the IHRL/IHL sphere. The UN Security Council, the General Assembly, the Secretary General, the Commission on Human Rights and, more recently, the Human Rights Council have been all active promoters in such a process. This is without mentioning the role exercised by regional bodies. While not disputing the fact that each of these bodies possesses the competence to establish international investigations, the consequences of such pluralistic approach in the absence of a coherent underpinning framework should be assessed. According to Grace and Bruderlein:

> '[o]n the one hand, the multiplicity of [commissions of inquiry] mandating bodies – including international, regional, and national entities – is beneficial, providing political actors with various venues for reaching consensus around initiating [commissions of inquiry] mechanisms. On the other hand, institutional barriers have fragmented the [commissions of inquiry] community, hindering the development of adequate guidelines, training opportunities, and rosters of qualified and available [commissions of inquiry] leaders and investigators'.[738]

Hence, in relation to the commissions of inquiry's establishing phase more clarity is required. In particular, while it may be neither feasible nor useful to 'centralise' and concentrate the power of setting up inquiries to one specific

737 In this regard, it should be noted how the OHCHR website groups commissions of inquiry, fact-finding missions and OHCHR investigations under the same domain. See, in particular, OHCHR website at http://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx accessed on 8 December 2016.

738 Grace and Bruderlein (n 1) 2.

body, a more structured division of roles among different organs may enhance the consistency and fairness of the whole fact-finding exercise. In particular, certain bodies may retain the power to appoint commissions to investigate into matters that pertain to the specific ambits of their operations and in so far better coordinate responses. In this regard, the concurrent appointment by the UN Secretary General and the UN HRC of two independent inquiries on the Gaza flotilla incident should draw important lessons for the future. Although the two inquiries were set up with significantly different mandates, the fact that they reached opposite conclusions on certain important matters (such as the legality of the Israeli blockade) may expose the risks hidden behind such lack of coordination.[739]

For example, certain authors have implicitly argued that HRC-appointed inquiries may better focus uniquely on investigating international human rights law violations rather than looking at situations of armed conflict and breach of the peace that may better fall under the more authoritative mandate of the UNSC.[740] While – as it has been already underlined in previous chapters – limiting the competence of the HRC in such a manner may not represent the most appropriate solution, it is undeniable that a more clear understanding of the roles played by different bodies involved in the establishment of independent inquiries may contribute to the commissions' own legitimacy, in this way increasing their effectiveness and chances of success.

In relation to the central phase concerning the commissions' work and reporting, a more robust and comprehensive set of guidelines and lessons learnt is pivotal in order to mitigate the numerous challenges currently faced by these investigations.[741] Such guidance is needed both for investigators at a more procedural and methodological level and for commissioners at higher reporting level. In this regard it should be noted how the implementation phase represents the stage in the life cycle where commissions may play a protagonist role as their dependency from the decisions of political organs is less acute. Thus, the need to enhance and safeguard their impartiality and independence and strengthen the credibility and fairness of the fact-finding process should be seen as priorities. Only in this manner can the commissions' own legitimacy and consequent final success be secured. According to certain authors, by ensuring that the commissions' impartiality, independence and credibility are guaranteed it would be possible

> 'to insulate [their] implementation phase – in which investigators undertake technical data gathering and analysis – from the initial mandate-drafting phase – in

739 Report of the Secretary-General's Panel of Inquiry (n 339) paras. 69-82; Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 272) paras. 51-54.

740 Frulli (n 178) 1334.

741 Grace and Bruderlein (n 1) 2.

which political actors agree to create a […] mission and decide on the mission's broad contours'.[742]

Safeguarding these principles means also ensuring a clear-cut separation of roles, responsibilities and clarifying the hierarchical relationships existing between the different components within the inquiry mechanism.[743] In particular, the relationship between the external commissioners and the Secretariat (including the team of investigators) put at disposal by the OHCHR should be the object of a careful assessment of past performances in order draw lessons learnt and stimulate the provision of guidelines for the future. Furthermore, the use and selection of the different (technical, financial, human, logistic) resources available (especially given the recurrent time and resources constraints that commissions are facing) should always follow a careful needs-assessment discussion among relevant stakeholders involved.

As already noted above, significant steps have been recently adopted by the OHCHR in this direction. Furthermore organisations such as the Institute for International Criminal Investigations and Justice Rapid Response have been increasingly supporting the development of best practices related to the investigations phase, by providing training courses and setting up roster of experts to be deployed on occasion to support the work of commissions of inquiry.[744]

However, many remaining gaps need to be filled in order to adequately tackle the fragmentation and lack of harmonisation in the commissions' central phase. In this regard, a determination coming from an authoritative body would be highly beneficial. In particular, based on the precedent of the 1970 UNSG Model Rules, a set of guidelines regulating the main procedural features

742 Ibid 3.

743 Wilkinson (n 296) 23-24.

744 Justice Rapid Response (JRR) is an association that works as professional service provider to entities that have the jurisdiction or mandate to investigate, fact-find or carry out inquiries wherever mass atrocities may have occurred. In particular, the idea behind the set up of Justice Rapid Response is that of providing adequate resources to entrust international bodies to conduct prompt investigations immediately after a situation of conflict or human rights violations took place. JRR developed a module to train in a 'standardised manner' investigators and experts to be included in a roster where states, international organisations, international tribunals and commissions of inquiry can refer to. JRR has so far contributed to a number of international commissions of inquiry included, inter alia, those on Guinea, Cote d'Ivoire, Libya, Syria and North Korea. For more information, visit the Justice Rapid Response website at http://www.justicerapidresponse.org/ accessed on 8 December 2016. The Institute for International Criminal Investigations 'is an independent, not-for-profit, non-governmental international organization constituted for the purpose of providing criminal justice and human rights professionals with training in the techniques and knowledge necessary to impartially investigate and adjudicate egregious human rights violations, war crimes, crimes against humanity, and genocide, and for the purpose of quickly deploying multi-disciplinary teams to investigate such violations or crimes'. For more information, visit the Institute's website at http://www.iici.info/ accessed on 8 December 2016.

inherent to the modern model of commissions of inquiry may shed clarity and in so help harmonising future practices.

Finally, with regard to the third 'follow up' phase, it is now time to explore the possibility of setting up compliance mechanisms within the framework of each mandating organs. Whether this would translate into concrete obligations and commitments for states to comply with the recommendations of commissions of inquiry will probably depend by the coercive powers exercised by each body, but the design of pre-determined mechanisms to monitor compliance records and ensure a time-bound implementation will definitely strengthen the effectiveness, and as a result increase the chances of replication, of these fact-finding exercises. In this regard, it is worth mentioning again the recommendation by the 2014 UN Commission of Inquiry on the Gaza Conflict to the Human Rights Council to consider conducting a comprehensive review of the implementation of the recommendations contained in previous commissions of inquiry and fact-finding missions' reports and explore mechanisms to ensure their implementation.[745] The mapping exercise subsequently undertaken by the OHCHR should be considered as an important starting point but more significant action and a greater degree of political commitment are required in order to seriously advance a process that can lead to the design and implementation of a compliance mechanism.[746]

3.3.2 Challenge 2: interplay of political and technical dimensions in the commissions of inquiry's life cycle: the risk to produce short circuits

The definition of the life cycle of commissions of inquiry in three phases allows us to appreciate the interplay between political and technical actors and their related dimensions.

In particular, phase one related to the inquiries' establishment is heavily influenced by the work and determinations of political actors. The main actor in this phase is indeed the mandating body. The political dimension is mainly reflected in the way the mandate of commissions can be shaped and in the capability of attiring the necessary consensus among states. It can also affect the choice of the commissioners and the time, financial and technical resources devoted to perform the fact-finding task.

It has been already emphasized how unilateral mandates or mandates that already imply specific conclusions over the facts alleged may expose commissions to accusations of politicisation, exacerbate divisions among states and thus turn counterproductive. The identification of individuals to serve as commissioners represents also an extremely delicate passage as the choice of personalities that may be perceived as not impartial or not qualified enough

745 Report of the independent commission of inquiry (n 344) para. 90.
746 Human Rights Council, A/HRC/31/40/Add. 1 (2016).

in relation to the specific context can undermine the legitimacy of the whole fact-finding exercise. Furthermore, the appointment of people holding UN positions directly liked to the country under investigation (such as UN country or thematic rapporteurs) is also a trend that merits further reflection, including an assessment study balancing its positive and negative implications. Also, inadequate financial and human resources as well as technological and logistical support can negatively affect the work of the commissions along with the imposition of strict time constraint.

