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

Tonutti, A.

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Author: Tonutti, A.
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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

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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

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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

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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]

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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

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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]

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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.

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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.