With regard to phase two, the work and reporting stage is apparently the moment where the more technical and impartial assessment of commissions as independent bodies can prevail. However, even during this phase commissions of inquiry are not immune from political considerations. Firstly, lack of cooperation and access to the territory from affected states and non-state actors may seriously jeopardise the collection of information and evidence and expose the inquiries' findings to criticism, as they might not wholly reflect the situation existing on the ground. Sometimes, the impossibility for commissions to reach certain areas also depends from the security situation on the ground, as it has been the case for the investigations in Libya and Central African Republic. In light of that, a strong and unequivocal support of the international community becomes paramount either in pressuring the concerned countries or in empowering the commissions to gather evidence through alternative avenues. At the same time inquiries shall as much as possible develop an open and constructive dialogue with the main actors concerned and exercise a high level of caution in reaching specific findings in the absence of relevant information coming from the main parties involved. Secondly, for the sake of the credibility and fairness of the whole fact-finding exercise, commissioners should be adequately equipped to conduct their investigation in a thorough and comprehensive manner. It thus becomes extremely important to place an adequate level and quality of resources at disposal of the commissions as well as to ensure a fair and transparent definition of roles and responsibilities in the relationship between commissioners (who act as experts that are independent and external to the UN machinery) and the OHCHR secretariat (which, although put at disposal of the commissioners still responds to the OHCHR hierarchical structure).

Finally, with the endorsement of the commissions' reports political actors return to play a critical role in ensuring adequate follow-up to the findings and conclusions reached by the inquiries. Thus, phase three can be linked back to phase one as being characterised by a strong political dimension.

The study analysis conducted in this dissertation has revealed how disconnection and lack of coordination between the actors involved in the three phases may seriously jeopardise the commissions' work, legitimacy and chances of success. Indeed, politicization of commissions and their work on one hand and lack of political will in entrusting them with adequate resources and ensuring serious follow-up mechanisms on the other may create short

circuits that can irreversibly undermine the whole commissions' life cycle. It thus seem from a certain perspective that great responsibility should be placed on political actors and mandating organs in preserving the commissions' legitimacy and success by protecting their independence and impartiality and ensuring meaningful support and compliance.

At the same time, much can be done by commissions of inquiry themselves. Numerous examples have shown how commissions have demonstrated the tendency to correct and amend certain distortions related to their establishment phase and to partially overcome the obstacles represented by the lack of cooperation and access from affected states. A remarkable example is represented by the 2009 UN Fact-Finding Mission on the Gaza Conflict, which has pushed for an amendment of its unilateral mandate and has made sure in its analysis to adequately portray the Israeli views of the events despite the lack of cooperation from the Israeli authorities. The fact that the Human Rights Council in establishing a second Gaza investigation in 2014 has taken stock of past experiences by resorting to a more neutral terminology in the mandate shows the potential of independent inquiries in affecting the political spheres within their own life cycle.

Furthermore, commissions can ensure, through an open and transparent dialogue, the cooperation and trust of the affected states. Even in those cases where formal channels of cooperation would prove unavailable, working through informal and indirect forms of dialogue may still result precious both in terms of evidence gathering and legitimacy of the whole exercise. An interesting example is represented by the Commission of Inquiry on the situation of human rights in Eritrea. Despite receiving no formal cooperation and access from the Government of Eritrea, the Commission met with the Permanent and Deputy Permanent Representatives of the Permanent Mission of Eritrea to the United Nations, while its Secretariat at the opportunity to hold an exchange of views with the Presidential Adviser and Head of Political Affairs of the People's Front for Democracy and Justice.[747] The Commission duly noted the pro-government's criticism and submissions filed against its first report and thoroughly screened and rebutted such arguments in its second report, in this way carrying out an indirect exchange of views with the Eritrean authorities on issues of merit, which has undoubtedly enhanced the credibility and authoritativeness of its findings.[748]

Finally, in relation to their 'denouncing' and 'evoking action' roles, commissions should be always mindful of the great value attached to their conclusions and recommendations. Particularly looking at the low level of compliance emerging from the practice, this requires future commissions to be both pragmatic and creative in ensuring that their work can produce meaningful follow-

747 2nd Report, detailed findings of the commission of inquiry on human rights in Eritrea (n 315) para. 4.

748 Ibid paras. 42-47.

up at both domestic and international level. Indeed, the manner in which to frame and identify recommendations should depend on each singular case. For example, high-sounding and ground-breaking recommendations can well serve the inquiries' provoking and denouncing functions in certain situations but undermine any prospect to ensure a meaningful follow-up in other more delicate contexts, while more modest but tailored suggestions may lead to substantial improvements particularly at the level of national reforms and domestic accountability.

In conclusion, while it is true that commissions still fundamentally rely upon the good will of political actors in phases one and three, through their work and the methodology adopted in phase two they can still significantly affect the records of both their establishment and follow-up stages.

3.3.3 Challenge 3: the interaction of commissions of inquiry with international tribunals

It is unanimously accepted that commissions of inquiry are not adjudicatory bodies. They do not apply the same standard of proof, they do not possess the same instruments, they do not employ the same procedural structure and apply the guarantees of judicial bodies.

At the same time, it has been emphasized how commissions of inquiry have for various reasons increasingly resorted to international criminal law paradigms, including by making findings on the criminal responsibility of individuals.

It has also been analysed how findings (both factual and legal) and evidence collected by commissions of inquiry have been often significantly relied upon by international criminal tribunals, particularly by prosecutors in the preliminary phases of their investigations. At the same time some experts have raised concerns on the partial and selective approach to international criminal law by commissions of inquiry and the possibility to resort to their findings has been considered more difficult in more advanced stages of the proceedings.[749] In this regard, according to Darcy

> 'while the reports of contemporary commissions are frequently described as authoritative, international courts have been quite conservative when it comes to relying upon their findings'.[750]

749 In particular, it has been pointed out how 'no immediate precedential value should be attached to detailed legal findings of commissions of inquiry. [...] legal findings and interpretations from commissions of inquiry can only be transposed to the context of a criminal trial with a certain care and diligence'. van den Herik and Harwood (n 154) 2-3, 16.

750 Darcy (n 44) 3.

The author notes how

> 'Judge Ušacka of the International Criminal Court commented that the legal conclusions of such commissions "may be relevant only by analogy", in the same way that the jurisprudence of the *ad hoc* tribunals "is not directly applicable before this Court without 'detailed analysis'"'.[751]

Taking into account these caveats, a number of conclusions and suggestions for improving future performances can be made.

Firstly, it should be noted that, while the commissions' more substantial involvement in the applicability of international criminal law is now a fact, such a debate has not yet attired institutional attention. In particular, any discussion so far regarding the value of commissions' findings in the area of ICL and their potential coordination with international criminal tribunal has remained confined to practitioners and scholars' contributions. Hence, after the encouraging experience of the UNWCC in the 1940s, no further attempt has been made to institutionally improve coordination between the work of inquiry and adjudicative bodies involved in potential criminal investigations. In this regard it should be warned that in the absence of any guidance regulating such coordination, a futile competition in securing accountability risks to prevail over a fruitful cooperation and separation of roles.

It is a fact that commissions of inquiry (at least in their modern conceptualization) and international tribunals are bodies that belong to different and separate institutional frameworks so any discussion about institutionalising their coordination would not conform to reality. However, this does not mean that there have not been examples of direct and indirect coordination between the two actors and that this coordination cannot be improved.

Although we have seen that international investigations can be more beneficial to criminal justice mechanisms if they operate at the outset of the international community response and before international tribunals take the lead, there have been many cases in which commissions and tribunals where concurrently involved and even coordinated their activities. These exchanges should be, where possible, encouraged.

In particular, leaving aside the prominent example of the Yugoslavia Commission and the ICTY highlighted above, more recently the investigations on Libya and CAR have, in the course of their activities, held consultations and exchanged information with the Prosecutor of the ICC.[752] These inter-

751 Ibid. See also ICC, *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (Pre-Trial Chamber I) (Separate and Partially Dissenting Opinion of Judge Anita Ušacka) Case No. ICC-02/05-01/09 (4 March 2009) para. 6.

752 Report of the International Commission of Inquiry into Libya (n 202) para. 18; Report of the International Commission of Inquiry on the Central African Republic (n 294) paras. 4, 92.

actions, albeit on ad hoc basis, are nonetheless important where commissions of inquiry and the ICC are simultaneously involved in a given context. This is even more important in those situations, like in the case of former Yugoslavia and Sudan, where commissions of inquiry are deployed immediately after certain events took place and granted access to fresh evidence, which may not be available at a later stage when criminal justice mechanisms take the lead. In this regard, awareness by each actor of its role in the broader response and coordination with other key stakeholders involved in the process represent pivotal ingredients for the effectiveness and success of the overall performance of the international community.

It is a fact that modern inquiries have been increasingly resorting to international criminal law. Not only they have been applying international criminal law paradigms but they have also been explicitly tasked to highlight responsibilities and identify individuals responsible. These new powers, whether or not they have been wisely conferred,[753] come with new responsibilities. In particular, commissions of inquiry should show greater transparency in consistently and meticulously outlining their standards of proof and explaining the methodology they have applied in order to collect and assess sources and evidence. This includes also those procedures eventually developed to test the reliability of different sources, to protect confidentially and ensure the safety of witnesses and victims.

In this regard, the fact that commissions have (or not) availed themselves of the expertise of specific human resources and of the use of certain techniques should be clearly spelled out in the methodology section of their reports. For example, commissions of inquiry have increasingly resorted to the experts included in the roster of the JRR association. Indeed, the trainings that are provided by JRR are focused on criminal investigations over contexts where international crimes are committed. Hence, those experts that are trained by JRR and seconded to commissions of inquiry are formed on the basis of the standards applied in criminal proceedings. If it has been the case, this aspect should be duly emphasized in the final report of commissions of inquiry as a criminal prosecutor or a court of law may more easily rely upon evidence collected by a criminal investigator rather than by a 'mere' human rights expert.

Furthermore, although it has been argued in this dissertation that even a selective application of international criminal law by commissions of inquiry may benefit the course of criminal proceedings, an effort should be required for commissions of inquiry in order to adequately investigate all aspects related to the perpetration of international crimes. It means not only to address the

753 On the feasibility of empowering commissions with the task of identifying individuals responsible for international crimes see Carsten Stahn and Catherine Harwood, 'What's the Point of 'Naming Names' in International Inquiry? Counseling Caution in the Turn Towards Individual Responsibility' *EJIL Talk!* (11 November 2016).

facts and circumstances related to the criminal offence and the contextual element but also to properly link the commission of the crime with the responsibility of a given individual. In this regard, commissions of inquiry should more consistently analyse and assess modes of responsibility particularly when tasked in their mandate to identify individuals allegedly responsible.

Commission should then exercise an high degree of caution in managing incriminating evidence and in engaging in the naming and shaming of individuals in the absence of an adversarial procedure that takes into adequate account the rights and guarantees of the defendants. In this regard, an approach that respects the confidentiality of such information should generally be preferred to 'public naming and shaming'.

Finally, as an alternative to the delicate and challenging process of naming individuals, commissions may explore the usefulness of investigating other forms of responsibilities. As it has been already emphasized in Chapter 2, these responsibilities (including those of organs, institutions and groups) may be more feasible for inquiries to highlight while still empowering relevant actors within the international community to take the appropriate actions. In addition such evidence – together with indications concerning contextual elements of the crimes or the identification of patterns of violations or specific incidents that may attire attention for their criminal implications – can still provide an enormous contribution in tailoring and narrowing the focus of the activities subsequently carried out by criminal tribunals.

In sum, more transparency in the methodology and procedures employed and a greater level of consistency in the application of international criminal law paradigms can give findings of commissions of inquiry more appeal in front of international tribunals and induce criminal prosecutors and judges to resort more safely to their reports as authoritative secondary sources. Especially in those contexts where they lack access to the territory and possibility to gather first-hand fresh evidence, the actors involved in criminal proceedings may in fact be more inclined to resort to findings and evidence that have been collected with the mind of a criminal investigator that conform to specific standards, procedures and guarantees.

However, it should be recalled that the identification of responsibilities for the commission of international crimes represent just one of the tasks assigned to modern commissions of inquiry and the need to develop 'criminally-oriented' procedures and practices should be compromised with the other functions and duties that these investigations have to absolve. In other terms, reducing modern human rights inquiries to preliminary-investigations supporting bodies would firstly not fit with the nature of such bodies and secondly unduly limit their scope and frustrate their potential as a tool within the broader international community response. Hence, while further coordination and procedural efforts are required in order to improve the records of interaction between commissions of inquiry and international tribunals, any further step in this direction should be assessed case by case

and will depend on the instructions received in the mandate given to each commission.

4 Conclusions

This research has analysed the role played by independent international inquiries with an emphasis on those mechanisms mandated to investigate so-called 'atrocities', namely situations of gross and systematic violations of international humanitarian and human rights law.

Through a historical overview it was shown how such role has significantly evolved and how the underlying causes of the exponential proliferation of human rights mandated international commissions of inquiry witnessed in recent years have progressively led to a model whose features differ significantly from the inquiry paradigm as conceptualised at the beginning of the 20th Century.

While the fact-finding aspect has substantially remained unaltered, this study has demonstrated how commissions have been increasingly empowered with law-applying functions. On the one hand, such a trend has opened the discussion – debated in the course of the comparative thematic analysis – concerning the use made by commissions of inquiry of the relevant legal frameworks and their contribution to the development and consolidation of international law. On the other hand, it has raised important questions on the value of the legal findings of inquiry bodies particularly if compared with the function exercised by adjudicative organs such as courts and tribunals. The use of international criminal law by commissions of inquiry and their contribution (both factual and legal) to efforts aimed at ensuring criminal accountability represent also matters that have extensively been investigated in the course of this research.

However, such issues undoubtedly present wider ramifications and inevitably call into question what are the main goals and purposes of modern fact-finding exercises. This dissertation has in fact demonstrated how modern human rights inquiries can no longer be conceived, as they were traditionally, as mere preventive diplomacy tools in the hands of states to appropriately settle their international disputes. These mechanisms seem also to differ from the model envisaged in the R2P framework, where fact-finding was considered as an early-warning tool in the hands of the international community to prevent further escalations of crises. Practice has shown how such investigations have become at times more involved in condemning rather than preventing, in provoking action (and often outrage) in front of situations of protracted human rights violations rather than in de-escalating tensions. In particular circumstances, one can even argue that inquiries have operated as correction

mechanism to the failures of the international community to react rather than as a trigger of further action. This may indeed raise some questions concerning which kind of accountability and enforcement inquiries can bring as an end in themselves in light of the failure of enforcement bodies, such as the UN Security Council or the International Criminal Court, to act.

Hence, this study has recognised two main functions of modern inquiry commissions as preliminary step in the international community's response to atrocities. The first, more 'activist' and 'political', is to provoke further measures and actions by relevant local and international stakeholders or to denounce a particular crises in light of the failure of the international community to react. The second, more technical, is to influence with their findings and analysis further determinations by local and international institutional actors, particularly in the legal and judicial spheres.

It has also been emphasized that this evolution in the role of international inquiries has taken place without any formal institutional backing. This has stimulated a fascinating debate among scholars on the challenges and opportunities of such a transformation. This study has not taken a particular position on whether this new model of inquiry commissions is itself legitimate or whether certain institutional rubber-stamp would be necessary. It has noted how this evolution has led to a well-established practice that, as such, needs to be accepted and improved.

Indeed, what this dissertation has attempted to do – through the comparative thematic analysis and by assessing the impact of a number of landmark inquiry experiences – is to identify a number of key gaps and challenges (mainly related to the lack of harmonization and the interplay of different political interests in the course of the commissions' life-cycle) that the current practice is facing. This with the goal of contributing to those debates (and hopefully stimulate new ones) aimed at rectifying certain trends and positively influencing future models of response. This analysis has in fact underlined how commissions of inquiry in their modern conceptualisation have shown the potential to incarnate a paramount, albeit preliminary, step in the international community's response to ensure accountability in case atrocities have been perpetrated. Such a potential (with all its ramifications) needs to be carefully studied and debated and any attempt in this direction requires the contribution of an array of different actors, including academics, practitioners and institutional and political decision-makers. This author sincerely hopes that the present dissertation will represent a fresh and positive input to advance such a process.

Summary

The thesis engages with a topic that still remains under-researched: the role of international commissions of inquiry and their evolution throughout recent history. While – given the recent proliferation of these mechanisms particularly in relation to the investigation of serious violations of international humanitarian and human rights norms – a number of ramifications stemming from such trend have become the object of selective academic work, there exist only few comprehensive analysis of the phenomenon. In this regard, the present work engages not only in an historic overview of the evolution undertaken by inquiry mechanisms but also examines thoroughly the main significant consequences emerging from the current practice, including the interpretation of the commissions' mandates, their use and contribution to the development of international law, their impact on the proceedings before international criminal courts and tribunals and the shift in their role as part of the response by the international community. In this regard, the thesis, by reaching findings that go beyond the state-of-the-art, makes a novel contribution to academic research.

In terms of the research question, the thesis aims to respond to the following query:

> *which is the role currently acquired by modern commissions of inquiry, particularly looking at the international community's response to gross human rights violations?*

The present research has being based primarily on the review of the documents that constitute the work, practice and follow-up to commissions of inquiry and similar human rights investigations. It has also benefited from the consultation of articles, books, conferences and policy papers written by experts and practitioners on the matter. While refraining to resort to the instrument of formal interviews, the author has also conducted a round of informal exchanges of views and consultations with former commissioners, practitioners and experts in the field. Furthermore, the research has benefited from the fieldwork carried out by the author in Israel and the Occupied Palestinian Territory, which represents one of the most relevant contexts to appreciate the work and functioning of modern international commissions of inquiry. This author has spent the last four years researching and working as legal advisor for local and international OPT-based non-governmental organisations.

He has closely followed the work and developments of two international inquiries: the 2012 UN Fact-Finding Mission on Israeli settlements and the 2014 UN Commission of Inquiry on the Gaza Conflict.

The dissertation is divided into three main chapters. The first one provides an overview of the history of commissions of inquiry from their inclusion in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes to their current proliferation in relation to the investigation of serious human rights and international humanitarian law violations. The Second Chapter engages in an in-depth comparative thematic analysis of the main recent experiences of international commissions of inquiry based on a number of thematic areas including: mandate received; standard of proof implemented; impact of cooperation/non cooperation by the parties; use and combination of sources and evidence; use and contribution to the development of international law; contribution in ensuring accountability and the use of international criminal law. Finally, Chapter 3 provides an assessment of the impact of inquiry mechanisms and, by highlighting a number of gaps and challenges, it draws a number of lessons learnt that can help rectifying future trends.

In terms of findings, this research has emphasized, in relation to the evolution undertaken by commissions of inquiry, how these tools, while preserving their original fact-finding task, have been increasingly empowered with law-applying functions. On the one hand, such a trend has opened the discussion concerning the use made by commissions of inquiry of the relevant legal frameworks and their contribution to the development and consolidation of international law. On the other hand, it has raised important questions on the value of the legal findings of inquiry bodies particularly if compared with the function exercised by adjudicative organs such as courts and tribunals.

This dissertation has also pointed out how the role of inquiries has significantly shifted from their original function as preventive diplomacy tools in the hands of states to appropriately settle their international disputes. These mechanisms, as currently operationalized, seem also to differ from the model envisaged in the 'Responsibility to Protect' framework, where fact-finding was considered as an early-warning tool in the hands of the international community to prevent further escalations of crises. On the contrary, the recent practice has shown how such investigations have become at times more involved in condemning rather than preventing, in provoking action (and often outrage) in front of situations of protracted human rights violations rather than in de-escalating tensions. In particular circumstances, one can even argue that inquiries have operated as correction mechanism to the failures of the international community to react rather than as a trigger of further action. This may indeed raise some questions concerning which kind of accountability and enforcement inquiries can bring as an end in themselves in light of the failure of enforcement bodies, such as the UN Security Council or the International Criminal Court, to act.

Hence, this study has recognised two main functions of modern inquiry commissions as preliminary step in the international community's response to atrocities. One, more technical, is to influence with their findings and analysis further determinations by local and international institutional actors, particularly in the legal and judicial spheres. The other, more 'activist' and 'political', is to provoke further measures and actions by relevant local and international stakeholders or to denounce a particular crises in light of the failure of the international community to react.

The thesis has also emphasized that this evolution in the role of international inquiries has taken place without any formal institutional backing. This has stimulated a fascinating debate among scholars on the challenges and opportunities of such a transformation. On this point, the dissertation does not take a particular position on whether this new model of inquiry commissions is itself legitimate or whether certain institutional rubber-stamp would be necessary. It has noted how this evolution has led to a well-established practice that, as such, needs to be accepted and improved. What this dissertation has attempted to do is to identify a number of key gaps and challenges (mainly related to the lack of harmonization and the interplay of different political interests in the course of the commissions' life-cycle) that the current practice is facing. This with the goal of contributing to those debates (and hopefully stimulate new ones) aimed at rectifying certain trends and positively influencing future models of response. This analysis has in fact underlined how commissions of inquiry in their modern conceptualisation have shown the potential to incarnate a paramount, albeit preliminary, step in the international community's response to ensure accountability in case atrocities have been perpetrated. Such a potential (with all its ramifications) needs to be carefully studied and debated and any attempt in this direction requires the contribution of an array of different actors, including academics, practitioners and institutional and political decision-makers.

Samenvatting
Dutch summary

DE ROL VAN MODERNE INTERNATIONALE ONDERZOEKSCOMMISSIES:
Een eerste stap naar het waarborgen van verantwoording voor schendingen van internationaal recht?

Het proefschrift behandelt een onderwerp dat nog steeds weinig onderzocht wordt: de rol van internationale onderzoekscommissies en hun ontwikkeling in de loop van de recente geschiedenis. In het licht van de recente toename van deze mechanismen, met name als gevolg van onderzoek naar ernstige schendingen van internationale humanitaire normen en mensenrechten, is in beperkte mate academisch onderzoek verricht naar een aantal gevolgen die voortvloeien uit deze ontwikkeling; grondige analyses van dit fenomeen komen echter maar sporadisch voor. In dit verband verschaft dit proefschrift niet alleen een historisch overzicht van de ontwikkeling van onderzoeksmechanismen, maar onderzoekt ook diepgaand de belangrijkste gevolgen die voortvloeien uit de huidige praktijk, waaronder de interpretatie van de mandaten van de commissies, hun gebruik van en bijdrage aan de ontwikkeling van internationaal recht, de invloed van de commissies op de procedures voor internationale strafhoven en tribunalen en de verandering van hun rol als onderdeel van de reactie van de internationale gemeenschap. In dit opzicht verstrekt dit proefschrift een nieuwe bijdrage aan het academische onderzoek, doordat er conclusies worden getrokken die verder strekken dan de huidige stand van de wetenschap.

Dit proefschrift heeft tot doel de volgende onderzoeksvraag te beantwoorden:

> *wat is de rol die hedendaagse onderzoekscommissies inmiddels verworven hebben, in het bijzonder ten aanzien van de reactie van de internationale gemeenschap op grove schendingen van mensenrechten?*

Dit onderzoek is hoofdzakelijk gebaseerd op de beoordeling van documenten met betrekking tot het werk, de praktijk en de follow-up van onderzoekscommissies en soortgelijke onderzoeken met betrekking tot mensenrechten. Tevens zijn artikelen, boeken en conferentie- en beleidsdocumenten geraadpleegd die door deskundigen en beoefenaars over dit onderwerp zijn geschreven. Hoewel geen officiële interviews gehouden zijn, heeft de auteur wel een aantal infor-

mele gedachtewisselingen en beraadslagingen gehad met voormalige commissieleden, professionals en deskundigen in dit vakgebied. Daarnaast is door de auteur veldwerk uitgevoerd in Israël en het bezette Palestijnse gebied: één van de meest relevante contexten voor evaluatie van het werk en het functioneren van moderne internationale onderzoekscommissies. De auteur heeft de afgelopen vier jaar onderzoek verricht en gewerkt als juridisch adviseur voor lokale en internationale niet-gouvernementele organisaties die gevestigd zijn in het bezette Palestijnse gebied. Hij heeft nauwlettend het werk en de ontwikkelingen van twee internationale onderzoeken gevolgd, namelijk de VN-onderzoeksmissie van 2012 inzake Israëlische nederzettingen en de VN-onderzoekscommissie van 2014 inzake het conflict in de Gazastrook.

Dit proefschrift bestaat uit drie hoofdstukken. Het eerste hoofdstuk geeft een overzicht van de geschiedenis van de onderzoekscommissies vanaf hun opname in het Verdrag voor de vreedzame beslechting van internationale geschillen van 1899 en van 1907 tot de huidige toename van de onderzoekscommissies als gevolg van onderzoek naar ernstige schendingen van mensenrechten en internationaal humanitair recht. Het tweede hoofdstuk bestaat uit een diepgaande, vergelijkende analyse van de belangrijkste recente ervaringen van internationale onderzoekscommissies aan de hand van een aantal thema's, waaronder: ontvangen mandaat, toegepaste bewijslast, effect van samenwerking/niet-samenwerking door partijen, toepassing en combinatie van bronnen en bewijsmateriaal, toepassing van en bijdrage aan de ontwikkeling van internationaal recht, bijdrage aan het waarborgen van verantwoording en toepassing van internationaal strafrecht. Tot slot wordt in hoofdstuk III een analyse gegeven van de impact van de onderzoeksmechanismen en wordt door middel van het aanstippen van enkele leemtes en uitdagingen een aantal lessen getrokken die kunnen bijdragen aan het rechtzetten van toekomstige ontwikkelingen.

Voor wat betreft de conclusies heeft dit onderzoek met betrekking tot de ontwikkeling die ontwikkelingscommissies hebben doorgemaakt, benadrukt hoe deze instrumenten, met behoud van hun oorspronkelijke taak van waarheidsvinding, steeds meer functies met betrekking tot rechtshandhaving hebben gekregen. Enerzijds heeft deze ontwikkeling de discussie in gang gezet over de toepassing door onderzoekscommissies van de relevante juridische kaders en hun bijdrage aan de ontwikkeling en consolidatie van het internationaal recht. Anderzijds zijn hierdoor belangrijke vragen opgeworpen over de waarde van de juridische bevindingen van onderzoeksorganen, in het bijzonder in vergelijking met de functie die wordt uitgeoefend door berechtingsorganen zoals rechtbanken en tribunalen.

In dit proefschrift wordt ook duidelijk gemaakt hoe de rol van onderzoeken aanzienlijk verschoven is ten opzichte van de oorspronkelijke functie van preventief diplomatiek instrument waarmee staten hun internationale geschillen op passende wijze beslechten. In hun huidige toepassing lijken deze mechanismen ook te verschillen van het model zoals voorzien in het 'Responsibility

to Protect'-kader, waarin onderzoek beschouwd werd als vroegtijdig waarschuwingsinstrument van de internationale gemeenschap ter voorkoming van verdere escalaties van crises. De recente praktijk laat echter zien dat dergelijke onderzoeken soms meer de tendens hebben om te veroordelen in plaats van te voorkomen, of actie (en vaak verontwaardiging) uit te lokken ten aanzien van langdurige schendingen van mensenrechten in plaats van spanningen te de-escaleren. Onder bepaalde omstandigheden zou men zelfs kunnen concluderen dat onderzoeken meer hebben gefunctioneerd als correctiemiddel voor het falen van de internationale gemeenschap dan als stimulans tot verdere actie. Dit kan zelfs een aantal vragen oproepen over het soort verantwoording en handhaving dat onderzoekscommissies kunnen verschaffen als doel op zich, gezien het achterwege blijven van optreden door handhavingsinstanties zoals de VN-Veiligheidsraad of het Internationaal Strafhof.

Daarom zijn er in dit onderzoek twee hoofdtaken van onderzoekscommissies vastgesteld als voorbereidende stap voor het reageren door de internationale gemeenschap op gruweldaden. De eerste, meer technische taak betreft het beïnvloeden, door middel van toepassing van de bevindingen en analyses van onderzoekscommissies, van nadere besluiten door lokale en internationale institutionele actoren, in het bijzonder op juridisch en gerechtelijk terrein. De tweede taak is meer activistisch en politiek van aard en betreft het uitlokken van nadere maatregelen en acties van relevante lokale en internationale belanghebbenden en het veroordelen van een specifieke crisis in het licht van het uitblijven van een reactie van de internationale gemeenschap.

Het proefschrift benadrukt tevens dat deze ontwikkeling van de rol van internationale onderzoeken zich heeft voltrokken zonder enige formele institutionele steun. Dit heeft een fascinerend debat onder geleerden op gang gebracht over de uitdagingen en kansen van een dergelijke transformatie. Op dit punt neemt het proefschrift geen specifiek standpunt in ten aanzien van de vraag of het nieuwe model voor onderzoekscommissies op zichzelf legitiem is of dat er een bepaalde mate van institutionele goedkeuring benodigd is. Er wordt op gewezen hoe deze ontwikkeling heeft geleid tot een gevestigde praktijk, die als zodanig moet worden aanvaard en verbeterd. In dit proefschrift is geprobeerd een aantal belangrijke leemtes en uitdagingen vast te stellen (hoofdzakelijk gerelateerd aan het gebrek aan harmonisatie en de wisselwerking tussen verschillende politieke belangen tijdens de levenscyclus van de commissies) waarmee de huidige praktijk zich geconfronteerd ziet. Het doel hiervan is om bij te dragen aan de discussies (en hopelijk nieuwe te stimuleren) die gericht zijn op het corrigeren van bepaalde ontwikkelingen en het positief stimuleren van toekomstige reactiemodellen. Deze analyse heeft onderstreept hoe onderzoekscommissies in hun hedendaagse uitvoering het potentieel aangetoond hebben tot het gestalte geven aan een ??belangrijke, zij het eerste stap in de reactie van de internationale gemeenschap ter waarborging van verantwoording in het geval van gruweldaden. Een dergelijk potentieel (met alle bijkomende gevolgen) dient zorgvuldig te worden bestudeerd

en besproken; voor elke poging in deze richting is bovendien de bijdrage benodigd van een reeks verschillende actoren, waaronder academici, professionals en institutionele en politieke besluitvormers.

Bibliography

A. International and regional instruments

- Convention (II) with Respect to the Laws of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988 (29 July 1899)
- The Hague Convention for the Pacific Settlements of International Disputes (1907), UKTS 6 (1971) Cmnd 4575
- Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), (1919) Ts. 4
- Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey (1923) 28 LNTS 11
- Charter of the United Nations (1945) 1 UNTS XVI
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3
- Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998) (Rome Statute) Article 58(1)(a)
- Constitutive Act of the African Union (Lome, Togo, 11 July, 2000)

B. Case law

International Court of Justice

- ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Rep. 2002
- ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Rep 2004
- ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) ICJ Rep 2005
- ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia II) ICJ Rep. 2015

International Criminal Tribunals

- ECCC, (Supreme Court Chamber, Judgment) Case 002/01 (23 November 2016)
- *France et al. v. Goering et al.*, (1946) 22 IMT 203, (1946) 12 ILR 203; (1946) 41 *American Journal of International Law* 172
- ICC, *Prosecutor v Harun and Ali Khusayb*, 'Prosecutor Application under Article 58(7)' Case No. ICC-02/05 (27 February 2007)

- ICC, *Prosecutor v Bashir*, 'Prosecutor Application under Article 58(7)' Case No. ICC-02/05-157-AnxA (14 July 2008)
- ICC, *Prosecutor v Bashir*, (Pre-Trial Chamber I) Case No. ICC-02/05-01/09 (4 March 2009)
- ICC, *Prosecutor v Bashir*, (Judgment in the Sentencing Appeals) Case No. ICC-02/05-01/09-OA (3 February 2010)
- ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Pre-Trial Chamber II) Case No. ICC-01/01-19 (31 March 2010)
- ICC, 'Request for authorization of an investigation pursuant to article 15' Case No. ICC-02/11 (23 June 2011)
- ICC, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire' (Pre-Trial Chamber III) Case No. ICC-02/11 (2 October 2011)
- ICC, *Prosecutor v. Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (Pre-Trial Chamber I) Case No. ICC-02/05-01/09 (12 December 2011)
- ICC, *Prosecutor v. Mbarushimana*, (Pre-Trial Chamber I, Decision on the Confirmation of Charges) Case No. ICC-01/04-01/10- 465-Red (16 December 2011)
- ICC, 'Situation in Palestine' (4 April 2012) http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf accessed on 8 December 2016
- ICC, 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation' (14 May 2013), http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf accessed on 8 December 2016
- ICC, *Prosecutor v. Gbagbo,* (Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) Case No. ICC-02/11-01/11-432 (3 June 2013)
- ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: 'Rome Statute legal requirements have not been met'' (6 November 2014), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-06-11-2014.aspx accessed on 8 December 2016
- ICC, 'Situation on registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report' (6 November 2014)
- ICC, 'Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation on Registered Vessels of the Union of the Comoros, the Ellenic Republic of Greece and the Kingdom of Cambodia' Case No. ICC 01/13 (29 January 2015)
- ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (Pre-Trial Chamber I) Case No. ICC 01/13 (16 July 2015)
- ICC, 'Request for authorization of an investigation pursuant to article 15', Case No. ICC-01/15 (17 November 2015)

· ICC, *Prosecutor v. Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal (Trial Chamber V(A)) Case No. ICC-01/09-01/11 (5 April 2016)
· ICC Prosecutor, 'Report on Preliminary Examination Activities' (13 December 2011)
· ICC Prosecutor 'Report on Preliminary Examination Activities' (12 November 2015)
· ICTR, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Judgment, 2 September 1998)
· ICTR, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-A (Appeal, 1 June 2001)
· ICTY, *Prosecutor v. Tadiæ*, Case No. IT-94-1 (Decision on the Defence Motion for Interlocutory Appeal, 2 October 1995)
· ICTY, *Prosecutor v. Jelisic*, Case No. IT-95-10-T (Judgment, 14 December 1999)
· ICTY, *Prosecutor v. Krstic*, Case No. IT-98-33-A (Judgment, Appeal, 19 April 2004)
· ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T (Judgment, 30 November 2005)
· ICTY, *Prosecutor v. Stakic*, Case No. IT-97-24-A (Appeal, 22 March 2006)
· ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T (Judgment, 3 April 2008)
· ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T (Judgment, 12 December 2012)

C. Publications

– – Acting US Secretary of State (Frank Lyon Polk) to the Commission to Negotiate Peace, January 6, 1919, *Foreign Relations of the United States, 1919: The Paris Peace Conference vol. II* (1919)
– – 'Burundi to leave the ICC six months after probe announced' *BBC News* (7 October 2016) http://www.bbc.com/news/world-africa-37585159 accessed on 8 December 20116
– – 'Israel ban on UN probe may backfire' *The Age* (2 May 2002) http://www.theage.com.au/articles/2002/05/01/1019441391191.html accessed 8 December 2016
– – 'Israel defies UN over Jenin mission' *The Telegraph* (25 April 2002) http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1392196/Israel-defies-UN-over-Jenin-mission.html accessed 8 December 2016
– – 'Israel finally realises that Arabs should be accountable for their leaders' acts –Interview with IDF Northern Command Chief Gadi Eizenkot' *Yedioth Ahronoth* (10 June 2008)
– – 'Kim Jong-un placed on sanctions blacklist for the first time by the US' *The Guardian* (6 July 2016) https://www.theguardian.com/world/2016/jul/06/north-korea-kim-jong-sanctions-blacklist accessed on 8 December 2016
– – 'PM: Throw Goldstone Report into dustbin of history' *The Jerusalem Post* (2 April 2011) http://www.jpost.com/Diplomacy-and-Politics/PM-Throw-Goldstone-Report-into-dustbin-of-history accessed on 8 December 2016
– – 'South Africa to Quit International Criminal Court' *Al Jazeera* (21 October 2016) http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html accessed on 8 December 2016
– – The Gambia joins African queue to leave ICC' *BBC News* (26 October 2016) http://www.bbc.com/news/world-africa-37771592 accessed on 8 December 2016
– – *The Economist* (London, 18 July 1914)
– – The United Nations War Crimes Commission (ed.), *History of the United Nations War Crimes Commission and the Development of Laws of War* (London, His Majesty's Stationary Office 1948)

– – 'UN Security Council Extends Inquiry Into Chemical Weapons Attack in Syria' (2016) *The Wire* http://thewire.in/81108/un-security-council-extends-inquiry-into-chemical-weapons-attack-in-syria/ accessed 8 December 2016
– – 'US Senate Urges UN to Rescind Goldstone's Gaza Report' *Haaretz* (15 April 2011) http://www.haaretz.com/israel-news/u-s-senate-urges-un-to-rescind-goldstone-s-gaza-report-1.356124 accessed on 8 December 2016
– – 'U.S. Veto Thwarts UN Resolution Condemning Settlements' *Haaretz* (18 February 2011) http://www.haaretz.com/israel-news/u-s-veto-thwarts-un-resolution-condemning-settlements-1.344333 accessed on 8 December 2016

Akande D and Tomkin H, 'International Commissions of Inquiry: A New Form of Adjudication?' *EJIL:Talk!* (6 April 2012)
Alston P G, 'The Darfur Commission as a Model for Future Responses to Crisis Situations' (2005) 3 *Journal of International Criminal Justice* 602
Alston P G, *The Criminalisation of International Human Rights Fact-Finding', Conference on Fact- finding on Gross Violations of Human Rights During and After Conflicts*, (Norwegian Centre for Human Rights, 2011)
Aksenova M and Bergsmo M, 'Non-Criminal Justice Fact-Work in the Age of Accountability', in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl Academic EPublisher 2013)
Aumond F, '*La situation au Darfur déférée à la CPI*' (2008) *Revue générale de droit international public* 111

Bassiouni C, 'The United Nations Commission of Experts Established pursuant to Security Council Resolution 780 (1992)' (1994) 88 *The American Journal of International Law* 784
Bassiouni C, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' (1996) Occasional Paper No. 2 – International Human Rights Law Institute, DePaul University College of Law
Bassiouni C, 'World War I: 'The War to End All Wars' and the Birth of an Handicapped International Criminal Justice System' (2002) 244 (253) *Denv. J. Int.L. L.&Pol.'Y* 290
Bell A, 'A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law' 2010) ASIL Annual Meeting
Blank, 'Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare' (2011) 43 *Cas. W. Res. J. Int'L. L*
Boczek B A, *International Law: A Dictionary* (Scarecrow Press, 2005)
Boutruche T, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 *Journal of Conflict and Security Law* 1
Boutruche T, 'Selecting and Applying Legal Lenses in Monitoring, Reporting and Fact-Finding Missions' (2013) HPCR Working Paper
Breaking the Silence, 'This is how we fought in Gaza' (2014) http://www.breakingthesilence.org.il/testimonies/database/?tzuk=1 accessed on 8 December 2016

Bring O, 'The Kunduz Hospital Attack: The Existence of a Fact-Finding Commission', *EJIL Talk!* (15 October 2015)
Bugnion F, '*Droit de Genève et droit de La Haye*' (2001) 844 *International Review of the Red Cross* 901

Cassese A, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding', in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)
Cayley A T, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 834
Chinkin C, 'U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza', in M. H. Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011)
Ciampi A and Condorelli L, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) *Journal of International Criminal Justice* 597
Cohen D, 'Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor' (2006) East West Centre Special Rep. 9
Condorelli L, '*La Commission international humanitaire d'établissement des faits: un outil obsolète ou un moyen utile de mise en oeuvre du droit international humanitaire?*' (2001) 824 *IRRC* 393
Conforti B, *Le Nazioni Unite* (7th edn, CEDAM 2005)
Cryer R, 'Sudan, Resolution 1593 and International Criminal Justice' (2006) *Leiden Journal of International Law* 195

Darcy S, 'Laying the foundations: Commissions of inquiry and the development of international law', in Christian Henderson (ed), *Commissions of Inquiry, Problems and Prospects* (Hart Publishing 2016)
Dennett T, 'The Lytton Report' (1932) 26 *The American Political Science Review* 1148
Devaney J, 'Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?' (2013) Sant'Anna Legal Studies STALS Research Paper n. 2/2013
Diakonia IHLRC, 'From Fact-Finding to Ending Impunity' (2015)

Evans G, 'Crimes Against Humanity and the Responsibility to Protect' in Leila N Sadat (ed), *Forging a Convention for Crimes Against Humanity* (2011)

Falk R, *Humanitarian Interventions and Legitimacy Wars: Seeking Peace and Justice in the 21st Century* (Routledge 2014)
Franck T M and Fairley H S, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74 *American Journal of International Law* 333
Frulli M, 'Fact-Finding or Paving the Road to Criminal Justice?' (2012) 10 *JICJ* 1323

Goldstone R J, 'Reconsidering the Goldstone Report on Israel and war crimes' *The Washington Post* (1 April 2011) http://www.washingtonpost.com/opinions/recon

sidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html accessed on 8 December 2016

Goldstone R J, 'Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl Academic EPublisher 2013)

Grace R, 'The Design and Planning of Monitoring, Reporting and Fact-Finding Missions' (2013) Program on Humanitarian Policy and Conflict Research Harvard University

Grace R and Bruderlein C, 'On Monitoring, Reporting and Fact-finding Mechanisms' (ESIL Reflections – Volume 1, Issue 2, 15 July 2012)

'Guidelines for Field Staff, NGOs and UN Agencies, Children and Armed Conflict – Monitoring and Reporting of Grave Violations of Child Rights in Israel and oPt' (May 2009)

Hale K and Cline D, 'Holding Collectives Accountable' (2014) 25 *Criminal Law Forum* 261

Hampson F, 'Fact-finding and the International Fact-Finding Commission' in Fox Hazel and Meter Michael (eds), *Armed Conflict and the New Law, Vol. II, Effecting Compliance* (London, the British Institute of International and Comparative Law 1993) 53

Harwood C, 'The Competence of UN Human Rights Council Commission of Inquiry to Make Findings of International Crimes' (2013) Grotius Centre Working Paper

Harwood C, 'Will the 'Sleeping Beauty' Awaken? The Kunduz Hospital Attack and the International Humanitarian Fact-Finding Commission', *EJIL Talk!* (15 October 2015)

Heller K J, 'The International Commission of Inquiry on Libya: A Critical Analysis' in Meierhenrich, Jens, (ed), *International Commissions: the Role of Commissions of Inquiry in the Investigation of International Crimes* (Oxford: Oxford University Press)

Heyder C, 'The UN Security Council Referral of the Crimes in Darfur to the International Criminal Court in Light to the US Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) *Berkeley Journal of International Law* 658

ICRC, 'The International Humanitarian Fact-Finding Commission' (Geneva, Advisory Service on International Humanitarian Law 2001)

International Bar Association, 'Special Panels for Serious Crimes (East Timor)' http://www.ibanet.org/Committees/WCC_EastTimor.aspx accessed on 8 December 2016

Jacobs D and Harwood C, 'International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013)

Jilani H – Chinkin C – Travers T, 'Goldstone Report: Statement issued by members of UN mission on Gaza war' *The Guardian* (11 April 2011) http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza accessed on 8 December 2016

Kalshoven F, 'The International Humanitarian Fact-finding Commission: its Birth and Early Years' in Erik Denters and Nico Schrijvers (eds), *Reflections on International Law from the Low Countries* (The Hague, Kluwer Law International 1998) 201

Kalshoven F, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?' (2002) *Humanitäres Völkerrecht* 213

Kearney M, 'Empowering the General Assembly to Advance International Criminal Investigations' (2014)

Kim H J, 'The Role of UN Commissions of Inquiry in Developing Global Human Rights: Prospects and Challenges' (2016) 14 *The Korean Journal of International Studies* 244

Kress C, 'The Darfur Report and Genocidal Intent' (2005) 3 *Journal of International Criminal Justice* 562-578

Kress C, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *LJIL* 855

Kuhn A K, 'The Lytton Report on the Manchurian Crisis' (1933) 27 *American Journal of International Law* 96

Leach P – Paraskeva C – Uzelac G, 'International Human Rights and Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights' (London Metropolitan University 2009)

Lemkin R, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd edition, Foundations of the Laws of War 1944)

Lewis M, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford University Press 2016)

Lott A, 'The Tagliavini Report Revisited: Jus ad Bellum and the Legality of the Russian Intervention in Georgia' (2012) 28(74) *Utrecht Journal of International and European Law*

Marauhn T, 'Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – The Case of Syria' (2012) 43 *California Western International Law Journal* 401

Meierhenrich J (ed), *International Commissions: The Role of Commissions of Inquiry in the investigation of International Crimes* (Oxford University Press 2013)

Melzer N, 'Interpretative Guidance on the Notion of 'Direct Participation in Hostilities' under International Humanitarian Law' (ICRC Geneva 2006)

Meron T, 'Reflections on the Prosecution of War Crimes by International Tribunals', (2006) 100 *American Journal of International Law* 555

Mikos-Skuza E, 'The International Humanitarian Fact-Finding Commission: An Awakening Beauty' in Andreas Fischer-Lescano, Hans-Peter Gasser, Thilo Marauhn, and Natalino Ronzitti (eds), *Frieden in Freheit: Festschrift fur Michael Bothe zum 70 Geburstag* (Nomos 2008) 481

Miller R, 'United Nations Fact-Finding Missions in the Field of Human Rights' (1970-1973) 40 *Australian Yearbook of International Law* 40, 42; Franck and Fairley (n 147) 308-345

MSF, 'Afghanistan: Enough. Even war has rules – MSF calls for State activation of the International Humanitarian Fact-Finding Commission to investigate Afghanistan bombing' (7 October 2015)
Mullins C, *The Leipzig Trials* (London, H.F.G. Witherby 1921)

OHCHR, 'Training Manual on Human Rights Monitoring' (New York & Geneva, United Nations 2001)
OHCHR, 'Press Release: Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission led by Justice Goldstone and Calls for their Implementation' (16 October 2009)
OHCHR, 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (New York & Geneva, United Nations, 2015)
Orentlicher D F, 'Bearing Witness: The Art and Science of Human Rights Fact-Finding' (1990) 3 *Harv. Hum. Rts. J.* 83

Partsch K J, 'Fact-Finding and Inquiry' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (North-Holland, Amsterdam-London 1992)
Pedersen S, *The Guardians: The league of Nations and the Crises of Empire* (Oxford University Press 2015)
Plesch D and Sattler S, 'A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943-1948 and its associated Courts and Tribunals' (2014) 25 *Criminal Law Forum* 20

Ramcharan B, 'Evidence' in: B. Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff: The Hague 1982)
Reinisch A, 'The International Fact-Finding Commission to Article 90 Additional Protocol I to the Geneva Conventions and its Potential Enquiry Competence in the Yugoslav Conflict' (1996) 65 *Nordic Journal of International Law* 241
Rhea H, 'The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its contribution to International Criminal Justice after World War II' (2014) 25 *Criminal Law Forum* 147
Rodenhauser T, 'Progressive Development of International Human Rights Law: The Reports of the Independent Commission of Inquiry on the Syrian Arab Republic', *EJIL Talk!* (13 April 2013)

Salmon J, '*Le fait dans l'application du droit international*' (1982) 175 The Collected Courses of the Hague Academy of International Law 261
Sassoli M, '*Le droit international humanitaire : Une lex specialis par rapport aux droits humains*?' in Andreas Auer, Alexandre Flückiger, Michel Hottelier (eds), *Les droits de l'homme et la constitution : Etudes en l'honneur du Professeur Giorgio Malinverni* (Schulthess Geneva 2007)
Schabas W A, 'Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide' (2005) 18(4) *Leiden Journal of International Law* 871-885
Schabas W A, 'The United Nations War Crimes Commission's Proposal For an International Criminal Court' (2014) 25 *Criminal Law Forum* 171

Schabas W A- Stahn C – Powderly J – Plesch D – Sattler S, 'Symposium: The United Nations War Crimes Commission and the Origins of International Criminal Justice', (2014) 25 *Criminal Law Forum*

Scharf M P, 'Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability' (2006) Case School of Law – Occasional Paper

Stahn C, 'Complementarity and Cooperative Justice Ahead of Their Time? The United Nations War Crimes Commission, Fact-Finding and Evidence' (2014) 25 *Criminal Law Forum* 3

Stahn C and Harwood C, 'What's the Point of 'Naming Names' in International Inquiry? Counseling Caution in the Turn Towards Individual Responsibility' *EJIL Talk!* (11 November 2016)

Stahn C and Jacobs D, 'Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction' (2014) Grotius Centre Working Paper 2014/017- ICL

Stewart J G, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal' (2007) 5 *Journal of International Criminal Justice* 1039

Taylor T, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knofp, 1992)

The European Council, 'Council Conclusions on the Middle East Peace Process', Press Release 610/15 (20 July 2015) http://www.consilium.europa.eu/en/press/press-releases/2015/07/20-fac-mepp-conclusions/ accessed on 8 December 2016

Tonutti A, 'Famine Crises and International Crimes', (2014) International Law and Disasters Working Paper 02 http://disasterlaw.sssup.it/wp-content/uploads/2014/01/IDL-Working-Paper-22014.pdf accessed on 8 December 2016

Tonutti A, 'International Commissions of Inquiry and Palestine: Overview and Impact – Study Analysis' *(2016)* Al-Haq Center for Applied International Law

Trix F, 'Peace-mongering in 1913: the Carnegie commission of inquiry and its report on the Balkan wars' (2014) 5(2) *First World War Studies* 147

Van den Herik L J, 'The Schism between the Legal and Social Concept of Genocide in Light of the Responsibility to Protect' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide; International, Comparative and Contextual Aspects* (2007) 75

Van den Herik L J, 'An Inquiry into Commissions of Inquiry: Navigating between Fact-Finding and Law-Application' (2014) 13 *Chinese Journal of International Law* 507

Van den Herik L J and Harwood C, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry' (2014) Grotius Centre Working Paper 2014/016-ICL

Vité S, *Les procédures internationales d'établissement des faits dans la mise en ouvre du droit international humanitaire* (Brussels, Bruylant 1999)

Vite ì S, '*L'expertise au service du droit: comment la norme façonne le processus d'enquête dans la mise en œuvre des droits de l'homme et du droit des conflits armés*' in Debons and others (eds), *Katyn et la Suisse* (Georg Geneva 2009)

Wilkinson S, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (2011) Geneva academy of international humanitarian law and human rights

Wilkinson S, 'Finding the facts: standards of proof and information handling in monitoring, reporting and fact-finding missions' (2014) Program on Humanitarian Policy and Conflict Research Harvard University

Yihdego Z, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' (2012) 13 *Melbourne Journal of International Law* 48

D. Documents of the United Nations and other international organisations

UN Commission on Human Rights

· CHR Res. 8(XXXI) (1975)
· CHR Resolution 20(XXXVI) (1980)
· CHR, E/1998/106 (1988)
· CHR, Report of the Fifth Special Session 'Grave and massive violations of the human rights of the Palestinian people by Israel', E/CN.4/S-5/5 E/2000/112 (19 October 2000)

UN Economic and Social Council

· ECOSOC Res. 350(XII) (1951)
· ECOSOC Res. 2(XXIV) (1967)
· ECOSOC Res. 1503(XLVIII) (1970)

UN Human Rights Council

· Human Rights Council, S-2/1 (2006)
· Human Rights Council, Special session resolution S-3/1 (2006)
· Human Rights Council, A/HRC/RES/S-9/1 (2009)
· Human Rights Council, A/HRC/S-15/1 (2011)
· Human Rights Council, A/HRC/S-15/2 (2011)
· Human Rights Council, A/HRC/18/53 (2011)
· Human Rights Council, A/HRC/RES/19/17 (2012)
· Human Rights Council, A/HRC/21/L.32 (2012)
· Human Rights Council, A/HRC/RES/23/26 (2013)
· Human Rights Council, A/HRC/RES/S-21/1 (2014)
· Human Rights Council, A/HRC/28/L.18 (2015)
· Human Rights Council, A/HRC/28/20 (2015)
· Human Rights Council, A/HRC/29/L.23 (2015)
· Human Rights Council, A/HRC/29/L.35 (2015)
· Human Rights Council, A/HRC/31/L.25 (2016)
· Human Rights Council, A/HRC/31/40/Add. 1 (2016)

UN General Assembly

· UNGA Res. 2329 (XXII) (1967)
· UNGA Res. 2243 (XXIII) (1968)
· UNGA Res. 3114(XXVIII) (1973)
· UNGA, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence from colonial countries and peoples for the effective guarantee and observance of human rights', A/RES/3246/XXIX (29 November 1974)
· UNGA, 'Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security', A/RES/46/59 (1991)

UN Security Council

· UNSC Res. 446 (1979)
· UNSC Res. 496 (1981)
· UNSC Res. 571 (1985)
· UNSC Res. 780 (1992)
· UNSC Res. 876 (1993)
· UNSC Res. 885 (1993)
· UNSC Res. 935 (1994)
· UNSC Res. 1012 (1995)
· UNSC Res. 1405(2002)
· UNSC Res. 1564 (2004)
· UNSC Res. 1591 (2005)
· UNSC Res. 1593 (2005)
· UNSC Res. 1970 (2011)
· UNSC Res. 1973 (2011)
· UNSC Res. 2127 (2013)
· UNSC, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', SC/11407 (22 May 2014)
· UNSC Res. 2235 (2015)

UN Secretary General

· UNSG, 'Model Rules of procedure for UN bodies dealing with violations of human rights- Noted by the Secretary-General', E/CN.4/1021/Rev. 1 (1970)
· UNSG, 'An Agenda for Peace; Preventive diplomacy, peacemaking and peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992', UN Doc. A/47/277–S/24111 (17 June 1992)
· UNSG, 'Report of the Secretary General prepared pursuant to General Assembly resolution ES-10/10', A/ES-10/186 (30 July 2002)
· UNSG, 'Implementing the Responsibility to Protect, Report of the Secretary General' A/63/677 (2009)

Other international bodies

· UNTAET, Regulation No. 2000/15, UNTAET/REG/2000/15 (6 June 2000)
· Council of the European Union, Decision 2008/901/CFSP (2008)

E. Reports and documents related to the work of international commissions of inquiry

· *Report of the International Commission to Inquire into the Causes and Conducts of the Balkan Wars* (Washington, Carnegie Endowment for International Peace 1914)
· *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (*Carnegie Endowment for International Peace, Oxford Clarendon Press 1919)
· United Nations War Crimes Commission, Unofficial preliminary Meeting (26th October 1943) London
· United Nations War Crimes Commission, Sub-Committee II, Report on the Constitution of and the Jurisdiction to be Conferred on an International Criminal Court', (submitted to the London International Assembly by Dr J.M. de Moer), SC II/3, (25 February 1944)
· United Nations War Crimes Commission, III/1, 18.3.44, *Resolution moved by Mr. Pell on 18th March,* 1944
· United Nations War Crimes Commission, Preparation and Presentation of Cases of War Crimes, Memorandum adopted by the Commission on 18 April 1945, C. 87 (1)
· United Nations War Crimes Commission, Committee I, Notes on the United Kingdom Case No, 1645 (Discriminatory Measures in Jersey), I-412, 20 October 1945
· UN Commission of Investigation concerning Greek Frontier Incidents, UNSC Res. 15 (1946)
· UN Special Committee on Palestine, UNGA Res. 106(S-1) (1947)
· UN Commission for India and Pakistan, UNSC Res. 39 (1948)
· Inquiry of the Secretary-General on the Situation in Hungary (established at the request of the General Assembly) UNGA Resolution 1004 (ES-II) (1956)
· UN Special Committee on South Africa, UNGA Res. 1702(XVI) (1961)
· UN Commission of Inquiry on the Circumstances of the death of Mr. Lumumba, UNGA Res. 1601(XV) (15 April 1961)
· UN Commission of Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Mr. Dag Hammarskjold and Members of the Party Accompanying Him, UNGA Res. 628(XVI) (1961)
· UN Commission on Ruanda-Urundi, UNGA Res. 1627(XVI) (1961)
· UN Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa (renamed UN Special Committee Against Apartheid), UNGA Res. 1761(XVII) (1962)
· UN Mission to South-Vietnam, Statement by the President of the General Assembly, 1239th meeting (1963)
· Report of the Commission of Inquiry on the Reported Massacres in Mozambique, UNGA (XXIX) Supplement No. 21 (A/9621)

· Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq, established in March 1984 following the request from Iran, UN Doc. S/17911 (1986)
· Commission of Experts established pursuant to Security Council Resolution 780, UNSC Res. 780 (1992)
· Final Report of the International Commission of Investigation on Human Rights Violations in Rwanda since October 1, 1990 (March 1993)
· Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405 (9 December 1994)
· Report of the international Commission of Inquiry concerning the assassination of the President of Burundi on 21 October 1993 and the massacres that followed, S/1996/682 (22 August 1996)
· Group of experts for Cambodia to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability, A/RES/52/135 (1998)
· OHCHR Investigative team for Afghanistan to investigate fully the reports of massacres of innocent civilians and of mass executions of prisoners of war as well as on reports of killings in Mazar-e Sharif and Bamian; and reports of mass killings of prisoners of war and civilians, rape and cruel treatment in Afghanistan, A/RES/54/185 (1999)
· Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000, E/CN.4/2001/121 (16 March 2001)
· Report of the Commission of Inquiry on the events connected with the march planned for 25 March 2005 in Abdijan, S/2004/384 (13 May 2004)
· Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General Pursuant to Security Council Resolution 1564 (2004) (25 January 2005)
· Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina (18 July 2005)
· Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (2 October 2006)
· Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2 (23 November 2006)
· Report of the Special Rapporteur on the human rights situation in the Palestinian territories occupied since 1967 pursuant to resolution S-1/1 of the Human Rights Council, A/HRC/4/116 (20 December 2006)
· Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, A/HRC/9/26 (1 September 2008)
· Report of the Independent Fact-Finding Committee on Gaza Presented to the League of Arab States (30 April 2009)
· Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council, UN Doc. A/63/855 (15 May 2009)
· Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (25 September 2009)
· Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009)

- Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of?28 September 2009 in Guinea, S/2009/693 (18 December 2009)
- Report of the international Commission of Inquiry on East Timor, A/54/726 – S/2000/59 (31 January 2000)
- OHCHR, 'Democratic of the Congo 1993-2003: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010)
- Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance', A/HRC/15/21 (27 September 2010)
- Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010 (January 2011)
- 'Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9', A/HRC/16/24 (18 March 2011)
- Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (31 March 2011)
- Report of the International Commission of Inquiry to investigate alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44 (1 June 2011)
- Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011)
- Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add. 1 (23 November 2011)
- 2nd Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/19/69 (22 February 2012)
- Full Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Law in Libya, A/HRC/19/68 (8 March 2012)
- 3rd Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/21/50 (16 August 2012)
- 4th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/22/59 (5 February 2013)
- 5th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/24/46 (16 August 2013)
- Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, A/HRC/25/63 (7 February 2014)
- UNSG, 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem and the occupied Syrian Golan', A/HRC/25/38 (12 February 2014)
- 6th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/25/65 (12 February 2014)
- 7th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/27/60 (13 August 2014)
- Report of the independent commission of inquiry on the Syrian Arab Republic – Rule of Terror: Living under ISIS in Syria (14 November 2014)

· The International Commission of Inquiry on the Central African Republic –Final Report, Annex –S/2014/928 (22 December 2014)
· UNSG, 'Report of the Secretary General on the situation in Mali', S/2014/943 (23 December 2014)
· 8th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/28/69 (5 February 2015)
· UN Security Council, Letter dated 27 April 2015 from the Secretary-General addressed to the President of the Security Council, S/2015/286 (27 April 2015)
· Report of the commission of inquiry on human rights in Eritrea, A/HRC/29/42 (4 June 2015)
· Report of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/CRP.4 (22 June 2015)
· Report of the detailed findings of independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/CRP.4 (22 June 2015)
· 9th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/30/48 (13 August 2015)
· Report of the OHCHR Investigation on Sri Lanka (OISL), A/HRC/30/CRP.2 (16 September 2015)
· 10th Report of the independent commission of inquiry on the Syrian Arab Republic, A/HRC/31/68 (11 February 2016)
· First Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/142 (12 February 2016)
· Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings, A/HRC/31/CRP.3 (15 February 2016)
· Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, A/HRC/31/40/Add.1 (7 March 2016)
· Detailed findings of the commission of inquiry on human rights in Eritrea, A/HRC/32/CRP.1 (8 June 2016)
· Second Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/530 (10 June 2016)
· Report of the International Commission of Inquiry on Syria, 'They Came to Destroy': ISIS Crimes Against the Yazidis', A/HRC/32/CRP.2 (15 June 2016)
· Third Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/738 (24 August 2016)
· Fourth Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Mechanism, S/2016/888 (21 October 2016)

Curriculum vitae

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After an experience with the Coalition for the ICC in The Hague, Alessandro has worked from 2012 to 2016 in the Occupied Palestinian Territory as legal advisor and human rights expert for the Palestinian human rights organisation Al-Haq, the Italian Development Cooperation and the Diakonia International Humanitarian Law Resource Center. Since January 2017, he has been working as Associate Judicial Affairs Officer at the UN Department for Peacekeeping Operations in New York.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2016 and 2017

MI-259 S. Tjandra, *Labour Law and Development in Indonesia* (diss. Leiden), Zutphen: Wöhrmann 2016, ISBN 978 94 6203 981 0

MI-260 R.H.C. van Kleef, *Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law* (diss. Leiden), Den Haag: Eleven International Publishing (BJu) 2016, ISBN 978 94 6236 670 1

MI-261 C.G. Breedveld-de Voogd, A.G. Castermans, M.W. Knigge, T. van der Linden & H.A. ten Oever (red.), *Core Concepts in the Dutch Civil Code. Continuously in Motion*, BWKJ nr. 30, Deventer: Kluwer 2016, ISBN 978 90 1313 725 5

MI-262 P.W. den Hollander, *De relativiteit van wettelijke normen*, (diss. Leiden), Den Haag: Boom Juridische uitgevers 2016, ISBN 978 94 6290 235 0

MI-263 W. Wels, *Dead body management in armed conflict: paradoxes in trying to do justice to the dead*, (Jongbloed scriptieprijs 2015), Den Haag: Jongbloed 2015, ISBN 979 70 9003 825 9

MI-264 E.A. Fredericks, *Contractual Capacity in Private International Law,* (diss. Leiden), Zutphen: Wöhrmann 2016

MI-265 J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality,* Research Report, Den Haag: Eleven International Publishing (BJu) 2016, ISBN 978 94 6236 687 9

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MI-271 J.M.J. van Rijn van Alkemade, *Effectieve rechtsbescherming bij de verdeling van schaarse publieke rechten,* (diss. Leiden), Den Haag: Eleven International Publishing (BJu) 2016

MI-272 J. Wang, *Trends in social assistance, minimum income benefits and income polarization in an international perspective*, (diss. Leiden), Enschede: Gildeprint 2016, ISBN 978 94 6233 3734

MI-273 A.J. Metselaar, *Drie rechters en één norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie,* Deventer: Wolters Kluwer 2016, ISBN 978 90 1313 988 4

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